

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES**

VICTOR PEY CASADO AND SPANISH PRESIDENT

ALLENDE FOUNDATION

versus

THE REPUBLIC OF CHILE

Case No ARB/98/2

**MEMORIAL CONCERNING THE ANNULMENT OF THE AWARD
OF 13 SEPTEMBER 2016**

Which the Claimants submit to the *ad hoc* Committee pursuant to Article 52 of the Washington Convention and Arbitration Rules 52, 53 and 31, and Procedural Order No 1 of 7 March 2018 (§ 14.1).

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Washington, 27 April 2018

(*) Courtesy translation from the original in French

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INTRODUCTION

1. According to the calendar attached to Procedural Order No 1 of 7 March 2018, Víctor Pey Casado and the Spanish President Allende Foundation (hereinafter the “**Claimants**”) have the honor to submit to the *ad hoc* Committee (hereinafter the “**Committee**”) their Memorial seeking the annulment of the Award on resubmission of 13 September 2016 (hereinafter the “resubmission Award” or “RA”) in ICSID case No ARB/98/2 between them and the Republic of Chile (the “**Respondent**” or the “**Respondent State**”).
2. “*La présente instance est le prolongement de l’arbitrage initial*”, as is rightly stated in the award rendered on resubmission on 13 September 2016 (§ 188)¹ (hereinafter the “resubmission Award” or “RA”).
3. The resubmission Award has however created an inaccurate and unjustified impression:

"[Les Demanderesses] soutiennent à certains endroits que des éléments des parties non annulés de la Sentence Initiale doivent être réexaminés et modifiés par le présent Tribunal." (§ 196 de la Sentence de resoumission).

4. This assertion is entirely without foundation. The Award moreover contains no reference (for obvious reasons) to any such assertion by Mr. Pey Casado and the President Allende Foundation. For this assertion is in complete contradiction with what the Claimants' representative stated to the members of the Tribunal in the hearings of April 2015, viz.:

"*Les Demanderesses proposent de ne pas modifier un iota, pas un iota, la partie non annulée de la Sentence. C'est res judicata*"² [emphasis added].

5. Mr. Pey Casado and the President Allende Foundation also wish to note the unethical procedural behaviour to which they have become accustomed from the Respondent, so that the Committee may know what to expect. According to the original Award, “*force est de constater que la durée de la présente procédure, et par conséquent ses coûts pour toutes les parties et pour le Centre, ont été notablement augmentés par la politique adoptée par la défenderesse consistant, au-delà des exceptions usuelles ou "normales" à la compétence, à multiplier objections et incidents parfois incompatibles avec les usages de l’arbitrage international.*”³ And the Committee could see at first hand in the hearing of 16 February 2018 how the Respondent State cited facts that were either inaccurate or misleading in support of its efforts to have Mr. Pey Casado and the President Allende Foundation penalised for protesting in the previous hearing of 14 February, in line with the charge made against them on 12 February of having submitted false information on 2 February in order to mislead the *ad hoc* Committee.⁴
6. In its Decision of 15 March 2018 on the provisional stay of enforcement of the resubmission Award, the *ad hoc* Committee said that:

"*l’objectif des Demanderesses, tel que le Comité le comprend, [est] de rétablir l’effet de res iudicata de la sentence initiale de 2008, ne peut être atteint au moyen de la demande en annulation de la Sentence (...) Le seul effet possible d’une décision en*

¹ **Document C9**, Resubmission Award of 13 September 2016

² **Document C43**, transcript of the hearing of 13-04-2015, p. 4, address by Mr Juan Garcés

³ **Document C2**, Original Award, § 729

⁴ These facts are substantiated in the request for the defence of procedural integrity and equity submitted by the Claimants on 27 April 2018

annulation serait en réalité l'extinction de l'autorité de chose jugée de la Sentence après Nouvel Examen, et non pas le rétablissement automatique de la force obligatoire des parties annulées de la sentence initiale."⁵ [emphasis added]

7. There seems here to be an initial misunderstanding that may have major consequences. The Claimants' overriding aim is to have the force of *res judicata* restored only to the **unannulled portions of the original Award** (OA), compromised by the resubmission Tribunal. There has **never** been any question of restoring the portions annulled in 2012 by the first *ad hoc* Committee. They will provide points of fact and of law establishing the following:
 - a) that the dispute resubmitted on 18 June 2013⁶ is not that submitted in the First Request dated 3 November 1997 which the OA rejected for lack of jurisdiction *ratione temporis*⁷ (based on the uncertainty as to the status of Decree No 165 during the first proceeding), but the disputes arising after that date, as from May 2000 and November 2002;
 - b) that in some respects the aim of the resubmission request of 18 June 2013 and of the application for annulment of 10 November 2017 is the same, i.e. **the effective enforcement only of the parts of the original award of 8 May 2008** (hereinafter the "original Award" or "OA") **that have the force of *res judicata* according to the decision of the *ad hoc* Committee of 18 December 2012;**
 - c) that is, all parts of the Award of 8 May 2008 except "*le paragraphe 4 du dispositif de la Sentence du 8 mai 2008 et les paragraphes correspondants dans le corps de la Sentence relatifs aux dommages-intérêts (Section VIII)*",⁸ contrary to the first conclusion of the resubmission Award (§ 196) quoted above.
8. To this end it is necessary to set out as briefly as possible, though in sufficient detail, certain aspects of the content and context of the original Award of 8 May 2008 and of the decision in partial review of 18 November 2009⁹ in connection with the *ad hoc* Committee's decision of 18 December 2012, so as then refer to the infringements in the RA of what is *res judicata* in the original Award, summarised in the application for annulment of 10 November 2017.
9. It is worth recalling first that the disputes submitted to ICSID as from 2000 and 2002 were prompted by the Respondent's refusal, despite the effectiveness since 29 March 1994¹⁰ of the Treaty between the Kingdom of Spain and the Republic of Chile for the Mutual Protection and Support of Investments and the Protocol of 2 October 1991¹¹ (hereinafter the "BIT"), to recognise the Claimants' rights over their investment in the media companies CPP SA and EPC Ltda once a court decision had, on 29 May 1995, restored to them the titles of ownership and proof of payments made in 1972¹² – which had been seized by the secret services of the *de facto* regime imposed violently between 11 September 1973 and 11 September 1990. After the

⁵ Decision of 15 March 2018 of this *ad hoc* Committee on the provisional stay of enforcement of the resubmission Award, § 58

⁶ **Documents C83 and 84**, New Arbitration Request submitted on 18 June 2013 (§ 6) and covering letter, respectively

⁷ **Document C2**, Original Award, §§ 601-612 and para. 8 of its dispositive part

⁸ **Document C20**, Decision of the first *ad hoc* Committee of 18 December 2012, § 359(1)

⁹ **Document CL261**, Decision of the original Tribunal in the proceeding for partial review of the Award of 8 May 2008

¹⁰ **Document C2**, Original Award, § 2

¹¹ **Document C3f** (DI-08)

¹² **Document C2**, Original Award, §§ 77, 163, 210, 214, 215, 444

decision of the *ad hoc* Committee of 18 December 2012, the only remaining question was that of appraising the amount of the damages resulting from the Chilean State's breaches of its obligation to give Mr. Pey Casado and the President Allende Foundation fair and equitable treatment, including the duty to refrain from any denial of justice.

10. All the facts underlying the issues arising between the parties as from May 2000, as established in the original Award, are recalled therein accurately and decided with *res judicata* effect in §§ 419-500 (terms of the BIT's application *ratione temporis*) and §§ 574-674 (the State's responsibility for breach of the BIT).

11. **Mr. Pey Casado and the President Allende Foundation seek solely the implementation of what is *res judicata* in the original Award**
12. The Claimants' claims in the proceeding for resubmission of the disputes arising since May 2000 and now in their application for annulment were (and are) confined to the enforcement of the *ad hoc* Committee's decision of 18 December 2012, namely:

§ 263 : "*La seule fois où la question des dommages pour violation de l'article 4 de l'API a été soulevée, c'est lors de l'audience de janvier 2007, lorsque le Président du Tribunal a demandé aux parties si le préjudice ou dommage résultant de la violation hypothétique de la disposition relative au traitement juste et équitable était le même que celui résultant de l'expropriation ou bien s'il était différent de celui-ci. Cependant, comme il ressort du dossier, l'audience de janvier 2007 avait pour objet de traiter des questions de compétence. **Il est évident pour le Comité que (...) les Demanderesses (...) ont eu très peu de temps lors de l'audience pour répondre à la question posée par le Président. (...)***

§ 264. "**Les parties n'ont pas eu la possibilité de déposer des mémoires suivant l'audience de janvier 2007 car le Tribunal avait précisé dans sa décision du 13 septembre 2006 et dans son Ordonnance de procédure n° 13 du 24 octobre 2006 qu'il n'y aurait pas de réouverture de la phase écrite de la procédure.**

§ 266. : "(...) Même si le Tribunal a bien utilisé des éléments objectifs pour l'évaluation des dommages-intérêts (les données communiquées et débattues par **les parties**), à aucun moment il ne s'est référé à des arguments invoqués par **l'une ou l'autre des parties**. Comme elles l'ont expliqué dans leur Contre-mémoire sur l'annulation, **les Demanderesses ont soutenu, lors de l'audience de janvier 2007, que l'indemnisation due était équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation. Le Tribunal a cependant adopté un autre standard. Il a placé les Demanderesses dans la situation dans laquelle elles se seraient trouvées s'il n'y avait pas eu de violation de l'API, et il a accordé le montant fixé par la Décision n° 43.**" [emphasis added]

13. In relation to the contradiction between § 688 and § 692 of the OA, the *ad hoc* Committee's decision thus clearly distinguished between a) the possible validity, under article 4 of the BIT, of an assessment based on equivalence with the compensation that would have been payable for expropriation, and b) the exclusion of linkage with the request of 3 November 1997 for compensation for expropriation under article 5 of the BIT (§§ 280-287 of the decision). In other words, the reason for the first *ad hoc* Committee's annulment of point 4 of the OA's dispositive part was to give:

§ 267 "aux deux parties la possibilité de présenter leurs arguments sur le critère d'indemnisation applicable et l'évaluation des dommages-intérêts au titre de la violation de l'article 4 de l'API" (emphasis added).

§ 271." (...) Le Comité a, dans la présente partie de sa Décision, conclu à l'existence d'une erreur annulable dans le processus suivi par le Tribunal pour parvenir à sa conclusion, et **non dans les modalités de calcul du montant des dommages-intérêts.**"

(References omitted, emphasis added).

14. Yet the resubmission Award excludes from its re-examination (§§ 223-231) of the OA and of the *ad hoc* Committee's decision any consideration of the possible "equivalence" recognised in § 266 of that Committee's decision.
15. The "modalités de calcul" of the **amount of damages** as a result of acts occurring between the parties as from May 2000, *res judicata*, are defined in law as:

*"la compensation financière à laquelle peut prétendre une personne qui a subi un préjudice moral ou une atteinte dans son patrimoine ou les deux la fois. Qu'il s'agisse du dommage né d'un retard ou de l'inexécution d'un contrat, de celui provenant d'un dommage accidentel ou de la réparation d'un délit ou d'un crime, la réparation qui s'opère par équivalent se fait par le versement d'un capital ou d'une rente. Ces sommes sont des dommages-intérêts."*¹³

16. But since the original Award was rendered on 8 May 2008 and despite a failure to have the Award annulled in whole, the Respondent has sought in various ways to misrepresent the meaning and scope of the Award confirmed by the *ad hoc* Committee and to assert that that Award rules out any duty to pay significant pecuniary compensation to the investors. By accepting these claims from the Respondent, the resubmission Award infringed the *res judicata* effect of paras. 1 to 3 of the original Award's dispositive part, according to which:

"1. [Le Tribunal arbitral] est compétent pour connaître du litige entre les demandereses et la République du Chili ;

2. la défenderesse a violé son obligation de faire bénéficier les demandereses d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice ;

3. les demandereses ont droit à compensation".

17. Once the original Award had been rendered, Chile, as it did after the confirmation of paras. 1 to 3 of its dispositive part by the *ad hoc* Committee, denied, in public statements¹⁴ and in its proposals to the arbitral proceeding, the substance, grounds and purposes of points 1, 2 and 3 of the Award's dispositive part. The Respondent and the resubmission Tribunal share the aim of making the enforcement thereof impossible or ineffective.
18. The fact that the ICSID jurisdiction may set up an Arbitral Tribunal constituted according to art. 52(6)¹⁵ of the Convention to ensure the enforcement of paras. 1, 2 and 3 of the original Award's dispositive part does not at all mean that the present *ad hoc* Committee constituted under art.

¹³ Dictionnaire du Droit Privé, Serge Braudo, Honorary Counsel at the Appeal Court of Versailles, see <http://bit.ly/2gjqrxU>

¹⁴ See the statement of the Chilean head of State's personal representative, Jorge Carey, 15 September 2016 in **document C34f and C34e**

¹⁵ Art. 52(6) of the Convention: "If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter."

52(3)¹⁶ of the Convention can ignore the failure to enforce the OA's dispositive part by the resubmission Tribunal.

19. The Respondent State, and in its wake the resubmission Award, contest decisions, questions, grounds and considerations which, under the original Award, are matters already decided, disregarding *res judicata* and deciding points going beyond the intentions of the original Tribunal and incompatible with the original Award. These will be detailed below in so far as their practical importance is crucial to the enforcement of points 1 to 3 of the original Award's dispositive part and the RA's infringement of *res judicata*.
20. After describing the role of the *ad hoc* Committee and the legal framework applicable to the grounds for annulment pursuant to Article 52(1) of the Convention (2), Mr. Pey Casado and the President Allende Foundation will set out reasons justifying the annulment of the resubmission Award (3).

1. ROLE OF THE AD HOC COMMITTEE AND PRESENTATION OF GROUNDS FOR ANNULMENT

21. *"Le seul contrôle opéré par le comité porte sur l'intégrité du processus suivi par le tribunal pour trancher les arguments et prétentions des parties. Ce contrôle est opéré à la lumière des moyens d'annulation prévus par la Convention du CIRDI", as stated by the ad hoc Committee in the Antoine Abou Lahoud v. Congo case.*¹⁷

22. The present *ad hoc* Committee confirmed in its decision of 15 March 2018 that:

"[le] droit d'une partie de vérifier devant un comité d'annulation sa conviction de bonne foi que la sentence est fondamentalement entachée d'un vice aux termes de l'article 52 de la Convention (soit parce que le tribunal a été irrégulièrement constitué, voire corrompu, soit parce que le tribunal a commis un excès manifeste de ses pouvoirs, a violé une règle fondamentale de procédure ou n'a pas motivé sa décision)",

"[le] droit légitime de faire examiner la sentence pour en vérifier la régularité fondamentale d'un point de vue institutionnel et procédural.",

*"L'article 52 de la Convention s'intéresse à l'intégrité des procédures d'arbitrage du CIRDI et cherche à concilier le caractère définitif de la sentence avec la nécessité d'empêcher tous cas flagrants d'excès de pouvoir et d'injustice."*¹⁸

23. In this case, as they announced in their application for annulment of 19 October 2017, Mr. Pey Casado and the President Allende Foundation base their application on four of the grounds provided in Article 52(1) of the Convention, namely: the Tribunal was not properly constituted, the Tribunal has manifestly exceeded its powers, a serious departure from fundamental rules of procedure, and finally failure to state the reasons on which the award is based.

¹⁶ Art. 52 (3) of the Convention: "On receipt of the request [for annulment] the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. (...) The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)."

¹⁷ **Document CL304**, *Antoine Abou Lahoud v. Congo*, ICSID Case ARB/10/4, Decision on annulment, 29 March 2016, § 115

¹⁸ Decision of the *ad hoc* Committee of 15 March 2018 on the provisional staying of the resubmission Award, §§ 53, 54, 72

24. Mr. Pey Casado and the President Allende Foundation submit *bona fide* their application for annulment of the whole resubmission Award in that it seriously infringes Articles 10(5) of the Spain-Chile BIT and 53(1) of the ICSID Convention, as well as the *res judicata* of the Arbitral Award of 8 May 2008, and in particular points 1 to 3 of its dispositive part and their corresponding grounds as confirmed in the framework established by the decision of the first *ad hoc* Committee of 18 December 2012, which annulled point 4 of the Award's dispositive part so as to allow:

"aux deux parties la possibilité de présenter leurs arguments sur le critère d'indemnisation applicable et l'évaluation des dommages-intérêts au titre de la violation de l'article 4 de l'API".

Considering that:

"Même si le Tribunal a bien utilisé des éléments objectifs pour l'évaluation des dommages-intérêts (les données communiquées et débattues par les parties), à aucun moment il ne s'est référé à des arguments invoqués par l'une ou l'autre des parties. Comme elles l'ont expliqué dans leur Contre-mémoire sur l'annulation, les Demanderesses ont soutenu, lors de l'audience de janvier 2007, que l'indemnisation due était équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation. Le Tribunal a cependant adopté un autre standard. Il a placé les Demanderesses dans la situation dans laquelle elles se seraient trouvées s'il n'y avait pas eu de violation de l'API, et il a accordé le montant fixé par la Décision n° 43." [emphasis added]

"Le Comité a, dans la présente partie de sa Décision, conclu à l'existence d'une erreur annulable dans le processus suivi par le Tribunal pour parvenir à sa conclusion, et non dans les modalités de calcul du montant des dommages-intérêts." ¹⁹ [References omitted and emphasis added].

25. After setting out the role of the *ad hoc* Committee in this proceeding for annulment (1.1), whose legal framework was set out in the annulment application, Mr. Pey Casado and the President Allende Foundation will indicate the reasons for which the Award of 13 September 2016 must be annulled (1.2).

1.1 The *ad hoc* Committee's clearly defined role

26. *"Les comités ad hoc ne sont pas des cours d'appel, et l'annulation n'est pas un recours contre une décision estimée incorrecte"*, as was recalled by the *ad hoc* Committee in *Antoine Abou Lahoud v. Congo*,²⁰ which quotes, *inter alia*, the *ad hoc* Committee in the *Soufraki* case:

¹⁹ Document C20, Decision of the *ad hoc* Committee of 18 December 2012, §§ 267, 266 and 271

²⁰ Document CL304, *Antoine Abou Lahoud v. Congo*, ICSID Case ARB/10/4, Decision on annulment, 29 March 2016, § 111, quoting *ad hoc* Committee decisions in *Amco Asia Corporation and others v. Indonesia (Amco II)* (ICSID Case ARB/81/1), Decision on the applications of Indonesia and Amco respectively for annulment and partial annulment, 17 December 1992, para. 1.17, document CL308; *Patrick Mitchell v. Congo* (ICSID Case ARB/99/7), Decision on the application for annulment of the Award, 1 November 2006, para. 19, document CL315; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case ARB/01/7), Decision on annulment of 21 March 2007, para. 31, document CL349; *Amco Asia Corporation and others v. Indonesia (Amco I)* (ICSID Case ARB/81/1), Decision on annulment of 16 May 1986, para. 23, document C196; *Togo Électricité and GDF-Suez Énergie Services v. Togo* (ICSID Case ARB/06/7), Decision on annulment of 6 September 2011, para. 50, document C13; *Klöckner Industrie-Anlagen GmbH and others v. Cameroun and*

"un comité ad hoc n'a pas compétence pour examiner de quelque manière que ce soit le bien-fondé de la sentence initiale. Le mécanisme d'annulation est conçu pour protéger l'intégrité, et non pas le résultat, des instances d'arbitrage".²¹

27. It is thus not the *ad hoc* Committee's task to reconsider the merits of the case either in law or in fact. Especially as the questions of the Centre's jurisdiction and those determining the Respondent's liability were settled by the original Award of 8 May 2008, with *res judicata* effect, relating to the matters arising between the parties following a court ruling in Santiago de Chile of 29 May 1995, and then, in particular, "Decision 43" of the Minister of National Assets of 28 April 2000, and the additional arbitration request of 4 November 2002 relating to denial of justice in the proceedings in the 1st Civil Court of Santiago committed after 3 November 1997 (points 1 to 3 of the dispositive part).
28. Consequently neither the resubmission request of 18 June 2013²² nor the subsequent submissions nor the Claimants' oral pleadings in the hearings²³ related to jurisdiction or to the merits of the case. Likewise neither the parties, nor the resubmission Award and nor now the *ad hoc* Committee may legitimately re-examine matters of jurisdiction or the merits of the case given that these are *res judicata*. The sole task assigned to the resubmission Tribunal was quite different, i.e. to set the *quantum*, the amount in US\$, that the Respondent State should pay the investors for having breached its obligation to give fair and equitable treatment, including the duty to refrain from denial of justice, in the acts submitted to the arbitration of the original Tribunal, *res judicata*.
29. Having recalled the above, Mr. Pey Casado and the President Allende Foundation will now summarise the legal framework applicable to the grounds for annulment invoked:

1.2 Legal framework applicable to the grounds for annulment in Article 52(1)

30. The annulment of the resubmission Award sought by Mr. Pey Casado and the President Allende Foundation is based on the following grounds: the Tribunal was not properly constituted (**1.2.1**), the Tribunal manifestly exceeded its powers (**1.2.2**), serious departure from fundamental rules or procedure (**1.2.3**), and failure to state the reasons on which the award is based (**1.2.4**).

1.2.1 Legal framework applicable to improper constitution of the Tribunal

31. According to Article 52(1)(a) of the ICSID Convention, an arbitral award may be annulled if "*the Tribunal was not properly constituted*".²⁴
32. The meaning of this provision is interpreted in the preparatory work for the Convention, doctrine and decisions rendered by previous *ad hoc* Committees, as Mr. Pey Casado and the President Allende Foundation described in their annulment application (Sections III.1 and III.2).

Société Camerounaise des Engrais (Klöckner I) (ICSID Case ARB/81/2), Decision rendered by the *ad hoc* Committee on 3 May 1985, para. 83, **document C7**

²¹ **Document CL305**, *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case ARB/02/7), Decision of the *ad hoc* Committee on the application for annulment by Mr Soufraki, 5 June 2007, para. 20

²² **Document C83**

²³ See Resubmission Memorial of 27 June 2014 (**document C8**), the Rejoinder of 9 January 2015 (**document C40**) and the transcript of the hearings of April 2015 (**document C43**)

²⁴ Article 52(1)(a) of the ICSID Convention

33. The Background Paper on Annulment for the ICSID Administrative Council thus says that the drafting history of the Convention indicates that *“the ground of improper constitution of the Tribunal was intended to cover situations such as a departure from the parties’ agreement on the method of constituting the Tribunal or (...) other requirements for becoming a member of the Tribunal.”*²⁵
34. Such is also the view of Professor Schreuer, for whom *“questions concerning the tribunal’s proper constitution might arise from dissatisfaction in the manner in which challenges to arbitrators and alleged conflicts of interest have been handled.”*²⁶
35. We may infer from the ordinary meaning of the words used in Article 52(1)(a) of the Convention that *“the constitution of the Tribunal”* refers to the various provisions of the Convention and the Arbitration Rules governing the arbitral tribunal’s constitution. These provisions may be understood to be: Section 2 (Constitution of the Tribunal) of the Convention’s Chapter IV (Arbitration), the Convention’s Chapter V (Replacement and Disqualification of Conciliators and Arbitrators), and Chapter I (Establishment of the Tribunal) of the Arbitration Rules.
36. In this case Mr. Pey Casado and the President Allende Foundation submit that the serious departure from fundamental rules of procedure, manifest excess of powers and failure to state reasons in the constitution of the resubmission Tribunal and the procedural incidents in this regard have had a real, serious impact on the resubmission Award, as substantiated in Sections III.1 and III.2 of the application for annulment and Section II of this Memorial.

1.2.2 Legal framework applicable to manifest excess of powers

37. According to Article 52(1)(b) of the ICSID Convention, an Arbitral Tribunal may be annulled if *“the Tribunal has manifestly exceeded its powers”*.²⁷ Two conditions for this are apparent in Article 52(1)(b): the requirement of excess of powers (1.2.2.1), and the manifest nature thereof (1.2.2.2).

1.2.2.1 The requirement of excess of powers

38. Regarding the notion of excess of powers, the Background Paper on Annulment for the ICSID Administrative Council says that *“the drafters of the ICSID Convention anticipated an excess of powers when a Tribunal went beyond the scope of the parties’ arbitration agreement, decided points which had not been submitted to it, or failed to apply the law agreed to by the parties.”*²⁸
39. Prof. Schreuer, for his part, says that:

“An arbitral tribunal derives its power from the parties’ agreement. The agreement to arbitrate constitutes both the basis and the outer limit of the tribunal’s power. In the case of ICSID arbitration, the agreement to arbitrate incorporates the Convention by reference. Therefore, the parameters for the tribunal’s powers are to be found in the Convention and in any additional relevant provisions in the parties’ agreement.”

²⁵ ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID of 5 May 2016, § 77, available at <https://bit.ly/2gZH17p>

²⁶ C. Schreuer (C.), *The ICSID Convention, a commentary*, Cambridge University Press, 2009, Art. 52, §§ 122-123

²⁷ ICSID Convention, art. 52(1)(b)

²⁸ ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID of 5 May 2016, § 82, available at <https://bit.ly/2gZH17p>

The most important excess of powers occurs when a tribunal exceeds the limits of its jurisdiction (...). In the case of ICSID arbitration, jurisdiction is determined by Art. 25 de la Convention and the parties' agreement on consent. A tribunal may also exceed its power by failing to exercise a jurisdiction it does have. Another instance of excess of powers would be a violation of Art. 42 on applicable law. Non-application of the law agreed by the parties or of the law determined by the residual rule in Art. 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of powers"²⁹.

40. As the ad hoc Committee said in *Antoine Abou Lahoud v. Congo*:³⁰

*"Un Tribunal peut commettre un excès de pouvoir lorsqu'il excède les limites de sa compétence. Ce peut être le cas lorsqu'un tribunal "exerce une compétence qu'il ne possède pas en vertu du contrat ou du traité applicable et de la Convention CIRDI, interprétés conjointement, mais également lorsqu'il n'exerce pas une compétence qui lui revient en vertu de ces instruments".*³¹

41. A tribunal may also commit an excess of powers where it fails to apply applicable law. All ad hoc Committees recognise that *"le fait pour un Tribunal de ne pas du tout appliquer le droit applicable ou de statuer ex aequo et bono sans l'accord des Parties à cet effet, comme l'exige la Convention du CIRDI, est susceptible de constituer un excès de pouvoir manifeste"*³², or the ad hoc Committee in *Venezuela Holdings v. Venezuela*:

*"a tribunal ought not to be allowed to exercise a judicial power it does not have (or vice versa). (...) the reference in Article 52(1)(b) to a tribunal having "manifestly exceeded its powers" fits most naturally into the context of jurisdiction, in the sense that it covers the case where a tribunal exercises a judicial power which on a proper analysis had not been conferred on it (or vice versa declines to exercise a jurisdiction which it did possess)."*³³

42. As explained by Prof. Schreuer, excess of powers is not confined to the situation in which a tribunal wrongly declares itself to have jurisdiction or not to have it. It may also be characterised as where although the tribunal's jurisdiction, as defined in Article 24 de la Convention, is uncontested, the tribunal exceeds its limits:

*"Lack of jurisdiction need not be absolute. A tribunal may be competent in principle, but may go beyond the limits of its competence (...) In fact, the expression "excess of powers" would indicate that there is jurisdiction but that the tribunal has exceeded the limits of its powers"*³⁴.

²⁹ Schreuer (C.), *The ICSID Convention, a commentary*, Cambridge, University Press, 2009, Art. 52, §§ 132-133

³⁰ **Document CL304**, *Antoine Abou Lahoud v. Congo*, ICSID Case ARB/10/4, Decision on annulment, 29 March 2016, § 118

³¹ [§ 104. *Compañía de Aguas del Aconquija S.A. et Vivendi Universal S.A. (anciennement Compagnie générale des eaux) v. République Argentine* (ICSID Case ARB/97/3), Décision sur la Demande en annulation du 3 July 2002, para. 86: "exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments".

³² [105. Background Paper on Annulment for the Administrative Council of ICSID, para. 94. See also Schreuer, *The ICSID Convention*, p. 938.]

³³ **Document CL306**, *Venezuela Holdings v. Venezuela*, ICSID Case No ARB/07/27. Decision on Annulment, 2017-03-09, § 110

³⁴ **Document RALA-0006**, C. Schreuer, *The ICSID Convention, a commentary*, Cambridge, University Press, 2009, Art. 52, § 163

43. Such is the case when a tribunal oversteps the limits of its jurisdiction, as determined by Article 55(3) of the Arbitration Rules, in the presence of a previous award with *res judicata* effect.

44. As was decided by the second *ad hoc* Committee in *Amco v. Indonesia*:

"Arbitration Rule 55(3) states : "If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled". If a new Tribunal reconsiders an issue not annulled, it exceeds its power" (emphasis added).³⁵

45. Mr. Pey Casado and the President Allende Foundation have respectfully submitted and demonstrated that the resubmission Tribunal manifestly exceeded its powers by challenging the *res judicata* of the Arbitral Award of 8 May 2008, disregarding, reconsidering and even denying the scope of the initial jurisdiction established in points 1 to 3 of the original Award's dispositive part.

46. This situation falls unquestionably into the category of excess of powers within the meaning of Article 52(1)(b) of the Convention. Mr. Pey Casado and the President Allende Foundation submit that the resubmission Tribunal manifestly overstepped the limits of its jurisdiction and manifestly failed to apply and even denied these limits, as determined by Article 55(3) of the Arbitration Rules and by the original Award – of which Chapter VII (Responsibility of the State) and points 1 to 3 of its dispositive part have force of *res judicata*. The basis of this ground for annulment is substantiated in Sections III.3, III.4, III.5 and III.6 of the application for annulment and in Section II of this Memorial.

47. As we have an excess of powers deriving from the Tribunal's failure to apply the law applicable to the dispute, it is worth making a distinction between the Tribunal's non-application of the normally applicable law, constituting grounds for annulment,³⁶ and an erroneous application of applicable law, not normally constituting grounds for annulment.³⁷ The *ad hoc* Committee in the *Soufraki* case said:

*"L'on doit également considérer qu'un tribunal outrepassé les limites de ses pouvoirs s'il ne respecte pas le droit applicable au fond de l'affaire en vertu de la Convention CIRDI. Il est largement reconnu par la jurisprudence du CIRDI que le défaut d'application du droit applicable constitue un excès de pouvoir. Les dispositions pertinentes du droit applicable sont des éléments constitutifs de l'accord des Parties de recourir à l'arbitrage et font partie intégrante de la définition de la mission du Tribunal."*³⁸

³⁵ **Document CL308**, *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 3 December 1992, § 8.07.

³⁶ **Document CL304**, *Antoine Abou Lahoud v. Congo*, ICSID Case ARB/10/4, Decision on annulment 29 March 2016, § 118-122; C. Schreuer, *The ICSID Convention, a commentary*, Cambridge, University Press, 2009, Art. 52, §§ 196: "[t]here is widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal"

³⁷ **Document CL307**, *Enron Creditors Recovery Corporation & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/13, Decision of the *ad hoc* Committee of 30 July 2010, § 68; **document CL305**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on Mr Soufraki's application for annulment, 5 June 2007, § 85

³⁸ **Document CL305**, *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case ARB/02/7), Decision of the *ad hoc* Committee on Mr Soufraki's application for annulment, 5 June 2007, para. 45: "[O]ne must also consider that a tribunal goes beyond the scope of its power if it does not respect the law applicable to the substance of the arbitration under the ICSID Convention. It is widely recognized in ICSID jurisprudence that failure to apply the applicable law constitutes an excess of power. The relevant provisions of the applicable law are constitutive elements of the Parties' agreement to arbitrate and constitute part of the definition of the

"Une application erronée du droit ne constitue un motif d'annulation que dans les cas les plus graves, où une telle mauvaise application est d'une telle nature ou ampleur qu'elle équivaut objectivement (et indépendamment des intentions réelles ou présumées du Tribunal) à une non-application", says the ad hoc Committee in Antoine Abou Lahoud v. Congo,³⁹ quoting Amco Asia Corporation et al. v. Republic of Indonesia.⁴⁰

48. In this case there is not so much an erroneous application of applicable law as an absolute failure to apply Chilean law and the applicable principles of international law identified in the BIT (art. 10(4)), in the original Award, *res judicata*, in particular in §§ 210 *in fine*, 215, 244 and 665-674, and in Mr. Pey Casado and the President Allende Foundation submissions and oral pleadings in the hearings of April 2015 – for the sole purposes of setting the amount of the compensation which the original Award orders the Respondent to pay and which the resubmission Tribunal was duty bound to calculate in the framework of the decision of the *ad hoc* Committee of 18 December 2012, especially in the latter's §§ 266 and 267.
49. Moreover the resubmission Tribunal even categorically refused to apply Chilean law and international law to the treatment of one of the issues identified by the *ad hoc* Committee in annulling point 4 of the original Award's dispositive part, namely that the original Tribunal had not given Mr. Pey Casado and the President Allende Foundation:

*"la possibilité de présenter leurs arguments sur le critère d'indemnisation applicable et l'évaluation des dommages-intérêts au titre de la violation de l'article 4 de l'API (...) que l'indemnisation due était équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation"*⁴¹

which is crucial to determining the *quantum*, a point therefore addressed by the pleadings in the resubmission proceeding, as set out in the application for annulment,⁴² as is generally accepted in investment protection law.

50. The RA avoids applying applicable law to the issues arising between the parties after 3 November 1997 – submitted to arbitration as from May 2000 and for which the original Award ordered Chile to compensate Mr. Pey Casado and the President Allende Foundation (points 1 to 3 of its dispositive part) – by declaring them outside the RT's jurisdiction.
51. Whatever kind of excess of powers is invoked, to qualify as grounds for annulment, it must be of a manifest nature.

tribunal's mandate."

³⁹ **Document CL304**, *Antoine Abou Lahoud v. Congo*, ICSID Case ARB/10/4, Decision on annulment, 29 March 2016, § 121, "is of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non-application"

⁴⁰ **Document CL308**, *Amco Asia Corporation and others v. Indonesia* (ICSID Case ARB/81/1), Resubmitted case: Decision on the application for annulment of 3 December 1992, para. 7.19; "is of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non-application" In the decision of the *ad hoc* Committee in *Antoine Abou Lahoud v. Congo*, footnote n° 13 September 2016.

⁴¹ **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012, § 266

⁴² Annulment application of 10 November 2017, §§ 267, 231(5) and (8), 264

1.2.2.2 Manifest nature of the excess of powers

52. Only a manifest exceeding of powers is liable to justify the annulment of an award. Now in the interpretation of this term, past *ad hoc* Committees and doctrine have taken various approaches.
53. Several *ad hoc* Committees have interpreted the term *manifest* as meaning that the excess of powers must be patent or even flagrant, or easily discernible.⁴³ Certain tribunals have also indicated that the patent or flagrant nature of the excess of powers does not mean, given the complexity of the case, that a relatively extensive demonstration may not be required.⁴⁴
54. Other committees have held that a tribunal commits a manifest excess of powers if this entails serious consequences for the award. Thus the *ad hoc* Committee in the *Vivendi I* case concluded that:

*"One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b)"*⁴⁵.

55. Given these *a priori* divergent approaches, several committees have synthesised the criteria of obviousness and of seriousness.
56. Thus in *Soufraki v. UAE*, the *ad hoc* Committee deemed that only a cumulative approach was appropriate to adopt:

*"A strict opposition between two different meanings of "manifest" – either "obvious" or "serious" – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious."*⁴⁶

⁴³ **Document CL309**, *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case ARB/01/10), Decision on the application for annulment of 8 January 2007, para. 36: "exceeding one's powers is 'manifest' when it is 'obvious by itself' simply by reading the Award, that is, even prior to a detailed examination of its contents"; *CDC Group plc v. Republic of Seychelles* (ICSID Case ARB/02/14), 29 June 2005, Decision on the application for annulment, para. 41. "[I]f a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other,' is not manifest".

⁴⁴ **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case n° ARB/03/23, Decision on annulment, 5 February 2016, § 193: "While the Committee agrees that an excess of powers will be manifest only if it can readily be discerned, it considers that this does not mean that the excess must, as it were, leap out of the p. on a first reading of the Award. The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being 'manifest'"

⁴⁵ **Document CL310**, *Compañía de Aguas del Aconquija S.A. et Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on the application for annulment 3 July 2002, § 86, see also § 115

⁴⁶ **Document CL305**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Mr Soufraki's application for annulment 5 June 2007, § 40; see also *Malicorp Limited v. République Arabe d'Egypte*, ICSID Case ARB/8/18, Décision sur la Demande en annulation de Malicorp Limited, 3 July 2013, § 56: "Le Comité est d'accord avec la décision sur l'annulation dans l'affaire Soufraki et interprète le terme 'manifeste' comme signifiant à la fois évident et grave. Le Comité estime que ces deux termes ne sont pas

57. In the *Malicorp*⁴⁷ and *Antoine Abou Lahoud* cases the *ad hoc* Committees said they agreed with the approach in the annulment decision of the *Soufraki* case which interpreted “manifest” as meaning both obvious and serious, as summarised here.

1.2.3 Legal framework applicable to a serious departure from a fundamental rule of procedure

58. Pursuant to Article 52(1)(d) of the Convention, an arbitral award may be annulled in the event of a serious departure from a fundamental rule of procedure.
59. In order for this ground for annulment to come into play, two conditions must be met: the departure must, on one hand, concern a fundamental rule of procedure (1.2.3.1), and on the other, involve a degree of seriousness (1.2.3.2).
60. Thus a serious departure from an ordinary rule of procedure cannot lead to the annulment of an award, and nor can an ordinary departure from a fundamental rule of procedure.⁴⁸

1.2.3.1 The notion of fundamental rule of procedure

61. As explained by the Background Paper on Annulment for the ICSID Administrative Council, it appears from the drafting history of the Convention that the notion of a fundamental rule of procedure “has a wide connotation including principles of natural justice, but that it excludes the Tribunal’s failure to observe ordinary arbitration rules.”⁴⁹

62. The *ad hoc* Committee in *Saur International v. Argentina* held that:

*"Parmi les normes de procédure qui peuvent être considérées comme "fondamentales" figurent le traitement égalitaire des parties, le droit à être entendu, le traitement des éléments de preuve et la charge de la preuve, l'indépendance et l'impartialité du tribunal et les délibérations entre les membres du tribunal."*⁵⁰

63. More particularly as regards the right to be judged by an independent and impartial tribunal, the *ad hoc* Committee in *Klöckner v. Cameroon* explained that:

*"Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a 'serious departure from a fundamental rule of procedure' in the sense of the term 'procedure', i.e., a serious departure from a fundamental rule of arbitration in general, and of ICSID arbitration in particular."*⁵¹

64. In order to qualify as grounds for annulment, the infringement of the fundamental rule of procedure must be serious.

incompatibles, dans la mesure où ce qui a des conséquences graves et substantielles est également clair et évident".

⁴⁷ **Document CL311**, *Malicorp Limited v. Egypt* (ICSID Case ARB/8/18), Decision on the application for annulment, 3 July 2013, para. 56, available at <https://bit.ly/2HxFbaD>

⁴⁸ Schreuer C.), *The ICSID Convention, a commentary*, Cambridge, University Press, 2009, Art. 52, §§ 281-282

⁴⁹ **ICSID**, Updated Background Paper on Annulment for the Administrative Council of ICSID of du 5 May 2016, § 98, available at <https://bit.ly/2gZH17p>

⁵⁰ **Document C103**, *Saur International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Decision on Argentina’s application for annulment, 19 December 2016, § 182.

⁵¹ **Document C7**, *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985-05-03, § 95

1.2.3.2 Seriousness of a departure from a fundamental rule of procedure

65. As explained by Mr Bishop et Ms Marchili, the serious departure criterion has been interpreted in two ways by *ad hoc* Committees.⁵²
66. Some committees, such as that in *MINE v. Guinea*, have deemed that, in order to be serious, the departure from the rule in question must deprive a party of the benefit or of the protection which that rule was intended to provide.⁵³
67. Others, such as that in *Wena v. Egypt*, have required the infringement to have a major impact on the dispute's resolution.⁵⁴
68. Yet others have simply combined the above two criteria.
69. Thus the committee in *CDC v. Seychelles* decided that:

*"A departure is serious where it is 'substantial and [is] such as to deprive the party of the benefit of protection which the rule was intended to provide'. In other words, 'the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed'."*⁵⁵

1.2.4 Legal framework applicable to failure to state reasons

70. Pursuant to Article 52(1)(e) of the Convention, an arbitral award may be annulled if the award fails to state the reasons on which it is based.
71. Article 48(3) of the Convention provides that *"the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."*⁵⁶
72. Similarly Arbitration Rule 47(1)(i) provides that *"The award shall be in writing and shall contain: (...) (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."*⁵⁷
73. As Bishop and Marchili explain, the Convention's drafting history shows that originally a failure to state reasons was not an independent ground for annulment but rather was a part of a departure from a fundamental rule of procedure.⁵⁸

⁵² **Document CL312**, Bishop (R. Doak) & Marchili (S. M.), *Annulment under the ICSID Convention*, OUP, 2012, § 8.12 et seq.

⁵³ **Document CL313**, *MINE v. Guinea*, ICSID Case No. 84/4, Decision of the *ad hoc* Committee on annulment, 22 December 1989, § 5.05: *"The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide"*.

⁵⁴ **Document CL314**, *Wena hotels v. Egypt*, ICSID Case No. ARB/98/4), Decision of the aaa of 5 February 2002, § 58: *"In order to be a "serious" departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed"*.

⁵⁵ **Document CL263**, *CDC v. Seychelles*, § 49; **document CL307**, *Enron*, § 71; **document C69**, *Azurix*, § 51-52

⁵⁶ Art. 48(3) of the Convention.

⁵⁷ Art. 47(1)(i) of the Arbitration Rules

⁵⁸ **Document CL312**, R. Doak Bishop & S. M. Marchili, *Annulment under the ICSID Convention*, OUP, 2012, §§ 9.07-9.10

74. The obligation for a tribunal to state the reasons underpinning its award was thus conceived as a basic guarantee in relation to general principles of natural justice, and its purpose may not be deflected so as to allow a review of the merits of an award rendered by the tribunal.⁵⁹
75. That said, it has to be noted that in practice, past *ad hoc* Committees have taken different and sometimes irreconcilable approaches as to the degree to which awards are expected to state their reasons.
76. As explained in the Background Paper on Annulment for the ICSID Administrative Council, two views are discernible within the case law of *ad hoc* Committees.⁶⁰
77. Firstly, some *ad hoc* Committees have deemed that:

*"la possibilité d'annulation d'une sentence arbitrale en raison d'un défaut de motifs représente un élément important du système des relations entre États souverains et investisseurs étrangers et du règlement de leurs différends. Les décisions et sentences doivent être le résultat d'une appréciation des faits et d'une évaluation selon le droit applicable. Les parties sont en droit de connaître le processus et les réflexions juridiques qui ont mené l'arbitre à sa décision, de pouvoir suivre son raisonnement, de savoir si l'arbitre s'est fondé sur les faits allégués et les questions soulevées par les parties ; les arbitres ont l'obligation de "répondre à tous les chefs de conclusions ", comme le prescrit l'article 48(3) de la Convention de Washington et de motiver leur démarche intellectuelle. La transparence procédurale et l'explication des raisons qui fondent une décision sont les éléments clés qui sous-tendent l'acceptabilité de l'arbitrage."*⁶¹

78. A second view may be found in the decisions of *ad hoc* Committees according to which "insufficient" or "inappropriate" reasons may give rise to annulment.⁶²
79. The first *ad hoc* Committee in *Klöckner v. Cameroon* thus ruled that:

"In the opinion of the Committee, one could hardly be satisfied simply by "apparently relevant" reasons. This would deprive of any substance the control of legality Article 52 of the Convention is meant to provide. On the other hand, interpreting this provision as (indirectly) requiring "relevant reasons" could make the annulment proceeding more like an appeal, and lead the Committee to substitute its own appreciation of the relevance of the reasons for that of the Tribunal.

⁵⁹ **Ibid.**, R. Doak Bishop & S. M. Marchili, *Annulment under the ICSID Convention*, OUP, 2012, §§ 9.07-9.10: "Committees relying on Article 52(1)(e) as a tool to expand their review of the underlying decision have sometimes disregarded the fact that the travaux préparatoires illustrate that this ground: (i) was originally conceived as a part of the provision involving a serious departure from a fundamental rule of procedure, a ground that committees tend to credit only rarely; (ii) actually purported to ensure that the tribunal gave reasons 'for the award'; and (iii) was intended to ensure that the minimum guarantees of 'natural justice' were observed. To turn Article 52(1)(e) into a gateway to a disguised appeal is contrary to the text and the travaux préparatoires of the ICSID Convention".

⁶⁰ **ICSID**, Background Paper on Annulment for the Administrative Council of ICSID of 5 May 2016, § 105 et seq., available at <https://bit.ly/2gZH17p>

⁶¹ **Document C101**, *Compagnie d'Exploitation du Chemin de Fer Transgabonais (Claimant) v. Gabon (Respondent)* ICSID Case No. ARB/04/05 Decision of the *ad hoc* Committee of 10 May 2010, § 86; along the same lines, **ICSID**, Background Paper on Annulment for the Administrative Council of ICSID of 5 May 2016, § 105 et seq.

⁶² **Ibid.**, Background Paper on Annulment for the Administrative Council of ICSID of 5 May 2016, § 106

A middle and reasonable path is to be satisfied with reasons that are “sufficiently relevant”, that is, reasonably capable of justifying the result reached by the Tribunal. In other words, there would be a “failure to state reasons” in the absence of a statement of reasons that are “sufficiently relevant”, that is, reasonably sustainable and capable of providing a basis for the decision”⁶³.

80. The *ad hoc* Committee in *Soufraki v. United Arab Emirates* also held that:

*“In the view of the ad hoc Committee, it has to verify the existence of reasons as well as their sufficiency – that they are adequate and sufficient reasonably to bring about the result reached by the Tribunal – but it cannot look into their correctness.”*⁶⁴

81. This is a view regularly taken by *ad hoc* Committees.⁶⁵

82. Finally, beyond the two views above, there seems to be a consensus in doctrine and in the decisions of *ad hoc* Committees as to the fact that contradictory or frivolous reasons may also justify the annulment of an award on the ground of failure to state reasons.⁶⁶

83. As was recently noted by the decision of the *ad hoc* Committee in *Abou Lahoud v. Lebanon*, *“au-delà de l’apparente contradiction, le comité ad hoc doit chercher à suivre la logique et le raisonnement du tribunal. L’annulation n’est alors justifiée que si les motifs du tribunal sont si contradictoires qu’ils sont “aussi utiles que l’absence totale de motifs.”*⁶⁷

84. The *ad hoc* Committee in *Venezuela Holdings v. Venezuela* deemed that:

*“a composite decision on jurisdiction suffers from an internal contradiction when it arrives at opposite conclusions in respect of ... (found to be within the jurisdiction) and the ... (found to fall outside the jurisdiction). For a complaint of that kind to be valid, two conditions would have to be satisfied: first, that there was indeed a contradiction which was apparent on the face of the Decision; but second, and in the circumstances more important still, that the contradiction, once demonstrated, was serious enough to vitiate the Tribunal’s reasoning on jurisdiction as a whole. This latter condition stems from the fact that, when applied mutatis mutandis to a decision on jurisdiction what Article 52(1)(e) opens to challenge is a failure to state reasons for the decision on jurisdiction as such, not alleged insufficiencies in parts of the reasoning along the way.”*⁶⁸

⁶³ **Document C7**, *Klöckner Industrie-Anlagen GmbH and Others v. Republic of Cameroon and Société Camerounaise des Engrais*, Decision by the Ad Hoc Committee on the Application for Annulment Submitted by Klöckner Against the Arbitral Award Rendered on October 21, 1983, ICSID Case No. ARB/81/2, 3 May 1985, § 120

⁶⁴ **Document CL305**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, decision of the *ad hoc* Committee on Mr Soufraki’s application for annulment, 5 June 2007, § 131; see also §§ 122-128.

⁶⁵ **Document C128**, *Lucchetti*, § 98; **document CL315**, *Mitchell*, § 21; **document CL316**, *TECO*, §§ 249-250.

⁶⁶ **ICSID**, Background Paper on Annulment for the Administrative Council of ICSID of 5 May 2016, § 107, available at <https://bit.ly/2gZH17p>; R. Doak Bishop & S. M. Marchili, *Annulment under the ICSID Convention*, OUP, 2012, §§ 9.22-9.34; Schreuer (C.), *The ICSID Convention, a commentary*, Cambridge, University Press, 2009, Art. 52, §§ 389 et seq.

⁶⁷ **Document CL304**, *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. République Démocratique du Congo*, ICSID Case No. ARB/10/4, Decision on Congo’s application for annulment, 29 March 2016, § 135

⁶⁸ **Document CL306**, *Venezuela Holdings v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 2017-03-09, §§ 119-120

85. Yet since, as the resubmission Tribunal rightly stated, “*la présente instance est le prolongement de l’arbitrage initial*” (§ 188), the matter of jurisdiction *ratione temporis* over issues arising between the parties after 3 November 1997 – in May 2000 and on 4 November 2002 – was settled with *res judicata* effect in the original Award, this was not liable to be “reconsidered” by the RT (Arbitration Rule 55(3)). Consequently the contradiction as regards jurisdiction between the resubmission Award, establishing the *dies ad quem* at 3 November 1997, and the original Award, establishing it at 8 May 2008, is manifest, highly prejudicial to Mr. Pey Casado and the President Allende Foundation in terms of time and money, and sufficiently serious to vitiate the reasoning of the RA as a whole.
86. Having established the legal framework of the annulment procedure, Mr. Pey Casado and the President Allende Foundation will in the next section set out their grounds for annulment of the resubmission Award.

2. GROUNDS FOR ANNULMENT OF THE RESUBMISSION AWARD

87. As set out in the application for annulment of 10 October 2017, the four reasons for annulment set out above come into play in several of the grounds for annulment submitted by Mr. Pey Casado and the President Allende Foundation, with various reasons sometimes being cited in support of one ground.
88. As will be demonstrated below:
- The appointment by the Chilean Republic of Mr Mourre was made in breach of the provisions of the Convention and of the Rules governing the appointment of an arbitrator in the event of a vacancy. It follows that the constitution of the Tribunal was vitiated (2.1);
 - After the Award was rendered, Mr. Pey Casado and the President Allende Foundation learned of facts not disclosed by arbitrators Veeder and Berman during the proceeding that cast doubt on their independence and impartiality. Their conduct both after the rendering of the Award and during the proceedings for rectification of material errors only heightened that doubt. It follows that the constitution of the Tribunal was vitiated, and that the Tribunal was responsible for a serious departure from a fundamental rule of procedure (2.2);
 - The Tribunal failed to take account of the original Award’s *res judicata* and altered some of its conclusions. It follows that there was an excess of powers and manifest injustice (2.3);
 - The treatment by the Tribunal of the burden of proof constitutes a manifest excess of powers, a failure to state reasons, and a serious departure from a fundamental rule of procedure (2.4);
 - The Tribunal’s refusal to apply Chilean law constitutes an excess of powers (2.5);
 - The resubmission Award entailed a manifest excess of powers by denying *locus standi* to the successor to the rights of Víctor Pey (2.6); and
 - The rectification decision is itself vitiated by excess of powers, by a serious departure from a fundamental rule of procedure and by a failure to state reasons (2.7);

2.1 The appointment of Mr Mourre by Chile means that the Tribunal was not properly constituted, justifying the annulment of the Award under Article 52(1)(a) of the Convention.

89. As was demonstrated in the annulment application, the appointment of Co-Arbitrator Mourre by the Respondent State in the resubmission proceeding was made in breach of Articles 56(3) and 52(6) of the Convention, together with Articles 8, 10, 11(2)(a) and Rule 55(2)(d).⁶⁹ This means that the Tribunal was improperly constituted so as to justify the annulment of the resubmission Award on the ground provided in Article 52(1)(a) of the Convention.
90. As set out above, the rules relating to the “constitution of the Tribunal” for the purposes of Article 52(1)(a) of the Convention are understood to be the whole set of rules allowing a Tribunal to be formed.⁷⁰
91. Whereas the decisions of past *ad hoc* Committees are largely focussed on the rules in Section II of Chapter IV of the Convention,⁷¹ intended to cover the commonest situations, the constitution of a new Tribunal after the total or partial annulment of an award is governed by Article 52(6) of the Convention and Rule 55(2).
92. Indeed, where an award is annulled by an *ad hoc* Committee, Article 52(6) of the Convention provides that “*If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.*”
93. Rule 55(2)(d) also states that “*Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith: (...) invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.*” (emphasis added).
94. In the English version of the Convention, the French term “*Tribunal initial*” corresponds to the English term “*original one*”.
95. The reference in the Convention to the “*tribunal initial*” or “*original one [Tribunal]*” is understood to mean the tribunal that rendered the original award, as shown by the provisions on the interpretation or revision of an award.
96. Thus, for example, Article 50(2) of the Convention provides that requests for interpretation of awards should be submitted, if possible, to the “*Tribunal qui a statué*”; or in the English text, the “*Tribunal which rendered the award.*”
97. The same applies under Article 51(3) of the Convention for requests for revision, which are to be submitted, if possible, to the “*Tribunal qui a statué*”; or in the English version, once again, the “*Tribunal which rendered the award.*”

⁶⁹ Requête en annulation, §§ 43 et s.

⁷⁰ *Supra*, § 35

⁷¹ **Document** *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Argentina’s application for annulment, 1 September 2009, §§ 274 et seq.; **Document** *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016, §§ 126 et seq.; **Document** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina’s application for annulment, 5 May 2017, §§ 76 et seq.; **Document** *Compagnie d’exploitation du chemin de fer transgabonais v. Gabon*, Decision of the *ad hoc* Committee on Gabon’s application for annulment, 11 May 2010, §§ 109.

98. For these two types of proceedings, Rule 51(1)(a) likewise indicates that the request is transmitted to the “*tribunal ayant initialement statué*”; or in the English text, the “original Tribunal”.
99. If this Tribunal cannot be reconstituted, Rule 51(3) says the parties shall be invited to constitute a new Tribunal “*composé du même nombre d'arbitres, nommés de la même manière que pour le Tribunal initial*”; or in the English text, “*including the same number of arbitrators, and appointed by the same method, as the original one.*”
100. This comparison of the French and English texts of the Convention and of the Rules highlights the fact that the two instruments use without distinction and interchangeably the terms “*tribunal initial*”, “*tribunal ayant statué*”, “*original tribunal*” and “*tribunal which rendered the award*”.
101. As Prof. Schreuer says regarding the interpretation procedure provided for in Article 50 of the Convention:
- "Since the purpose of the procedure for interpretation is to elucidate the meaning of the original award, it seems logical to try to obtain an explanation from the tribunal that drew up that award" (emphasis added).⁷²*
- "Participation by the original arbitrators in proceedings for the interpretation of an award is voluntary. An interpretation by the original tribunal is contingent upon all members of that tribunal expressing their willingness to take part in proceedings for interpretation. A majority of the original arbitrators will not suffice. Therefore, even if a dissenting member of the original award, who did not participate in the drafting of the award, refuses to take part, an interpretation by the original tribunal is not possible" (emphasis added)⁷³.*
102. The same remarks apply to the procedure for revision provided for in Article 51, whose text is identical on this point.⁷⁴
103. Now, as recalled above, the Tribunal which rendered the original Award notably included Mr Emmanuel Gaillard. We should note that Mr Gaillard was appointed by the Chairman of the ICSID Administrative Council after the resignation, without the consent of the remaining arbitrators, of Mr Leoro Franco, an arbitrator appointed by Chile.
104. The consequences of the resignation of an arbitrator and the procedure for the appointment of a new arbitrator are governed by Article 56(3) of the Convention and Rules 8, 10 and 11.
105. These provisions also deal with the “*constitution of the Tribunal*” within the meaning of Article 52(1)(a) of the Convention, in the particular event of an arbitrator’s resignation.
106. Thus Article 56(3) of the Convention provides that “*If a conciliator or arbitrator appointed by a party shall have resigned without the **consent** of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.*”

⁷² C. Schreuer, *The ICSID Convention*, Art. 50, § 30

⁷³ C. Schreuer, *Ibid.* Art. 50, § 32

⁷⁴ C. Schreuer, *Ibid.*, Art. 51, § 33: “Art. 51(3) is identical with the first two sentence of Art. 50(2). The questions surrounding the reconvening of the tribunal or the constitution of a new tribunal are examined in the context of Art. 50(2) dealing with the interpretation (see Art. 50, paras. 30-41). The observations made there are also relevant to Art. 51(3) dealing with revision”.

107. Rule 8 moreover indicates the procedure to be followed after the resignation of an arbitrator:

“An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.”

108. Rule 10, for its part, provides the procedure to be followed during a vacancy on the Tribunal, and Rule 11(2)(a) details the procedure for filling a vacancy so as to replace the resigned arbitrator, where this resignation is not accepted by the remaining members of the Tribunal:

“In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators: (a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party” (emphasis added).

109. Pursuant to the above rules, it follows from the resignation of the arbitrator Leoro Franco (originally appointed by Chile), without the consent of the other arbitrators, that the replacement arbitrator, Mr Gaillard, was to be appointed by the Chairman of the ICSID Administrative Council. Such were the rules for the constitution of the original Tribunal.
110. Thus, following the partial annulment of the original Award, the members of the new Tribunal should have been appointed according to the same rules as applicable to the constitution of the original Tribunal, according to Rule 55(2)(d), i.e. with the appointment of the arbitrator that was originally to be appointed by Chile being made by the Chairman of the ICSID Administrative Council.
111. As the resubmission Award says, *"la présente instance est le prolongement de l'arbitrage initial"* (§ 196).
112. But contrary to Rule 55(2)(d), it was the Respondents and not the Chairman of the ICSID Administrative Council that appointed the Co-Arbitrator in the resubmission proceeding.
113. The appointment of Mr Mourre by the Respondent, instead an arbitrator being designated by the Chairman of the ICSID Administrative Council, means that the resubmission Tribunal was improperly constituted, as defined in Article 52(1)(a) of the Convention.
114. It is worth noting that the complaint against Mr Mourre was submitted by Mr. Pey Casado and the President Allende Foundation in a timely manner to the proceedings.
115. Indeed, as was detailed in the annulment application, as soon as Mr Mourre was appointed by Chile, Mr. Pey Casado and the President Allende Foundation stated their objection thereto as well as to the resubmission Tribunal's imposition of the procedure provided in Article 57 of the Convention to settle the matter, whereas this Article is not intended by the Convention for use in such events.
116. As the Arbitral Tribunal was constituted on the night of Christmas 2013,⁷⁵ on the following 26 December Mr. Pey Casado and the President Allende Foundation requested:

"4. (...) en application des articles 44 et 41(1)5 de la Convention, du nouveau Tribunal qu'il prenne acte que la désignation par la République du Chili d'un arbitre ne respecte pas

⁷⁵ Document C274

l'autorité de chose jugée de la Sentence et est contraire au Règlement d'arbitrage CIRDI ; en conséquence, ordonne que la nomination du troisième arbitre soit faite de la même manière que celle de son prédécesseur dans le Tribunal initial, c'est-à-dire par le Président du Conseil administratif.

5. Les motifs de cette demande ont été présentés par les Demanderesses dans leurs courriers au Centre des 18 juin et 10 juillet 2013 et réitérés dans les lettres des 26 et 27 juillet, 23 août, 25 septembre, 9 octobre et 23 décembre 2013. (...).⁷⁶

7. Dans lesdits courriers, les Demanderesses avaient fait état de la situation sans précédent, consistant à voir nommer un nouveau Tribunal sans méconnaître I) de l'autorité de la chose jugée de la Sentence et de l'effet utile de la Décision du 25 avril 2006 du Tribunal initial concernant la désignation du troisième arbitre par la Président du Conseil administratif à la place de la Défenderesse et II) l'article 55 (2) (d) du Règlement d'arbitrage CIRDI.

8. En effet, dans aucune des affaires ayant donné lieu à une nouvelle soumission du différend après une annulation de la sentence arbitrale par un Comité ad hoc⁷⁷, le tribunal initial ayant prononcé la sentence initiale avait été constitué conformément à l'article 56(3) de la Convention CIRDI."⁷⁸

117. This request was reiterated at the first meeting of the parties with the Arbitral Tribunal on 11 March 2014 (by telephone):

*"Sur le fondement de leur interprétation de l'article 55(2)(d) du Règlement d'arbitrage du CIRDI, les parties demanderesses ont fait valoir que l'arbitre nommé par la partie défenderesse aurait dû être nommé par le Président du Conseil administratif, comme M. le professeur Gaillard l'avait été dans l'arbitrage d'origine. Elles ont demandé au Tribunal (i) de déterminer si Me Mourre a été nommé conformément à la Convention et au Règlement d'arbitrage du CIRDI, et (ii) s'il ne l'a pas été, de l'inviter à démissionner. Les parties demanderesses ont confirmé que leur requête n'était pas une demande de récusation de Me Mourre."*⁷⁹

118. On 29 April 2008, with draft Procedural Order No 1, the Tribunal brushed aside all legal arguments based on the OA's *res judicata* effect:

*In the absence of a proposal for disqualification under the Convention and Rules, the Tribunal does not feel called upon to rule on the matter.*⁸⁰

119. Within the period granted by the Tribunal, on 6 May 2014⁸¹ Mr. Pey Casado and the President Allende Foundation filed a respectful and substantiated objection to this decision:

⁷⁶ See **documents C84, C86, C88, C89, C90, C91, C92**, respectively

⁷⁷ *Amco Asia Corporation et al. v. Republic of Indonesia*, Award of 6 June 1990, ICSID No. ARB/81/8 Décision du 17 Octobre 1990; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID No. ARB/81/2, **document C7**; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID No. ARB/84/4; *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentina*, ICSID No ARB/97/3, Sentence du 20 Août 2007, **document C54**; *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic*, ICSID No. ARB/01/3, 22 Mai 2007, **document CL351**; *Sempra Energy International v. Argentina*, Sentence, ICSID No ARB/02/16, **document C218**

⁷⁸ **Document C94**, References omitted

⁷⁹ **Document C275**, 2014-04-29 Pey v. Chile-First Session-Summary of Discussion at First Session § 2

⁸⁰ **Document C276**, 2014-04-29 Pey v. Chile - Draft PO 1 - to parties, § 2.2

"a) La conjonction singulière dans le cas d'espèce des conditions de l'article 56(3) de la Convention pourraient ne pas être considérées comme ce à quoi le renvoi est raisonnablement prévu par la deuxième phrase de l'article 57 ouvrant la voie à une récusation de l'arbitre nommé par le Chili. En effet, selon la Note explicative préparée par le Secrétariat du Centre en 1968⁸² à la Règle d'arbitrage n° 9, lettre "A"⁸³, de même que les Règles d'arbitrage nos. 3⁸⁴ et 4⁸⁵ et la doctrine qualifiée⁸⁶, ces conditions font référence à la nationalité de l'arbitre ou à sa présence dans la liste des arbitres de l'article 40(1) de la Convention;

b) Quant à la première phrase de cet article 57, elle renvoie à l'article 14(1)⁸⁷ de la Convention, qui n'est pas d'application en l'espèce ;

c) Au cas où l'acceptation d'une éventuelle proposition de récusation introduite par les Demanderesses pour d'autres motifs serait envisagée, compte tenu de la déstabilisation du Tribunal par la représentation du Chili en récusant à nouveau, pour des motifs dénués de pertinence⁸⁸, le Prof. Philippe Sands, ce qui a causé son départ en janvier 2014⁸⁹, et vu les antécédents spécifiques au présent cas, on ne peut exclure qu'avant que la décision soit signée, la représentation du Chili provoque une crise de la procédure, mettant en œuvre une variante de celle qu'elle avait provoqué en août 2005, et récuse, à nouveau, tous ou la majorité⁹⁰ des membres du Tribunal, suscitant ainsi un prétexte pour prolonger la présente procédure et augmenter les dommages infligés aux Demanderesses. Une situation dont celles-ci ne peuvent prendre le risque de créer la possibilité.

Dans de telles circonstances, les Demanderesses ne considèrent pas qu'une procédure de récusation puisse remédier à cette situation.

Les Demanderesses réitèrent que leur demande, adressée au Tribunal, d'éclaircir la question de procédure est complètement étrangère à toute considération concernant M.

⁸¹ **Document C100**, Claimants' observations on Draft PO 1

⁸² 1 ICSID Reports 76

⁸³ Explanation "A" to Rule 9: "Under Article 57 of the Convention, a party may propose the disqualification of an arbitrator on account of any fact indicating a manifest lack of the qualities required by Article 14(1) or on the ground that he was ineligible for appointment under Section 2 of Chapter IV (see the restrictions relating to nationality in Articles 38 and 39, and the requirement of listing on the Panel of Arbitrators in Article 40(1))"

⁸⁴ Arbitration Rule 3: "Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)"

⁸⁵ Arbitration Rule 4: "Appointment of Arbitrators by the Chairman of the Administrative Council"

⁸⁶ See, *inter alia*, Schreuer (C.): *The ICSID Convention: A Commentary*, Cambridge Univ. Press, 2001, p. 1201; Baker (M.)-Greewood (L.): *Are Challenges Overused in International Arbitration?*, Journal of International Arbitration, Volume 30, Issue 2 (2013), p. 106

⁸⁷ Article 14(1) of the Convention: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. (...)"

⁸⁸ See the Claimants' observations of 23 January 2014 on the Chilean delegation's proposal to disqualify Prof. Philippe Sands, available at <http://italaw.com/sites/default/files/case-documents/italaw1617.pdf>

⁸⁹ See the letter from the arbitrator Prof. Philippe Sands of 11 September 2013 and his resignation from the Tribunal of 10 January 2014 at [11LetterfromPhSandsreappointmentPeyCasadovChile.pdf](http://italaw.com/sites/default/files/case-documents/italaw3045.pdf) and <http://italaw.com/sites/default/files/case-documents/italaw3045.pdf>, respectively

⁹⁰ On 16 March 2006 the Chilean delegation abandoned its challenge to arbitrator Leoro (which was the sole reason he gave for resigning on 24 August 2005) and restated its challenge to the other two arbitrators, Prof. Pierre Lalive and Judge M. Bedjaoui, former President of the International Court of Justice. M. Leoro's resignation letter may be viewed at <https://bit.ly/2qLLss6>

Alexis Mourre - qui a été nommé arbitre après que la question ait été soulevée et dont la personnalité n'a pas été mise en cause⁹¹."

120. Before it refused to decide the legal point arising from the OA's *res judicata* – submitted by the means provided in Articles 38, 56(3), 44 and 41(5) of the Convention in relation to Rules 55(2)(d), 11(2)(a) – the RT was fully aware that no effective remedy would be available on this point to Mr. Pey Casado and the President Allende Foundation with ICSID once, on 13 September 2013, the ICSID Secretary-General had taken the following view:

*"Nous comprenons que les Demandeurs sont en désaccord avec la conclusion du CIRDI. Il est loisible aux Demandeurs de soulever cette question devant le Tribunal une fois que celui-ci aura été constitué"*⁹².

121. Given the fact that "*la présente instance est le prolongement de l'arbitrage initial*"⁹³ and the specific context of the facts arising during this arbitration, by not deciding on this legal point as raised – §§ 34-37 and 729 of the OA – the resubmission Tribunal:

1) disregarded its *res judicata* effect and rendered the OA's censure of Chile for the conduct of the arbitrator appointed by it wholly ineffective;

2) committed serious misconduct coming within the grounds for annulment provided in Article 52 – excess of powers, serious departure from fundamental rules of procedure (due process, equality of the parties in the Convention's implementation), failure to state sufficient reasons and improper constitution of the Tribunal tasked with determining the amount of compensation.

122. This improper constitution of the resubmission Tribunal has major consequences in so far as it allowed Chile to appoint an arbitrator when it should not have been entitled to do so, thereby affecting the whole resubmission Award.

123. For these reasons Mr. Pey Casado and the President Allende Foundation ask the Committee to annul it in whole.

2.2 The lack of disclosure of the links between the Chilean Republic and Essex Court Chambers means that the Tribunal was improperly constituted and involves a serious departure from a fundamental rule of procedure

124. The factual and legal framework of this ground for annulment was substantiated in the annulment application of 10 November 2017 (§§ 86-185) and in section I.2.1 above.

125. As Mr. Pey Casado and the President Allende Foundation showed in their annulment application, the resubmission Award has a major flaw regarding an apparent and objective conflict of interest and the resulting doubt as to the Tribunal's independence and impartiality.

126. This derives from the non-disclosure by arbitrators Veeder and Berman of business relationships demonstrating close links between the Chilean State and the barristers' group to which they belong, namely *Essex Court Chambers* (ECCh), leading to an apparent and objective

⁹¹ See the Claimants letter of 26 December 2013, para. 2, **document C94**

⁹² **Document C93**, Reply by the ICSID Secretary-General of 13 September 2013 to the Claimants regarding the constitution of the Arbitral Tribunal for resubmission of the dispute

⁹³ **Document C9f**, Resubmission Award, § 188

conflict of interest and casting doubt on the independence and impartiality of those arbitrators (2.2.3).

127. This involves both a serious departure from a fundamental rule of procedure and an improper constitution of the Tribunal (2.2.4).
128. Given the peculiar nature of the situation with which the *ad hoc* Committee is faced, Mr. Pey Casado and the President Allende Foundation will first describe the Committee's jurisdiction to decide this particular point (2.2.1). Mr. Pey Casado and the President Allende Foundation will also show how the complaint regarding arbitrators Veeder and Berman was raised by Mr. Pey Casado and the President Allende Foundation in a timely manner in the proceedings (2.2.2).
129. Finally, the Respondent State would need to produce the documents requested in order for the facts relating to the arbitrators' apparent conflict of interest to be fully established (2.2.5).

2.2.1 The *ad hoc* Committee has jurisdiction to decide and assess the question of the apparent conflict of interest of Messrs Veeder and Berman *de novo* given the presence of significant new facts

130. The complaint involving the Tribunal's lack of independence and impartiality is of a peculiar nature given its procedural character. This procedural character in principle requires that the parties file their complaint at the stage of the proceedings before the Tribunal, via a proposal for disqualification, as provided in Article 57 of the Convention.
131. When such a proposal to disqualify is frustrated, an *ad hoc* Committee may, at the stage of annulment proceedings, have to consider the decision of the original Tribunal or of the Chairman of the ICSID Administrative Council rejecting the proposal for disqualification. Such is the case here, and the Committee must approach the first decision on disqualification of arbitrators and the second decision on disqualification of arbitrators.⁹⁴
132. The approach that *ad hoc* Committees should take in such circumstances has been discussed by several *ad hoc* Committees including, recently, those set up in *EDF International v. Argentina* and *Suez v. Argentina*.
133. In *EDF International v. Argentina* the *ad hoc* Committee distinguished between two situations:

(1) *Where the parties have not been able to file a proposal for disqualification during the proceedings, the ad hoc Committee will have the task of approaching the question posted de novo, and should determine whether there is reasonable doubt as to the arbitrators' independence and impartiality:*

"Accordingly, in a case in which an application for annulment is made on the basis that there were reasonable grounds to doubt the independence or impartiality of one of the arbitrators and no proposal for disqualification had been made before the proceedings were declared closed, the role of an ad hoc committee is to decide the following questions:

- *(a) was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly?*
- *(b) if not, has the party seeking annulment established facts the existence of which would cause a reasonable person, with knowledge of all the facts, to consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality? and*

⁹⁴ *Infra*, §140-147, et Requête en annulation, §§141-173

- (c) if so, could the lack of impartiality or independence on the part of that arbitrator – assuming for this purpose that the doubts were well-founded – have had a material effect on the award?

With respect to each question, the committee must approach the matter *de novo*.⁹⁵

(2) Where a proposal for disqualification has already been rejected, the review by the *ad hoc* Committee appears in principle to be more limited, confined to ascertaining whether the decision in question was untenable and manifestly unreasonable:

"The Committee therefore considers that its role in relation to an application for annulment based on the alleged lack of independence or impartiality of an arbitrator is a more limited one in a case where the remaining members of the tribunal, or the Chairman of the Administrative Council, have already taken a decision on whether that arbitrator should be disqualified than in a case where the issue of independence or impartiality is raised only after the proceedings have closed. In the former type of case, an *ad hoc* committee does not write on a blank sheet: it is faced with existing findings of fact and assessment of those facts, as well as with an application of the law to those facts. While a committee is not bound to uphold the decision of the remaining members of the tribunal (or the Chairman of the Administrative Council), nor can it simply disregard that decision. It is limited to the facts found in the original decision on disqualification. Moreover, commensurate with the principle that an *ad hoc* committee is not an appellate body, it may not find a ground of annulment exists under either Article 52(1)(a) or 52(1)(d) unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision."⁹⁶

134. The *ad hoc* Committee in *Suez v. Argentina* took this approach, with qualifications. Thus the Committee first recalled the standard set by the *ad hoc* Committee in the *EDF International* case, deeming that.

"in order to find that a ground for annulment exists under the standard of review of Articles 52(1)(a) and 52(1)(d) of the convention, the Decision on Disqualification rendered by the two remaining members of the Tribunal would have to be 'so plainly unreasonable that no reasonable decision-maker could have come to such a decision'."⁹⁷

135. The Committee then described in more detail what might justify such a decision being held to be plainly unreasonable:

"In the Committee's view, there are circumstances in which a decision could be considered "plainly unreasonable," e.g., if a disqualification proposal was dismissed even though the challenged arbitrator was appointed to the Board of Directors of one of the parties, or was previously consulted by one of the parties on the subject-matter of the case. The seriousness of these examples is corroborated by the fact that they are also captured on the Non-waivable or Waivable Red List of the IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"). There may even be circumstances in which a failure of the challenged arbitrator to disclose substantial circumstances to the Parties could render the decision of the remaining arbitrators "plainly unreasonable," e.g., if a disqualification

⁹⁵ **Document** *EDF International*, Decision of the *ad hoc* Committee of 5 February 2016, § 136. See also §§ 130 et seq.

⁹⁶ **Document** *EDF International*, Decision of the *ad hoc* Committee of 5 February 2016, § 145

⁹⁷ **Document** *Suez II*, Decision of the *ad hoc* Committee of 5 May 2017, § 70

proposal was dismissed even though the challenged arbitrator failed to disclose that he or she recently served as counsel for one of the parties. Thus, even situations captured in the Orange List of the IBA Guidelines could, in certain circumstances, be of such a seriousness that it could compromise the fundamental integrity of the proceedings and thus would warrant annulment of the award.

*It will be for this Committee to assess whether the circumstances of the present case give rise to a conflict of interest that is of a comparable seriousness an threat to the fundamental integrity of ICSID arbitration proceedings, which renders the Tribunal's decision 'plainly unreasonable.'*⁹⁸

136. The *ad hoc* Committee then left open the possibility of making a broader review, akin to the second situation envisaged by the Committee in the *EDF International* case, in the presence of significant new facts.⁹⁹
137. Indeed (and as indicated in §§ 42, 75-85, 91, 92, 94 of the annulment application), where the facts underlying the ground for annulment provided in Article 52(1)(a) were not known before the arbitral award was rendered, *ad hoc* Committees have specifically confirmed their jurisdiction to consider such grounds, as witnessed by the decisions in *Azurix v. Argentina*,¹⁰⁰ *Vivendi II*,¹⁰¹ *EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v. Argentine Republic*,¹⁰² or *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.*¹⁰³
138. These decisions are in keeping with the drafting history of the ICSID Convention:

“Mr. HETH (Israel) suggested that an objection to the constitution of the Tribunal ought to be raised always as a preliminary objection. Only when the facts upon which the opposition rested were unknown to the objecting party at the early stages of the proceedings should there be a possibility of attacking the award on the ground that the Tribunal was not properly constituted, as provided for in Article 55(1) (a).

“Mr. BROCHES (Chairman) requested the sense of the meeting with respect to the proposal that (a) of Article 55(1) be deleted entirely because the point would undoubtedly have been raised in the proceedings and there might be grounds for objecting to a double attack on the same grounds. A vote was then taken and the motion defeated by 18 to 2.

A proposal that the objections covered by (a) should not be advocated for the first time in annulment proceedings but that a party should be required to state any such objection in the

⁹⁸ **Document C109**, *Suez II*, Decision of the *ad hoc* Committee of 5 May 2017, § 189.

⁹⁹ **Ibid.**, § 194: “The Committee is of the view that the factual basis underlying the Decision on Disqualification had not changed in a manner that would justify a re-consideration of the facts, i.e., a review beyond the scope identified above”.

¹⁰⁰ **Document C69**, *Azurix Corp. v. The Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/12, 1 September 2009, Dr. Gavan Griffith, Q.C., Judge Bola Ajibola, Mr. Michael Hwang, S.C.

¹⁰¹ **Document C107**, *Vivendi v Argentina (II)*, Annulment Decision, 10 August 2010, available at <http://bit.ly/2eQbuHm>

¹⁰² **Document C103**, *EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v Argentine Republic* (ICSID Case No ARB/03/23), Annulment Decision of 5 February 2016, available at <http://bit.ly/2v08Rti>

¹⁰³ **Document C109**, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment, 5 May 2017, available at <http://bit.ly/2prirhT>

*actual proceedings before the Tribunal had no support. The proposal that the parties be given an immediate right of redress after a tribunal had decided that it was properly constituted without having to wait for the award was defeated by a majority of 9 to 3.*¹⁰⁴

139. In our case, the total and accumulated lack of transparency of the Respondent, of the two arbitrators belonging to ECCh, of the resubmission Tribunal and of ECCh itself, along with major developments occurring since the resubmission Award was rendered, and, in particular, after the first and second decisions on the disqualification of arbitrators, justify a review *de novo* by the Committee of the issue of the independence and impartiality of arbitrators Veeder and Berman.
140. Indeed, and contrary to what the Chairman of the ICSID Administrative Council was led to believe when the disqualification of Messrs Veeder and Berman was proposed, the information in the public domain when the resubmission proceeding began was insufficient for Mr. Pey Casado and the President Allende Foundation to know of the link between the Chilean State and *Essex Court Chambers* when those arbitrators were appointed.
141. The press articles relating to the *Maritime Dispute (Peru v. Chile)* published in 2012 did mention that Mr Wordsworth represented Republic of Chile at the International Court of Justice, but they did not refer to his membership of *Essex Court Chambers*.¹⁰⁵ The same goes for the press articles published in 2014 and 2015 on the *Maritime Dispute (Bolivia v. Chile)*.¹⁰⁶
142. In any case, as recalled above, in opposing the request for disclosure of documents concerning its relationship with members of *Essex Court Chambers*, on 12 April 2017 Chile cited the fact that these documents had been declared secret, and were a matter of national interest.¹⁰⁷
143. By definition, if this information was secret, it could not therefore be in the public domain and known by the Claimants.
144. These particulars, arising after the rendering of the first and second decisions on disqualification of arbitrators, also constitute developments justifying a full reconsideration of the matter, as does the ruling of the 28th Civil Court of Santiago of 24 August 2015 ordering Chile to disclose details of the payments made by the Chilean State to members of *Essex Court Chambers*, which injunction Chile has since then been resisting¹⁰⁸ to the point that on 20 April 2018 it managed to have that Court, without being acquainted with the content of the information, deem that information “confidential”,¹⁰⁹ after having ruled to the contrary between 24 July 2017 and 20 April 2018.¹¹⁰ The President Allende Foundation filed an appeal on the following 25 April.¹¹¹
145. In view of these new aspects, the Committee should now determine whether there is an apparent and objective conflict of interest and reasonable doubt as to the independence and impartiality of the arbitrators, as if the matter were being judged for the first time.

¹⁰⁴ **Document C15**, History of the ICSID Convention, Vol. II, p. 851

¹⁰⁵ Document R-36

¹⁰⁶ R-39, R-40, R-41, R-42, R-43, R-44

¹⁰⁷ **Document C138**

¹⁰⁸ **Documents C110, C208, C220, C221, C283, C-**

¹⁰⁹ **Document C284**

¹¹⁰ **Documents C184, C110, C242, C191, C220, C221, C242, C242bis, C243, C244, C245**

¹¹¹ **Document C290**

146. For these purposes it will not fail to notice that when the arbitrators were first questioned by the Centre in the disqualification proceedings, on this subject they refused point blank to disclose any information whatsoever.
147. In view of these developments Mr. Pey Casado and the President Allende Foundation have directly requested information from *Essex Court Chambers* on their activities.¹¹² Also in this context a first request for the production of documents was made to the *ad hoc* Committee, and will be reiterated after submission of the Memorial.

2.2.2 Mr. Pey Casado and the President Allende Foundation filed their complaint regarding the arbitrators' apparent conflict of interest in a timely manner in the proceedings

148. The Claimants were quite unaware of any apparent conflict of interest between Chile and arbitrators Veeder and Berman prior to the appearance of a publication on 18 September 2016 mentioning covert ("*sigilosos*") links between *Essex Court Chambers* and the Chilean Republic.¹¹³
149. Indeed, neither Chile nor the arbitrators disclosed any link between *Essex Court Chambers* and the Respondent – which subsequently further stressed that the scope of this relationship was confidential – when those arbitrators were appointed. Thus the Claimants were unable to detect any apparent conflict in the reasonable enquiries performed between 12 December 2013¹¹⁴ and 6 February 2014¹¹⁵ pursuant to the IBA Guidelines on Conflicts of Interest in International Arbitration. Chile thereby infringed IBA Standard 7(a) on conflicts of interest in international arbitration.¹¹⁶
150. If Mr. Pey Casado and the President Allende Foundation had been aware of the existence of such relationships, they would naturally have refrained from appointing Mr Veeder as arbitrator, as they did in May 2013 on waiving the appointment of Mr Albert Van den Berg after the latter disclosed his professional ties with the Chilean State.¹¹⁷

¹¹² **Documents C251, C252, C253**

¹¹³ **Document C191**, public statement by the Chilean Foreign Minister on 18 September 2016 (three days after the notification of the resubmission Award); **Document C118**, Reasoned proposal for disqualification of arbitrators Berman and Veeder of 22 November 2016, § 8; 1st conclusion (p. 39); footnote 7, documents and annex nos. 6 and 7

¹¹⁴ **Document C144**, the Centre gives notice of its intention to appoint M. Berman as Chair of the resubmission Tribunal

¹¹⁵ 1st meeting (by phone) of the resubmission Tribunal with the parties. Messrs Berman and Veeder accepted their appointments on 13 and 31 January 2014, respectively (**documents C145 and C146**)

du Tribunal de resoumission avec les parties. MM. Berman et Veeder ont accepté leur nomination les 13 et 31 January 2014, respectively (**documents C145 and C146**)

¹¹⁶ "A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of **any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration)**, or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. **The party shall do so on its own initiative at the earliest opportunity.**"

¹¹⁷ During exchanges with Mr Van de Berg with a view to a possible appointment and following his disclosure on 21 May 2013 that "J'ai, par le passé, eu l'occasion d'oeuvrer en tant qu'avocat dans le cadre de l'affaire 'République du Chili contre Azeta B.V.', ayant été déférée aux juridictions néerlandaises. Ce dossier concernait des procédures d'exécution forcée lors d'un jugement rendu à Rotterdam en 1984 contre la République du Chili.", les Demanderesses ont indiqué le 23 May suivant: "Je vous écris aujourd'hui avec une très profonde tristesse. Je n'avais la moindre idée du fait que vous aviez été avocat de la République du Chili dans l'affaire

151. Furthermore they would have objected to the appointment of Mr Berman as arbitrator.
152. This is moreover exactly what they did immediately after first learning of the links between *Essex Court Chambers* and the Respondent State.
153. Indeed, on 20 September 2016, i.e. two days after the covert ("*sigilosos*") links between the Respondent and members of *Essex Court Chambers* were first made public, Mr. Pey Casado and the President Allende Foundation asked arbitrators Veeder and Berman to comply with their duty of disclosure, stating:

*"1. si dans les Essex Court Chambers il y aurait des membres, des assistants ou d'autres personnes qui recevraient des instructions, de financement ou qui seraient impliqués, de quelque manière que ce soit, directement ou indirectement, avec la République du Chili,
2. si la République du Chili a dévoilé au Tribunal la nature et l'envergure des éventuels rapports financiers ou d'autre nature qu'elle a pu avoir avec des membres des Essex Court Chambers - les parties Demanderesses sont en mesure d'affirmer catégoriquement qu'elles n'en ont eu absolument d'aucune sorte avant la nomination des arbitres dans le Tribunal de la présente procédure arbitrale, ni après-,
3. si l'un et l'autre des deux arbitres a mené, et à quelle date, une enquête raisonnable - en vertu de leur devoir de due diligence- afin d'identifier des conflits d'intérêts, des faits ou des circonstances raisonnablement susceptibles de soulever des doutes légitimes quant à leur impartialité dans la présente procédure arbitrale où la République du Chili a été condamnée pour manquement au traitement juste et équitable, en ce compris le déni de justice, par la Sentence arbitrale du 8 mai 2008 (Piere Lalive, M. Chemloul, E. Gaillard), condamnation confirmée par la Décision du Comité ad hoc du 18 décembre 2012 (L.Y. Fortier QC, P. Bernardini, A. El-Kosheri),
4. le cas échéant, à quelle date l'un et l'autre des arbitres aurait eu connaissance, le cas échéant, d'éventuels rapports de la République du Chili avec des membres, des assistants ou d'autres personnes des Essex Court Chambers,
5. si des membres ou des associés des Essex Court Chambers représentent le Chili d'une manière régulière,
6. si dans les trois dernières années des membres des Essex Court Chambers ont agi pour la République du Chili, ou un organisme dépendant de celle-ci, dans des affaires sans rapport avec le présent arbitrage sans que les deux arbitres y aient pris part personnellement,
7. si une law firm-Chamber ou un expert qui partagerait des honoraires significatifs ou d'autres revenus avec des membres des Essex Court Chambers rend des services à la République du Chili, ou à un organisme appartenant à celle-ci,
8. si une law firm-Chamber associée ou formant alliance avec des membres des Essex Court Chambers mais qui ne partagerait pas des honoraires significatifs ou d'autres revenus de membres des Essex Court Chambers, prête des services à la République du Chili, ou à un organisme appartenant à celle-credit institution."*¹¹⁸

154. On 13 October 2016, Mr. Pey Casado and the President Allende Foundation also addressed a request to the Respondent State through ICSID, asking them:

Azeta B.V., ce dont vous avez eu la gentillesse de m'informer. Je vous en suis gré, car bien au-delà de notre volonté, cela pourrait dans l'avenir créer des situations objectivement embarrassantes pour vous, ou l'une ou l'autre de parties, dans l'étape à venir de cette procédure d'arbitrage où nous nous sommes trouvés face à des situations tout à fait inattendues et regrettables. (...) Compte tenu de ces précédents, nous aimerions que vous compreniez combien, à notre grand regret, nous considérons qu'il est sage de nous désister de notre proposition du 20 mai dernier", document C259

¹¹⁸ **Document C125**, email from the Claimants to the ICSID Secretary-General of 20 September 2016

"Au cas où se confirmeraient les craintes concernant une absence de révélation au Centre par la République du Chili de toutes ses relations avec des membres des Essex Court Chambers, les Demanderesses sollicitent que la République du Chili les lui révèle pleinement au plus tard le 17 octobre 2016 compte tenu du fait que le délai de la Règle d'arbitrage n°. 49 se termine huit jours ouvrables après, en particulier

- 1. si l'État du Chili, ou un organisme dépendant de celui-ci, est un client actuel ou antérieur de membres des Essex Court Chambers, et à quelles dates,*
- 2. si la République du Chili, ou un organisme dépendant de celle-ci, est un client régulier ou occasionnel de membres des Essex Court Chambers, et à quelles dates,*
- 3. le nombre de millions de dollars que la République du Chili, ou un organisme dépendant de celle-ci, aurait versé à des membres et des personnes en rapport avec les Essex Court Chambers jusqu'au 13 septembre 2016, et les dates des paiements correspondants –notamment à partir des dates où les deux arbitres ont été nommés dans le présent Tribunal arbitral,*
- 4. les montants financiers engagés par la République du Chili, ou par un organisme dépendant de celle-ci, pour une période à venir avec des membres de ces Chambers, et les dates des accords correspondants,*
- 5. si les services que la République du Chili, ou un organisme dépendant de celle-ci, reçoivent de membres appartenant aux Essex Court Chambers portent sur des conseils stratégiques ou des transactions spécifiques,*
- 6. si les travaux de membres des Essex Court Chambers pour la République du Chili, ou un organisme dépendant de celle-ci, sont effectués dans les lieux où les deux arbitres dans la présente procédure sont installés ou ailleurs, et depuis quelles dates,*
- 7. si les membres des Essex Court Chambers au service de la République du Chili ont mis en place un ethical screen ou une Chinese Wall comme bouclier desdits deux arbitres à l'égard des autres travaux, et à quelles dates,*
- 8. quels sont les membres, les assistants ou autres personnes desdites Chambers qui reçoivent des instructions, des financements ou qui seraient impliqués, de quelque manière que ce soit, directement ou indirectement, avec la République du Chili ou un organisme dépendant de celle-ci,*
- 9. si dans les trois dernières années des membres des Essex Court Chambers ont agi pour la République du Chili, ou un organisme dépendant de celle-ci, dans des affaires sans rapport avec le présent arbitrage sans que les deux arbitres y aient pris part personnellement,*
- 10. si une law firm-Chamber ou un expert qui partagerait des honoraires significatifs ou d'autres revenus avec des membres des Essex Court Chambers rend des services à la République du Chili, ou à un organisme appartenant à celle-ci, et depuis quelles dates,*
- 11. si une law firm-Chamber associée ou formant alliance avec des membres des Essex Court Chambers, mais qui ne partagerait pas des honoraires significatifs ou d'autres revenus de membres des Essex Court Chambers, prête des services à*

la République du Chili, ou à un organisme appartenant à celle-ci et à quelles dates. ¹¹⁹

155. The Claimants' requests bore no fruit, despite being reiterated on 27 October 2016 within their request for rectification of the Award of 13 September 2016.¹²⁰
156. On 21 September 2016 the resubmission Tribunal simply refused to consider the issue.¹²¹
157. Mr. Pey Casado and the President Allende Foundation repeatedly reiterated their requests during the procedure for the rectification of material errors, to no avail.¹²²
158. In March 2017 the Claimants filed an official request for information to the Chilean government.
159. On 12 April 2017 the Chilean Foreign Ministry acknowledged the existence of relations between *Essex Court Chambers* and the Chilean State since 2005 but refused to give details because the information was a matter of "national interest".¹²³
160. On 27 June 2017 Mr. Pey Casado and the President Allende Foundation asked the Chilean courts to order the Foreign Ministry to disclose the payments made to those chambers.¹²⁴
161. On 24 July 2017 the 29th Civil Court of Santiago de Chile, after accepting the request of the Spanish Foundation, ordered:

*"que soit décrétée la mesure préjudicielle de production de documents dont disposerait le Ministère des Affaires Étrangères visant à accréditer l'existence de paiements effectués par le Ministère des Affaires Étrangères ou tout autre organisme qui lui serait subordonné, à tout membre ou avocat du cabinet d'avocats dénommé Essex Court Chambers, de Londres (Royaume-Uni), depuis le 1er Janvier 2005 à ce jour."*¹²⁵

162. Chile has since refused to comply with this injunction.¹²⁶

¹¹⁹ **Document C174bis**, p. 8

¹²⁰ **Document C126**

¹²¹ **Document C134**

¹²² Application for annulment, §§ 97, 102, 105, 111, 112, 116, 119, 120, 123, 126, 127, 138(b), 174, 181

¹²³ **Document C138**, Reply from the Chilean authorities to counsel for the President Allende Foundation of 12 April 2017

¹²⁴ **Document C184**

¹²⁵ **Document C110**

¹²⁶ Application for annulment, §180, and Claimants' letter to the *ad hoc* Committee of 21 December 2017 (§§16-1926) et 2 February 2018 (§3: « *Aujourd'hui l'État Défendeur s'applique pareillement à paralyser l'injonction du 28ème Tribunal civil de Santiago du 24 juillet 2017 afin de priver les Demanderesses d'une preuve nécessaire à la formulation d'une demande civile pour responsabilité extracontractuelle. Pour cela il n'hésite pas à passer à la contrainte/obstruction envers cette juridiction* » ; §15: « *les 5 et 12 janvier 2018, le Conseil de Défense de l'État, qui assure sa représentation devant le 28ème Tribunal civil de Santiago, a déposé auprès de celui-ci deux sommations, dont la portée intimidatrice est à peine voilée, demandant de manière pressante que soit privée d'effet ladite injonction après avoir refusé d'y déférer*»). The decision of 20 April 2018 of the 28th Civil Court cites article 277 of the Civil Procedure Code: « *S'il y avait lieu (...) et que la personne à qui en incombe l'accomplissement désobéissait, alors que se trouvent en son pouvoir les instruments ou livres auxquels les mesures font référence (...)* », **documents C284f, C290f & C292f**.

163. Given that Mr. Pey Casado and the President Allende Foundation filed this complaint as soon as they learned of the links between the Respondent and *Essex Court Chambers*, the Claimants are entitled to raise an objection regarding the improper constitution of the Tribunal and a consequent serious departure from a fundamental rule of procedure before the *ad hoc* Committee.

2.2.3 The close links existing between Chile and *Essex Court Chambers*, moreover not disclosed to Mr. Pey Casado and the President Allende Foundation during the proceedings, are such as to call into question the arbitrators' independence and impartiality

164. The Republic of Chile and *Essex Court Chambers* have close links (2.2.3.1) involving an apparent conflict of interest for Messrs Veeder and Berman (2.2.3.2), whose non-disclosure casts doubt on their independence and impartiality (2.2.3.3).

2.2.3.1 Close links between the Republic of Chile and past or current members of *Essex Court Chambers*, from 1998 to the present

165. As the Claimants stated in their application for annulment, they learned after the rendering of the resubmission Award that Chile had frequent relations on strategic matters with several barristers at *Essex Court Chambers*, of which two resubmission Tribunal members are members, namely Messrs Veeder and Berman. This information was not disclosed to them during the resubmission proceeding.

166. Thus, after 18 September, Mr. Pey Casado and the President Allende Foundation learned of a public statement by the Foreign Minister to the effect that Chile had “covert” ties with members of *Essex Court Chambers*.¹²⁷

167. The Claimants subsequently learned that other members of *Essex Court Chambers* had represented the Chilean State, or entities attached to it, in the past, both before and after the resubmission proceeding, or continued to so do to the present. Some of this information has subsequently been substantiated, especially as regards:

¹²⁷ Document C141, statement of the Chilean Foreign Minister of 18 September 2016

- **Samuel Wordsworth QC**, counsel for Chile at the International Court of Justice in the *Maritime Dispute (Peru v. Chile)*. These proceedings, filed on 16 January 2008, were concluded by a judgment of 27 January 2014. We recall that the resubmission proceeding was started on 18 June 2013 and that the proceeding for annulment of the original Award was followed by the parties between September 2008 and December 2012.¹²⁸ Mr Wordsworth also represents Chile at the International Court of Justice in the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case, filed on 24 April 2013 and still pending.¹²⁹
- **Mr Christopher Greenwood QC**, who advised Chile in the *Maritime Dispute (Peru v. Chile)* before the International Court of Justice;¹³⁰
- **Mssrs Simon Bryan and Stephen Houseman**, who defended Coromine Ltd. (an associate of Codelco, the world's largest copper producer and exporter, wholly owned by the Chilean State, in 2007)¹³¹ in a case linked to Compañía Minera Doña Inés de Collahuasi, whose head office is in Chile.¹³²
- **Mr Lawrence Collins**, who represented Chile in the process for the extradition of General Pinochet to the United Kingdom initiated by the President Allende Foundation,¹³³ became a member of Essex Court Chambers in 2012.¹³⁴

168. These many ties, recurring over time, were not disclosed by arbitrators Veeder and Berman on their appointment in the resubmission proceeding.

169. The relations between Chile and *Essex Court Chambers* prior and concurrent to the resubmission proceeding, undisclosed by arbitrators Veeder and Berman or by Chile, thus led to a request for the production of documents filed by Mr. Pey Casado and the President Allende Foundation on 21 December 2017, which had to be reiterated in March and April 2018,¹³⁵ pursuant to Procedural Order No 1 of 7 March 2018.

170. The Claimants contend that these links, and the considerable extent thereof, give rise to an objective conflict of interest which, undisclosed, generates the appearance of a lack of independence and impartiality in the resubmission Tribunal.

2.2.3.2 The close relations between the Republic of Chile and *Essex Court Chambers* constitute an apparent conflict of interest

171. The business relations between members of *Essex Court Chambers* and Chile constitute an apparent conflict of interest according to the IBA Guidelines on Conflicts of Interest in International Arbitration, hereinafter the “IBA Rules”), casting doubt on the independence and impartiality of arbitrators Veeder and Berman.

¹²⁸ ICJ website: <http://www.icj-cij.org/en/case/137>

¹²⁹ **Document C285**, statement by the Chilean Foreign Minister on 18 September 2016

¹³⁰ **Documents C286, C287 and C288**

¹³¹ **Document C128**, §§ 23-24

¹³² See the site <http://www.collahuasi.cl/es/>

¹³³ See documents 1 and 3 attached in **document C127**, *Observations des Demanderesses aux commentaires des arbitres MM. Berman et Veeder et de l'État du Chili*, (on digital media, given its large volume), available at <http://bit.ly/2lKWQCc> (fr) et <http://bit.ly/2lLliiT> (es)

¹³⁴ **Document C128**, §§ 26 and 100 et seq.

¹³⁵ **Documents C251 to C253**

172. Indeed, the IBA Rules identify a number of situations creating a conflict of interest between arbitrators and parties resembling the nature and extent of the relationship between Chile and *Essex Court Chambers* (a).

173. Although these rules apply to the members of a law firm, i.e. not strictly the same structure as a set of chambers, Mr. Pey Casado and the President Allende Foundation will show that in reality, given the similarities between the operation of *Essex Court Chambers* and that of a law firm, equally strict rules are applicable to the latter (b).

(a) The close relationship between the Republic of Chile and *Essex Court Chambers* show an apparent conflict of interest under the Non-Waivable Red List, the Waivable Red List the Orange List in the IBA Rules

174. According to the Non-Waivable Red List, describing the most severe situations in which “an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances,”¹³⁶ and for which “acceptance of such a situation cannot cure the conflict,”¹³⁷ point 1.4 envisages a scenario in which:

*“The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom”*¹³⁸.

175. In view of what we have described above, this scenario appears fully applicable here to Messrs Veeder and Berman.

176. In the Waivable Red List, describing situations that are “serious but not as severe” as those in the Non-Waivable Red List, and in which “because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c),”¹³⁹ point 2.3.5 envisages a situation in which:

*“The arbitrator’s law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.”*¹⁴⁰

177. Here again, this scenario appears to precisely describe the relationship between Chile and *Essex Court Chambers*.

178. In the Orange List, describing situations which “depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence,”¹⁴¹ point 3.1.4 envisages a scenario in which:

*“The arbitrator’s law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator”*¹⁴².

¹³⁶ IBA Rules, p. 17

¹³⁷ IBA Rules, p. 17

¹³⁸ IBA Rules, article 1.4 of the Non-Waivable Red List

¹³⁹ IBA Rules, p. 17

¹⁴⁰ IBA Rules, article 2.3.5 of the Waivable Red-List

¹⁴¹ IBA Rules, p. 18

¹⁴² IBA Rules, article 3.1.4 of the Orange List

179. Point 3.2.1 of the Orange List also envisages a scenario in which:

*"The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator."*¹⁴³

180. Or point 3.2.3 of the Orange List:

*"The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute."*¹⁴⁴

181. Once again, this scenario appears to be fully applicable here to Messrs Veeder and Berman.

182. In order to determine the exact nature and scope of the relationship, it is essential for Mr. Pey Casado and the President Allende Foundation and the Tribunal to have access to various documents possessed only by Chile.

(b) Messrs Veeder and Berman's membership of a set of chambers rather than of a law firm is immaterial to an appraisal of the conflict of interest

183. When the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration were drawn up, the question of the application of the duty of disclosure to barristers was addressed in the drafting process.

184. It was thus stressed that:

*"While the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, **there is an understandable perception that barristers' chambers should be treated in the same way as law firms.**"*¹⁴⁵

(...)

*the Working Group considers that full disclosure to the parties of the involvement of more than one barrister in the same chambers in any particular case is highly desirable. Thus, barristers (including persons who are 'door tenants' or otherwise affiliated to the same chambers) should make full disclosure as soon as they become aware of the involvement of another member of the same chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity"*¹⁴⁶ (emphasis added).

185. According to the Working Group's recommendations, point 3.3.2 of the Orange List of the 2014 IBA Rules, describing situations liable to raise justifiable doubts in the parties' minds as to an

¹⁴³ IBA Rules, article 3.2.1 of the Orange List

¹⁴⁴ IBA Rules, article 3.2.3 of the Orange List

¹⁴⁶ O. de Witt Wijnen, N. Voser & N. Rao, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration", *Business Law International*, 2004, p. 433 et seq.

arbitrator's independence and impartiality, expressly envisages the event in which arbitrators and counsels acting in the same arbitration are members of the same chambers:

*"The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers"*¹⁴⁷.

186. Though the examples listed above of situations involving conflicts of interest according to the Non-Waivable Red List, the Waivable Red List and the Orange List do not specifically concern the situation in which one of the parties has ties with the chambers in which one of the arbitrators practises (as opposed to with a law firm), Mr. Pey Casado and the President Allende Foundation contend that they are none the less applicable to the situation at hand.
187. This type of conflict of interest was envisaged by the drafters of the IBA Rules, as witnessed by Rule 6 and its corresponding Explanation.
188. Rule 6, dealing with relationships between a party and the practice to which an arbitrator belongs, provides that:

*"The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case."*¹⁴⁸

189. The Explanation to Rule 6 briefly envisages the application of this provision to barristers, stating that:

*"Although barristers' chambers should not be equated with law firms for the purpose of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel."*¹⁴⁹

190. It is worth noting that the practical effects of Rule 6 for the situation of barristers in the various lists of example in the IBA Rules appear to fall well short of the Rule's effects for lawyers belonging to a law firm.
191. Yet there is no objective reason to give preferential treatment to barristers over solicitors or other types of lawyer practising in a law firm in the application of rules relating to the disclosure of conflicts of interest. This objective situation of *quasi-law firms* is summarised by Peter Ashrof in *"The reality of those barristers' chambers most active in international arbitration."*¹⁵⁰
192. This differentiated application of the IBA Rules according to whether the practitioner involved is a lawyer in a law firm or a barrister in chambers has no basis in the Arbitration Convention or Rules and no rational justification given that the *modus operandi* of chambers has evolved over the last two decades to the point that it strongly resembles that of law firms. As Prof. Griffiths-Baker says:

¹⁴⁷ IBA Rules 2014, article 3.3.2 of the Orange List

¹⁴⁸ IBA Rules, Rule 6

¹⁴⁹ IBA IBA Guidelines on Conflicts of Interest in International Arbitration, commentary under General Rule 6

¹⁵⁰ Ashrof (Peter): Handbook on International Commercial Arbitration, Huntington, N.Y.: JurisNet, LLC, 2014, Second Edition, p. 116 et seq., viewable at <https://bit.ly/2CXGL1K>

*"chambers afford other benefits for individual barristers. They may call upon each other for advice on points of law, share the cost of training, (...) this in turn has strengthened collegiality amongst barristers (...)"*¹⁵¹

193. Chambers have in particular developed marketing and promotional techniques similar to those of law firms. A barrister's success may thus be vaunted so as to promote the chambers, allowing it and all of its members to benefit.

194. Indeed, as explained in international arbitration doctrine:

"In England, and a few other jurisdictions, some lawyers practice together in 'chambers' which are organized as collections of sole practitioners who share certain common costs but who are otherwise financially and professionally independent. English courts historically rejected claims that a barrister, nominated as arbitrator, should be removed because he or she was in the same chambers as counsel to one of the parties. Foreign courts also generally reached similar results.

These conclusions rested, however, on assumptions regarding the commercial structure and professional setting of barristers' chambers. In recent years, this structure and setting has significantly evolved, with barristers' chambers increasingly engaging in common promotional, training and other professional activities comparable to those of law firms. As a consequence, conclusions regarding barristers' independence must be re-examined in light of the realities of contemporary practice. That reexamination has occurred in several recent cases, with some authorities now holding that, at least in international cases, the relationship between members of barristers' chambers are relevant to an arbitrators' independence in much the same manner that relationships within law firms are relevant" (emphasis added)¹⁵².

"Not all are convinced, however, that the integrity of proceedings remains uncompromised when barristers from one set of chambers serve as arbitrators and counsel in the same arbitration. Shared profits are not the only type of professional relationships that can create potential conflicts. Senior barristers often have significant influence on the progress of junior colleagues' careers. Moreover, London chambers increasingly brand themselves as specialists in particular fields, with senior 'clerks' taking on marketing roles for the chambers, sometimes travelling to stimulate collective business. Moreover, a barrister's success means an enhanced reputation, which in turn reflects on the chambers as a whole" (emphasis added)¹⁵³.

"Significant changes occurred in the 90's and the beginning of the 2000's to the way in which chambers presented and marketed themselves. The practice of law in general became more commercial and the prohibition on advertising by barristers was lifted. Some chambers grew very considerably in size and whereas chambers used to be known simply by the postal address of the building from which the members practiced, more and more they started to

¹⁵¹ **Document CL270**, Griffiths-Baker (J.), *Serving Two Masters: Conflicts of Interest in the Modern Law Firm*, edited by Tullio Scovazzi, and Prof. Francesco Francioni, Bloomsbury Publishing PLC, 2002, p. 52

¹⁵² **Document CL339**, Born (G.), "Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration" in *International Commercial Arbitration*, 2nd Ed., 204, Kluwer International Law, p. 1894.

¹⁵³ **Document CL340**, W. W. Park, "Arbitrator Bias", *Transnational Dispute Management*, Vol. 12, Issue 6, November 2015.

brand themselves by the name of the chambers, the previous address of the chambers or the name of an illustrious former head of chambers" (emphasis added)¹⁵⁴.

"The use of advertisements alone seriously impeaches the sweeping assertion that these are merely "independent self-employed practitioners". A reasonable complainant viewing these advertisements could understandably harbour doubts as to the barristers' ability impartially to judge their fellow members of chambers. Indeed, barristers that tout their skills as a unit may fairly be said to have a stake in the success of their fellow barrister" (emphasis added)¹⁵⁵.

195. This advertising, and the extra activity it may generate, directly influences the chambers' performance, for chambers are funded by their members in proportion to their income, and offer their members common services.

196. As noted by the practitioners Mark Green and Edith A Robertson in a study on this subject:

"1) Barristers (...) can benefit from considering how the collective entity – the chambers – can be made more profitable. It is not necessarily appropriate for the chambers entity to make a profit in the sense of a financial surplus. However, it is relevant to talk about a profitable set of chambers, in the sense of a chambers that offers each of its barrister members the opportunity to pursue a profitable practice.

The income of chambers (...) is directly related to the amount of money that the members of chambers receive over any given period, regardless of the procedure or process adopted for contributions.

2) Chambers are financed by contributions from members. The 2002 BDO Stoy Hayward Survey of Barristers' Chambers found that the most popular way of calculating contributions was to take a percentage of the member's income."¹⁵⁶

197. This is similar to the analysis made by Dr Marc K Peter, director at LexisNexis Butterworths:

"Greater numbers of individual barristers and chambers are engaging in strategic, well executed marketing plans to attract regular, well-paid work.

The LN survey indicates that over half of barristers believe that having a clear marketing strategy cemented directly to business goals can lead to the success of the chambers" (emphasis added).¹⁵⁷

¹⁵⁴ **Document CL153**, K. Daele, "Chapter 6: Challenge and Disqualification on the Ground of Independence Issues" in *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012, §§ 6-107.

¹⁵⁵ **Document CL154** - A. H. Merjian, "Caveat arbor: Laker Airways and the Appointment of Barristers as Arbitrators in Cases Involving Barrister-Advocates from the Same Chambers", *Journal of International Arbitration*, 2000, pp. 31-70.

¹⁵⁶ **Document CL343**, Green (M.)- Robertson (E.A.), associate at BDO Stoy Hayward et director at Falcon Chambers, respectively, "Running a profitable set of chambers", article published on 14 February 2003 in *Reporter* 153 NLJ 209, available at <http://bit.ly/2F7HL5f>; see also **document CL346**, Smith (C.), "Mansfield Team Move Chambers", article published on 9 November 2015 in *Reporter LS Gaz*, 9 Nov, 6 (2), available at <http://bit.ly/2F6e58A>, highlighting the fact that chambers receive dues from barristers in proportion to the fees received by the latter, on average 25%.

¹⁵⁷ **Document CL344**, Peter (M.), director at LexisNexis Butterworths, *Smart Investment (Pt2)*, article published on 24 January 2016 in *Reporter* 166 NLJ 7684, p20, available at <http://bit.ly/2FedULA>; see also document

198. The above considerations apply especially to *Essex Court Chambers*, which boast a pre-eminent position on the international arbitration scene in London and describe themselves as “a leading set of barristers’ chambers, specialising in commercial and financial litigation, arbitration, public law and public international law.”¹⁵⁸

199. As was moreover remarked by the Tribunal in *Hrvatska Elektroprivreda v. Slovenia*, in a case directly concerning them:

"Barristers are sole practitioners. Their Chambers are not law firms. Over the years it has often been accepted that members of the same Chambers, acting as counsel, appear before other fellow members acting as arbitrators.

(...)

*It is, however, equally true that this practice is not universally understood let alone universally agreed, and that Chambers themselves have evolved in the modern market place for professional services with the consequence that they often present themselves with a collective connotation. Essex Court Chambers' elaborate website, obviously serving marketing purposes, contains special sections entitled "about us" and "how we operate" and quotes with apparent approval a Law Directory which states that the Chambers are recognized as "a premier commercial operator..." (emphasis added)*¹⁵⁹

200. And much as they style themselves as freelances, barristers share facilities in their chambers and so are likely in the normal course of their daily interactions to find themselves discussing the cases they are working on, in the absence of a binding rule against this or of a “Chinese wall” erected for the needs of a case. As Mr Athelstane Aamodt, barrister at 4-5 Gray’s Inn Square, says:

"The first thing I do when I go into chambers is check my pigeonhole. I wager that all barristers do this, on average, about one hundred times a day. The reason for this is simple. Paper in your pigeonhole usually means that you've been paid.

*My morning will invariably be punctuated by people dropping in for a chat. Barristers love to natter, and the conversations will invariably involve stories about a recent courtroom victory or defeat, or an unreasonable client/opponent/judge/solicitor."*¹⁶⁰

201. The above shows there is no reason, in the field of international arbitration, to make a distinction as to how conflicts of interest are assessed in chambers or in law firms.

202. In these circumstances, the links existing between the Republic of Chile and members of *Essex Court Chambers*, undisclosed by arbitrators Veeder and Berman, evince a conflict of interest casting reasonable doubt on the resubmission Tribunal’s independence and impartiality and justifying the annulment of the resubmission Award.

CL345, Ronan (C), chief executive, St John’s Buildings, *Driving change at the Bar*, article published on 14 July 2017 in *Reporter* 167 NLJ 7754, p20, available at <http://bit.ly/2FiZpGg>

¹⁵⁸ Homepage of the Essex Court Chambers website <<https://essexcourt.com/>>.

¹⁵⁹ **Document CL157** *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, §§ 17 et seq.

¹⁶⁰ **Document CL342**, Aamodt (A.), *A life in the day*, *Reporter*, 166 NLJ 7692, p22, available at <http://bit.ly/2csync5>

2.2.3.3 The non-disclosure of the close ties between the Republic of Chile and Essex Courts Chambers calls the arbitrators' independence and impartiality into question

203. Arbitrators practising under the ICSID rules are obliged to disclose any circumstance liable to cast doubt on their independence and impartiality **(a)**. This duty of disclosure extends to facts that are supposedly in the public domain **(b)**. In the particular case where the arbitrator is a barrister, as indicated above, there is no reason in international arbitration, and particularly in the ICSID system, to give a treatment other than that which would be given if he were a member of a law firm. Finally, this duty of disclosure also extends to the parties **(c)**. The non-disclosure of the circumstances recalled above therefore casts doubt on the independence and impartiality of arbitrators Veeder and Berman **(d)**.

(a) Arbitrators' duty of disclosure

204. Arbitrators are obliged to disclose any circumstances liable to cast doubt on their independence and their impartiality.

205. The duties of disclosure of arbitrators practising under the auspices of ICSID are governed by Rule 6(2). This Rule details the declaration to be completed by arbitrators, stating notably:

"Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

206. We may also note the similar terms used in point 3 of the IBA Rules:

(a) *If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.*

(b) *An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).*

(c) *Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.*

(d) *When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.*

207. In this case, Messrs Veeder and Berman are charged with not having disclosed other material circumstances.

208. As one author indicates, the reference to "any other circumstance" in the second limb of Rule 6(2) is to be construed in the widest possible sense:

*"The term 'any other circumstance' refers to any other circumstance than the relationships of the arbitrator with the parties. It is a catch-all category that includes virtually any kind of relationship, interest or contact with anything or anyone that is in some degree related to the case. It includes relationships of the arbitrator and the arbitrator's law-firm with counsel, co-arbitrators and fact or expert witnesses appearing in the matter."*¹⁶¹

209. According to the same author, if an arbitrator is in doubt as to what should be included in the declaration, he should make a disclosure:

*"The disclosure is limited to those circumstances that 'might cause the arbitrator's reliability for independent judgment to be questioned'. By requiring the disclosure of circumstances that 'might cause' the arbitrator's reliability to be questioned, only those circumstances that do not cause the reliability to be questioned are excluded from disclosure. If there is a possibility, not a certainty, that a circumstance calls the arbitrator's reliability for independent judgment into question, disclosure should be made."*¹⁶²

210. As Mr. Pey Casado and the President Allende Foundation also stated in § 130 of their application for annulment, what must be included in a disclosure should be viewed from the parties' perspective:

"1-017. The drafting history of the ICSID Rules supports this point. (...)

1-023. The question of whether or not a circumstance must be disclosed, must thus be answered from the perspective of the parties. The reference to 'a party' indicates that a subjective standard is adopted whereby the judgment of the parties is decisive in order to determine whether the arbitrator must make a disclosure or not.(...)

1-026 A good example is the use of English barristers in international arbitration (...) non-English parties and counsel are far less familiar with the concept of barrister chambers (...)

1-028. (...) the test for disqualification is an objective one. The test for disclosure and the test for disqualification are thus of a different nature.(...)

*1-037. The issue as to whether a fact requires disclosure is to be viewed from the perspective of the parties. That is the meaning of the 'may be questioned by the parties' language in ICSID Rule 6(2)(b)"*¹⁶³.

(b) The duty of disclosure extends to facts in the public domain

211. As indicated in arbitral case law and doctrine, the Convention does not exclude information accessible to the public from the scope of the duty of disclosure.

212. Indeed, Daele points out that:

*"(...) exempted information in the public domain from disclosure (...) such exemption is nowhere to be found in the ICSID Rules and it has been rejected in other ICSID challenge decisions that will be analyzed."*¹⁶⁴

¹⁶¹ **Document C153**, 'Chapter 1: Disclosure', in Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, International Arbitration Law Library, Volume 24 (© Kluwer Law International; Kluwer Law International 2012) pp. 1 - 64, § 1-020.

¹⁶² **Ibid.**, pp. 1 - 64, § 1-021

¹⁶³ **Document C153**, Daele (Karel), Challenge and Disqualification of Arbitrators in International Arbitration, International Arbitration Law Library, Volume 24(© Kluwer Law International; Kluwer Law International 2012)

¹⁶⁴ **Ibid.**,

213. Several decisions have moreover been given along these lines. As Mr. Pey Casado and the President Allende Foundation mentioned in § 129 of their annulment application, in *Tidewater Inc and others v. Venezuela* the Tribunal decided that:

*"Arbitration Rule 6(2) does not limit disclosure to circumstances which would not be known in the public domain. The wording of this rule is all encompassing without distinguishing among categories of circumstances to be disclosed."*¹⁶⁵

214. ICSID Tribunals have also held that arbitrators should not count on the parties' diligence and are themselves in a better position than the parties to disclose information, even that which is publicly available:

*"The Two Members agree with Tidewater that in general, in considering the scope of her duty of disclosure, the arbitrator may not count on the due diligence of the parties' counsel. As pointed out by Tidewater, arbitrators will always be in 'the best position to gather, evaluate, and disclose accurate information relevant to their potential conflicts'."*¹⁶⁶

215. The Request of 7 November 2017 also cites (in § 128) the statement along the same lines by the Chairman of the ICSID Administrative Council in *Universal Compression v. Venezuela*:

*"In order to ensure that parties have complete information available to them, an arbitrator's Arbitration Rule 6(2) declaration should include details of prior appointments by an appointing party, including, out of an abundance of caution, information about publicly available cases"*¹⁶⁷.

216. Beyond the precedents cited in the annulment application,¹⁶⁸ here we may add the following:

- a) In *Conoco v. Venézuéla*,¹⁶⁹ the arbitrators rejected disqualification chiefly because the arbitrator had made full disclosure of the facts in question.¹⁷⁰

Messrs Veeder and Berman have disclosed nothing, whether before or after the acknowledgment by Chile on 12 April 2017 of the relations between Chile and members of their lawyers' group, with a lack of transparency that it should be possible to offset with the documents whose production Mr. Pey Casado and the President Allende Foundation have requested since 20 September 2016, with renewed requests to the *ad hoc* Committee on 21 December 2017 and 2 February 2018, with *Essex Court Chambers* helping to maintain this opacity despite the invitations made by Mr. Pey Casado and the President Allende Foundation to disclose the requested information in letters dated 23 and 30 March and 16 April 2018.¹⁷¹

¹⁶⁵ **Document C105**, *Tidewater Inc et altri v. Venezuela*, ICSID Case No ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, § 46, available at <http://bit.ly/2sJW0rd>

¹⁶⁶ **Document C152**, *Tidewater v. Venezuela*, decision on the proposal to disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, 20 May 2011, §§ 90, 94 available at <http://bit.ly/2qoV4XP>

¹⁶⁷ **Ibid.**, §§ 90, 94

¹⁶⁸ Application for annulment, §§ 89, 91, 128, 130

¹⁶⁹ **Document CL266**, *ConocoPhillips Company and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Judge Kenneth J. Keith Professor Georges Abi-Saab), (Feb. 27, 2012), § 64

¹⁷⁰ **Ibid.**, § 64

¹⁷¹ **Documents C251 to C253**

- b) The *ad hoc* Committee in the *Vivendi* case regarded 1) the international arbitrator's conduct and 2) the scope or 3) the timing of the disclosure as the main factors to be considered by the Committee:

26. *Turning to the facts of the present case, it is true that a partner of Mr. Fortier's had (and still has) the Claimants or one of their affiliates as a client. But we do not think that this, in and of itself, is enough to justify disqualification in the circumstances of this case. Relevant on the other hand are the following facts: (a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency*"¹⁷² [emphasis added].

This is a world away from the case of Messrs Berman and Veeder, who have disclosed nothing, and, moreover, have expressly refused – in their capacity as members of the RT – to ask Chile to disclose its relations with members of ECCh, or to make a reasonable enquiry in this regard.¹⁷³ These three decisions make it necessary for Chile to disclose the requested documents in order to determine the extent of these relations and then to assess whether they are substantial enough to give rise to justifiable doubts as to the likelihood of receiving independent and impartial arbitration.

- c) Similarly in *Suez v. Argentina II*, the two unchallenged arbitrators took account of the fact that the arbitrator in question had performed his duty to disclose.¹⁷⁴

In the *Pey Casado* case, Messrs Berman and Veeder have refused to disclose to the Centre and to Mr. Pey Casado and the President Allende Foundation the relations between members of their chambers and the Respondent.

- d) In *Cemex v. Argentina* an arbitrator was challenged because he was a former member of a group of lawyers to which the other party's counsel belonged. The other two arbitrators took account in their decision of the fact that the challenged arbitrator disclosed his relationship with this group of lawyers on the very day he was asked to do so.¹⁷⁵

Messrs Berman and Veeder have systematically refused to disclose, to request or to enquire in relation to anything linked to the relations between the Respondent and the lawyers' group of which they are members.

- e) In the *Tidewater* case, arbitrators Campbell McLachlan and Rigo Sureda deemed that the terms of Rule 6(2) in relation to Articles 14(1) and 57 of the Convention entail that a lack of disclosure by arbitrators could be a ground for disqualification where "*the facts or circumstances surrounding such non-disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment.*"¹⁷⁶

¹⁷² **Document CL267**, *Compania de Aguas del Aconquija SA. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3, 2001), § 26

¹⁷³ **Documents C135, 136, C132-C134**

¹⁷⁴ **Document C123**, *Suez, Sociedad General de Aguas de Barcelona S.A., & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (P. Salacuse & P. Nikken), May 12, 2008, § 48

¹⁷⁵ **Document CL268**, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Proposal for Disqualification of an Arbitrator (Judge G. Guillaume, G. Abi-Saab), Sept. 6, 2009, §§ 21-23, 44

¹⁷⁶ **Document C105**, *Tidewater*, *ibid.*, § 40

The lack of transparency on the part of Chile, Messrs Berman and Veeder and ECCh in this case makes it necessary for the requested documents to be disclosed so as to determine the non-disclosed facts and shed light on the possibility of there being an apparent and objective conflict of interest liable to cast doubt on the arbitrators' independence and/or impartiality.

- f) The *ad hoc* Committee in *Nations Energie v. Panama*, on examining a proposed disqualification pursuant to Articles 14 and 57 and Rule 6(2) held that the Rule was not breached if the non-disclosure was an honest exercise of discretion and if the non-disclosed information was in the public domain.¹⁷⁷

In this case, the facts constituting Chile's potential hold over ECCh is kept secret, and the former refuses even to comply with the injunction of the 28th Civil Court of Santiago¹⁷⁸ – which is grounds for the Committee to require Chile to disclose them.

217. Messrs Franklin Berman and V.V. Veeder have infringed the IBA Guidelines on Conflicts of Interest in International Arbitration,¹⁷⁹ Rules of Ethics for International Arbitrators of 1987 and Principles on Conduct for the Legal Profession of 28 May 2011¹⁸⁰ by failing to disclose the relations of members of *Essex Court Chambers* with the Respondent when they were approached to be appointed arbitrators, by failing to make a reasonable enquiry in this regard and refusing to do so when this was expressly asked of them in October and November 2016, as well as in June 2017¹⁸¹ after Chile's acknowledgment on 12 April 2017 of the relations between it and members of their chambers.

218. They have in particular infringed the Rules of Ethics for International Arbitrators.

3. Elements of bias.

3.3 Any current direct or indirect business relationship between an arbitrator and a party (...) will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence.

4. Duty of Disclosure

4.1 A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.

4.2 A prospective arbitrator should disclose:

(a) any past or present business relationship, whether direct or indirect as illustrated in Article 3.3, (...) with any party to the dispute (...). With regard to present relationships, the

¹⁷⁷ Document CL269, *Nations Energy Corporation, Electric Machinery Enterprises Inc., y Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Decision on the Proposal to Disqualify Dr. Stanimir A. Alexandrov, Sep. 7, 2011, §§ 76-77

¹⁷⁸ See documents C243, C244, C208 and C212

¹⁷⁹ See references in the Request to the Guidelines on Conflicts of Interest in §§ 119, 157 and footnote 198, in document C174bis – the Claimants' notice to the State of Chile, and also to arbitrators Berman and Veeder, on 13 October 2016 (available at <http://bit.ly/2rfhDPD>), invoking article 14(1) of the ICSID Convention and the relevant IBA Rules; in document C133, the request filed on 19 November 2016 to the Arbitral Tribunal; and in document C118, the proposal to disqualify of the following 22 November owing to an apparent conflict of interest between the Respondent State and two of the arbitrators.

¹⁸⁰ Available at <http://bit.ly/2p1ZwvS>. Procedural Order No 1 allowed the "*droit de chaque partie de présenter des arguments de fond ou de procédure basés sur toute norme dont elle souhaite établir la pertinence*" (para. 1.2).

¹⁸¹ See documents C135, 136, C132-C134

duty of disclosure applies irrespective of their magnitude, but with regard to past relationships only if they were of more than a trivial nature in relation to the arbitrator's professional or business affairs. (...);

4.3 The duty of disclosure continues throughout the arbitral proceedings as regards new facts or circumstances.

4.4 Disclosure should be made in writing and communicated to all parties and arbitrators.

219. They have also infringed Rule 3.1 of the IBA Principles on Conduct for the Legal Profession:

3.1 A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorization,

as officially interpreted:

3.3 (...) Every lawyer is called upon to observe the relevant rules on conflicts of interest when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice.

220. As Mr. Pey Casado and the President Allende Foundation explained in their application for annulment, if mere “*non-disclosure cannot in itself prove a lack of independence*”, ICSID Tribunals and *ad hoc* Committees take into account that “*undisclosed facts and circumstances may call into question an arbitrator's guarantee of independence*”.¹⁸²

221. The assessment of the “*facts and circumstances of non-disclosure*” has been amply discussed by ICSID Tribunals. In particular the *ad hoc* Committee in the *Vivendi* case, in its assessment of the applicable circumstances, held that the conduct of the international arbitrator in question and in particular the nature, scope and timing of the disclosure were the chief factors to be considered by the Committee:

"26. Turning to the facts of the present case, it is true that a partner of Mr. Fortier's had (and still has) the Claimants or one of their affiliates as a client. But we do not think that this, in and of itself, is enough to justify disqualification in the circumstances of this case. Relevant on the other hand are the following facts: (a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency"¹⁸³ (emphasis added).

222. Arbitrators Veeder and Berman have thus given rise to doubts as to their independence, resulting in an improper constitution of the Tribunal and a serious departure from a fundamental rule of procedure.

223. Finally, this duty of disclosure also extends to the parties.

¹⁸² Document **CL265**, *Getma International and others v. Guinea*, ICSID No. ARB/11/29, Decision on the challenge to the arbitrator Bernardo M. Cremades, June 28, 2012, § 80

¹⁸³ Document **CL267**, *Compania de Aguas del Aconquija SA. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3, 2001), § 26

(c) The parties are also required to disclose facts liable to give rise to a conflict of interest

224. Although there is no requirement in the Convention for parties to disclose facts known to them that are liable to give rise to a conflict of interest, a provision to this effect was included in the IBA Rules.

225. Points 7(a) and (b) of the IBA Rules thus provide that:

"(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team"¹⁸⁴.

226. The Explanation to this Rule states that:

"(a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award"¹⁸⁵.

(d) The lack of disclosure both by Messrs Berman and Veeder and by Chile calls into question the arbitrators' independence and impartiality

227. Given the above, Mr. Pey Casado and the President Allende Foundation were entitled to expect the Republic of Chile to inform them, and the Tribunal, of the ties it has with other members of *Essex Court Chambers*.

228. It is noteworthy that Chile did make a disclosure of this kind to the first *ad hoc* Committee. Thus in December 2009, on the establishment of the first *ad hoc* Committee that was to decide on the Respondent's request to have the original Award annulled, it disclosed links that could be seen as liable to give rise to a conflict of interest with one Committee member.¹⁸⁶ When on 4 December 2012 the Centre announced its intention to appoint Mr Yves Fortier¹⁸⁷ as a member of the first *ad hoc* Committee,¹⁸⁸ on the 15th of that month Chile disclosed the relationship of

¹⁸⁴ IBA Rules, General Rule 7

¹⁸⁵ IBA Rules, Commentary on General Rule 7

¹⁸⁶ See documents C255 to C258

¹⁸⁷ Document C256

¹⁸⁸ Document C255

one of its lawyers with the lawyers' group to which Mr Fortier belonged. On the same day the Centre requested further explanation and Chile replied promptly.¹⁸⁹

229. Moreover, in addition to the non-disclosure by Chile there is the equally questionable non-disclosure by Messrs Berman and Veeder.
230. Indeed, by failing to disclose the relations of members of *Essex Court Chambers* with the Respondent State when they were approached to be appointed arbitrators, and by refusing to make a reasonable enquiry in this regard when this was expressly asked of them in October and November 2016 and June 2017,¹⁹⁰ Messrs Veeder and Berman gave rise to doubts as to their independence and impartiality constituting an improper constitution of the Tribunal and a departure from a fundamental rule of procedure.

2.2.4 The arbitrators' objective lack of impartiality and independence involves the improper constitution of the Tribunal and a serious departure from a fundamental rule of procedure

231. As has been repeatedly recalled by the Chairman of the ICSID Administrative Council:¹⁹¹

"L'impartialité implique l'absence de biais ou de prédisposition à l'égard d'une des parties. L'indépendance se caractérise par l'absence d'un contrôle externe.¹⁹² (...) Les articles 57 et 58 de la Convention du CIRDI n'exigent pas la preuve d'une dépendance ou d'une prédisposition effective, mais il suffit d'établir l'apparence de dépendance ou de prédisposition"¹⁹³.

232. In particular, in *Getma v. Guinea*,¹⁹⁴ the Tribunal stated that:

"la notion d'indépendance de l'article 14(1) de la Convention CIRDI s'entend d'un devoir d'indépendance et d'impartialité 56.¹⁹⁵ Le devoir d'indépendance renvoie à l'absence de

¹⁸⁹ Documents C257 and C258

¹⁹⁰ See documents C135, 136, C132-C134

¹⁹¹ Document CL271, *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuna and Claus von Wobeser (Dec 13, 2013), § 71, available at <http://bit.ly/2H6jpZW>. Spanish version: "La imparcialidad implica la ausencia de sesgos o predisposición hacia alguna de las partes. La independencia se caracteriza por la ausencia de un control externo.54 (...) Los Artículos 57 y 58 del Convenio del CIADI no requieren evidencia de dependencia o predisposición real, sino que es suficiente con establecer la apariencia de dependencia o predisposición"

¹⁹² [54. *Decisión Suez, Sociedad General de Aguas de Barcelona, S.A. y Vivendi Universal, S.A. v. República Argentina*, (Caso CIADI No. ARB/03/19) ¶29; *Getma, Getma International y otros v. República de Guinea* (Caso CIADI No. ARB/11/29), Decisión sobre la Propuesta de Recusación del Árbitro Bernardo M. Cremades (28 de junio de 2012) ¶59; *ConocoPhillips, supra* nota 53 ¶5]

¹⁹³ [56. *Urbaser, Urbaser S.A. y Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. República Argentina* (Caso CIADI No. ARB/07/26), Decisión sobre la Propuesta de la Demandante de Recusación del Profesor Campbell McLachlan, Árbitro (12 de agosto de 2010) ¶43]

¹⁹⁴ Document CL265, *Getma International and others v. Guinea*, ICSID No. ARB/11/29, Decision on the challenge to the arbitrator Bernardo M. Cremades, June 28, 2012, §§ 58-59, available at <http://bit.ly/2oVUS2e>

¹⁹⁵ [56. 56 Voir, par ex., *Suez, Sociedad General de Aguas de Barcelona S.A., et InterAguas Servicios Integrales del Agua S.A. v. Argentina* (ICSID Case No. ARB/03/17) et *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentina* (ICSID Case No. ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 (ci-après "*Suez I*"), paras. 28-29; *Suez, Sociedad General de Aguas de Barcelona, S.A. et Vivendi Universal v. Argentina* (ICSID Case No. ARB/03/19) et *Suez, Sociedad General de Aguas de Barcelona S.A. et InterAguas Servicios Integrales del Agua S.A. v. Argentina* (ICSID Case No. ARB/03/17), Decision on a Second Proposal for the Disqualification of a Member of

relations avec les parties de nature à influencer la décision d'un arbitre 57.¹⁹⁶ Le devoir d'impartialité renvoie à l'absence de préjugé envers l'une des parties 58.¹⁹⁷ Il s'agit là de critères objectifs. Ces critères d'indépendance et d'impartialité "serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case" 59¹⁹⁸

233. In this case, as has been shown, the arbitrators' non-disclosure of the ties between Chile and *Essex Court Chambers*, to which chambers two of the three resubmission Tribunal arbitrators belong, is such as to create the objective appearance of a lack of impartiality and independence on the part of these arbitrators.
234. Thus, as has been detailed, the issue of the Tribunal's lack of independence and impartiality constitutes a ground for annulment under both Article 52(1)(a) and Article 52(1)(d).
235. The requirement of independence and impartiality on the part of arbitrators is undisputedly a rule.

**

2.2.5 The production of the documents requested of the Chilean State is necessary to establishing facts relating to the apparent conflict of interest

236. Mr. Pey Casado and the President Allende Foundation showed above that there were links between Chile and *Essex Court Chambers* before, during and after the resubmission proceeding, and that these links were not disclosed by arbitrators Berman and Veeder.
237. The documents whose production Mr. Pey Casado and the President Allende Foundation request below would allow us first to ascertain whether there are any other undisclosed links between Chile and *Essex Court Chambers* that may have remained unknown to the Claimants.
238. They would also allow us to accurately determine the scope of the financial links between Chile and *Essex Court Chambers*, and to complete our demonstration of the objective conflict of interest affecting Messrs Berman and Veeder. We may recall in this regard that the extent of financial links between an arbitrator's firm and a party to the proceedings is a key aspect in identifying any conflict of interest.¹⁹⁹

the Arbitral Tribunal, 12 May 2008 (ci-après "*Suez II*"), para. 27; *Universal Compression International Holdings, S.L.U. v. Venezuela* (ICSID Case No. ARB/10/9), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011 (ci-après "*Universal*") para. 70; *Tidewater Inc. and others v. Venezuela* (ICSID Case No. ARB/10/5), Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010 (...) para. 37]

¹⁹⁶ [57. Voir, par ex., *Suez I* para. 29. et *Suez II* para. 28 ("Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of bias or predisposition toward one of the parties"); See also, *Tidewater* para. 37]

¹⁹⁷ [58. Ibid.]

¹⁹⁸ [59. *Urbaser S.A. et Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. République argentine* (ICSID Case No. ARB/07/26), Decision on Claimants' Proposal to Disqualify an Arbitrator, 12 August 2010 (ci-après "*Urbaser*") para. 43; *Universal* para. 70; *ConocoPhillips Company et al v. République Bolivarienne du Venezuela* (ICSID Case No. ARB/07/30), Decision on the proposal to disqualify L. Yves Fortier, Q.C. Arbitrator, 27 February 2012 (ci-après "*ConocoPhillips*") para. 55.]

¹⁹⁹ **Document RALA-15**, IBA Rules, Non-Waivable Red List, Article 1.4: "The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom"; Red List, Article 2.3.6: "The arbitrator's law firm currently has a significant

239. In their application for annulment (§ 109) Mr. Pey Casado and the President Allende Foundation recalled that in the ICSID system all of the parties are required to disclose any relationship with the group of lawyers to which one of the arbitrators belongs, citing the decision of the *ad hoc* Committee in *Fraport Ag Frankfurt Airport v. Philippines*.²⁰⁰
240. The documents whose existence the Chilean State acknowledges but which it refuses to disclose contain an account of the extent of the relationship between members of ECCh and Chile constituting an apparent conflict of interest.
241. Though Mr. Pey Casado and the President Allende Foundation have now managed, after an investigation based on unofficial information furnished to the President Allende Foundation by reliable sources, to show the existence of extensive links between Chile and ECCh, this demonstration is necessarily partial and incomplete. It has allowed us only to publicise the links which have in one way or another been let into the public domain. But given the close relationship between the Respondent and ECCh, before and at the time of the Foreign Ministry statement of 18 September 2016, other non-publicised relations plainly exist. Moreover the links that it has been possible to corroborate do not allow us to define the financial flows which may have existed, or continue to exist, between Chile and members of ECCh. Yet such financial flows also constitute such a significant sign of a conflict of interest that the Respondent has constantly and by all means resisted complying with the 28th Civil Court of Santiago's order of 24 July 2008 to disclose them.²⁰¹
242. The first condition for substantiating “*une demande de récusation fondée sur un défaut d'indépendance, comme invoqué en l'espèce, doit (1) établir les faits à l'origine de la demande.*” Such were the words of the Chairman of the ICSID Administrative Council in the *Getma v. Guinea* case.²⁰²
243. Chile's refusal to produce any information on the extent of its relations with members of ECCh and its refusal to comply with 28th Civil Court of Santiago's injunction of 24 July 2008 on the pretext of the supposedly “secret” nature of the documents concerned has put Mr. Pey Casado and the President Allende Foundation in a position of acute inequality as regards access to these facts and their disclosure to the Chairman of the ICSID Administrative Council and the present *ad hoc* Committee.
244. This refusal by Chile is contrary to the general principles of good faith and equality between parties in arbitration proceedings.
245. Nor is it in keeping with Article 43(1) of the Convention or Rule 34(3), or the practice of arbitral tribunals, for the Respondent to avail itself of its unilateral declaration of secrecy and/or of unsubstantiated privileges in client-counsel relations, to refuse to produce the information requested by Mr. Pey Casado and the President Allende Foundation since 20 September 2016 through ICSID and the Arbitral Tribunal, and through their action in connection with the 28th

commercial relationship with one of the parties, or an affiliate of one of the parties”; **Document CL153**, K. Daele, “Chapter 6: Challenge and Disqualification on the Ground of Independence Issues” in *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012, §§ 6-119 et seq.

²⁰⁰ **Document C139**, *Fraport Ag Frankfurt Airport v. Philippines*, Decision on Application for Disqualification of Counsel (J. Crawford, J.C. Fernández Rozas, 18 September 2008, § 37, available at <http://bit.ly/2fAeybd>

²⁰¹ **Document C110**

²⁰² **Document CL265**, *Getma International and others v. Guinea*, ICSID No. ARB/11/29, Decision on the challenge to the arbitrator Bernardo M. Cremades, June 28, 2012, §§ 58-59, available at <http://bit.ly/2oVUS2e>

Civil Court of Santiago's injunction of 24 July 2008²⁰³ or via the *ad hoc* Committee as of 21 December 2017.

2.2.5.1 Chile has not substantiated the existence of the conditions for client-counsel privilege

246. In *ADF Group Inc. (Can.) v. United States*, one of the parties objected to the non-production of documents withheld on the basis of lawyer-client and governmental privileges. The Tribunal disallowed this objection until a document was refused on these grounds:

There are at least two main aspects of necessity when considered in the context of a request for document production. The first aspect relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are expected to be used. Inquiry into the relevancy of the documents requested needs to be done on a category by category basis.

*4. The second aspect concerns a procedural inquiry into the effective and equal availability of the documents requested to both the requesting party and the party requested. Where only one party has access to requested documents relevant to the proceeding at hand, we consider that the party with access should be required to make the documents available to the other party. (...) Where, however, the requesting party shows it would sustain undue burden or expense in accessing the publicly available material, the other party should be required to produce the documents for inspection. In the present case, where the Respondent identifies the particular government office at which the documents are in fact available to the Claimant or its representatives, as members of the general public, the Respondent will, in principle, have produced the documents requested within the meaning of Article 41(2) of the ICSID Rules. The Respondent should also provide the document reference numbers, and any other data, necessary to enable the official custodians of the documents to identify and locate them physically or in electronic data bases, with reasonable dispatch. There may be other administrative details that may need to be attended to by the Respondent (e.g., phone calls to the document custodians) to ensure the Claimant's effective and prompt access to the documents. The Respondent would be reasonably expected to provide such necessary and appropriate assistance, without having to deliver the documents physically to the Claimant. The appropriate assumption in every case is that, both parties having proceeded to international arbitration in good faith, neither would withhold documents for its own benefit and that good faith will render any practical problems of document production susceptible of prompt resolution without undue hardship or expense on either party.*²⁰⁴

247. The Tribunal in *Glamis Gold v. the U.S.*,²⁰⁵ after defining what constitutes client-counsel privilege, stated that the party invoking privilege had the task of proving that such privilege applied to each document, which presupposes having disclosed the information to the other parties, which then have the task of showing that privilege does not apply, with the Tribunal settling each dispute document by document:

§ 18. The Respondent entered a general objection to the Motion to the extent that the documents requested are "protected from disclosure by applicable law, including

²⁰³ Documents C208, C212, C220, C221, C245

²⁰⁴ Document C259, *ADF Group Inc. (Can.) v. United States*, ICSID, ARB(AF)/00/1, Procedural Order No. 3 Concerning Production of Documents, Oct. 4, 2001, ¶¶ 3–6

²⁰⁵ Document C252, *Glamis Gold, Ltd. (Can.) v. United States*, (UNCITRAL), Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, April 21, 2006, §§ 8, 14, 17, 30–52, 58; Document C253, *Glamis Gold...*, Decision on Requests for Production of Docs. on Privilege, 2005-11-17, §§ 17–20

without limitation, documents protected by the attorney-client and government deliberative and pre-decisional privileges." (Objections, p. 18) For the Tribunal to be able to determine the applicability of the privileges so adverted to, the Respondent will have to specify the particular documents in respect of which one or more privilege is claimed and the nature or scope of the specific privilege claimed, and show the applicability of the latter to the former. This is a matter for future determination, should the Respondent decide in fact to withhold, under claim of privilege, particular documents it should otherwise make available to the Claimant.

248. The Tribunal also said it was willing to appoint an independent expert who would confidentially review each document claimed to be privileged:

*If this review of the privilege logs and corresponding challenges is insufficient to enable the Tribunal to adequately determine the validity of all assertions of privilege, the Tribunal will consult further with the Parties about the process to be taken to complete this determination, including the possibility of the confidential review of individual documents by an independent special master.*²⁰⁶

249. In *Gallo v. Canada*²⁰⁷ the Tribunal deferred a decision on the claim of privilege until the party invoking it had identified each of the documents to which it assigned this privilege in view of their specific political and institutional sensitivity. It deemed that a document should generally meet four criteria in order to enjoy such privilege:

- (1) it must have been drawn up by a lawyer acting in that capacity;
- (2) there must be a lawyer-client relationship based on the trust that should exist between a lawyer and a client;
- (3) the document must have been issued with the aim of procuring or providing legal advice; and
- (4) the lawyer and the client must have acted with the expectation that the advice would be kept confidential in the event of a dispute.

250. Chile has however not to date indicated that the requested documents are covered by the confidentiality of deliberations of the head of State with his/her ministers.

2.2.5.2 The Respondent has not demonstrated the confidentiality of the documents requested

251. That said, the confidentiality of the documents invoked by the Respondent State²⁰⁸ does not suffice *per se* to release it from its duty to produce the documents in this arbitration according to the principles applied by international arbitration tribunals.

252. In *United Parcel Svc. of Am. Inc. (U.S.) v. Canada* the Respondent State refused to produce 143 documents which according to applicable law were covered by Cabinet secrecy, and produced 27 others with deletions.

253. The Tribunal stated that it was not bound by a duty of confidentiality under domestic law and that consequently the State could not invoke this in its defence and the Tribunal could not shield it from having to make a disclosure because it lacked jurisdiction to compel the production of information:

²⁰⁶ **Document C254**, *Glamis Gold...*, Procedural Order No. 8, Jan. 31, 2006, § 11

²⁰⁷ **Document C256**, *Gallo (U.S.) v. Canada*, (UNCITRAL) ¶¶ 37–42, Procedural Order No. 3 Apr. 8, 2009, §§ 52–57, 58–62

²⁰⁸ See *Chile's Second Submission on Preliminary Issues*, of 12 February 2018, § 10

We return to that question of the extent of the privilege. Does it extend beyond state secrets and if so to what? Does it extend to Cabinet documents of the kind in issue here? The authority to which UPS referred us in support of limiting the privilege to "state secrets" does not provide a definition of that expression. Depending on the definition, that expression may of course cover a narrow or wide range of matters. (...). But the protection to be afforded is in general carefully circumscribed to protect no more than the interests that call for protection, for instance in frank and uninhibited exchanges between Cabinet members or in advice given to them, and, as already discussed, those interests in general are subject to being outweighed by the competing interest in disclosure.”²⁰⁹

254. The Tribunal concluded that it could draw adverse inferences from the refusal to produce the documents.
255. In *Pope & Talbot, Inc. v. Canada*, Canada objected to the request to produce certain documents protected by the secrecy of Federal Government ministerial deliberations whose disclosure was strictly prohibited by the Canada Evidence Act.²¹⁰
256. The Tribunal decided that it needed to assess the refusal to produce these documents on the basis of ministerial confidence before deciding whether this was justified. Accordingly the Tribunal invited Canada to identify the documents, the aspects discussed therein and their dates, giving reasons why each document might not be produced.
257. In *Merrill & Ring Forestry L.P. v. Canada*²¹¹ the Tribunal stated that the phrase “documents of special political or institutional sensitivity” covered ministerial documents that the Canada Evidence Act defined as confidential. But in order not to be disclosed they needed to be sufficiently identified together with a reason satisfactorily accounting for why they enjoyed this privilege:

§ 19. The Tribunal is also persuaded (...) that the privilege, as held in Pope & Talbot and the Canada-Aircraft decisions invoked by the Investor, can only be asserted in respect of sufficiently identified documents together with a clear explanation about the reasons for claiming such privilege. The parties would need such information in order to assess whether they agree or disagree about a refusal on these grounds, just as the Tribunal needs it to decide in case of disagreement between the parties.

§ 21. In the absence of this specific information the Investor is unable to agree or disagree with such refusal just as the Tribunal is unable to decide on a privilege which at present has no connection to specific documents or even less so justified or explained. The principle of equality in the treatment of the parties laid down by Article 15 of the UNCITRAL Arbitration Rules governing these proceedings also requires that such privileges be clearly explained so as to allow the Investor the opportunity to provide informed comments on the matter.

²⁰⁹ **Document C259**, *UPS v. Canada United Parcel Svc. of Am. Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 11, Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege, Oct. 8, 2004

²¹⁰ **Document C257**, *Pope & Talbot, Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 193 (Phase 2 Award), April 10, 2001

²¹¹ **Document C260**, *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL) ¶¶ 16–24, Decision of the Tribunal on Production of Documents, July 18, 2008

2.3 An Award that disregards the original Award's *res judicata*

258. In the resubmission proceeding the Tribunal was dealing with an original Award which to a large extent was *res judicata* (2.3.1).
259. This *res judicata* effect barred the Tribunal from reconsidering the portions of the original Award that had not been annulled by the first *ad hoc* Committee (2.3.2), and which were binding for it (2.3.3).
260. Yet the resubmission Tribunal repeatedly reconsidered points already decided by the original Tribunal, and departed from the latter Tribunal's decision in disregard of the original Award's *res judicata*.
261. These infringements of the original Award's *res judicata* by the resubmission Tribunal each constitute manifest excesses of powers (2.3.4).

2.3.1 The original Award has *res judicata* effect

262. The *res judicata* of the original Award springs from three sources: the decision of the first *ad hoc* Committee (2.3.1.1), the provisions of the Convention and the Arbitration Rules (2.3.1.2), and more generally the rules of international law (2.3.1.3).

2.3.1.1 The decision of the first *ad hoc* Committee expressly gave *res judicata* effect to the original Award

263. The first *ad hoc* Committee, by its decision of 18 December 2012, annulled the original Award in part. Let us briefly recall the two reasons for this partial annulment: not having reopened the debate on substantiation of the extent of damage under Article 4 of the BIT (failure to give and equitable treatment, including denial of justice), asserted by Mr. Pey Casado and the President Allende Foundation to be *equivalent* to the firm's total value on the eve of its expropriation; b) a contradiction in terms by ruling out assessments relating to the value of the investment under Article 5 of the BIT (expropriation) while opting for such an assessment for the amount of compensation (for the *ad hoc* Committee makes no choice; it just takes note of a contradiction).
264. The first *ad hoc* Committee thus clearly confined the scope of annulment of the original Award to point 4 of its dispositive part relating to the amount of financial compensation payable by the Respondent to Mr. Pey Casado and the President Allende Foundation, and to the corresponding paragraphs in the Award's Chapter VIII.²¹²
265. On partially annulling the Award, the first *ad hoc* Committee was careful to note that the rest of the Award, which stood unamended, had the force of *res judicata*.²¹³ Thus, as recommended by doctrine,²¹⁴ it anticipated any risk of ambiguity in resubmission proceedings as to the scope of its decision.

²¹² **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012, § 359, 1: "*Par ces motifs, le Comité rend les décisions suivantes: 1. décide d'annuler le paragraphe 4 du dispositif de la Sentence du 8 mai 2008 et les paragraphes correspondants dans le corps de la Sentence relatifs aux dommages-intérêts (Section VIII) conformément à l'article 52(1)(d) et (e)*".

²¹³ **Ibid.**, Decision of the *ad hoc* Committee of 18 December 2012, § 359, 4°.

²¹⁴ **CL312**, R. Doak Bishop & S. M. Marchili, *Annulment under the ICSID Convention*, OUP, 2012, §§ 10.56: "*A clear annulment decision specifying which particular findings of the award remains res judicata should prevent any uncertainty in resubmission proceedings*".

2.3.1.2 The ICSID Convention and Arbitration Rules give *res judicata* effect to the unannulled portions of a partially annulled award

266. The resubmission of a dispute to an Arbitral Tribunal after the total or partial annulment of a first award is expressly provided for in the Convention and the Rules. Article 52(6) of the Convention thus states that a new Tribunal may be constituted after the annulment of an award by an *ad hoc* Committee:

*"If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter."*²¹⁵

267. Arbitration Rule 55 provides for the powers of the Tribunal to which the case is resubmitted. Paragraph 55(1) allows the parties to submit an award annulled in part to a new Tribunal:

*" If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal."*²¹⁶

268. Rule 55(3) then limits the powers of a resubmission Tribunal in the event of annulment in part:

*"If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled."*²¹⁷

2.3.1.3 *Res judicata* is a general principle of international law

269. *Res judicata* in international arbitral awards and court decisions is one of the best-established principles in international law, and is seen as a general principle of international law. This was noted by Bin Cheng as follows:

*"There seems little, if indeed any question as to res judicata being a general principle of law or as its applicability in international judicial proceeding"*²¹⁸

270. International courts and arbitral tribunals have long acknowledged this principle's binding force.²¹⁹

²¹⁵ Article 52(6) of the Convention

²¹⁶ Article 53(1) of the Rules

²¹⁷ Article 53(3) of the Rules

²¹⁸ **Document C317**, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge Grotius Publications Limited, 1987, p. 336

²¹⁹ **Ibid.**, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge Grotius Publications Limited, 1987, p. 336 et seq.; **document CL291**, *Pious Fund of the Californias* (U.S. v. Mexico), Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902): "Considérant que toutes les parties d'un jugement ou d'un arrêt concernant les points débattus au litige s'éclaircissent et se complètent mutuellement et qu'elles servent toutes à préciser le sens et la portée du dispositif, à déterminer les points sur lesquels il y a chose jugée et qui partant ne peuvent être remis en question; Considérant que cette règle ne s'applique pas seulement aux jugements des tribunaux institués par l'Etat, mais également aux sentences arbitrales, rendues dans les limites de la compétence fixées par le compromis; Considérant que ce même principe doit, à plus forte raison, être appliqué aux arbitrages internationaux"; **document CL318**, *Trail Smelters* (U.S. v. Can.), 3 R.I.A.A. 1905, at 1950 (1941): "That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law"; **Document CL288**, *Interpretation of Judgments Nos. 7 and 8 concerning the Case of the Factory at Chorzow*, 1927, PCIJ (Ser. A) No. 11 at 27 (Dissenting Opinion of Judge Anzilotti)

271. While the *res judicata* of an arbitral award or decision by an international court is in principle attached to the dispositive part of the ruling, its effects are also acknowledged to extend to the reasons underpinning that part.²²⁰

272. As it was put by Judge Anzilotti in his dissenting opinion in the *Factory at Chorzow* case:

*"En disant que seul le dispositif de l'arrêt est obligatoire, je n'entends pas dire que seulement ce qui est matériellement écrit dans le dispositif constitue la décision de la Cour. Il est certain, par contre, qu'il est presque toujours nécessaire d'avoir recours aux motifs pour bien comprendre le dispositif et surtout pour déterminer la causa petendi"*²²¹.

273. Similarly, the Permanent Court of Arbitration, in the *Case concerning the delimitation of continental shelf between France and the UK*, decided that:

"Le Tribunal arbitral considère comme bien établi que, dans la procédure internationale, l'autorité de la chose jugée, c'est-à-dire la force obligatoire de la décision, ne s'attache en principe qu'au contenu du dispositif et non pas aux motifs de la décision. De l'avis du Tribunal, il est également clair que, étant donné les liens étroits existant entre les motifs d'une décision et le contenu du dispositif, on peut en principe recourir aux motifs pour élucider le sens et la portée du dispositif. (...) De plus, si certaines constatations figurant dans les motifs constituent une condition essentielle de la décision contenue dans le dispositif, ces constatations doivent être considérées comme faisant partie des points tranchés avec force obligatoire dans la décision".

274. Tribunals ruling in investment arbitration have had occasion to apply the general principles recalled above. Thus in *Amco v. Indonesia*, in its decision on jurisdiction, the resubmission Tribunal recognised *res judicata* as a general principle²²² along with its application to all points resolved by a prior tribunal.²²³

275. Such was also the case with the resubmission Tribunal in *Vivendi v. Argentina*,²²⁴ which, referring to Article 55(3) of the Convention, decided that:

²²⁰ **Ibid.**, Bin Cheng, p. 348 et seq.; **Document CL319**, Schaffstein, §§ 261 et seq.

²²¹ **Document CL288**, Dissenting Opinion of Judge Anzilotti, p. 24

²²² **Document CL294**, *Amco v. Indonesia (Resubmission procedure)*, ICSID Case No. ARB/81/1, Decision on jurisdiction, 10 May 1988, § 26.

²²³ **Ibid.**, *Amco v. Indonesia (Resubmission procedure)*, ICSID Case No. ARB/81/1, Decision on jurisdiction, 10 May 1988, § 30; see also **document CL320**, *Apotex Holdings Inc., Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014), § 7.11; **document CL321**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, Award, 10 December 2010, §§ 7.1.9

²²⁴ **Document CL262**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, § 72; see also **document CL320**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, § 7.11 et seq.; **document CL321**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, Award, 10 December 2010, §§ 7.1.9; **document CL322**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on liability and heads of damage, 21 February 2017, §§ 266, 270; **document CL323**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Sentence, 27 September 2017, §§ 487-501; **document CL324**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 7 June 2008, § 126: "For an earlier final decision, issued by a competent court or arbitral tribunal, to be conclusive in subsequent proceedings, three cumulative basic conditions must be met: identity of parties, identity of subject matter or relief sought and identity of legal

"When it concluded, in its Award, that it had jurisdiction, the original Tribunal made determinations on the various elements of the jurisdiction under the ICSID Convention and the BIT, finding, inter alia that the CGE and CAA were proper Claimants and that the dispute arose out of the investments made by Claimants in Argentina. Given these findings this Tribunal is precluded under the doctrine of res judicata from reconsidering the original Tribunal's jurisdictional conclusions."²²⁵

276. In our case the resubmission Tribunal did reconsider the *res judicata* of the unannulled portions of the original Award.

2.3.2 Reconsideration of the *res judicata* part of the original Award

277. Signs of apparent bias on the part of the resubmission Tribunal are discernible on reading its Award.
278. The original Award ruled that the Tribunal's jurisdiction embraced acts occurring between the parties in breach of article 4 of the BIT and submitted to arbitration in May 2000 ("Decision 43" of 28 April 2000) and 4 November 2002 (the stalling of Mr Pey's claims with executive, administrative and judicial bodies):

Original Award, Chapter VII, "Responsibility of the State", *res judicata*:

§ 624. *"Les parties demanderesses prétendent être victimes d'un déni de justice qui aurait eu lieu durant une période commençant en 1995 et allant à tout le moins jusqu'en 2002. Le déni de justice allégué comportait initialement deux aspects : l'impossibilité d'obtenir une décision sur le fond en première instance au bout de sept ans de procédure dans l'affaire concernant la restitution de la rotative Goss et l'intervention de la Décision n°43, dont l'incompatibilité avec la procédure judiciaire a été en vain contestée par les demanderesses, présentées comme une violation de l'article 4 de l'API. Lors des audiences de janvier 2007, les demanderesses ont élargi leur demande fondée sur le déni de justice "à l'ensemble du contentieux soumis au Tribunal arbitral [...]" [Reference omitted]*

§ 625. *"La défenderesse n'a pour sa part pas développé d'arguments sur l'éventuelle applicabilité des dispositions de fond de l'API au déni de justice allégué par les demanderesses."* [Reference omitted, emphasis added].

279. So given that "*La présente instance est le prolongement de l'arbitrage initial*",²²⁶ according to the principle of *non bis in idem*, the Respondent could not submit, and nor could the RT accept, arguments on these matters when the sole object of the resubmission was to determine the *quantum* of compensation (that referred to in the annulled point 4 of the OA's dispositive part):

The whole question is regarded as settled and it may not be the subject of a second action. Eadem res, in the maxim is de eadem re non sit actio, should, therefore, be construed as the

grounds or causes of actions"; see also **Document CL325**, *Petrobart Limited v. Kyrgyz Republic*, ARB No. 126/2003, Arbitral Award, 29 March 2005, § VIII.4.3: "*There may however be special reasons, such as the appearance of new evidence, which justify a new examination. Moreover, the res judicata doctrine applies only when there is identity of object and does not prevent a new examination of a matter which differs significantly from that which has previously been decided.*"

²²⁵ **Document C262**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, § 78

²²⁶ **Document C9f**, Original Award, § 188

*entire claim without regard to the fact whether the various and separate items therein contained have all been presented or not.*²²⁷

280. The International Law Association's Recommendation no. 5 on *res judicata* states that:

*"L'effet négatif dans la procédure arbitrale ultérieure, de l'autorité de la chose jugée attachée à une sentence arbitrale, s'applique à toute demande, toute cause de demande ou toute question de fait ou de droit qui aurait pu être, mais n'a pas été soulevée dans la procédure ayant aboutie à la sentence, à condition que la soumission nouvelle d'une telle demande, cause de demande ou question de fait ou de droit, constitue une injustice procédurale ou un abus de procédure."*²²⁸

281. *Res judicata* was thus fully respected when, on 18 June 2013, Mr. Pey Casado and the President Allende Foundation resubmitted the claims arising as from 2000 **for the sole purpose of determining the amount of compensation payable by Chile pursuant to points 1 to 3 of the dispositive part of the Award of 8 May, with res judicata force.**

282. Yet the resubmission Award disregarded this *res judicata* and, surprisingly, reopened the proceedings and by accepting the Respondent's objections rejected by the original Award, stripped points 1 to 3 of the dispositive part of the OA and their corresponding grounds, *res judicata*, of effectiveness, freeing Chile, *de facto*, from its duty to pay the investors pecuniary compensation.

283. The proceedings in this arbitration, based on a treaty, are subject to general public international law:

*"The consent [to the arbitration offer under the treaty] must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty."*²²⁹

284. Accordingly matters relating to *res judicata* "have to be resolved by reference to the treaty rules, interpreted by reference to such other rules of public international law as may be applicable between the parties."²³⁰

285. The resubmission Award breached this requirement, whereas according to ICJ doctrine:

*"Le principe de l'autorité de la chose jugée répond, tant dans l'ordre international que dans interne, à deux objectifs, l'un général, l'autre particulier. Premièrement, la stabilité des relations juridiques exige qu'il soit mis un terme au différend considéré. (...). Deuxièmement, il est dans l'intérêt de chacune des parties qu'une affaire qui a d'ores et déjà été tranchée en sa faveur ne soit pas rouverte. (...) Priver une partie du bénéfice d'un arrêt rendu en sa faveur doit, de manière générale, être considéré comme contraire aux principes auxquels obéit le règlement judiciaire des différends."*²³¹

²²⁷ Document C317, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge Grotius Publications Limited, 1987, p. 344

²²⁸ Document C81, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>

²²⁹ Document C57, *ADC v. Hungary* (ICSID), Award of 2 October 2006, § 290

²³⁰ Document CL272, *McLachlan (C.)- Shore (L.)- Weiniger (M.)*, *Parallel Proceedings*, in *International Investment Arbitration*, Oxford International Arbitration Series, 2008, § 4.04

²³¹ Document CL273, ICJ., *Case concerning the application of the Genocide Convention*, Order of 26 February 2007, §§ 116, 120, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>

286. In our case, the adjudicated issue and the benefits resulting therefrom are as established in points 1 to 3 of the dispositive part of the original Award and their corresponding grounds.
287. As the procedure for the resubmission of disputes arising in May 2000 and in 2002 is determined by the ICSID Convention, and the Convention may be characterised as a *sui generis* system of public international law²³² in which general public international law must fill any gaps,²³³ the *res judicata* effect of the 2008 award must be determined according to public international law.
288. Thus the resubmission Tribunal had to take account of the dispositive part of the Award according to which Chile “*a violé son obligation de faire bénéficier les demandereses d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice*”, and as a result of that breach “*les demandereses ont droit à compensation*” (points 2 and 3 of the dispositive part). This it did not do, manifestly exceeding its powers.
289. This conclusion is in keeping with the recommendations of the *Final Report on Res Judicata and Arbitration* adopted by the International Law Association (Toronto 2006):²³⁴

"3. Une sentence arbitrale bénéficie, dans le cadre d'une procédure arbitrale ultérieure, des effets positif et négatif de l'autorité de la chose jugée, dès lors que cette sentence (...)

3.2 a tranché ou disposé d'une demande formulée ou débattue à nouveau dans le cadre de la procédure arbitrale ultérieure ;

3.3 découle d'une demande qui est invoquée dans la procédure arbitrale ultérieure ou qui sert de cause à la procédure arbitrale ultérieure ; et

3.4 a été rendue entre les mêmes parties.

4. Les effets positif et négatif de l'autorité de la chose jugée attachée à une sentence arbitrale, dans une procédure arbitrale ultérieure, s'étendent :

4.1 aux mesures et décisions contenues à son dispositif ainsi qu'à tous les motifs nécessaires à ces mesures et décisions ; et

4.2 aux questions de fait ou de droit effectivement débattues devant le tribunal arbitral et décidées dans la sentence, à condition que ces décisions aient été essentielles ou fondamentales pour aboutir au dispositif de la sentence. (...)

6. L'effet positif de l'autorité de la chose jugée attachée à une sentence arbitrale peut être invoqué dans une procédure arbitrale ultérieure à tout moment permis par les règles de procédure applicables.

7. L'effet négatif de l'autorité de la chose jugée attachée à une sentence arbitrale n'a pas à être soulevé d'office par le tribunal arbitral. S'il n'a pas été renoncé à cet effet négatif, celui-ci devrait être soulevé dès que possible par la partie qui s'en prévaut."

²³² **Document CL274**, Douglas (Z.), *The International Law of Investment Claims* (2009), 124; Douglas (Z.), *The Hybrid Foundations of Investment Treaty Arbitration*, 74 B.Y.I.L. (2003), 219; **document CL275**, Hansen (R.F.), *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, 73(4) Mod.L.Rev. (2010), 536; **document CL276**, Chukwumerije (O.), *International Law and Article 42 of the ICSID Convention*, 14(3) J.Int'l Arb. (1997), 81

²³³ **Document CL277**, Heiskanen (V.), *Forbidding Dépeçage: Law Governing Investment Treaty Arbitration*, 32(2) Suffolk Transnat'l L.Rev. (2009), 396

²³⁴ **Document C181**, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>

290. The resubmission Award did not abide by these principles.
291. The only questions put to the parties by the resubmission Tribunal during the three and a half years of this stage of arbitral proceedings were in the evening on 15 April 2015, i.e. the eve of the closure of oral hearings. Their thrust was contrary to provisions that are *res judicata*, taking a new look at Chile's objections dismissed by the original Award and by the decision of the first *ad hoc* Committee, as Mr. Pey Casado and the President Allende Foundation stated in the session of 15 April 2016,²³⁵ for example:

*"de manière continue la République du Chili a réasséné un certain nombre de choses qui sont (...) en contradiction complète avec l'autorité de la chose jugée. (...) c'est un peu comme l'éléphant au milieu de la pièce : on tourne autour de l'éléphant sans le voir. En réalité, c'est un des éléments essentiels du dossier. Le Chili n'accepte pas et n'a jamais accepté - apparemment il ne l'accepte toujours pas - que M. Pey était et est le propriétaire de l'investissement. C'est quelque chose qui, pourtant, a été tranché (...) c'est revêtu de l'autorité de la chose jugée (...) C'est vraiment, en fait, la remise en cause systématique de la qualité d'investisseur et de propriétaire de M. Pey Casado. Un deuxième exemple de la remise en cause de quelque chose qui est revêtu de l'autorité de la chose jugée, c'est l'existence même d'un investissement à la date d'entrée en vigueur de l'API. (...) cela a été discuté et cela a été tranché par le Tribunal arbitral initial et cela a été confirmé par le Comité ad hoc."*²³⁶

292. Four particular points were reconsidered by the resubmission Award: the existence of the investment made by Mr Pey (2.3.2.1), the nature of compensation payable by Chile to Mr. Pey Casado and the President Allende Foundation (2.3.2.2), the uncertainty when the original Award was rendered as to the status in domestic law of confiscatory Decree 165 (2.3.2.3) and "Decision 43" of 28 April 2000 (2.3.2.4). And the number and extent of aspects reconsidered led Mr. Pey Casado and the President Allende Foundation to ask: does the resubmission Award contain only material errors? (2.3.2.5)

*

2.3.2.1 1st question of *res judicata* reopened: for the purposes of the BIT, does Mr Pey's investment exist?

293. The first point reconsidered in the RT is an objection raised by Chile in the initial proceedings, rejected by the original Award. The issue is posed in the following terms:

*"The tribunal must be assumed to have reached its award on the basis that it found Mr Pey Casado and the Foundation President Allende to have been investors under the terms of the bilateral investment treaty. **But in what respect the award established the status of Mr Pey Casado and the foundation as investors** under the bilateral treaty, **and -- and this is an important point -- in respect of what** as their investment under the bilateral investment treaty."*²³⁷

²³⁵ See in **document C43** the transcript of the Claimants' contributions, especially pp. 183-186, 195, 196

²³⁶ **Ibid.**, pp. 185-186

²³⁷ **Ibid.**, transcript of the hearing of 15 April 2015, 16:49, pp. 162-163

294. Let us note, in passing, the obvious: the BIT states that investments made before the BIT's entry into force with foreign-investment status are covered by the treaty, i.e. the investor has rights, and such rights constitute an investment for the purposes of the treaty.
295. For 42 minutes²³⁸ Chile replied to this question by reiterating its objections *ratione personae*, *ratione materiae* and *ratione temporis*, dismissed by the original Tribunal and by the *ad hoc* Committee. Here is a summary:

"The award really doesn't make sense (...). There are contradictions and lacunae, anomalies that cannot be reconciled. The most you can aspire to do is to understand why it does not make sense (...)

Mr Pey had played merely a role as an intermediary. (...) in 2000 you have Decision 43 (...) identifying the people that ultimately were the successors of the people who were compensated (...)

the status of Mr Pey Casado and the foundation as investors under the treaty and what qualified ultimately as the investment that was covered by the treaty (...) was of paramount concern to Chile in the arbitration. We had said, "How can this be an investment arbitration under the bilateral investment treaty, when the investment had been extinguished 19, 20 years before the BIT's entry into force?" (...)

If the investment happened already, and then disappeared entirely before the entry into force, then how could it be covered by the treaty? so what did the tribunal do with our objection that the investment didn't exist anymore? They just ignored it. (...)

that's probably the struggle you're having: the award says absolutely nothing about that (...) in order to reach what we think was the conclusion that was preordained. (...)

there were any number of issues like this (...) they said that Mr Pey did in fact qualify as an investor under the treaty. (...) how illogical it was for the tribunal to assume jurisdiction over an investment that had ceased to exist 20 years earlier. There were a number of other bizarre things (...)"

296. The reopening of this issue shows particular apparent bias given that the resubmission Tribunal was fully aware of the facts established in the arbitration case-file:
- i. That the issue had been rejected in Chapters IV and V of the original Award, with *res judicata* effect, in particular in §§ 365-410;
 - ii. That the original Award had decided, also as *res judicata*:
 - that domestic jurisdictions "ont reconnu la propriété de M. Pey sur les actions confisquées" on 29 May 2005 (§ 666),
 - "que des autorités chiliennes avaient reconnu [déjà en 1977] que M. Pey Casado était propriétaire des titres confisqués⁶³²²³⁹ et que la défenderesse n'ignorait pas la revendication par M. Pey Casado d'une compensation [pécuniaire] au moment [28 avril 2000, "Décision 43"] où elle a décidé

²³⁸ **Ibid.**, transcript of the hearing of 16 April 2015, 15:43 to 16:29, pp. 67 to 92

²³⁹ [632. V., par exemple, le Décret suprême n°1200 du 25 novembre 1977 (annexe 20 à la requête d'arbitrage du 3 novembre 1997)]

d'indemniser d'autres que lui – un acte constituant de l'avis du Tribunal une claire violation du droit à un "traitement juste et équitable "prévu par l'API" (§ 685).

- iii. That Chile had asked the *ad hoc* Committee to annul the original Award in whole on the basis of these same objections, adding the supposed *non-existence*²⁴⁰ of the investment when the BIT came into force on 29 March 1994 because Decree 165 of 1975 was purported to have legally wound up the companies CPP and EPC and transferred full ownership of their assets to the State:

*143. Subsequently, Decree 165 of 10 February 1975 formally dissolved CPP and EPC, confiscating the assets of those companies. It was this 1975 decree that transferred the property rights over “El Clarín” to the Chilean State, thereby formalizing the confiscation that had occurred de facto on 11 September 1973.*²⁴¹

- iv. That in its Annulment Memorial of 10 June 2010, Chile continued to deny Mr Pey’s *locus standi* as recognised in the domestic judgment of 29 May 1995 (*res judicata*),²⁴² contending that:²⁴³

“550. [...] Mr Pey could not possibly have donated any CPP or EPC shares to the Fundación in 1990 for the simple reason that, by virtue of Supreme Decree n° 165 of February 10, 1975, the President of the Republic of Chile had declared those two companies formally dissolved. Accordingly, as of such date, those companies ceased to exist as legal entities and their corresponding ‘shares’ had also ceased to exist in a legal sense, and therefore could not be transferred to a third party.

“564. Given this, the Republic of Chile could not have committed any post-entry into force breach of the BIT with respect to Mr. Pey’s alleged investment for the simple reason that the relevant companies that purportedly constituted the investment had already been definitively expropriated by 1975 –almost 20 years before the BIT’s entry into force. As explained above, upon issuance of Decree N° 165 in 1975, CPP and EPC were irrevocably dissolved.”

- v. That in its Counter-Memorial of 22 December 2020, Chile again said:²⁴⁴

418. It bears recalling that the investment Mr. Pey allegedly made ceased altogether to exist in 1973, upon the de facto confiscation of El Clarín, or at the latest in 1975, upon the issuance of Decree No. 165 formally expropriating El Clarín and definitively dissolving the relevant corporate entities (CPP and EPC). (...) This means necessarily that Claimants’ investment was extinguished at that time. [...]

²⁴⁰ Cfr **Document C280**, Chile’s Request for annulment of the Award, ¶¶ 344, 402; **Document C280**, Chile’s reply on annulment, ¶¶ 398-399, 416-422, 485-487, and the dismissal of Chile’s Request by a Decision of the *ad hoc* Committee of 18-12-2012, **Document C20** (ND05), ¶¶ 167-168

²⁴¹ **Document C280**, Chile’s Request for annulment of the Award, ¶143

²⁴² **Document C2**, Original Award, "Conclusions du Tribunal. (...) 215. Le 29 mai 1995, au vu ‘de la valeur probante des antécédents’, la Huitième Chambre a accepté d’ordonner la restitution des documents demandés. Après examen du dossier, le Tribunal correctionnel a estimé que M. Pey Casado ne pouvait prouver sa qualité de propriétaire qu’à l’aide des éléments du dossier judiciaire qu’il détenait, reconnaissant par là même que M. Pey Casado était effectivement l’acquéreur et le propriétaire des actions.”

²⁴³ **Document C280**, Chile’s Request for annulment of the Award, ¶¶550, 564

²⁴⁴ **Document C269**, Chile’s Memorial on Annulment of the Award, 10 June 2010, ¶¶418, 486

486. *As a matter of pure logic, the foregoing cumulus of conclusions should have led the Tribunal to conclude that Mr. Pey had no investment that was still an existing one in 1994, at the time the BIT entered into force, and that therefore there was no proper basis for exercising jurisdiction over Mr. Pey's claim.*

vi. That the *ad hoc* Committee had rejected all of these objections by Chile.

297. The reconsideration of the *res judicata* of the original Award dismissing these objections, and the implicit acceptance in the resubmission Award of Chile's objections rejected in the original Award and in the *ad hoc* Committee's decision, are the logical premises of what would otherwise be incomprehensible, i.e. the resubmission Tribunal's refusal to exercise the jurisdiction provided for in points 1 to 3 of the dispositive part of the original Award on the breaches of the BIT committed since the Ministry of National Assets' "Decision 43".

*

2.3.2.2 2nd question of *res judicata* reopened: what is the nature of the compensation due by Chile to Mr. Pey Casado and the President Allende Foundation?

298. In the evening of the hearing of 15 April 2015, the resubmission Tribunal asked this second question:

"should the Tribunal understand the term "compensation", as it exists in point 3, as referring only to monetary compensation, to financial compensation, or as referring more generally to the forms of reparation recognised in international law in the case of international wrongs? And if the answer is the latter rather than the former, then what other forms of compensation might potentially be appropriate as remedies for the breaches of the bilateral investment treaty which were found by the first tribunal and upheld in the annulment decision?"

In other words, should we understand that as referring to financial compensation only, or as having more general scope? And if it is a more general reference, then what are the other forms of recognised reparation that might be appropriate to the particular breaches found by the tribunal and upheld by the annulment decision in this case?"

299. The resubmission Tribunal thereby set out on a course contrary to the *res judicata* of the original Award and to Article 54(1) of the ICSID Convention:

i. All through the initial arbitration, and especially from May 2000 ("Decision 43"), the Claimants' proposals and claims related to pecuniary compensation only, and indeed in the sphere of breaches of investment rights, this is evidently the appropriate form of remedy. This underpinned the whole arbitration procedure. As Prof. Crawford says:

If the Chorzów Factory principle embodies an entitlement, it is nonetheless one which depends in practice on choices made by the claimant. Illustrations include the claimant's right to elect the form of remedy, election of remedies in the course of proceedings, fork-in-the-road clauses and the non ultra petita rule. (...)

*For investment tribunals, virtually all remedies awarded to date have been in the form of monetary compensation. **This is the only type of remedy mandated by the ICSID Convention**. Under ICSID rules it seems that a tribunal may not award a non-pecuniary remedy in the absence of a monetary alternative. (...)*

*The International Court generally respects the choice of reparation made by the applicant and will not venture beyond it.*²⁴⁵

300. Indeed, Article 54(1) of the Convention refers only to “*pecuniary obligations*”. It is thus understandable that Prof. Douglas concludes:

*Unlike diplomatic protection in customary international law, ICSID proceedings are concerned with the vindication of private interests and the principal advantage of ICSID arbitration for investors is that the fate of their claims is not dependent upon the vicissitudes of the diplomatic relationship between States. The corollary of this essential feature of the ICSID investor/State regime is that forms of reparation that have evolved in inter-State cases cannot be assumed to be part of the remedial arsenal of ICSID tribunals*²⁴⁶,

As do Campbell McLachlan, Laurence Shore and Matthew Weiniger:

*To date, the remedy awarded by almost all [investment protection] tribunals has been the payment of monetary compensation*²⁴⁷,

Or the European Court of Human Rights in many rulings on foreign investments and property rights, including *Brumarescu v Romania*²⁴⁸ or *Youkos v. Russia*.²⁴⁹

- ii. Never in the initial proceedings did either the Respondent or the original Tribunal or the *ad hoc* Committee express any doubt as to the nature of the damages sought being solely pecuniary. Witness the wording, context, intent and general thrust of every paragraph of the original Award relating directly or indirectly to the compensation forming the basis of point 2 of the dispositive part – for example, §§ 29, 77-79, 448, 450, 454, 455, 462, 490, 496, 508, 594-596-598, 613, 614, 616, 621, 629-632, 635, 639, 641, 648, 647, 661, 662, 667, 668, 674, 728, or footnotes 191, 589, 599, 617.²⁵⁰

301. This intention of the original Award to grant pecuniary compensation is also reiterated in the following paragraphs of that Award:

- i. “*Que l'article 4 API était bien applicable (après son entrée en vigueur) au déni de justice allégué par les demanderessees*” (§ 676) ;
- ii. Qu’il ne reste au Tribunal arbitral qu’ “*à tirer les conséquences de ce qui précède, quant à l'obligation d'indemniser, son exécution concrète et le calcul de son montant*” (§ 679);

²⁴⁵ **Document CL278**, Crawford (J.), [State Responsibility/The Implementation of Responsibility Part VI.pdf](#), 2013, in *The Law of International Responsibility*, Edited by: James Crawford, Alain Pellet, Simon Olleson, Kate Parlett, Part VI, pp. 598, 620-622

²⁴⁶ **Document CL279**, Douglas (Z.), *Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID*, in *The Content of International Responsibility*, Part IV, Ch.54.1, in *The Law of International Responsibility*, Edited by: James Crawford, *ibid*.

²⁴⁷ **Document CL280**, McLachlan (C.), Shore (L.), Weiniger (M.): *Compensation*, in *International Investment Arbitration: Substantive Principles*, (2nd Edition), Oxford International Arbitration, 2017, Part III Substantive Rights, 9 *Compensation*, § 9.158

²⁴⁸ **Document CL282**[CL119] CEDH [GCJ], *Brumarescu v Romania* Award, 23 January 2001, §§ 19, 20, 21, 22, 23, 24

²⁴⁹ **Document CL283**, *Youkos v. Russie*, Judgment on Damages, ECHR, 31 July 2014, § 21: “*Despite the Government’s objections, the Court sees no good reasons to depart from the principle of restitutio in integrum, firmly established in its case-law, in assessing the amount of pecuniary compensation in the present case.*”

²⁵⁰ The sole exception is § 704, confined to “*la demande relative au dommage moral*”

- iii. Que "l'existence même de dommages résultant de la confiscation n'appelle aucune analyse particulière. Cette existence résulte à la fois, à l'évidence, de la nature des choses, d'une part, et de sa reconnaissance par la défenderesse d'autre part (...) On ne conçoit pas, en effet, l'octroi d'une quelconque indemnité par l'autorité chilienne - fût-ce à d'autres que le véritable propriétaire des biens confisqués, par erreur ou intentionnellement [dans la "Décision 43", pécuniaire] - sans l'admission de dommages causés par la confiscation." (§ 680) ;
- iv. Qu' "il est superflu d'ajouter que cette constatation élémentaire est indépendante du droit applicable, qu'il soit interne (chilien) ou international. Quelle qu'ait pu être la base juridique retenue par la défenderesse dans sa décision d'indemniser [à des tiers non propriétaires dans la "Décision 43"], le Tribunal arbitral, lui, ne peut que se fonder sur le droit international pour constater le déni de justice et le dommage résultant nécessairement du traitement (non "juste et équitable") réservé à l'investissement." (§ 681).
- v. Qu' "il convient de rappeler dans ce contexte que le préjudice à indemniser n'est pas celui souffert à la suite de l'expropriation (demande qui n'est pas couverte par les dispositions de fond de l'API), mais celui souffert en raison des violations de l'API que le Tribunal arbitral a constatées et à propos desquelles il est compétent pour rendre une décision". (§ 693)
302. That the sole compensation envisaged and granted by the original Award is of a pecuniary nature was confirmed by the *ad hoc* Committee's decision of 18 December 2012, in which compensation in the form of "satisfaction" is not even mentioned. On the contrary, with the wording, tenor and thrust of §§ 263, 264, 266, 271, the *ad hoc* Committee confirmed the solely pecuniary nature of the compensation referred to in points 3 and 4 of the original Award's dispositive part.
303. The resubmission Tribunal's questioning, as the hearings were closed, of the *res judicata* relating to the pecuniary nature of the compensation due is a logical premise of what would otherwise be incomprehensible, namely point 2 of the resubmission Award's dispositive part, which initially stated:
- "2) que, comme cela a déjà été indiqué par le Tribunal Initial, sa reconnaissance formelle des droits des Demanderesses et du déni de justice dont elles ont été victimes constitue en soi une forme de satisfaction au regard du droit international au titre de la violation par la Défenderesse de l'article 4 du TBI387."*²⁵¹
304. Yet points 1 to 3 of the original Award's dispositive part are symbiotically linked. The right to compensation provided in the third point may be construed only as an obligation, continual in nature, imposed on Chile to make good the pecuniary damage caused by its breach of Article 4 of the BIT (§§ 624, 626, 668 *in fine*, 674, notes 589, 599 of the original Award), in proportion to the harm caused. Notwithstanding this, the original Tribunal did not – and could not – decide in its Award on the point relating to the legal status of Decree 165 in domestic law as it assigned jurisdiction to determine this to the domestic courts (§ 593 *in fine* and § 603 *in fine*), whose

²⁵¹ [387 Document R-27, Original Award, 8 May 2008, para. 704 "... le Tribunal arbitral estime que le prononcé de la présente sentence, notamment par sa reconnaissance des droits des demanderesses et du déni de justice dont elles furent victimes, constitue en soi une satisfaction morale substantielle et suffisante"]. Cette version a été rectifié dans la Décision de correction du 7 November 2017 suivante: "2) que la reconnaissance formelle des droits des Demanderesses et du déni de justice dont elles ont été victimes constitue en soi une forme de satisfaction au regard du droit international au titre de la violation par la Défenderesse de l'article 4 du TBI."

withholding of the judgment of the 1st Civil Court of Santiago is one of that facts constituting the denial of justice, and is simply characterised as such in the original Award (§ 674).

305. The resubmission Award (§ 216 *in fine*), however, denied Mr. Pey Casado and the President Allende Foundation the right, recognised in arbitral *res judicata*, to invoke points of fact and of law known of or arising since 2000, making points 1 to 3 of the dispositive part ineffective for the purposes of calculating the amount of damages resulting from the breach of article 4 of the BIT, which could not be finally defined until what the denial of justice was intended to mask – the continuance of full ownership of the investment since 11 September 1973 in view of the “invalidity of public law” vitiating Decree 165 – became apparent (judgment of 24 July 2008 of the 1st Civil Court of Santiago).
306. This constitutes a manifest excess of powers.
307. In the current circumstances, constituting denial of justice and discrimination, the resubmission Tribunal has, *contra res judicata*, excluded from its jurisdiction the points of fact and of law brought to its notice subsequent to May 2000, and the grounds for points 1 to 3 of the original Award’s dispositive part specifying the nature and scope of the causal links between points 1, 2, 3 and 4, as only the elucidation of what the discrimination and the denial of justice masked may allow the financial amount of compensation to be determined (points 1 to 3 of the dispositive part), with a precise appraisal of the effects of their specified impact on the original Arbitral Tribunal.
308. This question had been raised by Mr. Pey Casado and the President Allende Foundation before the original Tribunal.

Original Award (emphasis added) :

§ 624. “Les parties demanderesses prétendent être victimes d’un déni de justice qui aurait eu lieu durant une période commençant en 1995 et allant à tout le moins jusqu’en 2002. (...) Lors des audiences de janvier 2007, les demanderesses ont élargi leur demande fondée sur le déni de justice ‘ à l’ensemble du contentieux soumis au Tribunal arbitral [...]’ ”.⁵⁸⁹²⁵²” [*res iudicata*, which the resubmission Award disregarded by carving up and dismembering the OA and the case];

§ 625. “La défenderesse n’a pour sa part pas développé d’arguments sur l’éventuelle applicabilité des dispositions de fond de l’API au déni de justice allégué par les demanderesses.”⁵⁹⁰²⁵³ [*res iudicata*, which neither Chile nor the Respondent Tribunal respected by reopening the proceedings on matters of *res judicata*];

§ 626. “Après examen des faits⁵⁹¹ et des prétentions des parties, il ne fait pas de doute que le déni de justice allégué par les demanderesses s’étend sur une période postérieure à l’entrée en vigueur de l’API. L’article 4 de l’API lui est donc bien applicable *ratione temporis*” [*res judicata*, which the RT disregarded by refusing to exercise its jurisdiction over issues arising between the parties after 3 November 1997];

²⁵² [“589. Transcript of the hearing of 16 January 2007, p. 46 (Mr Garcés). See also the transcript of the hearing of 16 January 2007, p. 47 (Mr Malinvaud): “le refus répété d’indemnisations à partir de 1995 est bien un déni de justice qui est un fait de l’Etat en réalité distinct de l’expropriation invoquée au titre de l’article 5 du Traité et qui est applicable à toutes les demandes qui sont présentées devant votre Tribunal”.]

²⁵³ [“590 Contre-mémoire de la défenderesse du 3 février 2003, p. 182 et seq. La défenderesse a formulé une objection aux développements des parties demanderesses sur le déni de justice lors de l’audience du 16 janvier 2007 (v. la transcription de l’audience du 16 janvier 2007, p. 45 (Me Goodman))”]

309. To exclude this elucidation is to directly contradict the terms of the original Award's dispositive part, preventing the necessary demonstration and, *a fortiori*, assessment of the extent of compensation (point 3), which constituted the very purpose of the decisions of the original Tribunal, with *res judicata* effect.
310. For the grounds underpinning points 1 to 3 of the OA's dispositive part state that in 2000 and 2002, when the respective disputes arose, and in 2007 when "*les demanderesses ont élargi leur demande fondée sur le déni de justice 'à l'ensemble du contentieux soumis au Tribunal arbitral'*",²⁵⁴ Chile was obliged to provide reparation on account of its breach of the investors' rights (§§ 419-466, 674 of the original Award):

Original Award:

§ 432. "(...) L'investissement en question, effectué par M. Pey Casado en 1972 et ayant la qualité d'investissement étranger conformément à la législation chilienne, est bien couvert par l'API."

§ 465. "Au vu de ce qui précède, le Tribunal conclut que les trois différends invoqués par les demanderesses sont bien survenus postérieurement à l'entrée en vigueur de l'API et qu'il est en conséquence compétent *ratione temporis* pour en connaître".

311. This was confirmed by the decision of the *ad hoc* Committee (§ 168),²⁵⁵ which reasserted that the right to compensation (point 3 of the dispositive part) is intended to put the victims of the breach of article 4 of the BIT in the position they would likely be in if that breach had not occurred,²⁵⁶ and in a context such as this one, compensation is of a pecuniary nature (see in the original Award §§ 28, 79, 624, 674 – as well as §§ 685, 693, 715 – or the long note 647, and p. 4 of the dispositive part):

Original Award:

"28. Le 8 octobre 2002, la défenderesse a déposé une requête tendant à ce que soient séparées les questions de responsabilité de celles des dommages et intérêts. Le Tribunal arbitral, par une ordonnance de procédure n°9-2002 du 3 décembre 2002, a rejeté cette requête.

"79. Le 25 juin 1998, c'est-à-dire huit mois après le dépôt de la requête d'arbitrage dans la présente instance le 3 novembre 1997, est promulguée la loi n°19.568 relative à la restitution ou indemnisation pour biens confisqués et acquis par l'État. Les parties demanderesses vont cependant informer le Ministre des biens nationaux par lettre du 24 juin 1999 de leur décision de ne pas recourir à la loi n° 19.568, du fait de la requête d'arbitrage

²⁵⁴ **Document C2**, Original Award, §§ 598, 624: "*les demanderesses ont élargi leur demande fondée sur le déni de justice 'à l'ensemble du contentieux soumis au Tribunal arbitral [...]*", and footnotes pp. 563 and 589.

²⁵⁵ **Document C20**, Decision of the first *ad hoc* Committee of 18 December 2012, "168. L'obligation d'accorder une réparation au titre de la violation de droits perdure même si les droits en tant que tels ont pris fin, dès lors que l'obligation au titre du traité en question était en vigueur à l'égard de l'État concerné au moment de la violation alléguée. Ces principes ont été respectés par le Tribunal dans la section de la Sentence consacrée à l'application de l'API *ratione temporis*"

²⁵⁶ **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012, "693. Il convient de rappeler dans ce contexte que le préjudice à indemniser [est] celui souffert en raison des violations de l'API que le Tribunal arbitral a constatées et à propos desquelles il est compétent pour rendre une décision. Notamment, l'indemnisation doit servir à mettre les demanderesses dans la position dans laquelle elles seraient si les violations en question n'avaient pas eu lieu"

*introduite en 1997 et de la clause d'option irrévocable (fork-in-the-road) contenue dans l'API Espagne-Chili."*⁵⁷

312. The *ad hoc* Committee accepted and confirmed that in a context such as this, the compensation in question in point 3 of the Award's dispositive part, meant to restore the victims to the position they would otherwise probably have been in, was of a pecuniary nature.²⁵⁷

Decision of the *ad hoc* Committee:

"165. Les Demandereses sont en désaccord avec le raisonnement du Chili. Elles expliquent¹⁰³²⁵⁸:

"425. Par cet argument, la République du Chili entend enfermer le Tribunal arbitral - et partant le Comité *ad hoc* - dans un syllogisme simpliste qui peut se résumer ainsi : l'acte instantané et achevé qu'est le Décret n°165 de 1975 édictant la dissolution de CPP S.A. et EPC Ltée et le passage de tous leurs biens à l'État équivaut à l'extinction pure et simple de tous les droits afférents à ces biens, et en particulier de la protection conférée par l'API.[...]

"433. S'agissant du point de savoir si l'investissement effectué par Monsieur Pey en 1972 était couvert par l'API, le Tribunal fonde sa décision sur l'article 2.2 de l'API qui prévoit : Le présent Traité s'appliquera aux investissements qui seraient réalisés à partir de son entrée en vigueur par des investisseurs de l'une des Parties contractantes dans le territoire de l'autre. Toutefois, il bénéficiera également aux investissements réalisés antérieurement à son entrée en vigueur et qui, selon la législation de la Partie contractante concernée, auraient la qualité d'investissement étranger. (emphasis added)

"434. Or, rien dans cet article [de l'API] n'impose que l'investissement réalisé existe encore à la date de la violation par l'État d'accueil. Il impose seulement que l'investissement réalisé antérieurement à l'entrée en vigueur ait été réalisé conformément à la législation en vigueur dans l'État d'accueil à la date de l'investissement. Le Tribunal a conclu que tel était le cas.

"435. L'argument de la Défenderesse consiste à imposer un critère supplémentaire dans la définition des investissements protégés par l'API. Or, comme l'a indiqué le Tribunal arbitral à propos de la définition du terme "investissement ""une telle démarche serait de toute évidence contraire à l'article 31 de la Convention de Vienne sur le droit des traités".

"436. En outre, l'imposition d'une telle condition supplémentaire contrevient à l'objet même du droit international de protection des investissements. En effet, suivre l'argument de la République du Chili équivaldrait à vider de son sens tout traité de protection des investissements.

"437. Ceci a d'ailleurs été rappelé dans plusieurs affaires portées devant des tribunaux arbitraux CIRDI et encore récemment dans la sentence rendue le 15 avril 2009 dans l'affaire *Phoenix Action Ltd c/ la République Tchèque* qui précise :

is true that an investment that has come to a standstill, because of the host State's actions, would still qualify as an investment, otherwise the international protection of foreign investment provided by BITs would be emptied of its purpose.

²⁵⁷ **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012 (DI-07), §§ 229, 258, including for non-material damage (§§ 59, 60, 258)

²⁵⁸ ["103 Voir C-Mém. Dem. Annul., paras. 425; 433-438. Notes de bas de p. omises"]

"438. Il résulte des développements précédents que le Comité ad hoc devra rejeter la demande d'annulation de la République du Chili sur ce fondement celle-ci étant irrecevable et à tout le moins mal fondée. [Underlining and italics in the original]

"166. En outre, les Demanderesses réfutent l'affirmation du Chili selon laquelle le Tribunal n'a pas motivé ses conclusions sur ce point²⁵⁹

"Analyse du Comité

"167. Le Comité est d'accord avec les Demanderesses. Il n'entre pas dans les attributions du Comité de dire qu'il est d'accord avec le raisonnement et la conclusion du Tribunal sur quelque question que ce soit (bien qu'il le soit sur cette question particulière). Cependant, il entre tout-à-fait dans ses attributions d'examiner le raisonnement et la conclusion du Tribunal sur chaque question soulevée par la Défenderesse, comme il l'a fait, et de s'assurer, au regard de ces motifs spécifiques, que le Tribunal n'a pas excédé ses pouvoirs, ni n'a omis de motiver sa décision.

"168. Le Comité note que cet argument de l'"investissement existant "n'avait pas été soulevé par le Chili devant le Tribunal. Néanmoins, le Comité considère que, aux fins des motifs invoqués, le Tribunal a appliqué l'article 2(2) de l'API et le droit chilien applicable pour conclure que l'investissement effectué par M. Pey Casado en 1972 était bien couvert par l'API²⁶⁰. En outre, le Comité est d'accord avec les Demanderesses sur le fait que l'on aurait pu faire valoir que **l'obligation d'accorder une réparation au titre de la violation de droits perdure même si les droits en tant que tels ont pris fin**²⁶¹, **dès lors que l'obligation au titre du traité en question était en vigueur à l'égard de l'État concerné au moment de la violation alléguée**²⁶². **Ces principes ont été respectés par le Tribunal dans la section de la Sentence consacrée à l'application de l'API ratione temporis**²⁶³.

Le Comité estime que le Tribunal n'a pas expressément abordé la question de l'investissement existant car elle n'avait pas été soulevée en ces termes par les parties dans la procédure arbitrale. Par conséquent, on ne peut pas considérer que le Tribunal n'a pas motivé sa décision. La demande en annulation de la Défenderesse sur le fondement de ce motif est par conséquent rejetée." [emphasis added]

"Position des Demanderesses

"256. Les Demanderesses sont de l'avis qu'il n'y a eu, dans les circonstances, aucune inobservation d'une règle fondamentale de procédure parce que l'adoption par le Tribunal du calcul des dommages-intérêts dans la Sentence était justifié. Selon les termes employés par les Demanderesses, 'le quantum du dommage réparable au titre du déni de justice et traitement discriminatoire était le même que celui résultant de la confiscation, les violations

²⁵⁹ ["104 Ibid., paras. 439 et seq."]

²⁶⁰ ["105 Voir Sentence, paras. 431-432"]

²⁶¹ ["106 Voir *Jan de Nul N.V. et Dredging International N.V. v. République arabe d'Égypte*, ICSID Case ARB/04/13, Décision sur la compétence en date du 16 June 2006, para. 135"]

²⁶² ["107 Voir *Mondev International Ltd. v. les États-Unis d'Amérique*, ICSID Case ARB(AF)/99/2, Sentence en date du 11 October 2002, para. 68 (ci-après 'Sentence Mondev')"]

²⁶³ ["108 Voir Sentence, paras. 419-466"]

du Chili n'ayant eu pour conséquence que de priver les Demanderesses d'obtenir réparation pour les confiscations subies [...]”²⁶⁴185²⁶⁵.

”257. Les Demanderesses soutiennent qu’elles n’ont pas présenté de demandes de dommages intérêts spécifiques au titre des violations de l’article 4 puisqu’elles étaient comprises dans la demande d’indemnisation pour expropriation¹⁸⁶²⁶⁶. De la même manière que pour la demande fondée sur le déni de justice, elles font référence à leur Demande complémentaire du 4 novembre 2002, p. 13 :

‘Enfin cette demande n’a pas d’incidence sur le montant total des dommages et intérêts sollicités dans la procédure principale. En effet, le rapport des experts “Alejandro Arráz et Associés” sur l’évaluation du groupe d’entreprises du journal Clarín (pièce D18) avait conclu que la compensation correspondant aux presses GOSS établie par le 1er Tribunal civil de Santiago devait être déduite de l’évaluation qu’ils avaient faite du montant global des dommages et intérêts. Cette position est confirmée par le rapport complémentaire du 28 octobre 2002 ci-joint (pièce C225).’

”258. S’agissant de la demande fondée sur la discrimination, elles soutiennent que les dommages-intérêts étaient inclus dans leur rapport d’expert du 19 février 2003¹⁸⁷²⁶⁷. Elles font également référence à l’audience de janvier 2007¹⁸⁸²⁶⁸:

‘L’interprétation des Demanderesses est que si cette “Décision 43” constituait une nouvelle violation du traitement équitable, il conviendrait, notamment dans le calcul du dommage, de tenir compte des actes passés du gouvernement et de la République du Chili, qu’il s’agisse des actes de 1995 ou des décrets de 1977 et 1975 et, dès lors, le calcul de l’indemnité ne serait pas différent si ce n’est qu’il serait peut être augmenté, en ce qui concerne le préjudice moral, qui est l’un des chefs de préjudice demandé, puisque le dommage moral qu’il s’agisse de celui de M. Pey ou de celui de la Fondation a été augmenté par cette nouvelle violation de la République du Chili’.

”263. La seule fois où la question des dommages pour violation de l’article 4 de l’API a été soulevée, c’est lors de l’audience de janvier 2007, lorsque **le Président du Tribunal a demandé aux parties si le préjudice ou dommage résultant de la violation hypothétique de la disposition relative au traitement juste et équitable était le même que celui résultant de l’expropriation ou bien s’il était différent de celui-ci**¹⁹⁷²⁶⁹. Cependant, comme il ressort du dossier, l’audience de janvier 2007 avait pour objet de traiter des questions de compétence. Il est évident pour le Comité que la Défenderesse (**et les Demanderesses**) a (**ont**) eu très peu de temps lors de l’audience pour répondre à la question posée par le Président. (...)” (emphasis added).

”266. (...) Comme elles l’ont expliqué dans leur Contre-mémoire sur l’annulation²⁰¹²⁷⁰, **les Demanderesses ont soutenu, lors de l’audience de janvier 2007, que l’indemnisation due était équivalente à celle résultant de la confiscation, étant donné que la violation de l’API**

²⁶⁴ Document C20, Decision of the *ad hoc* Committee of 18 December 2012 (DI-07), § 256

²⁶⁵ [”185 Voir C-Mém. Dem. Annul., para. 613; see also Répl. Dem. Annul., paras. 208 et seq.”]

²⁶⁶ [”186 Voir C-Mém. Dem. Annul., para. 592”]

²⁶⁷ [”187 Voir Répl. Dem. Annul., para. 210.”]

²⁶⁸ [”188 Voir C-Mém. Dem. Annul., para. 593, qui cite Tr. Comp. [2] [p. 50] (Fr.).”]

²⁶⁹ [”197 Voir RA-26c, qui fait référence à Tr. Comp. [p. 49] (Fr.).”]

²⁷⁰ [”201 Voir C-Mém. Dem. Annul., para. 613.”]

par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation. Le Tribunal a cependant adopté un autre standard. Il a placé les Demanderesses dans la situation dans laquelle elles se seraient trouvées s'il n'y avait pas eu de violation de l'API, et il a accordé le montant fixé par la Décision n° 43. (emphasis added).

[End of quote from the decision of the *ad hoc* Committee]

313. In short, by annulling point 4 of the dispositive part for this reason, the *ad hoc* Committee opened the way for Mr. Pey Casado and the President Allende Foundation to plead on the firmest basis to the resubmission Tribunal "*que l'indemnisation due [for the failure to give and equitable treatment, including denial of justice] était équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation.*"

2.3.2.3 3rd question of *res judicata* reopened: the uncertainty when the original Award was rendered as to the status in domestic law of confiscatory Decree 165

314. At the hearing of 15 April 2015, the resubmission Tribunal posed this question:

*"The question now is a purely hypothetical one. Assuming, purely hypothetically, that the first tribunal was wrong in making an assumption that Decree 165 was in force as a matter of Chilean law at the time of the award, what effect, if any, would that have on the terms of the award itself; or alternatively, what effect, if any, would it have on the powers and functions of the present Tribunal in these resubmission proceedings?"*²⁷¹ [emphasis added].

315. The resubmission Tribunal was aware that the reply to this question is an integral part of the original Award, *res judicata*, which takes a well-founded view based on the uncertainty of the status of Decree 165 – as Mr. Pey Casado and the President Allende Foundation said throughout the resubmission proceedings:

Resubmission Memorial of 27 June 2014:²⁷²

"§ 32. Cette rétention [du Jugement], constitutive d'un déni de justice, a en effet permis à la République du Chili de contraindre le Tribunal arbitral initial à statuer dans un cadre où la nullité de droit public du Décret n° 165 n'avait pas été établie, dans un sens ou un autre, par une juridiction interne chilienne, ce qui l'a conduit a) à admettre la validité de ce Décret lorsque le statut de celui-ci restait indéterminé devant la 1ère Chambre Civile de Santiago, et, b) à condamner de ce fait l'État du Chili pour déni de justice." [Underlined in the original, emphasis added]

Reply of 9 January 2015:²⁷³

§ 162 : "*La mission du présent Tribunal est de déterminer les conséquences des violations*

²⁷¹ Document C43, audience du 15 April 2015, 16:57, p. 165

²⁷² Document C8, Resubmission Memorial of 27 June 2014

²⁷³ Document C40, Reply of 9 January 2015

par l'État du Chili de l'article 4 de l'API et non pas de se substituer au Tribunal arbitral initial pour corriger la Sentence. Les parties ne sont pas dans une procédure de révision mais bien dans une re-soumission après annulation de son VIIIème Chapitre et du quantum de l'indemnisation" (emphasis added).

316. This was reiterated by Mr. Pey Casado and the President Allende Foundation in the Tribunal at the hearing of 13 April 2015:

"pour le Tribunal arbitral [initial], la validité de ce décret est essentielle. Or, dans sa Sentence, comment le Tribunal arbitral parvient à la conclusion que ce décret est valide, produit des effets ? Vous trouvez cela au paragraphe 603 de la Sentence, mais également au paragraphe 595. Je vous lis le paragraphe 603 :

À sa connaissance, "à la connaissance du Tribunal, la validité du décret n° 165 n'a pas été remise en cause par les juridictions internes et ce décret fait toujours partie de l'ordre juridique interne chilien".

En réalité, en disant cela le Tribunal refuse de constater lui-même la nullité de droit public de ce décret, en application de la Constitution chilienne, et considère qu'il appartient aux juridictions internes du Chili de se prononcer finalement sur cette nullité de droit public.

Et c'est là où se trouve le lien entre le déni de justice, que j'ai évoqué tout à l'heure, et le préjudice subi par les Demanderesses, puisque seul le juge de Santiago, saisi de la demande en restitution de la presse Goss, pouvait se prononcer sur la validité de ce décret dès lors que le Tribunal refusait de constater sa nullité.

Pourquoi seul le juge de Santiago pouvait le faire ? On l'a dit plusieurs fois, le décret 165 ne concerne en réalité que CPP SA et EPC Ltée. Or, M. Pey a présenté ses revendications en réparation pour les confiscations de l'ensemble de ses biens devant un Tribunal arbitral international, il a choisi un forum international, et comme nous l'avons déjà dit, le Traité de protection des investissements entre le Chili et l'Espagne contient une clause de choix définitive, la fork in the road, et donc à partir du moment où la Demanderesse a décidé d'aller devant le forum international elle ne pouvait plus saisir une juridiction chilienne pour se prononcer sur ce décret. Seul le juge de Santiago était saisi d'une question sur un petit point qui était la restitution de la presse Goss mais qui était, également, la propriété de ces sociétés et donc il devait, ce juge, se prononcer sur la validité de ce décret. Le fait qu'il devait se prononcer sur la validité de ce décret se retrouve dans les écritures des parties devant le juge de Santiago."²⁷⁴ [emphasis added]

317. We may also note that to the resubmission Tribunal's "pure hypothesis", Mr. Pey Casado and the President Allende Foundation replied the next day that the original Award contained no error and should not be changed "d'un iota".²⁷⁵
318. For in this regard the original Award clearly set out its decision based on the uncertainty "to its knowledge"²⁷⁶ as to the status in Chilean law of the confiscatory Decree: the only framework in which it took a view, incontestable and never contested by Mr. Pey Casado and the President Allende Foundation in the proceedings for resubmission of the disputes arising as from 2000.

²⁷⁴ Document C43, transcript of the hearing of 13 April 2015, Claimants' contributions, p. 26

²⁷⁵ See § 4 *supra* and §697 *infra*

²⁷⁶ §§ 593 *in fine* et 603 *in fine* de la original Award, Document C2

319. Yet these answers that could scarcely have been clearer were transformed in the resubmission Award into an attribution to Mr. Pey Casado and the President Allende Foundation of having said the opposite, namely:

*"que le Tribunal Initial a conclu **à tort** que la confiscation était exclue ratione temporis du champ d'application du TBI" (emphasis added).²⁷⁷*

320. The resubmission Tribunal's apparent bias is manifest.

321. Yet the resubmission Tribunal was fully aware that the original Tribunal made no error, and set down in black and white that it was ordering Chile to pay pecuniary compensation to Mr. Pey Casado and the President Allende Foundation on a different basis, namely that "***l'invalidité***" and "***l'illégalité des confiscations sur les biens litigieux***" had been asserted and recognised after the BIT's entry into force by Chile itself, as witnessed by the original Award in its *res judicata* portion:

- i. After the court decision of 29 May 1995 recognising Mr Pey as the owner of the shares of CPP S.A., "*les autorités chiliennes, exécutives et administratives (comme judiciaires) étaient informées des revendications et demandes formulées par les demandereses [of a pecuniary nature]" (§ 666);*
- ii. The Chilean State recognised on 6 May 2003 that the confiscation of Mr Pey's investments was "***invalidé***" and that the State had the "***devoir d'indemniser***" (§ 667) [emphasis added],
- iii. This was invoked by Mr. Pey Casado and the President Allende Foundation in the Resubmission Memorial of 27 June 2014:

"§ 225. (...) comme l'a souligné le Tribunal arbitral¹⁵⁴, l'invalidité des confiscations et le devoir d'indemnisation corrélatif ont été clairement admis par la Défenderesse dans le cadre de la procédure arbitrale"²⁷⁸,

In the Reply of 9 January 2015:

"295. Malgré la pertinence évidente de la décision, par laquelle le Tribunal initial a contraint l'Etat du Chili de donner acte à ses multiples déclarations qu'elle respecterait les droits des personnes assujetties à des confiscations nulles ab initio conformément à la Constitution³²⁹ ²⁷⁹, la Défenderesse tente encore une fois de mettre en question ses obligations ex API",

And at the hearing of 13 avril 2015.²⁸⁰

²⁷⁷ **Document C9**, Resubmission Award, § 198 – this is "*the core paragraph*" of the Award, as Chile contended on 9 June 2017 in § 6 of *Chile Observations on Rectification (document C263)*

²⁷⁸ **Document C8**, Claimants' Resubmission Memorial of 27 June 2014, see also § 102 footnotes 60 and 61

²⁷⁹ **Document C40**, Claimants's Rejoinder of 9 January 2015: footnote [329 *Comme noté par le Tribunal initial dans sa Sentence du 8 mai 2008*, ¶ 668-669: "Après le rétablissement au Chili d'institutions démocratiques et civiles, les nouvelles autorités ont proclamé publiquement leur intention de rétablir la légalité et de réparer les dommages causés par le régime militaire [...] Le Tribunal arbitral ne peut que prendre note avec satisfaction de telles déclarations, qui font honneur au Gouvernement chilien. Malheureusement, cette politique ne s'est pas été traduite dans les faits, en ce qui concerne les demandereses".]

²⁸⁰ **Document C43**, p. 43

"Le Tribunal [initial] poursuit avec le paragraphe 667 [de la Sentence initiale], qui est l'un des paragraphes-clés, dans lequel le Tribunal dit que l'invalidité des confiscations et le devoir d'indemnisation qui est lié à cette invalidité des confiscations est reconnu expressément par le Chili. Il cite, notamment en note 617 de bas de page de la Sentence, le représentant du Chili, Me Castillo, lors de l'audience du 6 mai 2003, et je cite :

"La République du Chili ne prétend pas justifier ce qui s'est produit pendant cette 17 période turbulente de notre histoire, bien au contraire. Nous avons réparé sur le plan 18 matériel, nous avons essayé aussi de réparer sur le plan moral, les préjugés soufferts 19 par des personnes pendant cette période ".

"Le Tribunal arbitral cite également l'extrait du mémoire en défense du Chili, du 20 juillet 1999, dans lequel le Chili indiquait, je cite à nouveau :

"Les gouvernements démocratiques qui remplacèrent en 1990 au moyen d'élections libres le gouvernement de Pinochet, se sont primordialement préoccupés de réparer les dommages causés par le régime instauré au Chili par le coup d'État du 11 septembre 1973. En effet, le gouvernement a pris les mesures pour réparer les dommages causés aux victimes dans tous les secteurs. Concrètement, en relation avec les confiscations, a été approuvée une loi qui dispose de la restitution ou indemnisation pour les biens confisqués, loi prise à l'initiative de l'Exécutif".

- iv. "Que les nouvelles autorités ont proclamé publiquement [since 1990] leur intention de rétablir la légalité et de réparer les dommages causés par le régime militaire" (§ 668) ;
- v. "Que ces déclarations ne se sont pas traduites dans les faits" as regards the Claimants (§ 669).

This was also reiterated in the original Award in § 677, with reference to § 617 and to the hearing of 6 May 2003:

"On observera enfin, toujours sur le fond, que la réalité des violations alléguées - ou, plus précisément, en son principe, l'illégalité des confiscations opérées par l'autorité militaire chilienne sur les biens litigieux, n'est pas contestée par la défenderesse.⁶²³²⁸¹ Pas plus que cette dernière ne conteste l'obligation d'indemniser les victimes de confiscations contraires au droit. Ce qu'elle conteste en revanche, ainsi qu'on l'a vu, c'est la qualité pour agir des demanderesses, découlant de leur qualité de propriétaire ou d'investisseur" ;

- vi. "L'absence de réponse de la Présidence aux requêtes de M. Pey Casado, [est constitutive] d'un déni de justice" (Award, §§ 658, 659, 674).

322. Thus points 1 to 3 of the original Award's dispositive part concluded, by applying articles 1²⁸², 2(2)²⁸³, 4²⁸⁴ et 10(4)²⁸⁵ of the BIT to the facts submitted to it as from May 2000 and the additional request of 4 November 2002:

²⁸¹ [623. V., par exemple, la transcript of the hearing of 6 May 2003, pp. 262-263 (Me Castillo), cité ci-dessus [§ 617]]

²⁸² **Document C3f**, BIT. "Article 1. Définitions. Aux fins du présent Accord : 1. Par "investisseurs" s'entendront les personnes physiques ou ressortissants nationaux, selon le droit de la Partie correspondante, et les personnes morales (...) qui se trouveraient constituées ou, selon le cas, dûment organisées conformément au droit de cette Partie et qui auraient leur siège dans le territoire de cette dernière, nonobstant le fait qu'elles appartiennent à des personnes physiques ou juridiques étrangères. 2. Par "investissements" on désigne toute sorte d'avoirs, tels que biens et droits de toute nature, acquis en accord avec la législation du pays recevant l'investissement et en particulier, encore que non exclusivement, les suivants: Actions et autres formes de participation dans les

- a) that a domestic ruling recognised on 29 May 1995 that the shares of CPP SA were owned by Spanish investors;
- b) that on 6 May 2003 Chile stated to the Arbitral Tribunal that the confiscations made by the *de facto* regime are invalid, and that the State has the duty to compensate the owners concerned;
- c) that the discrimination suffered by the investors constitutes a breach of the guarantee of “fair and equitable” treatment, including denial of justice;
- d) that this failure to give fair and equitable treatment entitles them to pecuniary compensation from Chilean State;
- e) that the cause of the harm sustained by the Spanish investors from the failure to give and equitable treatment consisted of the rejection of their claim to be compensated for all of their investment, as well as for the stalling of the domestic judicial actions brought for the purpose.

323. In total contrast, Chile’s rejection of what is *res judicata* was reiterated at the hearing of 16 April 2015 to the resubmission Tribunal. According to the Respondent State, the original Award’s conclusions (and those of the decision of the *ad hoc* Committee confirming them):

- a) Are claimed to be “bizarre things”, “the award really doesn't make sense in certain ways. There are contradictions and lacunae, anomalies that cannot be reconciled. The most you can aspire to do is to understand why it does not make sense”;
- b) Are claimed to be false, because the Claimants’ investment is supposed never to have existed and they are supposed not to be the owners of the CPP SA shares:

Mr Pey had played merely a role as an intermediary [in the purchase of the shares of CPP S.A.] (...) there's no way to interpret these documents [the “Estoril protocols”²⁸⁶] as a sale agreement; they make sense if the person is a conduit, intermediary in the sale;

sociétés. Crédits, valeurs et droits découlant de toute sorte d'apports réalisés dans le but de créer une valeur économique; y compris expressément tous les prêts consentis à cette fin, qu'ils aient ou non été capitalisés. Biens meubles et immeubles, ainsi que toute sorte de droits liés à ces derniers. Les droits de toute sorte relevant du domaine de la propriété intellectuelle, y compris expressément les patentes d'invention et marques commerciales, de même que les licences de fabrication et de ‘savoir faire’”

²⁸³ **Ibid.**, BIT. “Article 2. Soutien, admission. (2) Le présent Traité s'appliquera aux investissements qui seraient réalisés à partir de son entrée en vigueur par des investisseurs de l'une des Parties contractantes dans le territoire de l'autre. Toutefois, il bénéficiera également aux investissements réalisés antérieurement à son entrée en vigueur et qui, selon la législation de la Partie contractante concernée, auraient la qualité d'investissement étranger.”

²⁸⁴ **Ibid.**, BIT. “Article 4. Traitement. 1. Chaque Partie garantira dans son territoire, en accord avec sa législation nationale, un traitement juste et équitable aux investissements réalisés par des investisseurs de l'autre Partie, sous des conditions non moins favorables que pour ses investisseurs nationaux.

2. Ce traitement ne sera pas moins favorable que celui accordé par chaque Partie aux investissements réalisés dans son territoire par des investisseurs d'un pays tiers.”

²⁸⁵ **Ibid.**, BIT. Article 10. “(4) L'organe arbitral statuera sur la base des dispositions du présent Traité, du droit de la Partie contractante qui serait partie à la controverse -y compris les règles relatives aux conflits de lois- et des termes d'éventuels accords particuliers conclus en rapport avec l'investissement, de même que des principes du droit international en la matière.”

²⁸⁶ **Document C2**, Original Award, §§ 65, 128-130, 133, 136, 154, 156, 158, 168, 169, 182, 185, 186, 190, 204,

- c) Although the original Award described “Decision 43” as “*manipulations auxquelles des parties à l’arbitrage croient devoir ou pouvoir recourir pendente lite pour infléchir le cours de la procédure ou influencer le Tribunal arbitral (v., par exemple, la Décision n°43 du 28 avril 2000)*”²⁸⁷, Chile in its Rejoinder of 9 March 2015²⁸⁸ claims the original Award says the opposite:

154 (...) Claimants made similar arguments throughout the Original Arbitration (...) claiming that by means of the Decision 43 process, Chile was attempting in bad faith to derail or frustrate the ICSID proceeding, and that therefore Decision 43 amounted to a “*refus du ‘droit d’accès à l’arbitrage international.’*”³⁹⁷ None of this is true, as confirmed by the Original Tribunal, which summarily rejected these various “conspiracy theories” in both the Provisional Measures Decision³⁹⁸²⁸⁹ and in the Award³⁹⁹²⁹⁰;

- d) And it is again repeated that the original Award should be stripped of material effect, with fabrications such as the following:

-the award [is] unfair to Chile;

-when the new tribunal is constituted, with Mr Gaillard and Mr Chemloul as new members, they look at this mess: they are in year 10 of this arbitration, the longest running case in ICSID history, and there's no end in sight really. So they [the Tribunal] decide to figure out a solution to this problem which involves giving some compensation perhaps to these people who had been litigating in ICSID for ten years, and yet an amount not so high that it wouldn't be easy for Chile to simply absorb and pay out, and that that would be the end of the dispute;

-in 2008 they [the Tribunal] ultimately issued their award. What was the finding? The finding was, “Oh, you committed a violation of the treaty by implementing Decision 43”. And you can imagine the surprise of our clients from Chile when they said, “You mean Decision 43, the same one that the tribunal said was not problematic in its provisional measures decision in 2001? What's different now? What's changed?” They [the Tribunal] knew exactly what the impact of that was going to be, and absolutely nothing had changed, and yet here we were characterising Chile as having violated the treaty;

- the investment had been extinguished 20 years before the BIT's entry into force;

- they [the Tribunal] just decided not to deal with it, in order to reach what we think was the conclusion that was preordained. (...) there were any number of issues like this in which they essentially had to find their way clear to some sort of way to deal with a problem that really, strictly speaking, they should not have been able to overcome.

-There were a number of other bizarre things, and we won't belabour them because, as we say, these are things that you, the Tribunal, are stuck with as we were. But I encourage you

220, 222, 223

²⁸⁷ *Ibid.*, p. 103, note 270

²⁸⁸ **Document C262**, Chile's Rejoinder of 9 March 2015 in the proceeding for the resubmission of disputes arising in May 2000 and November 2002

²⁸⁹ The Decision of the original Tribunal of 25 September 2001 on the request for provisional measures in respect of “Decision 43” appears in **document C30**.

²⁹⁰ [399 Award, ¶ 664] This para. 664 of the original Award refers “aux comportements procéduraux chiliens dont se plaignent les demanderesses.”

to look at paragraph 108 of the award, just for entertainment value really, as an example of the type of "through the looking-glass" issues that we had to deal with;

- But they [the arbitrators] drew this distinction in the award between the *ratione temporis* jurisdiction of the tribunal and the substantive temporal scope of the investment treaty's obligations. We just kind of wondered what that was. And ultimately what it was is: if the Tribunal had concluded that it lacked *ratione temporis* jurisdiction, period, because of these issues, it would have been unable to find a post-BIT violation; and this distinction with the substantive scope enabled it to throw out the expropriation claims, and yet still purport to find a post-BIT violation, which is what we think they were really attempting to do.²⁹¹

324. For Chile, the practical consequence of points 1 to 3 of the dispositive part of the OA, of their grounds in §§ 600, 667 to 674 and of the context of this last paragraph is as follows:

- a) The investment is supposed not to have existed, or the original Tribunal not to have had jurisdiction or ICSID competence after the entry into force of the BIT of 29 March 1994 (contrary to what is stated in point 1 of the original Award's dispositive part and in article 2(2) of the BIT);²⁹²
- b) It follows that on implementing points 1 to 3 of the dispositive part of the original Award, the Tribunal tasked with determining the *quantum* of the compensation would lack jurisdiction over disputes arising as from "Decision 43" of 28 April 2000 or, in particular, over the facts constituting denial of justice in the proceedings in the 1st Civil Court of Santiago brought to the notice of the original Tribunal in the additional request of 4 November 2002,²⁹³ or, consequently, over any ongoing denial of justice before or after 8 May 2008;
- c) Accordingly the Tribunal tasked with carrying out points 1 to 3 of the original Award's dispositive part supposedly lacked jurisdiction to consider the existence of compensable damage with its causal linkage in facts subsequent to 2000 and 8 May 2008 constituting an ongoing breach of article 4 of the BIT, in particular in the domestic proceedings which, in the course of the action brought on 4 October 1995, were to determine *ex officio* the legal status of Decree 165 and which, by the judgment of 24 July 2008, finally recognised that it was "invalid public law";
- d) And the resubmission Tribunal was not to accept the evidence that the Claimants offered in support of compensation for damages with a causal link to these facts subsequent to 2000, especially as this evidence took account of the recognition of the *ab initio* invalidity, not subject to time bar, of Decree 165 in the aforesaid judgment of the 1st Civil Court of Santiago.

325. The practical consequences of these claims by Chile are to be found in the resubmission Award, which, given the impossibility of denying its jurisdiction to take notice of the consequences of the domestic judgment of 24 July 2008 on the denial of justice committed in the handling of proceedings before the 1st Civil Court of Santiago, *res judicata*, had to deny its jurisdiction over all disputes arising after 3 November 1997.

²⁹¹ **Document C260**, Transcript of Chile's statement of 16 April 2015 to the resubmission Tribunal, hearing of 16 April 2015, p. 68 (lines 4-9); p. 71 (lines 6-7, 17-18); p. 82 (lines 1-2, 11-21); p. 84 (lines 1-11); p. 85 (lines 18-19); p. 87 (lines 13-20); p. 89 (lines 24-25); p. 90 (lines 1-5, 8-19), respectively

²⁹² Article 2(2) de l'API, quoted in note 286 above

²⁹³ **Document C249f**

326. This denial of jurisdiction after 1997 – constituting a manifest excess of powers, wholly contrary to points 1 to 3 of the dispositive part of the original Award – was thus the necessary means to “justify” the non-admission of all the evidence produced by Mr. Pey Casado and the President Allende Foundation, and that for which the Tribunal was tasked with determining compensation, specifically damages caused by discrimination and denial of justice as determined in Chapters I to VII of the original Award, i.e. that caused by “Decision 43” of 28 April 2000 and, in particular, by the withholding of the domestic judgment which had (necessarily) to recognise the invalid public law vitiating Decree 165 (pursuant to the duty to apply articles 7 of the Constitution of 1980 and 4 of the Constitution of 1925).
327. Then, after having set aside the proof of the breach of article 4 of the BIT provided by the Claimants – where the original Award situates the right to compensation arising from acts of discrimination and denial of justice since 2000²⁹⁴ – the resubmission Award shifts Mr. Pey Casado and the President Allende Foundation evidence to where they had not put it – in relation to article 5 of the BIT (expropriation).
328. Thus after covering its absolute infringement of *res judicata* under the euphemism of *difficulty in understanding it*, and having altered the *causa petendi* and the subject of the resubmission request, the resubmission Award reaches its conclusions:

§ 244. "(...) *Malgré les difficultés qu'il a éprouvées à comprendre certaines parties de la Sentence Initiale, le Tribunal ne pouvait clairement pas permettre que la demande initiale [du 3 novembre 1997] fondée sur la confiscation soit de nouveau soumise [le 18 juin 2013] de manière détournée sous couvert d'une violation du traitement juste et équitable subie plusieurs années plus tard [à partir de l'année 2000] (...) Le Tribunal n'aurait pas pu non plus octroyer des dommages-intérêts pour préjudice moral à titre de consolation alors qu'aucun dommage réel n'avait été prouvé. (...) Il n'a donc pas eu d'autre choix que de rejeter, pratiquement dans leur intégralité, les demandes pécuniaires des Demanderesses*",

And decides in its dispositive part:

"3) *que les Demanderesses, sur lesquelles pesait la charge de la preuve, n'ont pas démontré de préjudice quantifiable qui leur aurait été causé par la violation de l'article 4 constatée par le Tribunal Initial dans sa Sentence ;*
 4) *que le Tribunal ne peut donc pas octroyer aux Demanderesses de compensation financière à ce titre ;*
 5) *que la demande subsidiaire des Demanderesses sur la base de l'enrichissement sans cause est sans fondement juridique."*

329. Thus it seems that with the question it asked on the closure of the hearings, the resubmission Tribunal was paving the way to misrepresent the cause-effect link in points 1 to 3 of the original Award's dispositive part and the grounds thereof, with consequences that appear in the Award of 13 September 2016:
- a) In the form of the dismissal, due to a supposed lack of jurisdiction, of all evidence relating to the precise assessment of the damages caused by the discrimination and denial of justice committed since 2000 and penalised by the original Award:

"H. L'interprétation de la Sentence Initiale (...) *le champ de compétence de ce Tribunal (...) est limité (...) exclusivement au "différend" (...) initialement soumis à l'arbitrage, différend*

²⁹⁴ See §§ 633-636, 639, 641-663, 674, and paras. 1 to 3 of the dispositive part of the original Award, **Document C2**

*pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses [le 6 novembre 1997]. Les questions qui ont surgi entre les Parties après cette date (...) ne peuvent pas, même avec un gros effort d'imagination, entrer dans le champ de la procédure de nouvel examen (...)"*²⁹⁵,

- b) In the dismissal, consequently, of the existence of a causal link between points 1 and 2 of the original Award's dispositive part, deeming that the original Award supposedly did not establish that the breaches of article 4 of the BIT with prejudicial consequences took place after 2000 – contrary to what is stated in points 1 and 2 of that dispositive part,
- c) In the dismissal of the fact that the causal relationship – on the basis of which the original Award declared the existence of damages – is constituted by the link between points 1, 2 and 3 of its dispositive part and their grounds (right to compensation), and, consequently,
- d) In the dismissal of the evidence relating to the real legal status of Decree 164, as established in the domestic Judgment of 24 July 2008, produced in support of the fact that the compensation provided for in point 3 of the dispositive part requires Chile to pay pecuniary compensation for the damage caused by the its breach of article 4 of the BIT, as expressly envisaged and accepted by the *ad hoc* Committee:

*"équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation"*²⁹⁶,

- e) Which results in the resubmission Award in removing the practical effect of points 1 to 3 of the original Tribunal's dispositive part and ruling out, *ipso facto*, the evidence produced of the existence of damage and the granting of any pecuniary compensation to the plaintiff investors.

330. Following these practical conclusions undermining the effectiveness of the original Award, *res judicata*, seventeen (17) months after these hearings, the resubmission Award granted the wishes of the Respondent State by which only point 8 of the OA's dispositive part should be enforced – altered, naturally, so as to suit its subject and purpose to the Respondent's preferences:

*in the end we think that what is appropriate for this Tribunal to grant is an award with a dispositive that incorporates the binding conclusions of the award on jurisdiction and merits that acknowledges the binding conclusion set forth in paragraph 8 of the first award's dispositif, pursuant to which the first tribunal rejected "any other or broader conclusion (...) it should conclude that the Claimants failed to carry their burden of proof of proving damages (...) accordingly should deny all relief to Claimants."*²⁹⁷

331. Yet these conclusions of the resubmission Award contradict and overturn the thrust and scope of points 1 to 3 and their basis, *res judicata*, in the original Award, making them ineffective and

²⁹⁵ **Document C9f**, resubmission Award du 13 September 2016, document DI-06, § 216; dans le même sens le § 150

²⁹⁶ **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012, § 266

²⁹⁷ **Document C260**, English transcript of the hearing of 16 April 2015, p. 121, lines 5-11, 19-20

constituting an injustice and a manifest excess of powers together with a serious departure from a fundamental rule of procedure (bias) and a failure to state reasons.

*

2.3.2.4 4th question of *res judicata* reopened: “Decision 43” of 28 April 2000

332. At the hearing of 15 April 2015 the resubmission Tribunal asked this question:

“whether it would have been open to some other claimant shareholder, some other person claiming to be a shareholder in the two companies, to have brought a similar claim under the compensation law of Chile. And assuming there was no problem about their locus standi, or no problem about prescription, about the power of time, would any other person have been in a position to bring an application -- and to potentially obtain a decision -- under the compensation law, which would have been inconsistent with the terms of Decision No. 43?”

333. This question runs totally contrary to what the original Tribunal decided with *res judicata* effect:

- a) Firstly because *"la Décision Ministérielle n° 43 (...) ne tranche pas (...) le même litige que celui que les Demanderesses ont voulu soumettre à la compétence du Tribunal Arbitral CIRDI, (...) [elle] n'a pas "tranché définitivement "et avec force de chose jugée, la question de la propriété des actions (...). En tout état de cause, compte tenu du "principe de la primauté des procédures internationales par rapport aux procédures internes "(...), cette décision ne saurait ni lier le Tribunal Arbitral, ni prévaloir sur la décision que ce dernier pourrait être amené à rendre, dans l'hypothèse où il se reconnaîtrait compétent pour ce faire"*²⁹⁸ ;
- b) Secondly because the resubmission Tribunal accepts what the original Award, *res judicata*, refused to the Respondent in §§ 632 et 674,²⁹⁹ namely that points 1 to 3 of that Award's dispositive part should not be applied as the State is supposed to have been released of its duty to pay pecuniary compensation by indemnifying the beneficiaries of “Decision 43”, and that Mr. Pey Casado and the President Allende Foundation are supposed to have forfeited any right to compensation by not having requested it from the Ministry responsible for granting it under domestic law 19,568 of 1998³⁰⁰ rather than filing a request for international arbitration under the BIT:

Resubmission Award:

²⁹⁸ **Document C30f**, Decision of the Tribunal of 25 September 2001 on the request for provisional measures in respect of “Decision 43” of 28 April 2000

²⁹⁹ **Document C2, § 632:** *“Le 28 avril 2000, le Ministre des biens nationaux adopte la Décision n°43 selon laquelle les dispositions de la loi n°19.568 sont applicables aux biens confisqués aux sociétés CPP S.A. et EPC Ltda. Cependant, comme le Tribunal l’a expliqué ci-dessus, la Décision n°43 indemnise des requérants autres que les demanderesses pour la confiscation des biens en question et le Ministre des biens nationaux maintiendra cette décision que les demanderesses contesteront en vain”; § 674 :* *"Dans le cas d’espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – à des personnages qui, de l’avis du Tribunal arbitral, n’étaient pas propriétaires des biens confisqués (...) la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable."*

³⁰⁰ **Document C193** (ND20)

"§ 139. La Défenderesse soutient en outre que les Demanderesses se sont porté préjudice à elles-mêmes, en refusant sciemment et volontairement de participer au programme de réparation mis en place par le Chili par le biais de la Loi n° 19.568 et en préférant exercer la clause d'option irrévocable ("fork-in-the-road ") du TBI Chili-Espagne et porter leurs demandes fondées sur l'expropriation devant une instance internationale, rendant ainsi impossible toute indemnisation par la Défenderesse au titre de la confiscation d'El Clarín sur le fondement du droit chilien".

§ 232 in fine et § 233. "La Défenderesse soutient ... [que] si les Demanderesses pouvaient être présumées avoir subi quelque dommage, la cause immédiate du dommage était constituée par leurs propres actes, rompant ainsi le lien de causalité exigé pour l'octroi d'une compensation financière sur le fondement du projet d'Articles 31 et 36 de la CDI. **Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés.**" [emphasis added]

334. Yet the original Award had rejected Chile's claim according to which:

"§ 599. (...) S'appuyant sur la décision du Tribunal du 25 septembre 2001, la défenderesse fait également valoir que la Décision n°43 ne peut quant à elle être considérée comme un acte illicite ; elle n'est qu'une conséquence d'une expropriation qui s'est achevée bien avant l'entrée en vigueur de l'API" (References omitted),

And decided, on the contrary:

"Comme d'autres démarches ou manipulations auxquelles des parties à l'arbitrage croient devoir ou pouvoir recourir pendente lite pour infléchir le cours de la procédure ou influencer le Tribunal arbitral (v., par exemple, la Décision n°43 du 28 avril 2000, ou les tentatives faites pour obtenir de Madrid une interprétation favorable et commune d'un traité bilatéral), pareils actes sont de nature à susciter inévitablement le scepticisme des arbitres"³⁰¹ ;

"§ 652. (...) la Décision n°43 doit s'analyser en une application discriminatoire d'une loi postérieure à l'API et des droits que celle-ci a créés."

"§ 674."Dans le cas d'espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexplicées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués (...) la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable."

335. The *ad hoc* Committee confirmed this conclusion of the OA after categorically rejecting in §§ 23(30), 232-233 this same claim by the Respondent, which the resubmission Award then accepted with a manifest excess of powers and partiality.

336. This matter reopened by the resubmission Tribunal had also been dismissed by the original Tribunal on the basis of domestic Law 19,568 itself, making Chile's claim untenable for the following reasons:

³⁰¹ Document C2, Original Award, p. 103, note 270

- I. The 1st article of Law 19,568 clearly states that it does not override the right to seek compensation in the courts according to the Constitution and the Civil Code, as investors had done since 1995 in the 1st Court of Santiago:

"Pourront se prévaloir de cette procédure ceux qui ont un procès en cours à l'encontre du Fisc, introduit antérieurement à l'entrée en vigueur de la présente loi dans le cadre duquel ils réclament la restitution ou l'indemnisation des biens indiqués au premier alinéa. Dans ce cas, ils devront renoncer préalablement aux actions introduites devant le tribunal respectif et joindre à leur demande une copie autorisée de la décision judiciaire qui mette fin au litige" ;

- II. The original Award established that the Respondent was aware of the investors' continuous claims for compensation and ordered it to compensate Mr. Pey Casado and the President Allende Foundation for its adoption of "Decision 43" (§ 674 and points 2 and 3 of the dispositive part of the 2008 Award).

337. The above was expressly confirmed in the decision of the *ad hoc* Committee, which declared it *res judicata*:

"§ 233 : " Les Demandereses, dans la longue citation extraite de leur Contre-mémoire et reproduite ci-dessus, ont démontré, d'une manière tout-à-fait convaincante pour le Comité, que le Tribunal a amplement motivé sa conclusion selon laquelle la Décision n° 43 du Chili était discriminatoire à l'encontre des Demandereses et violait donc l'article 4 de l'API. La demande en annulation présentée par la Défenderesse sur le fondement de ce motif est donc rejetée".³⁰²

338. Yet the resubmission Award accepts unreservedly (§§ 151-157) that Chile may reopen the debate on these claims by the apparent means:

a) of ignoring Chile's acknowledgment to the original Tribunal as regards *"l'invalidité des confiscations et au devoir d'indemnisation"*³⁰³ – *res judicata* – and

b) of attributing two imaginary conclusions to Mr. Pey Casado and the President Allende Foundation:

Cependant, la principale difficulté ne réside pas tant dans cette proposition elle-même que dans les conclusions que les Demandereses cherchent à en tirer, en ce qui concerne les recours disponibles dans la présente procédure. Selon le Tribunal, il n'y en a que deux : la première est que le Tribunal Initial a conclu à tort que la confiscation était exclue ratione temporis du champ d'application du TBI ; la seconde est que ce qui a constitué en fait (si non dans la forme) la confiscation est intervenue avec la Décision n° 43." [emphasis added]

³⁰² **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012

³⁰³ **Document C2**, Original Award, § 667, *res judicata*: "Quant à l'invalidité des confiscations et au devoir d'indemnisation, il y a lieu de rappeler aussi des déclarations parfaitement claires de la défenderesse dans la présente procédure, [footnote] 617. V., par exemple, la transcription de l'audience du 6 mai 2003, pp. 262-263 (Me Castillo) : "La République du Chili ne prétend pas justifier ce qui s'est produit pendant cette période turbulente de notre histoire, bien au contraire. Nous avons réparé sur le plan matériel, nous avons essayé aussi de réparer sur le plan moral, les préjugés soufferts par des personnes pendant cette période" and p. 264 : "Il ne s'agit pas non plus de justifier la légitimité des actes qui ont découlé de la confiscation de bien de CPP S.A. et Clarin Ltée. Bien au contraire, la République du Chili est constante [sic; devrait dire "consciente"] des dommages causés par ces confiscations et c'est pour cela qu'elle a indemnisé ces titulaires légitimes."

339. Proof of the non-existence of these two “conclusions” appears in the arbitration file submitted to the resubmission Tribunal:
1. As to the supposed “first conclusion”, as we’ll see below (page 175), Mr. Pey Casado and the President Allende Foundation expressly asserted that **the original Tribunal was not “mistaken”**;
 2. As to the supposed “second conclusion”, at no point in the resubmission proceeding did Mr. Pey Casado and the President Allende Foundation say that “Decision 43” constituted a “confiscation”, and this possibility was expressly ruled out by the original Award (§ 622).
340. By thus allowing the State’s claims contrary to *res judicata* and misrepresenting Mr. Pey Casado and the President Allende Foundation claims, the resubmission Award is contrary to the *res judicata* of the original Award.
341. This non-recognition of *res judicata* was moreover confirmed by Chile on 15 April 2016 before the resubmission Tribunal³⁰⁴ when it contextually challenged other points already settled. The 2016 Award however accepted this claim on crediting “Decision 43” with the effects on the ownership of the investment that had been expressly rejected by the original Award.
342. Indeed, whereas the latter had determined, *res judicata*, that the ownership of all the shares of CPP SA had been established in the final decision by domestic courts of 27 May 1995, the resubmission Tribunal challenges this condition with “Decision 43” of 28 April 2000 of the Ministry of National Assets:

<u>Original Award</u>	<u>Resubmission Award</u>
§ 229. <i>"Le Tribunal conclut que, au moment où a été effectuée la saisie du journal El Clarín, M. Pey Casado devait être considéré comme le seul propriétaire légitime des actions de la société CPP S.A." ;</i> 317 : <i>"M. Pey Casado a bien démontré avoir procédé à des investissements et être propriétaire des biens meubles ou immeubles qui ont été confisqués par l'autorité militaire chilienne" ;</i> §§ 666 (et 77, 210, 214, 215, 444, 719) : <i>"On rappellera à ce propos l'existence d'un jugement chilien [du 29 mai 1995] reconnaissant la propriété de M. Pey Casado sur les actions confisquées ..."</i>	1§ 198 (original version)³⁰⁵ : <i>"Le Tribunal terminera avec une dernière observation avant de passer à un autre sujet: <u>si la prétendue nullité de la Décision n° 43 au regard du droit chilien avait effectivement une importance décisive, la conséquence en serait certainement que l'investissement est, en droit, resté la propriété de M. Pey Casado et/ou de la Fondation et le recours à ce titre pourrait relever de la sphère domestique</u>, mais clairement pas du présent Tribunal dans le cadre de la présente procédure de nouvel examen."</i> [emphasis added]

343. The resubmission Award again goes against the *res judicata* part of the original Award on describing the invalidity of “Decision 43” as “*prétendue*” [i.e. sought by Mr. Pey Casado and the President Allende Foundation], and excludes from its jurisdiction this issue that has been subject to arbitration since 2000. This is a major contradiction in that the original Award clearly

³⁰⁴ Document C200, transcript, 15:52, p. 72, line 6.

³⁰⁵ The Tribunal’s decision of 6 October 2017, **document C201**, allowed, the Claimants’ request, the replacement in this paragraph of “Décision 43” with “le Décret N° 165”

asserted the Tribunal's jurisdiction to judge and sanction Chile precisely because of "Decision 43" (§ 674), and it was further careful to state what we quoted above (§ 334):

"Comme d'autres démarches ou manipulations auxquelles des parties à l'arbitrage croient devoir ou pouvoir recourir pendente lite pour infléchir le cours de la procédure ou influencer le Tribunal arbitral (v., par exemple, la Décision n°43 du 28 avril 2000, ou les tentatives faites pour obtenir de Madrid une interprétation favorable et commune d'un traité bilatéral), pareils actes sont de nature à susciter inévitablement le scepticisme des arbitres" (page 103, note 270).³⁰⁶

344. Indeed we should first recall that the original Award and the original Tribunal considered:

- i. That the disputes between the Spanish investors and Chile submitted to arbitration under ICSID rules in May 2000³⁰⁷ and on 4 November 2002³⁰⁸ – for breach of article 4 (failure to give and equitable treatment, including denial of justice) – centred on the question of the pecuniary compensation payable to Mr. Pey Casado and the President Allende Foundation for breach of the obligations provided in the BIT, and that the original Award's conclusion, *res judicata*, was:

"Que la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable avec la Décision 43 du 28 avril 2000 et son application" (§§ 674 et 675) ;

- ii. That Law 19,568 of 1998 confirmed the unconstitutionality of the confiscatory decrees enacted pursuant to Decree-Law 77 of 1973 (including Decree 165 of 1975, affecting Mr Pey Casado's investment in CPP SA), and recognised the right to act and right to the restoration of their assets to all **legal persons** supposedly wound up pursuant to Decree-Law of 1973, owners of the assets concerned:

*"Article 1^{er}. Les personnes morales qui auraient été privées de la pleine propriété de leurs biens par application des décrets-lois Nos. 12, 77...de 1973[...] auront droit de solliciter leur restitution ... Auront les mêmes droits leurs successeurs ou réputés tels."*³⁰⁹ (emphasis added).

- iii. That the original Award took account of Law 19,568 (§§ 79, 595, 596, 613, 614, 621, 631, 632).
- iv. That Law 19,568 (1st article *in fine*) left solely to the investor (a physical or natural person) the choice to exercise his/her right to restoration/compensation:

³⁰⁶ Document C2

³⁰⁷ Document C2, Original Award, §§ 451,452, 453, 632

³⁰⁸ Document C249f

³⁰⁹ Document C193, Law 19.568 of 1998: "Artículo 1º.- Las personas naturales y las personas jurídicas, incluidos los partidos políticos, que hayan sido privados del dominio de sus bienes por aplicación de los decretos leyes N°s. 12, 77 y 133, de 1973; 1.697, de 1977, y 2.346, de 1978, tendrán derecho a solicitar su restitución o requerir el pago de una indemnización, en conformidad con las normas establecidas en esta ley. Igual derecho tendrán sus sucesores o quienes se reputen como tales" (emphasis added)

- Either in the courts of law (which by direct and mandatory application of article 7 of the Constitution³¹⁰ are required to take note of the invalidity *ab initio*, not subject to time bar, of the dictatorship's confiscatory decrees);
- Or with the government (which applies Law 19.568 of 1998 within the time limit provided therein):

"Pourront recourir à cette procédure [tous ceux] qui auraient un procès pendant à l'encontre de l'État, introduit antérieurement à l'entrée en vigueur de la présente loi, dans lequel ils réclameraient la restitution ou l'indemnisation des biens mentionnés dans la première section. Dans ce cas ils devront se désister préalablement des actions introduites devant le tribunal respectif, et joindre à leur demande une copie authentifiée de la décision judiciaire qui aurait mis fin au litige" (emphasis added).

- v. That this 1998 law states that the right to compensation may be asserted through either of the following two channels:
 - a) By actions in the competent courts/tribunals (which channel was opted into by the Spanish investors in 1997 at ICSID by virtue of the "fork on the road" in art. 10(2) of the BIT,³¹¹ as noted in the original Tribunal in §§ 79, 325, 458, 467-500, 595, 631);
 - b) Through the administrative channel, after waiving the judicial channel, which in this case was barred by article 10(2) of the BIT to Spanish investors as soon as they took the irrevocable step of opting for international arbitration on 3 November 1997.
- vi. And the original Award concluded that the right to compensation recognised by the 1998 law (§ 621), and Chile's statements to the original Tribunal acknowledging the invalidity and

³¹⁰ Article 7 of the Chilean Constitution of 1980, « (...). No magistrate, individual or group of persons may claim for itself, not even under the pretext of extraordinary circumstances, powers or rights other than those that have been expressly conferred upon it by virtue of this Constitution or the laws. Any act in contravention of this article **is null** (...)» "Ninguna magistratura, ninguna persona ni grupo de personas pueden atribuirse, ni aun a pretexto de circunstancias extraordinarias, otra autoridad o derechos que los que expresamente se les hayan conferido en virtud de la Constitución o las leyes. Todo acto en contravención a este artículo **es nulo**"),

³¹¹ **Document C3f**, Art. 10 of the Spain-Chile BIT: "**Conflits entre l'une des Parties et des investisseurs de l'autre Partie.** 1. Toute controverse relative aux investissements, au sens du présent Traité, entre une Partie contractante et un investisseur de l'autre Partie contractante sera, dans la mesure du possible, résolue par des discussions amiables entre les deux parties à la controverse. 2. Si la controverse n'a pas pu être résolue au terme de six mois à partir du moment où elle aura été soulevée par l'une ou l'autre des Parties, elle sera soumise, au choix de l'investisseur: Soit aux juridictions nationales de la Partie contractante impliquée dans la controverse; Soit à un arbitrage international dans les conditions décrites au paragraphe. Une fois que l'investisseur aura soumis la controverse aux juridictions de la Partie contractante impliquée ou à l'arbitrage international, le choix de l'une ou l'autre de ces procédures sera définitive. 3. En cas de recours à l'arbitrage international la controverse pourra être portée devant l'un des organes d'arbitrage désignés ci-après au choix de l'investisseur: Au Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI) (...) 4. L'organe arbitral statuera sur la base des dispositions du présent Traité, du droit de la Partie contractante qui serait partie à la controverse -y compris les règles relatives aux conflits de lois- et des termes d'éventuels accords particuliers conclus en rapport avec l'investissement, de même que des principes du droit international en la matière. 5. Les sentences arbitrales seront définitives et contraignantes pour les parties à la controverse. 6. Les Parties contractantes s'abstiendront d'échanger, au travers des canaux diplomatiques, des arguments concernant l'arbitrage ou une action judiciaire déjà entamée jusqu'à ce que les procédures correspondantes aient été conclues; hormis quant-au fait que les Parties à la controverse n'auraient pas exécuté la décision de la Cour arbitrale ou l'arrêt du Tribunal ordinaire, selon les modalités d'exécution établies dans la décision ou l'arrêt."

illegality of the confiscation of the CPP SA shares (§§ 667-669 ; 677), confirmed the right to pecuniary compensation asserted by Mr. Pey Casado and the President Allende Foundation to the Arbitral Tribunal according to the BIT and to the ICSID Convention (Award, sections II to IV).

345. Yet as Chile had denied Mr. Pey Casado and the President Allende Foundation this right to compensation by a manoeuvre consisting of attributing the ownership of their investment in CPP SA and EPC Ltd:

"à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués (...)" [la Décision n° 43, du 28 avril 2000],³¹²

the original Award found the Respondent State liable:

"la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable" (§ 674).

346. So it is clear that points 1 to 3 of the dispositive part of the original Award recognise both a) the irrevocable “fork on the road” occurring in the disputes submitted in 2000 and 2002 to international arbitration, and b) the right to pecuniary compensation owing to the discrimination constituted by “Decision 43”, and to the stalling and/or dismissal of the claims filed as from 1995 (Award, § 674).
347. ***"L'invalidité"*** and ***"l'illégalité des confiscations sur les biens litigieux"*** that Chile recognised to the original Tribunal,³¹³ “Decision 43”, the discrimination and denial of justice committed in the case of the Goss presses by the 1st Civil Court of Santiago – these are the causal links in the damages caused by the breach of article 4 of the BIT under ICSID jurisdiction (point 2 of the original Award’s dispositive part) from which the right to compensation stems (point 3 of the dispositive part).
348. It follows that the question asked by the resubmission Tribunal on 15 April 2015 appears objectively as a logical preparation for the granting, *contra res judicata*, of Chile’s constant wish since the adoption of “Decision 43” in 2002, as witnessed by the original Award,³¹⁴ to shut off the investor-claimants’ access to international arbitration and to compensation.
349. Indeed, the resubmission Tribunal accompanies Chile in pointing out to Mr. Pey Casado and the President Allende Foundation that the channel that they are supposed to follow to assert their rights belongs to ***"la sphère domestique..."*** (§ 198), after attributing to them manifestly inaccurate statements such as having asserted:

"que (...) le paragraphe 78 de la Sentence Initiale montre simplement qu'à la connaissance du Tribunal Initial, la validité du Décret n° 165 n'avait jamais été mise en question devant les tribunaux chiliens" (§ 61),

or

³¹² Document C180, “Decision 43” of 28 April 2000, of the Ministry of National Assets

³¹³ Document C2, Original Award, §§ 667 and footnote 617

³¹⁴ Ibid., §§ 111, 377 and footnote to p. 271

that they "*soutiennent que (...) le déni de justice résultant de l'absence de décision dans l'affaire de la rotative Goss (...) a été consommé par la Sentence Initiale du 8 mai 2008*" (§ 66).³¹⁵

2.3.2.5 Are these mere material errors in the resubmission Award?

350. Were these truly material errors, as Mr. Pey Casado and the President Allende Foundation thought for a while when submitting their request for rectification on 25 October 2016? Certain events during the rectification proceeding confirmed that rather than errors these are manifestly untenable expressions of the Award's internal logic with a view to paving the way for the dispositive part:

351. § 220 of the resubmission Award provides the logical result of the question that the Tribunal asked on the closure of the 2015 hearings relating to "Decision 43", and also of § 198 in its previous version, by replacing the reference to the "invalidity" of "Decision 43" with the reference to the invalidity of Decree 165.

352. For § 220 starts by attributing to Mr. Pey Casado and the President Allende Foundation what they never said:

"les Demanderesses soutiennent que, si les autorités de la Défenderesse n'avaient pas insisté pour poursuivre l'adoption de la Décision n° 43 dans la procédure interne de restitution, selon laquelle une indemnisation au titre de la confiscation a été accordée à d'autres personnes alors que l'arbitrage initial était en cours, les Demanderesses auraient encore eu la possibilité de se prévaloir d'autres recours potentiels en vertu du droit chilien" [emphasis added];

And on the basis of this patent inaccuracy, § 220 reaches the conclusion aimed at:

"en d'autres termes, le préjudice que les Demanderesses ont subi du fait de la discrimination établie par le Tribunal Initial était la perte du droit à recouvrer, bien que tardivement, une compensation au titre de la confiscation, étant donné que le système juridique chilien n'aurait pas été en mesure d'accepter le concept d'une deuxième compensation pour un préjudice ayant déjà donné lieu à indemnisation" [emphasis added],

This last assertion is based on another statement inaccurately attributed to Mr. Pey Casado and the President Allende Foundation, in § 84 of the resubmission Award, namely:

"Les Demanderesses affirment en outre que, avec la Décision n° 43, la Défenderesse a satisfait son obligation au titre de la Loi n° 19.568, empêchant ainsi les Demanderesses d'être en mesure de demander une indemnisation, étant donné que la Défenderesse ne pouvait pas être forcée à indemniser deux fois au titre d'un même actif." [emphasis added]

353. Yet since at no point have Mr. Pey Casado and the President Allende Foundation said they would have been able to apply for compensation under Law 19,568 – and they could not even think of doing so as from 3 November 1997 according to article 10(2) of the BIT, the "fork on the road", which fact is *res judicata* in the original Award³¹⁶ – § 84 is the (imaginary) "factual"

³¹⁵ The inaccurate expressions attributed to the Claimants in §§ 61 and 66 of the RA were corrected at the Claimants' request in the rectification decision of 6 October 2017, **document C201**

³¹⁶ **Document C2**, Original Award, "79. Le 25 juin 1998, c'est-à-dire huit mois après le dépôt de la requête d'arbitrage dans la présente instance le 3 novembre 1997, est promulguée la loi n°19.568 relative à la restitution ou indemnisation pour biens confisqués et acquis par l'État. Les parties demanderesses vont cependant informer le Ministre des biens nationaux par lettre du 24 juin 1999 de leur décision de ne pas

basis and § 220 is the “legal” conclusion (*per se* arbitrary and contradictory) of what is the grounds, purport and aim of the uncorrected § 198, namely:

- a) The basis is the assertion wrongly attributed to Mr. Pey Casado and the President Allende Foundation that "*ce qui a constitué en fait (sinon dans la forme) la confiscation est intervenue avec la Décision n° 43*";³¹⁷
- b) The purport is the assertion wrongly attributed to the Claimants that "*si la prétendue nullité de la Décision n° 43 au regard du droit chilien avait effectivement une importance décisive, la conséquence en serait certainement que l'investissement est, en droit, resté la propriété de M. Pey Casado et/ou de la Fondation*";³¹⁸
- c) The aim sought in the Award is that "*le recours à ce titre pourrait relever de la sphère domestique*";³¹⁹
- d) **This in itself constitutes a denial of justice by the resubmission Tribunal in its Award**, for pursuant to article 10(2) of the BIT, any remedy will come irrevocably under international jurisdiction;
- e) This denial of justice is the *sine qua non* basis of points 2 to 8 of the dispositive part of the RA, i.e. the resubmission Tribunal's supposed lack of jurisdiction over matters arising between the parties since 2000 and 2002 and, consequently, lack of consideration of the evidence submitted by Mr. Pey Casado and the President Allende Foundation with a view to determining the amount of damages resulting from the breaches of article 4 of the BIT subsequent to 3 November 1997;
- f) The State was well aware of this denial of justice on asserting, in the rectification proceedings, that this § 198:
*"is one of the core paragraphs in the 2016 Award. If the Tribunal were to “erase” this paragraph, as Claimants request, it would in fact be modifying the Tribunal's intentions, analysis, reasoning, and conclusions"*³²⁰ (emphasis in the original).

354. The manifest inaccuracies appearing in §§ 61, 66 and 198 of the RA, i.e. the total inversion of facts that are *res judicata*, have an internal coherence:

- i) The situations/assertions (imaginary or non-existent) that these paragraphs describe are supposed to stem from Mr. Pey Casado and the President Allende Foundation or from the original Tribunal, and accordingly to be their sole responsibility;
- ii) On the basis of this manipulation, the Respondent contended that the Claimants:

"initiated a Rectification Proceeding with the goal of challenging Messrs. Berman and Veeder",³²¹ or "the abusive nature of Claimants' Request for Rectification", "Chile has been forced to address Claimants' charade of a request for rectification;"³²²

recourir à la loi n°19.568, du fait de la requête d'arbitrage introduite en 1997 et de la clause d'option irrévocable (fork-in-the-road) contenue dans l'API Espagne-Chili."

³¹⁷ Document C9f, Resubmission Award, § 198

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Document C263, Chile Observations on Rectification, 9 June 2017, § 6

³²¹ Chile's reply to the *ad hoc* Committee of 20 March 2018, p. 3, a charge reiterated in notices to the Committee on 19 January 2018, p. 3, or to the resubmission Tribunal on 9 June 2017 (Reply to the request for rectification, §§ 1: "*a procedurally improper request*" (document C263)

³²² Document C263, Chile Observations on Rectification, 9 June 2017, §§ 20, 23

355. Point 2 of the resubmission Award's dispositive part is a mere transposition of what Chile requested, contrary to *res judicata* and all the evidence, namely for the purport and aim of § 704 of the original Award – its answer just to the "*demande relative au dommage moral*" – to be extended to all the other requests for which the original Award granted pecuniary compensation (see the paragraph of Chapter VIII and relating to "*modalités de calcul du montant des dommages-intérêts*" which the *ad hoc* Committee explicitly said it did not annul).³²³ This is apparent in the original version of the dispositive part of the resubmission Award in the following table (emphasis added):

Chile's proposal (Counter-Memorial of 27-10-2014)	Resubmission Award (dispositive part, para. 2)
"4. The Original Tribunal Did Not Order Any Additional Payment For the Denial of Justice"³²⁴ § 132(...) Although the Award declined Claimants any monetary relief for the denial of justice relating to the delay in the Goss Machine Case, it did grant satisfaction to Claimants: "³²⁵[L]e prononcé de la presente sentence, notamment par sa reconnaissance des droits des demandereses et du déni de justice dont elles furent victimes, constitue en soi une <u>satisfaction</u> morale substantielle et suffisante."³²⁶	" Que, comme cela a déjà été indiqué par le Tribunal Initial, sa reconnaissance formelle des droits des Demanderesses et du déni de justice dont elles ont été victimes constitue en soi une forme de <u>satisfaction</u> au regard du droit international au titre de la violation par la Défenderesse de l'article 4 du TBI."³⁸⁷ 387 Pièce R-27, original Award, 8 May 2008, para. 704 "... le Tribunal arbitral estime que le prononcé de la présente sentence, notamment par sa reconnaissance des droits des demandereses et du déni de justice dont elles furent victimes, constitue en soi une satisfaction morale substantielle et suffisante ".

356. After accepting all the rectifications requested by Mr. Pey Casado and the President Allende Foundation, the decision of 6 October 2017 imposed on them all the costs of the rectification proceeding.
357. In §§ 220 and 221 the resubmission Tribunal attributes arguments to the Claimants that they did not make, namely:

§ 220 : "*Que le retard excessif de la procédure relative à la rotative Goss devant le Tribunal de Santiago a eu pour conséquence d'empêcher les Demanderesses de démontrer au Tribunal Initial que le Décret confisquant l'investissement dans El Clarín était entaché d'une nullité absolue dès l'origine (ex tunc). Si les Demanderesses avaient été en mesure de*

³²³ Document C20, Decision of the *ad hoc* Committee of 18 December 2012, § 271

³²⁴ Document C44, Counter-Memorial, p. 69

³²⁵ *Id.*, Counter-Memorial, § 132

³²⁶ "Award, § 704"

*le faire, poursuivent-elles, **elles auraient pu convaincre le Tribunal Initial** que la confiscation n'était pas en réalité un fait consommé dans les années 1970, et **le Tribunal Initial aurait en conséquence décidé** qu'il y avait une confiscation continue s'étendant au-delà de l'entrée en vigueur du TBI, au titre de laquelle les Demanderesses auraient effectivement eu droit à compensation en vertu du TBI. [emphasis added]*

358. This shows at best a misunderstanding by the resubmission Tribunal. At no point did Mr. Pey Casado and the President Allende Foundation claim to have guessed what the original Award might have done "si...", now that "le système juridique chilien n'aurait pas été en mesure d'accepter ..." anything at all. Mr Pey and the FPA's arguments are quite different (emphasis added):

*"On remarquera dans ce paragraphe [603 of the original Award³²⁷] la démarche suivie par le Tribunal arbitral : la validité du Décret n° 165 était déterminée par sa mise en cause, **ou non**, par une décision des juridictions internes portée à la connaissance du Tribunal arbitral. L'objet même du déni de justice pour l'Etat du Chili a consisté à maintenir le statut du Décret dans cette **indétermination**, en retenant la résolution des juridictions internes à cet égard jusqu'après ... le prononcé de la Sentence arbitrale.*

*Or, de ce fait, le cheminement du Tribunal arbitral initial, qui dépend de cette **option procédurale légitime**, est dépourvu de portée sur la démarche juridique du nouveau Tribunal [de resoumission] dès le moment que cette indétermination n'existe plus.*

"S'agissant plus particulièrement du déni de justice, les Demanderesses soutiennent que les actes de l'État hôte les ont privées de la preuve devant déterminer si le Décret n° 165 était entaché de la nullité de droit public, ce qui a conduit le Tribunal arbitral à reconnaître –en l'absence d'une décision de la 1ère Chambre Civile de Santiago- un titre de propriété à l'Etat sur l'investissement dès 1975.

*Ainsi, le préjudice des Demanderesses résultant du déni de justice découle de l'impossibilité d'obtenir l'indemnisation de ces saisies par le biais de l'API de la part d'un Tribunal **contraint de statuer à cet égard** -en conséquence directe du déni de justice- dans l'ignorance du statut du Décret n°165 dans le système juridique chilien." ³²⁸*

359. These questions that the resubmission Tribunal asked the parties for the first time on the night before the closure of the hearings of April 2015 reopened points that the original Award and the *ad hoc* Committee had rejected when they were raised by the Respondent. These points were thus *res judicata*.
360. Mr. Pey Casado and the President Allende Foundation had to make an oral reply to fundamental questions, which limited their means of defence, whereas the resubmission Tribunal had not told them at any time – either before or during the hearings – of the question that the Claimants had

³²⁷ **Document C2**, Original Award, § 603: "A la connaissance du Tribunal, la validité du Décret n°165 n'a pas été remise en cause par les juridictions internes et ce décret fait toujours partie de l'ordre juridique interne chilien".

³²⁸ **Document C8**, Memorial of 27 June 2014 for resubmission of disputes arising in 2000 and 2002, §§ 13, 14, 24 and 304, referred to but not reproduced by § 220 and footnote 96 of the resubmission Award.

the surprise to read in § 216 of the resubmission Award, overturning what the original Award had determined with *res judicata* effect regarding jurisdiction, namely:

§ 216 : "le champ de compétence de ce Tribunal (...) est limité (...) au 'différend' qui avait été initialement soumis à l'arbitrage, différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses [le 3 novembre 1997]. Les questions qui ont surgi entre les Parties après cette date – et a fortiori les questions découlant d'une conduite postérieure à la Sentence – ne peuvent pas, même avec un gros effort d'imagination, entrer dans le champ de la procédure de nouvel examen" (§ 216). (emphasis added)

361. The reopening by the resubmission Tribunal, on the closure of the hearings, of matters that are *res judicata* in the original Award, along with the fact of not having told Mr. Pey Casado and the President Allende Foundation before the notification of the Award that it was excluding from its jurisdiction, *contra res judicata* and against all logic, the issues arising between the parties subsequent to 3 November 1997, and for which the Tribunal was tasked with assessing compensation, constitute unmistakable signs of excess of powers, apparent bias and failure to state reasons, infringing points (b), (d) and (e) of Article 52(1) of the Convention.
362. The points of the RA quoted above reopening the *res judicata* of the OA, and/or infringing the OA, are the grounds for points 2 to 7 of the RA's dispositive part (§ 256), and so the latter should be annulled.

2.3.3 The resubmission Tribunal manifestly exceeded its powers by disregarding the *res judicata* of the original Award

363. In their Request of 18 June 2013 submitting the disputes arising in 2000 and 2002 to the consideration of a new Tribunal, Mr. Pey Casado and the President Allende Foundation had moreover noted the *res judicata* of the original Award and drawn the Tribunal's attention to the limited nature of its task:

"En déclarant l'autorité de la chose jugée des paragraphes 1 à 3 et 5 à 8 du dispositif de la Sentence ainsi que du corps du texte de la Sentence à l'exception de la Section VIII, le Comité ad hoc a confirmé la violation par la République du Chili de son obligation de faire bénéficier les parties Demanderesses d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice. Le Comité a également confirmé la décision du Tribunal arbitral selon laquelle les parties Demanderesses ont droit à compensation" (emphasis added) ;³²⁹

"En conséquence, le nouveau tribunal arbitral qui sera constitué devra se prononcer non seulement sur le quantum de la réparation mais encore sur le standard de réparation qu'il conviendra d'appliquer afin de réparer le dommage subi par les parties Demanderesses" (emphasis added);³³⁰

"A la lumière des développements précédents, le différend porté devant le nouveau tribunal arbitral concerne la détermination de la réparation des préjudices résultant des violations

³²⁹ Document C83, Resubmission request of 18 June 2013, § 9

³³⁰ Ibid., Resubmission request of 18 June 2013, § 59

par la République du Chili de ses obligations internationales de traitement juste et équitable (en ce inclus le déni de justice) et de non-discrimination" (emphasis added).³³¹

364. Likewise, in their Memorial to the resubmission Tribunal Mr. Pey Casado and the President Allende Foundation recalled the points of fact and of law settled with *res judicata* effect by the original Award, so as to make the Tribunal's jurisdiction clear.

365. Mr. Pey Casado and the President Allende Foundation first recalled the nature of the dispute submitted to the Tribunal:

*"Le nouvel examen de cette affaire par un nouveau Tribunal arbitral a pour objet de déterminer le montant de la réparation due par la République du Chili aux Demanderesses en raison de la violation de l'article 4 de l'API relatif à l'obligation de traitement juste et équitable des investisseurs par l'Etat d'accueil"*³³².

366. Then they recalled the effect of the partial annulment of the original Award:

*"Il en résulte que le présent Tribunal ne pourra se prononcer sur aucun des points non affectés par l'annulation partielle, en particulier sur la compétence du Tribunal pour connaître du litige opposant les Demanderesses à la République du Chili ni sur les violations par la République du Chili de ses obligations au titre de l'API constatées par le Tribunal initial. En outre, le présent Tribunal devra tenir compte de la décision du Tribunal arbitral initial selon laquelle les Demanderesses "ont droit à compensation""*³³³.

367. Finally they recalled the relevant facts and decisions in the original Award with *res judicata* effect, and especially (i) the Tribunal's competence and (ii) the acts in breach of the Spain-Chile BIT since 2000 and 2002 identified in the original Award.

368. The Tribunal's role was thus the following: in view of the breaches of the Spain-Chile BIT after 3 November 1997, and of the right to compensation recognised for the Claimants, *res judicata* in the original Award, it was to determine the amount of compensation to be awarded to the Claimants.

369. This role moreover appeared clear enough to practitioners of investment arbitration for Prof. Schreuer to write, following the decision of the first *ad hoc* Committee in the Pey Casado case, that:

*"In the resubmitted proceedings, initiated in June 2013, the Tribunal will be restricted to determining the amount of damages flowing from the first Tribunal's finding of liability which is res judicata"*³³⁴.

370. Yet the Tribunal repeatedly challenged the original Award's *res judicata*, constituting a manifest excess of powers.

371. By reason both of the flagrant nature of these breaches and of their especially serious impact on the decision reached by the resubmission Tribunal, that Tribunal thereby exceeded its powers for the purposes of Article 52(1)(b), justifying the annulment of the resubmission Award.

³³¹ **Ibid.**, Resubmission request of 18 June 2013, § 60

³³² **Document C8**, Memorial of 27 June 2014, § 55

³³³ **Ibid.**, Memorial of 27 June 2014, § 59

³³⁴ **Document CL326**, Schreuer (C.), "Victor Pey Casado and President Allende Foundation v Republic of Chile, Barely an Annulment", ICSID Review, 2014, No. 2, p. 327

372. Thus the resubmission Tribunal:

- Unduly reopened the matter of the pecuniary nature of the reparation to be granted to Mr. Pey Casado and the President Allende Foundation, a question already settled in the original Award (2.3.4.2);
- Questioned the very reality of the harm sustained by the Claimants by accepting the Respondent's arguments which had however been rejected both by the original Tribunal and by the first *ad hoc* Committee (2.3.4.3);
- Unduly denied its jurisdiction as regards the discrimination and denial of justice recognised by the original Award (2.3.4.4).

373. Before detailing these specific breaches, the Claimants will make some general criticisms of the method followed by resubmission Tribunal in its interpretation of the original Award (2.3.4.1).

2.3.3.1 The interpretation of the original Award by the resubmission Award was unjustifiable

374. The Tribunal could not fail to be aware of the restricted nature of its task, given the *res judicata* of the unannulled parts of the original Award.

375. The Claimants do not contest that the resubmission Tribunal had necessarily to consider the unannulled parts of the original Award, binding for it, and that for these purposes it had some power of interpretation, essentially as a result of the need to understand the decision in order to apply it, as with any arbitral tribunal.

376. This interpretative power cannot, though, run contrary to the *res judicata* of the unannulled portions of the original Award, or remove the effect of established facts, conclusions and decisions in the original Award that are *res judicata*.

377. The limits of the interpretative power of an Arbitral Tribunal have been discussed especially in the framework of cases involving the interpretation of rulings or decisions of international courts by the court or tribunal that previously rendered them.

378. In such situations, it is agreed that interpretation may not to be liable to call into question what the tribunal has judged finally and definitively.

379. Thus in the *Factory at Chorzow* case, the court decided that:

"L'interprétation n'ajoute rien à la chose jugée et ne peut avoir effet obligatoire que dans les limites de la décision de l'arrêt interprété" (emphasis added).³³⁵

380. Similarly, in the *Case concerning the delimitation of continental shelf*, the Permanent Court of Arbitration stated that:

"[I]l convient de tenir compte de la nature et des limites du droit de demander à un tribunal une interprétation de sa décision. L' "interprétation" est un processus purement auxiliaire qui peut servir à expliquer, mais non à modifier, ce que le tribunal a déjà décidé avec force obligatoire et qui est chose jugée" (emphasis added).³³⁶

³³⁵ **Document C79**, Interpretation of orders Nos 7 et 8 (*Factory at Chorzow*), 16 December 1927, Reports of judgments of the PCIJ, *Factory at Chorzow*, Series A - No 13, p. 21

³³⁶ **Document C80**, ICJ, *Case concerning the delimitation of continental shelf*, Decision of 14 March 1978, § 29;

381. One author also has remarked, with regard to proceedings in which a Tribunal interprets its award, that:

*"Le Tribunal qui interprète sa propre décision ne fait pas œuvre juridictionnelle: il lève un mot, corrige la forme, mais sans jamais toucher au fond, sans jamais porter atteinte à la chose jugée irrémédiablement acquise" (emphasis added).*³³⁷

382. If this is so in proceedings for interpretation strictly speaking, the same is true *a fortiori* where a Tribunal has to deal with the *res judicata* of a previous arbitral award in a procedure for re-examination after that award's partial annulment.
383. The second *ad hoc* Committee in *Amco v. Indonesia* was notably faced with this question.
384. The particulars of this case are worth detailing.
385. In *Amco v. Indonesia* the first *ad hoc* Committee annulled the original award "*as a whole for the reasons and with the qualifications set out above*".³³⁸ But it omitted to decide which parts had *res judicata* effect, unlike the first *ad hoc* Committee in the *Pey Casado* case.
386. The second Arbitral Tribunal, required to rule on its jurisdiction, thus had to interpret the original award and the decision of the *ad hoc* Committee in order to determine which parts of the original Award were *res judicata* in line with the reservations expressed in the decision of the first *ad hoc* Committee.
387. Both parties filed applications for annulment of the second award, arguing that the resubmission Tribunal had, in interpreting the original Award and the decision of the first *ad hoc* Committee, disregarded the *res judicata* of those decisions.
388. The Tribunal decided, when ruling on the application for annulment filed by Amco, that:

*"If a new Tribunal reconsiders an issue not annulled, it exceeds its power. In the present case the first committee had not taken any explicit decision on the controversial issue of the nature of the prejudice caused by the army and police actions. The second tribunal therefore had to interpret the Committee's decision with regard to this issue. Its interpretation could be considered as a manifest excess of powers only if it were manifestly outside any bona fide interpretation of the first committee's decision and therefore obviously untenable" (emphasis added)*³³⁹.

389. The second *ad hoc* Committee in the *Amco* case thus confirmed the reasonable nature of the interpretation made by the second Arbitral Tribunal.
390. The circumstances of *Amco v. Indonesia* are different from our case in so far as the scope of annulment was uncertain, for the original award had been totally annulled, albeit with qualifications, and the *ad hoc* Committee had not identified which parts of the award had *res judicata* effect.

see also **Document CL327**, *Request for interpretation of the judgment of 15 June 1952 in the Preah Vihear Temple Case* (Cambodia v. Thailand), Judgment of 11 November 2013, § 55.

³³⁷ R. Perrot, "L'interprétation des sentences arbitrales", *Revue de l'arbitrage*, 1968, pp. 7 et seq.

³³⁸ **Document C196**, Dispositive part, p. 542

³³⁹ **Document CL308**, *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 3 December 1992, § 8.07

391. As the Tribunal noted in the *Fraport* case:

*“the qualified dispositif in Amco I, Annulment Decision, presented the Amco II tribunal with the problem of interpreting its formulation by identifying which parts of the first decision had not been annulled and were therefore binding on the parties as res judicata, and which parts could be re-litigated after being nullified by the ad hoc Committee.”*³⁴⁰

392. In the *Fraport* case the Tribunal nonetheless noted that as, unlike in the *Amco* case, the dispositive part of the *ad hoc* Committee’s decision was explicit as to the extent of the annulment granted, the interpretation of the original award by a resubmission Tribunal was liable come up against that award’s *res judicata*:

*“In the present case, if the Tribunal, in the absence of any “qualifications” in the dispositif of the Award, attempts to determine which issues are res judicata and which issues may be re-litigated, it would likely expose its own decision to a request for annulment, as occurred in Amco II, thus defeating the objective of saving costs and time”*³⁴¹.

393. As Mr. Pey Casado and the President Allende Foundation recalled above, the decision of the first *ad hoc* Committee unequivocally delimits the scope of the annulment made, and states that the unannulled parts of the original Award have *res judicata* effect.³⁴²

394. Given the clarity of the first *ad hoc* Committee’s decision, the Tribunal’s interpretative discretion was restricted, and the Tribunal could not certainly not interpret the unannulled portions of the original Award contrary to that Award’s *res judicata*.

395. An interpretation contrary to the *res judicata* of the original Award, as clearly delimited in the dispositive part of the first *ad hoc* Committee’s decision, would be untenable and unreasonable, and would expose the Tribunal to the complaint of manifest excess of powers.

396. But as we shall show below, it was just such an interpretation that was made by the resubmission Tribunal at several points in its Award, justifying the annulment of that Award.

2.3.3.2 The Tribunal rejudged the matter of the pecuniary nature of the reparation to be granted to Mr. Pey Casado and the President Allende Foundation, disregarding the *res judicata* of the original Award

397. In the original Award the original Tribunal clearly determined the pecuniary nature of the reparation due to Mr. Pey Casado and the President Allende Foundation following the Respondent’s breach of article 4 of the Spain-Chile BIT: Mr. Pey Casado and the President Allende Foundation are entitled to compensation, understood to be pecuniary compensation (**a**).

398. The resubmission Tribunal, disregarding the *res judicata* of this conclusion in the original Award, reopened a debate on the nature of the reparation to be granted to the Claimants. This led the resubmission Tribunal to ultimately substitute its own condition for that of the original Award, and to deem that Mr. Pey Casado and the President Allende Foundation had received satisfaction by the mere recognition of breaches of the Spain-Chile BIT by the Respondent (**b**). This conclusion is further contradicted by the RA’s own remark in § 244 *in fine*, that Chile is assumed not to have given satisfaction for point 2 of the original Award’s dispositive part.

³⁴⁰ **Document CL329**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, Procedural Order No. 1, 17 May 2012, § 52

³⁴¹ **Ibid.**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, Procedural Order No. 1, 17 May 2012, § 56

³⁴² *Supra*, § 12,13, 24

399. This conclusion, trampling on the *res judicata* of the original Award, constitutes a manifest excess of powers for the purposes of Article 52(1)(b) (c).

(a) The nature of the reparation to which Mr. Pey Casado and the President Allende Foundation are entitled was determined with *res judicata* effect by the original Award

400. A mere reading of the original Award shows that the original Tribunal settled the matter of the nature of compensation to which Mr. Pey Casado and the President Allende Foundation are entitled. This is understood to be financial compensation, of a pecuniary nature (i). There is no disagreement between the parties on this point (ii).

(i) The “compensation” referred to by the original Award means financial compensation, of a pecuniary nature

401. We have already recalled that the original Tribunal, in point 3 of its Award’s dispositive part, stated that “*les Demandereses ont droit à compensation*”.³⁴³

402. This decision was not annulled by the first *ad hoc* Committee. Quite the reverse: in point 4 of the dispositive part of its decision, the Committee expressly confirmed that point 3 of the original Award’s dispositive part, and the corresponding portions of the body of the Award, had *res judicata* effect.³⁴⁴

403. The term “compensation” cannot be understood other than as a reference to financial compensation, of a pecuniary nature, given the terms, the purport and the purpose of the Spain-Chile BIT, the requests filed by Mr. Pey Casado and the President Allende Foundation to the original Tribunal and the reasoning and context of the original Award’s decisions.³⁴⁵

404. It worth stressing that, as from the Memorial resubmitting the disputes arising in 2000 and 2002, Mr. Pey Casado and the President Allende Foundation asked the Arbitral Tribunal to order financial compensation for the harm sustained as a result of the Respondent’s breach of article 4 of the Spain-Chile BIT.³⁴⁶

405. Later, after the International Law Commission (ILC) adopted its Draft Articles on Responsibility of States for Internationally Wrongful Acts in 2001, Mr. Pey Casado and the President Allende Foundation referred to these Articles in the original³⁴⁷ and resubmission proceedings.³⁴⁸

406. Article 31 of the Draft Articles provides the principle of full reparation for injury caused by an internationally wrongful act by a State:

“1. The responsible State is under the obligation to make full reparation for the injury caused by the internationally wrongful act.”

³⁴³ Document C2, Original Award

³⁴⁴ See document C20, Decision of the first *ad hoc* Committee.

³⁴⁵ See *supra*, “2nd question of *res judicata* reopened: what is the nature of the compensation due by Chile to the Claimants?”

³⁴⁶ Document C8, Claimants’ Memorial for the resubmission Tribunal

³⁴⁷ Document C272, Claimants’ Rejoinder to the original Tribunal 3 February 2003, p. 70 et seq.

³⁴⁸ Document C40, Rejoinder of 9 January 2015, §§ 376, 383, 408, 480-482, 495; Document C8, Resubmission Memorial of 27 June 2014, §§ 142, 169-171, 181, 182; Application for annulment of 10 November 2017, §§ 192-196, 209, 210, 231(6), 232, 239

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."³⁴⁹

407. Article 34 indicates that there are three forms of reparation in this context. The French text of the Articles speaks of *restitution*, *indemnisation*, and *satisfaction*.³⁵⁰ The English text uses the term "*compensation*" in place of "*indemnisation*".³⁵¹

408. Article 36 defines the scope of the terms "compensation" (respectively "*indemnisation*" in the French version), and highlights the fact that there is to be financial assessment of the damage caused:

"1. The State responsible for the internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

*2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."*³⁵²

409. Mr. Pey Casado and the President Allende Foundation already explained in their application for annulment that every time it used the terms "*compensation*" or "*indemnisation*" in the body of the original Award, the original Tribunal give them a financial, i.e. a pecuniary, meaning.³⁵³

410. To see this it suffices to read, consecutively, all the passages in which the term "*compensation*" is used in the unannulled parts of the original Award, none of which concerns anything other than pecuniary compensation:

- In § 29: "*Le 4 novembre 2002, les demanderesses ont déposé une demande complémentaire relative à la compensation des dommages découlant de la saisie par les autorités chiliennes des presses Goss, confisquées par le Décret Suprême n°165 du 10 février 1975, que les parties demanderesses soumettent au Tribunal arbitral en conformité notamment de la clause de la nation la plus favorisée de l'API entre l'Espagne et le Chili, du 2 octobre 1991, qui lui permet d'invoquer également l'API conclu entre la Suisse et la République du Chili le 24 septembre 1999*"³⁵⁴.

³⁴⁹ Article 31 provides the principle of full reparation of injury caused by an internationally wrongful act by a State. In the English version: "*1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. / 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State*".

³⁵⁰ Article 34: "*La réparation intégrale du préjudice cause par le fait internationalement illicite prend la forme de restitution, d'indemnisation et de satisfaction, séparément ou conjointement, conformément aux dispositions du présent chapitre*"

³⁵¹ Article 34: "*Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter*".

³⁵² Article 36. In the English text: "*1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. / 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established*".

³⁵³ Application for annulment of 10 November 2017, §§ 189 et seq.

³⁵⁴ **Document C2**, Original Award, § 29

- In § 78 : *"En 1995 les demanderesses saisirent le Président de la République (le 6 septembre 1995) ainsi que la Première Chambre civile de Santiago (le 4 octobre 1995) d'une demande en restitution ou en compensation pour la perte de la rotative Goss"*³⁵⁵.
- In § 450 : *"Le Tribunal s'est déjà, selon elle [La Défenderesse], prononcé sur la question pour conclure que "la Décision n°43 ne se référait qu'à des tiers et non aux Demanderesses, et qu'en tout cas elle n'avait causé aucun préjudice aux Demanderesses compte tenu du fait qu'elle avait simplement donné un avis sur la compensation à des tiers, sans prétendre se prononcer sur un quelconque droit de propriété que pourraient avoir les Demanderesses"*³⁵⁶.
- In § 648 : *"Comme le Tribunal arbitral l'a rappelé ci-dessus, pour la partie défenderesse, "la Décision N°43 ne se référait qu'à des tiers et non aux Demanderesses, et qu'en tout cas elle n'avait causé aucun préjudice aux Demanderesses compte tenu du fait qu'elle avait simplement donné un avis sur la compensation à des tiers, sans prétendre se prononcer sur un quelconque droit de propriété que pourraient avoir les Demanderesses"*³⁵⁷.
- In § 661 : *"De même, la Commission des Réclamations Anglo-Mexicaine a considéré que le délai de neuf ans écoulé depuis le dépôt de la demande de compensation devant une juridiction étatique devait être qualifié de déni de justice mettant en cause la responsabilité de l'Etat sur le plan international"*³⁵⁸.
- In § 662 : *"La Cour européenne des droits de l'homme s'est également prononcée dans le même sens, en estimant que les sept ans que les juridictions étatiques ont mis pour examiner une demande en compensation à la suite d'une expropriation étaient bien supérieurs à un délai raisonnable, ce qui constitue une violation de l'article 6-1 of the Convention européenne des droits de l'homme qui compte, au rang de ces droits fondamentaux, le droit d'être entendu "dans un délai raisonnable"*³⁵⁹.
- And finally in § 674: *"Dans le cas d'espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués, en même temps qu'elle paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable."*³⁶⁰

411. A reading of Chapitre VIII (Damages) of the original Award confirms the original Tribunal's intention:

- In § 685 : *"Le Tribunal arbitral estime superflu en l'espèce d'entrer dans une discussion de détail de l'argumentation soutenue par les demanderesses quant à l'évaluation des divers préjudices qu'elles allèguent avoir subis, et cela à la fois pour des raisons de fait et de preuve et en raison du comportement de la défenderesse. Il rappellera cependant que des autorités chiliennes avaient reconnu que M. Pey Casado était propriétaire des titres confisqués et que la défenderesse n'ignorait pas la revendication par M. Pey Casado d'une compensation, au*

³⁵⁵ **Ibid.**, Original Award, § 78

³⁵⁶ **Ibid.**, Original Award, § 450

³⁵⁷ **Ibid.**, § 648

³⁵⁸ **Ibid.**, § 661

³⁵⁹ **Ibid.**, § 662

³⁶⁰ **Ibid.**, § 674

moment où elle a décidé d'indemniser d'autres que lui - un acte constituant de l'avis du Tribunal une claire violation du droit à un "traitement juste et équitable" prévu par l'API"³⁶¹.

- In § 715 : *"De même, dans l'affaire Tecnicas Medioambientales Tecmed S.A. v. Mexique, le Tribunal arbitral, citant plusieurs sentences CIRDI dans la même sens, a exprimé l'opinion que "application of compound interest is justified as part of the integral compensation owed to the Claimant as a result of the loss of its investment""*³⁶².

412. The same applies to the use made by the original Award of the terms "indemniser" or "indemnisation".

413. Thus in the unannulled parts of the original Award:

- In § 77: *"Sur le terrain des démarches tendant à une indemnisation, il y a lieu de noter que le 1er février 1995, M. Pey Casado a saisi la Huitième Chambre criminelle de Santiago d'une demande en restitution de la société CPP S.A. et des documents y-relatifs, demande qui fit l'objet d'une décision favorable le 29 mai 1995, "compte tenu de la valeur probante des antécédents "*³⁶³
- In § 79: *"Le 20 novembre 1995, le ministère des biens nationaux informe M. Pey Casado que la loi d'indemnisation qui permettra de traiter les situations comparables à celle de M. Pey Casado n'a pas encore été promulguée.56 Le 25 juin 1998, c'est-à-dire huit mois après le dépôt de la requête d'arbitrage dans la présente instance le 3 novembre 1997, est promulguée la loi n°19.568 relative à la restitution ou indemnisation pour biens confisqués et acquis par l'Etat. Les parties demanderesses vont cependant informer le Ministre des biens nationaux par lettre du 24 juin 1999 de leur décision de ne pas recourir à la loi n°19.568, du fait de la requête d'arbitrage introduite en 1997 et de la clause d'option irrévocable (fork-in-the-road) contenue dans l'API Espagne-Chili."*³⁶⁴
- In § 448: *"Ayant pris connaissance le 3 avril 2000 de la Décision n°43 du Ministère des biens nationaux, décision qui accorde une indemnisation à des personnes autres que les parties demanderesses pour la confiscation des biens des sociétés CPP S.A. et EPC Ltda, les demanderesses ont prétendu immédiatement que "la résolution du 28 avril 2000 constitue en soi un nouvel acte de dépossession ou de dénégation de la protection de l'investissement des demandeurs. Et que donc la question de savoir si c'est avant ou après l'entrée en vigueur du traité, que cette controverse a jailli, [...] paraît aujourd'hui un peu hors de propos, puisque le 28 avril dernier, un nouvel acte de cet ordre là a été réalisé ". "*³⁶⁵
- In § 454: *"Selon les demanderesses, un différend résultant du déni de justice allégué par les demanderesses "est né après l'entrée en vigueur de l'API Espagne –Chili "391. Les demanderesses font en effet valoir que la procédure engagée en 1995 devant la Première Chambre civile de Santiago pour la restitution de la rotative Goss ou l'indemnisation de sa valeur de remplacement n'a donné lieu à aucune décision sur le fond en sept ans392. En outre, dans le cas où la Première Chambre civile de Santiago rendrait une décision au fond dans cette affaire, l'adoption de la Décision n°43 priverait d'effet le jugement de la juridiction*

³⁶¹ *Ibid.*, § 685

³⁶² *Ibid.*, § 715

³⁶³ *Ibid.*, § 77.

³⁶⁴ *Ibid.*, § 79.

³⁶⁵ *Ibid.*, § 448.

chilienne dans la mesure où les bénéficiaires de la Décision n°43 ont déjà été indemnisés pour la rotative en question."³⁶⁶

- In § 455: "Les demanderesses soulignent également que leurs recours auprès du pouvoir exécutif et du pouvoir judiciaire visant à mettre en cause la compatibilité de la Décision n°43 avec la procédure judiciaire introduite en 1995 ont tous été rejetés.³⁹⁴ Elles indiquent avoir attiré en vain l'attention du Contralor general sur l'incompatibilité de la Décision n°43 avec l'action intentée devant la Première Chambre civile de Santiago.³⁹⁵ Leur demande de rétractation des décrets de paiement de l'indemnisation accordée par la Décision n°43, déposée le 29 juillet 2002, aurait également été rejetée in limine litis le 14 octobre 2002.³⁹⁶ Par ailleurs, la demande de mesures conservatoires des demanderesses déposée auprès de la Première Chambre civile de Santiago à l'encontre de la Décision n°43 a été rejetée le 2 octobre 2001³⁹⁷ et la requête déposée par les demanderesses auprès de la Cour suprême le 5 juin 2002 arguant d'un conflit de compétence entre le pouvoir exécutif et le pouvoir judiciaire a été déclarée irrecevable³⁹⁸. Enfin, les parties demanderesses indiquent que leur recours en protection constitutionnelle pour violation de leur droit de propriété sur la rotative Goss, porté devant la Cour d'appel de Santiago, a lui aussi été déclaré irrecevable et sans fondement par cette dernière le 6 août 2002.³⁹⁹"³⁶⁷
- In § 462: "Après avoir informé le Contralor de l'incompatibilité de la Décision n°43 avec l'action portée devant la Première Chambre civile de Santiago depuis le 4 octobre 1995,⁴¹¹ les parties demanderesses lui ont reproché d'avoir entériné les 22 et 23 juillet 2002 le paiement d'une indemnisation au profit des bénéficiaires de la Décision n°43, cette indemnisation comprenant notamment le préjudice subi du fait de la confiscation de la rotative Goss."³⁶⁸
- In § 490: "Dans la demande déposée devant la Première Chambre civile de Santiago le 4 octobre 1995, M. Pey Casado a fait valoir que la rotative Goss avait été illicitement saisie par l'Etat chilien en 1973 et, sur le fondement des dispositions du code civil chilien, demande que lui soit restituée la rotative en question. Dans le cas où la restitution serait impossible, M. Pey Casado demande une indemnisation correspondant à la valeur de la rotative plus les intérêts et, le cas échéant, une indemnisation pour les éventuels dommages qu'aurait subis la rotative"³⁶⁹
- In § 496: "En l'espèce, bien que les parties soient les mêmes, l'objet de la demande complémentaire, qui consiste à demander une indemnisation pour le préjudice subi du fait d'un déni de justice, n'est de toute évidence pas identique à celui de l'action portée devant les tribunaux chiliens pour obtenir la restitution de la rotative Goss. Le fondement est également différent dans chaque affaire: la demande relative au déni de justice est fondée sur l'API ; l'action intentée devant le juge chilien est fondée sur le droit chilien et, plus particulièrement, sur les dispositions du code civil relatives à la restitution."³⁷⁰
- In § 497: "Le Tribunal conclut que l'option irrévocable prévue à l'article 10(2) de l'API n'avait donc pas été exercée lorsque les demanderesses ont déposé devant le Tribunal arbitral leur demande complémentaire relative au déni de justice."³⁷¹

³⁶⁶ **Ibid.**, § 454.

³⁶⁷ **Id.**, § 455.

³⁶⁸ **Id.**, § 462.

³⁶⁹ **Id.**, § 490.

³⁷⁰ **Ibid.**, § 496.

³⁷¹ **Ibid.**, § 497.

- In § 508: *"Selon la défenderesse, en 1995 et 1996, les activités de la Fondation auraient été consacrées essentiellement à suivre les procédures judiciaires et/ou politiques en cours au Chili, et notamment devant le Parlement chilien, en ce qui concerne la reconnaissance des droits patrimoniaux cédés à la Fondation, ainsi qu'à agir juridiquement en vue d'obtenir du pouvoir judiciaire chilien une indemnisation pour les dommages subis dès 1973."*³⁷²
- In § 594: *"M. Pey Casado ayant été contraint de quitter le Chili et n'ayant pu y retourner qu'en 1989⁵⁴⁶, il ne formule sa première demande de restitution des biens confisqués qu'en septembre 1995.⁵⁴⁷ Le 4 octobre 1995, il se porte par ailleurs devant les tribunaux chiliens pour obtenir la restitution de la rotative Goss.⁵⁴⁸ Le 20 novembre 1995, le ministère des biens nationaux informe M. Pey Casado que la loi d'indemnisation qui permettra de traiter les situations comparables à celle de M. Pey Casado n'a pas encore été promulguée.⁵⁴⁹ Le 10 janvier 1996, M. Pey Casado réitère sa demande de restitution auprès du Président de la République, sans obtenir de réponse.⁵⁵⁰ Le 3 novembre 1997, les demanderesses déposent leur requête d'arbitrage auprès du CIRDI"*³⁷³
- In § 595: *"Le 25 juin 1998 est promulguée la loi n°19.568 relative à la restitution ou indemnisation pour biens confisqués et acquis par l'Etat à travers les décrets-lois n°12, 77 et 133 de 1973, n°1697 de 1977 et n°2436 de 1978. Les parties demanderesses vont cependant informer le Ministre des biens nationaux par lettre du 24 juin 1999 de leur décision de ne pas recourir à la loi n°19.568, du fait de la requête d'arbitrage introduite en 1997 et de la clause d'option irrévocable (fork-in-the-road) contenue dans l'API Espagne-Chili."*³⁷⁴
- In § 598: *"Dans le dernier état de leur argumentation, les demanderesses font valoir que le Tribunal se trouve en présence soit d'un fait illicite continu, soit d'un fait illicite composite et auxquels seraient applicables les dispositions de fond de l'API.⁵⁵⁵ Se fondant essentiellement sur des arrêts de la Cour européenne des droits de l'homme, les demanderesses qualifient "l'expropriation de 1975-1977 "⁵⁵⁶ et la Décision n°43⁵⁵⁷ de violations continues, contraires notamment à l'article 5 de l'API.⁵⁵⁸ Les demanderesses prétendent ainsi que le caractère continu de l'expropriation des biens litigieux résulte de la nullité du décret n°165 adopté en 1975. Le décret litigieux serait nul au regard du droit interne, la Cour suprême ayant elle-même déclaré nuls un certain nombre d'autres décrets de la même époque et relatifs à d'autres biens de M. Pey Casado.⁵⁵⁹ Les demanderesses avancent également que le décret n°165 serait contraire au droit international et insistent notamment sur la solution adoptée dans l'arrêt Loizidou qu'elles estiment applicable à la présente affaire.⁵⁶⁰ Le fait illicite composite allégué engloberait quant à lui "les décrets de 1975 et 1977 ", "le refus d'indemnisation de 1995 "et la Décision n°43 du 28 avril 2000.⁵⁶¹ Les demanderesses prétendent enfin être victimes d'un déni de justice pour la période 1995-2002, en violation de l'article 4 de l'API.⁵⁶² Lors des audiences de janvier 2007, les demanderesses ont élargi leur demande fondée sur le déni de justice en alléguant que "c'est à l'ensemble du contentieux soumis au Tribunal arbitral que s'applique, de notre point de vue, le déni de justice subi par M. Pey ""³⁷⁵*
- In § 613: *"Selon les parties demanderesses, la Décision n°43 du 28 avril 2000 serait en elle-même contraire aux articles 3, 4 et 5 de l'API.⁵⁸² La Décision n°43 a été rendue en application de la loi n°19.568, promulguée postérieurement à l'entrée en vigueur de l'API. Cette loi dispose dans son article 1 que "les personnes physiques ou les personnes morales,*

³⁷² **Ibid.**, § 508.

³⁷³ **Ibid.**, § 594.

³⁷⁴ **Ibid.**, § 595.

³⁷⁵ **Ibid.**, § 598.

incluant les partis politiques, qui [ont] été privé[s] du domaine de leurs biens par l'application des décrets-lois N°12, 77 et 133, de 1973 ; 1.687, de 1977, et 2.346, de 1978, auront le droit de solliciter leur restitution ou de réclamer le paiement d'une indemnisation, conformément aux normes établies dans cette loi "(souligné par nous). L'Etat défendeur a ainsi créé un droit à indemnisation, défini et délimité par la loi interne, et ayant vocation à s'appliquer à des personnes visées par une législation adoptée pendant la période 1973-1978."³⁷⁶

- In § 614: "La Décision n°43, qui autorise l'indemnisation de personnes autres que les parties demandereses pour l'expropriation des biens des sociétés CPP S.A. et EPC Ltda en application de la loi de 1998, est qualifiée par les parties demandereses de "nouvelle dépossession" 583 contraire aux dispositions de fond de l'API. Cette décision étant intervenue postérieurement à l'entrée en vigueur de l'API, le Tribunal conclut que les dispositions de fond de ce dernier lui sont applicables *ratione temporis*, sans toutefois préjuger à ce stade de sa décision au fond sur la violation alléguée."³⁷⁷
- In § 616: "Le Tribunal rappellera que les demandereses prétendent regrouper au sein d'un fait composite "les décrets de 1975 et 1977 ", "le refus d'indemnisation de 1995 "et la Décision n°43 du 28 avril 2000.584".³⁷⁸
- In § 621: "Les autres actes présentés par les demandereses comme éléments du fait composite allégué se sont tous produits postérieurement à l'entrée en vigueur du traité. Il s'agit essentiellement, selon les demandereses, du refus d'indemnisation opposé à Monsieur Pey Casado en 1995 et de la Décision n°43. Le refus d'indemnisation se rapporte à une expropriation qui a eu lieu dans les années 70, à une époque où l'API n'était pas en vigueur. Ce refus d'indemnisation n'est pas en lui-même contraire au traité, le seul droit d'indemnisation postérieur au traité n'ayant été créé par le législateur chilien qu'en 1998 ; il ne peut davantage être relié à une violation survenue postérieurement à l'entrée en vigueur du traité, l'expropriation ayant eu lieu bien avant cette date. Présenter le refus d'indemnisation comme l'élément d'un fait composite revient à confondre la notion de différend avec les faits qui en sont à l'origine, ce que les demandereses ont par ailleurs reproché à la défenderesse."³⁷⁹
- In § 629: "La première violation potentielle concerne l'indemnisation de personnes non-propriétaires par le Ministre chilien des biens nationaux par la Décision n°43 du 28 avril 2000".³⁸⁰
- In § 632: "Le 28 avril 2000, Le Ministre des biens nationaux adopte la Décision n°43 selon laquelle les dispositions de la loi n°19.568 sont applicables aux biens confisqués aux sociétés CPP S.A. et EPC Ltda.592 Cependant, comme le Tribunal l'a expliqué ci-dessus, la Décision n°43 indemnise des requérants autres que les demandereses pour la confiscation des biens en question et le Ministre des biens nationaux maintiendra cette décision que les demandereses contesteront en vain".³⁸¹

³⁷⁶ *Ibid.*, § 613.

³⁷⁷ *Ibid.*, § 614.

³⁷⁸ *Ibid.*, § 616.

³⁷⁹ *Ibid.*, § 621.

³⁸⁰ *Ibid.*, § 629.

³⁸¹ *Ibid.*, § 632.

- In § 635: *"Les demanderesses ont tenté en vain de faire reconnaître l'incompatibilité de la Décision n°43 avec cette procédure judiciaire. Le 2 octobre 2001, la Première Chambre civile de Santiago s'est déclarée incompétente pour juger de l'incompatibilité entre la Décision n°43 et la procédure engagée devant elle depuis le 4 octobre 1995. Seule la Cour suprême serait compétente. Après avoir informé le Contralor de l'incompatibilité de la Décision n°43 avec l'action portée devant la Première Chambre civile de Santiago depuis le 4 octobre 1995, les demanderesses lui ont reproché d'avoir entériné les 22 et 23 juillet 2002 le paiement d'une indemnisation au profit des bénéficiaires de la Décision n°43, cette indemnisation comprenant notamment le préjudice subi du fait de la confiscation de la rotative Goss."*³⁸²
- In § 639: *"Pour ce qui est la rotative Goss, alors que sa restitution avait fait l'objet d'une demande d'indemnisation devant les juridictions chiliennes et avait, en conséquence, été exclue de la requête d'arbitrage du 7 novembre 1997, il n'en allait pas initialement de même pour la demande d'indemnisation pour le manque à gagner. Dans leur demande complémentaire du 4 novembre 2002, les demanderesses ont fourni une demande d'indemnisation tendant à voir réparer la perte de la rotative Goss en alléguant avoir été victimes d'un déni de justice au sens du droit international au motif que, de 1995 à 2002, "aucune décision n'avait été adoptée au Chili par rapport à la valeur de restitution stricto sensu de la rotative ou sa valeur de remplacement " ."*³⁸³
- In § 641: *"Les demanderesses insistent sur le fait que plus de dix ans après la requête originale aux tribunaux civils du Chili concernant la rotative Goss, il n'y a pas eu de résolution en première instance. Sur la base des faits résumés ci-dessus, les demanderesses ont soutenu que le délai important de la procédure devant la Première Chambre civile de Santiago pour la restitution de la rotative Goss ou l'indemnisation de sa valeur de remplacement et l'absence de décision depuis plus de dix ans constituaient un déni de justice la part du Chili."*³⁸⁴
- In § 647: *"En ce qui concerne la Décision n°43, la défenderesse a soutenu, comme le Tribunal l'a rappelé ci-dessus, que "les réclamants n'ont jamais été propriétaires des bien confisqués. "602 De plus, elles ont suggéré qu'il serait pervers de: "décourager les pays de faire ce qu'a fait le Chili, c'est-à-dire indemniser les personnes qui ont subi un préjudice. Si toutes les personnes qui n'ont pas été indemnisées pour telle et telle raison, avaient accès au CIRDI du fait de la non application du traitement juste et équitable, j'ai l'impression que cela reviendrait à miner le système ""*³⁸⁵
- In § 667: *"Quant à l'invalidité des confiscations et au devoir d'indemnisation, il y a lieu de rappeler aussi des déclarations parfaitement claires de la défenderesse dans la présente procédure."*³⁸⁶
- In § 668: *"Après le rétablissement au Chili d'institutions démocratiques et civiles, les nouvelles autorités ont proclamé publiquement leur intention de rétablir la légalité et de réparer les dommages causés par le régime militaire. Comme la défenderesse l'a souligné : "[...] les gouvernements démocratiques qui remplacèrent en 1990, au moyen d'élection libres, le Gouvernement de Pinochet, se sont primordialement préoccupés de réparer les dommages causés par le régime instauré au Chili par le coup d'état du 11 septembre 1973. En effet, le*

³⁸² **Ibid.**, § 635.

³⁸³ **Ibid.**, § 639.

³⁸⁴ **Ibid.**, § 641.

³⁸⁵ **Ibid.**, § 647.

³⁸⁶ **Ibid.**, § 667.

Gouvernement a pris les mesures pour réparer les dommages causés aux victimes dans tous les secteurs. Concrètement, en relation avec les confiscations, a été approuvée une loi qui dispose de la restitution ou indemnisation pour les biens confisqués, loi prise à l'initiative de l'Exécutif"³⁸⁷

- In § 728: *"Pour les premiers, le Tribunal arbitral tiendra compte de l'ensemble des circonstances de l'espèce, de l'issue de la cause ainsi que des attitudes respectives des parties. A cet égard, il est constant que, comme le montrent les analyses et conclusions qui précèdent, les demanderesses ont eu gain de cause pour l'essentiel, qu'il s'agisse de la compétence du Centre et du Tribunal arbitral, du principe de la responsabilité de la République du Chili et de la violation de l'obligation internationale d'accorder à l'investissement un "traitement juste et équitable", ainsi que, sur le fond, de leur qualité de propriétaire des investissements visés par les diverses mesures prises par les autorités chiliennes. Cela en dépit de la contestation déterminée opposée dès le début à la compétence internationale et à leurs réclamations. Au regard de ces faits, il apparaît relativement secondaire que le montant de l'indemnisation finalement allouée aux demanderesses ne représente qu'un faible pourcentage des dommages-intérêts sollicités par elles."*³⁸⁸

414. And in Chapter VIII of the original Award, where, we should recall, the *ad hoc* Committee found nothing to criticise in the calculation method:

- In § 677: *"On observera enfin, toujours sur le fond, que la réalité des violations alléguées - ou, plus précisément, en son principe, l'illégalité des confiscations opérées par l'autorité militaire chilienne sur les biens litigieux, n'est pas contestée par la défenderesse."*⁶²³ *Pas plus que cette dernière ne conteste l'obligation d'indemniser les victimes de confiscations contraires au droit. Ce qu'elle conteste en revanche, ainsi qu'on l'a vu, c'est la qualité pour agir des demanderesses, découlant de leur qualité de propriétaire ou d'investisseur."*³⁸⁹
- In § 678: *"On se référera à ce propos, par exemple, aux déclarations des représentants de la partie chilienne devant le Tribunal arbitral. Celle-ci a expliqué que la Décision n°43 "est née d'une procédure établie par une loi chilienne de 1998 selon laquelle l'Etat se proposait d'indemniser les personnes qui avaient été expropriées durant la période de la dictature militaire". En novembre 1995, l'Etat chilien a indiqué à M. Pey Casado "qu'une loi était en cours d'élaboration et que celle-ci, une fois votée, permettrait d'indemniser les personnes qui avaient fait l'objet d'une expropriation ".⁶²⁴ On notera en passant qu'il s'est abstenu alors d'indiquer à M. Pey Casado s'il entraît ou non dans la catégorie des personnes ainsi visées. Selon les demanderesses, cette législation, inexistante en 1995, "prendra trois années avant d'être finalement votée"*"³⁹⁰
- In § 679: *"Ces faits ainsi rappelés, et la question de la qualité pour agir des demanderesses ayant été tranchée par le Tribunal arbitral, il reste à ce dernier à tirer les conséquences de ce qui précède, quant à l'obligation d'indemniser, son exécution concrète et le calcul de son montant."*³⁹¹
- In § 681: *"Et il est superflu d'ajouter que cette constatation élémentaire est indépendante du droit applicable, qu'il soit interne (chilien) ou international. Quelle qu'ait pu être la base*

³⁸⁷ *Ibid.*, § 668.

³⁸⁸ *Ibid.*, § 728.

³⁸⁹ *Ibid.*, § 677.

³⁹⁰ *Ibid.*, § 678.

³⁹¹ *Ibid.*, § 679.

juridique retenue par la défenderesse dans sa décision d'indemniser, le Tribunal arbitral, lui, ne peut que se fonder sur le droit international pour constater le déni de justice et le dommage résultant nécessairement du traitement (non "juste et équitable")⁶²⁶ réservé à l'investissement."³⁹²

- In § 692: *"En l'absence de preuves convaincantes apportées par les demanderesses et le recours à une ou plusieurs expertises devant être exclu, le Tribunal arbitral est cependant en mesure de procéder à une évaluation du dommage à l'aide d'éléments objectifs dès lors que, selon les données incontestées résultant du dossier, les autorités chiliennes elles-mêmes, à la suite de la Décision n° 43, ont fixé le montant de la réparation due aux personnes ayant, selon elles, droit à une indemnisation.*"³⁹³
- In § 693: *"Il convient de rappeler dans ce contexte que le préjudice à indemniser n'est pas celui souffert à la suite de l'expropriation (demande qui n'est pas couverte par les dispositions de fond de l'API), mais celui souffert en raison des violations de l'API que le Tribunal arbitral a constatées et à propos desquelles il est compétent pour rendre une décision. Notamment, l'indemnisation doit servir à mettre les demanderesses dans la position dans laquelle elles seraient si les violations en question n'avaient pas eu lieu, c'est-à-dire si, dans la Décision n°43, les autorités chiliennes avaient indemnisé les demanderesses, et non pas des tierces personnes non-propriétaires des biens en question. Dans cette hypothèse, les autorités chiliennes auraient accordé le montant d'indemnisation qu'elles ont accordé en vertu de la Décision n°43 aux demanderesses dans la présente instance, celles-ci étant, le Tribunal arbitral l'a constaté, les véritables propriétaires des actions des sociétés CPP S.A. et EPC Ltda. Par conséquent, c'est le montant payé comme indemnisation en vertu de la Décision n°43 qui correspond au préjudice souffert par les demanderesses.*"³⁹⁴
- In § 694: *"L'indemnisation décidée par la Décision n°43 du 28 avril 2000 a été alloué par le Ministère des Biens Nationaux en vertu des décrets d'indemnisation n° 76-79, en date du 11 avril 2002. Il s'agit d'un montant global d'indemnisation de USD 10 millions, bien que le montant exact soit contesté entre les parties.*"³⁹⁵
- In § 696: *"Selon les demanderesses, le montant précis alloué a été de 196.736,603 UTM,634 montant qui aurait été calculé par des experts nommés par l'administration chilienne comme montant de l'indemnisation, approuvé en tant que tel par l'ordre ministériel n°165 du 2 avril 2002,635 et inclus dans les décrets d'indemnisation n°76-79 du 11 avril 2002.*"³⁹⁶
- In § 700: *"Les demanderesses ont fourni des remarques supplémentaires dans une lettre en date du 29 octobre 2007, réitérant leur position que la date critique pour la conversion serait le 23 juillet 1998, date de la publication de la Loi n°19.518 portant sur la restitution où l'indemnisation de bien confisqués. A cette date, l'équivalent en dollars de 343.578,61 UF aurait été d'USD 10.607.830,77.*"³⁹⁷
- In § 703: *"Le déni de justice retenu par le Tribunal arbitral sur la question de la rotative Goss n'entraîne aucune indemnisation supplémentaire. En effet, cette rotative a été la propriété des*

³⁹² **Ibid.**, § 681.

³⁹³ **Ibid.**, § 692.

³⁹⁴ **Ibid.**, § 693.

³⁹⁵ **Ibid.**, § 694.

³⁹⁶ **Ibid.**, § 696.

³⁹⁷ **Ibid.**, § 700.

sociétés dont les titres, appartenant aux demanderesses, ont fait l'objet de l'indemnisation décidée par le Tribunal arbitral."³⁹⁸

- In § 709: "*De l'avis du Tribunal arbitral, les demanderesses ont droit au paiement d'intérêts composés annuellement sur la somme principale, intérêts courant à partir de la reconnaissance de la créance d'indemnisation par le Chili en vertu des décrets d'indemnisation n° 76-79 des bénéficiaires de la Décision n°43 du 28 avril 2000, soit le 11 avril 2002, jusqu'à la date de la présente sentence.*"³⁹⁹

415. In the parties' debate before the *ad hoc* Committee, as in the Committee's decision of 18 December 2012, the compensation provided for in the original Award was also taken to be pecuniary compensation:

§ 223. "*Le Comité a soigneusement étudié le raisonnement du Tribunal qui a conduit celui-ci à conclure que la compensation [pécuniaire] par les autorités chiliennes de quatre personnes qui, de l'avis du Tribunal, n'étaient pas propriétaires d'El Clarín, au titre de la Décision n° 43, a donné lieu à une demande fondée sur la discrimination. (...) Il ressort clairement de la Sentence que le Tribunal a été convaincu par les éléments de preuve produits par les Demanderesses. La demande en annulation présentée par la Défenderesse sur le fondement de ce motif est rejetée.*"⁴⁰⁰

§ 286. *Bien que le Comité reconnaisse que les tribunaux arbitraux disposent en règle générale d'un pouvoir considérable d'appréciation dans l'évaluation du quantum des dommages-intérêts, la question qui se pose en l'espèce n'est pas en soi celle du quantum des dommages-intérêts déterminés par le Tribunal. Le problème ne réside pas non plus en soi dans la méthode retenue par le Tribunal pour évaluer les dommages subis par les Demanderesses. La question réside précisément dans le raisonnement suivi par le Tribunal pour déterminer les modalités de calcul appropriées qui, comme cela a été démontré ci-dessus, est manifestement contradictoire.*"⁴⁰¹ [emphasis added]

416. The original Award may thus be unambiguously taken to be using the term "compensation" as referring to financial reparation, of a pecuniary nature.
417. This crystal-clear conclusion as to the nature of the reparation to be granted to Mr. Pey Casado and the President Allende Foundation, in so far as not annulled by the first *ad hoc* Committee, was *res judicata* and binding for the resubmission Tribunal.
418. Moreover the parties agreed as to how the term "compensation" was to be construed in the dispositive part of the original Award.

(ii) The parties made the same interpretation of the term "compensation"

419. One would search in vain for a divergence of interpretation between Mr. Pey Casado and the President Allende Foundation and the resubmission Respondent of the term "compensation" as used in the dispositive part of the original Award.
420. Thus, in its submissions to the resubmission Tribunal, every reference by Mr. Pey Casado and the President Allende Foundation to the term "compensation" was within the meaning of article

³⁹⁸ *Ibid.*, § 703.

³⁹⁹ *Ibid.*, § 709.

⁴⁰⁰ **Document C20**, Decision of the *ad hoc* Committee, § 223

⁴⁰¹ *Ibid.*, § 283

34 of the Articles on Responsibility of States, i.e. involving financial compensation. At no point did they refer to the reparation sought as “satisfaction”.

421. The same applies to the Respondent in its submission to the resubmission Tribunal.

422. In its Memorial replying to the resubmission, the Respondent explained, regarding the various types of reparation provided for in article 34 of the Articles on Responsibility of States, that

"As explained in more detail below, there are three components to the “full reparations” standard as that concept is defined in Article 34 of the Articles on State Responsibility: restitution, compensation, and satisfaction”⁴⁰².

423. According to the definition of the term “compensation” given by the Respondent, the term also refers to financial compensation:

"Reparation in the form of “compensation” “cover[s] any financially assessable damage including loss of profits insofar as it is established,” and is available “insofar as such damage is not made good by restitution.””⁴⁰³

424. In the next paragraph, the Respondent says this is the type of reparation granted by the original Award:

"Out of these three forms of reparation, the Award granted compensation for the discrimination violation relating to Decision 43.”⁴⁰⁴

425. Even more clearly, the Respondent indicates in § 224 of its Memorial on resubmission, referring directly to paragraph 3 of the dispositive part of the original Award, that the nature of the reparation to be granted to the Claimants was finally decided in the original Award, and is *res judicata*:

"For purposes of the present case, the Tribunal need not determine which form of reparation is the most appropriate, as that issue was already decided by the Original Tribunal in an unannulled portion of its Award. Thus, Paragraph 3 of the Award’s dispositif — which was not annulled and is therefore binding upon this Tribunal — states that “les demandereses ont droit a **compensation**.”” (in bold in the original, emphasis added).⁴⁰⁵

426. At the hearings, in reply to a question by the resubmission Tribunal,⁴⁰⁶ the parties confirmed their interpretation of the term “compensation”.

427. Mr. Pey Casado and the President Allende Foundation explained that:

"La langue maternelle des trois arbitres était la langue française et que, pour nous donc la version française de la Sentence a vraisemblablement été écrite en premier puis traduite en espagnol dans un deuxième temps. Au sens français de droit à compensation, nous considérons que cette notion se réfère exclusivement à une notion financière, un dommage

⁴⁰² **Document C273**, Respondent’s Memorial in reply on the resubmission of 27 October 2014, § 130

⁴⁰³ **Document C273**, Respondent’s Memorial in reply on the resubmission of 27 October 2014, § 130.

⁴⁰⁴ **Document C273**, Respondent’s Memorial in reply on the resubmission of 27 October 2014, § 131.

⁴⁰⁵ **Document C273**, Respondent’s Memorial in reply on the resubmission of 27 October 2014, §§ 224 et seq.

⁴⁰⁶ **Document C5**, Hearing of 15 June 2015, English transcript of the Chair’s address, pp. 163-164, 16:52; Application for annulment of 10 November 2017, §§ 15 et seq.

quantifiable financièrement -une compensation, c'est un dommage quantifiable financièrement-, et non pas à d'autres réparations comme, par exemple, la notion de satisfaction en droit international public.

*C'est également d'ailleurs la position adoptée par le Chili dans son contre-mémoire du 27 octobre 2014. Je vous renvoie pour ce faire au paragraphe 226 du contre-mémoire du Chili du 27 octobre 2014 dans cette procédure."*⁴⁰⁷

428. The Respondent then expressed its agreement with this interpretation:

"So now turning to exactly what points 3 and 4 of the dispositif say, point 3 states that the Claimants have a right to compensation, and point 4 -- we've seen it many times -- states the quantum of the amount.

Again, point 4 was annulled by the ad hoc committee in its annulment decision, while point 3 is res judicata and remains binding on this Tribunal.

Now, you have asked the parties whether point 3 has an independent meaning separate from point 4, and we are in agreement with Claimant's counsel on this point, which we heard earlier today. We believe the answer also is: yes. Much as Claimants' counsel expressed this morning, we agree that in point 3 the first tribunal named the specific form of reparation to which Claimants were entitled, namely compensation; and then in point 4 it identified the quantum of damages to be paid to Claimants in order to effectuate that compensation.

*To answer the second part of the question posed by the Tribunal, namely whether you should understand the term "compensation" as referring only to financial compensation or as referring to more generally the forms of reparation recognized under international law, again we agree with Claimants' counsel. Chile's position is that you should understand this term according to its specific legal meaning under international law. In other words, Claimants are entitled to the form of reparation comprised by damages that are financially assessable."*⁴⁰⁸

429. So the parties were in agreement as to the nature of the reparation to which the Claimants were entitled, reflected in the term "compensation" as used by the original Tribunal in the dispositive part of the original Award and confirmed by the decision of the first *ad hoc* Committee. it was pecuniary compensation.

430. Yet despite the quite unequivocal conclusions of the original Tribunal, and the lack of divergent interpretation by the parties, the resubmission Tribunal decided to reopen this point and to substitute its own conclusions for those of the original Award.

(b) The resubmission Tribunal reopened a debate on the nature of the reparation to be granted to Mr. Pey Casado and the President Allende Foundation, disregarding the *res judicata* of the original Award

431. We have shown above that the *res judicata* of the original Award barred the resubmission Tribunal from re-examining the unannulled portions of that Award, as the resubmission Tribunal was fully aware.⁴⁰⁹

⁴⁰⁷ Document C43, p. 185

⁴⁰⁸ Document C200, Hearings of 16-04-2015, transcript, day 4, p. 95-96, l. 12-14

⁴⁰⁹ *Supra*, § 279, 281-285

432. But in sharp contradiction with the *res judicata* attached to the nature of the reparation due to Mr. Pey Casado and the President Allende Foundation, as shown above⁴¹⁰, the resubmission Tribunal reopened and re-examined this point (i).
433. That allowed the resubmission Tribunal finally to substitute its conclusions for those – *res judicata* – of the original Tribunal (ii).

(i) The resubmission Tribunal re-examined the question of the nature of the reparation due to the Claimants

434. Thus, in the early paragraphs of its analysis, the Tribunal sets out from the assumption that the term “compensation” as used by the original Award is open to interpretation.
435. So in § 176, while referring to the dispositive part of the original Award, the Tribunal notes, in footnote 356, that *"le terme français "compensation" est traduit, dans les développements qui suivent, de manière littérale par "compensation". Le Tribunal est conscient que, par l'emploi de ce terme, il risque ainsi de présumer résolue une question importante, qui sera discutée plus amplement ci-dessous, mais il ne semble pas possible de trouver une meilleure traduction."*⁴¹¹
436. The RT seems to regret that this is indeed the meaning of the word.
437. In § 177, the resubmission Award details what, in the Tribunal's eyes, may merit examination in the context of the resubmission proceedings:

*"Inversement, ce qui peut donner lieu à de nouveaux débats à la demande des Demanderesses, c'est la nature de la compensation qui leur est due en vertu du paragraphe 3 en raison de la violation établie au paragraphe 2, à la suite de l'annulation de l'évaluation prononcée par le Tribunal Initial au paragraphe 4."*⁴¹²

438. This statement is surprising. The pecuniary nature of the compensation was never a subject of debate before the original Tribunal, the *ad hoc* Committee or the resubmission Tribunal.
439. In § 178, the Tribunal continues to describe the matters which it deems to come under its jurisdiction, namely:

*"Devant ce tribunal les seules questions qui font encore l'objet d'un "différend" entre les Parties dans la présente procédure de nouvel examen (au regard de l'article 52(6) de la Convention) est la nature de la compensation due au titre de la ou des violations déjà établie(s) par le Tribunal Initial et, si le présent Tribunal devait conclure qu'une telle compensation doit se faire sous une forme pécuniaire, son montant"*⁴¹³.

440. Another surprise. No *"différend entre les Parties"* on *"la nature de la compensation due au titre de la ou des violations déjà établie(s) par le Tribunal Initial"* was submitted or raised before the resubmission Tribunal.
441. §§ 177-178 reflect a flagrant fourfold excess of powers by the Tribunal as to the scope of its jurisdiction, as limited by a) the original Award's *res judicata*, b) the nature of compensation to which Mr. Pey Casado and the President Allende Foundation are entitled having been adjudged

⁴¹⁰ *Supra*, §§298-313

⁴¹¹ **Document C9f**, Award of 13 September 2016, footnote 356

⁴¹² **Ibid.**, § 177

⁴¹³ **Ibid.**, § 178

- by the original Tribunal⁴¹⁴, c) there being no debate on this point between the parties,⁴¹⁵ and d) the solely pecuniary nature of the compensation provided for in the Spain-Chile BIT.
442. Persisting with its excess of powers, the Tribunal set out in § 199 to interpret the term “compensation” so as to examine *"la question de savoir si cette formulation doit être comprise comme signifiant, en soi, que les Demanderesses ont un droit bien établi à une compensation pécuniaire et que la seule questions qui reste à trancher dans la présente procédure de nouvel examen est l'évaluation du montant adéquat de cette compensation."*⁴¹⁶
443. Having determined that *"ce n'est pas ainsi que doit être compris le sens et l'effet de la Sentence Initiale"*,⁴¹⁷ the Tribunal explains, in § 200, the reasons that led it to make this choice.
444. Firstly the Tribunal explains that *"les deux termes, anglais comme français, ont une connotation plus large selon le dictionnaire, qui n'est pas limitée à une réparation dans un sens purement financier."*⁴¹⁸
445. This first reason is again surprising.
446. We may note first that neither Mr. Pey Casado and the President Allende Foundation nor the Respondent referred “to the dictionary” during the proceedings before the original Tribunal, or before the resubmission Tribunal. We may also notice that the Tribunal does not bother to indicate what sources might support such a statement, and so its reasoning is, at the least, hard to verify.
447. Secondly, the Tribunal explains that *"pris dans son contexte, le paragraphe 3 du dispositif énonce de manière claire uniquement le principe général d'une réparation ; mais que ni ce paragraphe, ni le paragraphe 2 qui le précède ne cherchent à déterminer la nature du préjudice ou du dommage causé par la violation de la Défenderesse, ce qui serait le préalable essentiel à la détermination ultérieure de la nature ainsi que de l'étendue de la réparation nécessaire pour remédier à la violation."*
448. As shown above, in the proceedings before the original Tribunal, the first *ad hoc* Committee and the resubmission Tribunal, the parties referred to the articles of the Spain-Chile BIT and the CDI Draft, as well as to other sources of international law relating to the reparation of harm arising from a State's breach of its international undertakings and to applicable Chilean law. It is in this context that the original Tribunal's reference to the right to “compensation” should be construed.
449. The Tribunal also confuses the *nature* of the reparation due to Mr. Pey Casado and the President Allende Foundation, understood to be financial compensation, and the *scope* thereof, i.e. that it is to fully and effectively remedy the harm caused by the breach whose existence is recognised in the original Award. It was RT that was to clarify this scope, given the reopening of debate on the subject owing to the partial annulment of the OA.
450. The original Award settled the question of the existence of harm resulting from the breaches of the BIT recognised by the original Tribunal and the nature of the reparation due to Mr. Pey

⁴¹⁴ Supra, § 400-418

⁴¹⁵ Supra, §§419-430

⁴¹⁶ **Document C9f**, Award of 13 September 2016, § 199

⁴¹⁷ **Ibid.**, § 199

⁴¹⁸ **Ibid.**, § 200

Casado and the President Allende Foundation by reason of these breaches.⁴¹⁹ But it was up to the Tribunal to ensure, on calculating the compensation payable to the Claimants, that this would indeed compensate for the harm resulting from the Respondent's breach of article 4 of the Spain-Chile BIT, the *restitutio in integrum*.

451. Thirdly, the Tribunal referred to the parties' shared interpretation of the nature of the compensation as recalled above – which it calls, *contra evidentiam*, "*vues fortement divergentes*".⁴²⁰
452. Here again, the Tribunal perseveres in its confusion as to the *nature* of the reparation due to Mr. Pey Casado and the President Allende Foundation and its *scope*.
453. Finally, in § 201, after cavalierly describing as mere "*opinions*"⁴²¹ the agreement between the parties as to the nature of the reparation, the Tribunal brushes this aside with the sole explanation that it does not "*souscrit pas entièrement à l'interprétation selon laquelle le Tribunal Initial a utilisé le terme "compensation" au paragraphe 3 en tant que terme technique, spécifique et limitatif, avec l'intention de le distinguer des termes "indemnisation" ou "réparation", plus généraux*".⁴²²
454. The Tribunal goes on, explaining that it "*ne voit dans la Sentence Initiale aucun signe que le Tribunal Initial entendait faire un usage systématique sur le plan conceptuel de ces divers termes qui justifierait de traiter le paragraphe 3 comme une décision délibérée que des dommages-intérêts doivent nécessairement être octroyés (à condition, bien entendu, que leur montant ait été correctement déterminé). Replaçant le paragraphe 3 dans son contexte, le Tribunal l'interprète comme établissant le droit à réparation qui résulte nécessairement de la constatation de la violation d'une obligation internationale, mais sans déterminer d'avance la forme ou la nature que cette réparation doit prendre sauf peut-être le postulat non explicite que, dans le cas normal, elle peut prendre la forme de dommages-intérêts*".⁴²³
455. Here again, Mr. Pey Casado and the President Allende Foundation provided proof to the contrary.⁴²⁴
456. The conclusion the Tribunal deems it must draw from the above developments is that "*il reste alors à ce Tribunal à déterminer la nature et la forme de la "compensation" ainsi due, dans le sillage de l'annulation de l'évaluation du Tribunal Initial, telle qu'elle figure au paragraphe 4 sur la base du raisonnement de la partie correspondante (Section VIII) de la Sentence Initiale*".⁴²⁵
457. This conclusion, and the preceding reasoning quoted above, constitutes a **manifest** excess of powers in that the Tribunal disregarded the *res judicata* of the original Award so as to reopen a debate which that Award had already settled fully **as *res judicata***.
458. That then allowed the Tribunal, again disregarding *res judicata* in the original Award, to substitute its conclusions for those of the original Tribunal.

⁴¹⁹ **Document C2**, §665-674

⁴²⁰ **Document C9f**, Award of 13 September 2016, § 200

⁴²¹ **Ibid.**, § 201

⁴²² **Ibid.**, § 201

⁴²³ **Ibid.**, § 201

⁴²⁴ *Supra*, § 300 in fine

⁴²⁵ **Document C9f**, Award of 13 September 2016, § 202

(ii) The resubmission Tribunal substituted its conclusions for the res judicata conclusions of the original Tribunal

459. The Tribunal's reasoning detailed above serves as a starting point for the rest of its analysis.
460. Having deemed that the nature and form of reparation remained open, and that the full reparation rule in article 31 of the Draft Articles depended "*d'un préjudice, et que ce préjudice dépend lui-même d'un lien de causalité*", the Tribunal deemed it was then incumbent on it "*de déterminer quel comportement a été jugé par le Tribunal Initial constituer en l'espèce "le fait illicite", puis de déterminer, à la lumière des arguments des Parties adverses, comme la règle énoncée à l'article 31 doit être appliquée aux circonstances de l'espèce.*"⁴²⁶
461. Mr. Pey Casado and the President Allende Foundation will return later to the conclusions to which the Tribunal was led by its reasoning.
462. It suffices for now to note that the Tribunal decided that Mr. Pey Casado and the President Allende Foundation had not satisfied the burden of proof,⁴²⁷ and then rejected their claim for compensation,⁴²⁸ their claim on account of unjust enrichment,⁴²⁹ and their claim based on non-material damage.⁴³⁰
463. At the end of its Award, before addressing the matter of costs, the Tribunal considers the options open to it.
464. The Tribunal then notes that, even though it has not granted Mr. Pey Casado and the President Allende Foundation damages, "*la Sentence du Tribunal n'affecte pas la conclusion de la Sentence Initiale selon laquelle la Défenderesse avait commis une violation de l'article 4 du TBI en ne garantissant pas un traitement juste et équitable aux investissements des Demanderesses, en ce compris le déni de justice.*"⁴³¹
465. This conclusion which, as even the Tribunal acknowledges, is *res judicata* and was not the subject of the resubmission proceeding,⁴³² "*correspond donc à une obligation qui pèse toujours sur la Défenderesse et une obligation qui, comme l'a conclu le Tribunal Initial, est la conséquence d'une défaillance dans le fonctionnement du système interne du Chili pour la réparation des injustices passées qui ont été reconnues.*"⁴³³
466. The Tribunal then expresses the wish that "*une fois la présente procédure de nouvel examen terminée, la Défenderesse restera consciente de cette obligation et appréciera les conséquences à en tirer d'une manière adéquate.*"⁴³⁴
467. This notion reappears in point 2 of the Award's dispositive part, as amended by the rectification decision, stating:

⁴²⁶ **Ibid.**, § 204

⁴²⁷ **Document C9f**, Award of 13 September 2016, § 232

⁴²⁸ **Ibid.**, § 234

⁴²⁹ **Ibid.**, §§ 237 et seq.

⁴³⁰ **Ibid.**, §§ 241 et seq.

⁴³¹ **Ibid.**, § 244

⁴³² **Ibid.**, § 244

⁴³³ **Ibid.**, § 244

⁴³⁴ **Ibid.**, § 244

"Par ces motifs, le Tribunal décidé, à l'unanimité:

2) que, comme cela a déjà été indiqué par le Tribunal Initial, sa reconnaissance formelle des droits des Demandereses et du déni de justice dont elles ont été victimes constitue en soi une forme de satisfaction au regard du droit international au titre de la violation par la Défenderesse de l'article 4 du TBI" (emphasis added).⁴³⁵

468. With this paragraph of the dispositive part, the Tribunal substitutes, no less, what it deems an adequate form of reparation (satisfaction) for that which had been decided by the original Award with *res judicata* effect (compensation).
469. This paragraph, further to being contrary to the *res judicata* of the original Award, reflects a manifest, flagrant excess of powers by the resubmission Tribunal.
470. Now point 4 of the resubmission Award refers to the original Tribunal's decision.
471. Yet, contrary to what the resubmission Tribunal states, the original Award contains no decision with general scope on any "satisfaction" to repair the harm sustained by Mr. Pey Casado and the President Allende Foundation.
472. Indeed, only § 704 of the original Award, within Section VIII, annulled by the first *ad hoc* Committee, deals with the question of satisfaction.
473. Yet it is worth noting that this paragraph envisages only the question of non-material damage. Moreover the original Award refers to the notion of satisfaction only *obiter dictum*, and the main reason for which the Tribunal refused to grant damages for non-material harm is that it deemed Mr. Pey Casado and the President Allende Foundation had not provided proof of it:

"Une explication complémentaire se justifie en ce qui concerne la demande relative au dommage moral. Outre le fait que les demanderesses n'ont pas apporté de preuves permettant l'évaluation d'un tel préjudice le Tribunal arbitral estime que le prononcé de la présente sentence, notamment par sa reconnaissance des droits des demanderesses et du déni de justice dont elles furent victimes, constitue en soi une satisfaction morale substantielle et suffisante" (emphasis added)⁴³⁶.

474. Moreover, it is well established in investment law that the means of repairing harm sustained by an investor universally regarded as normal is pecuniary compensation. Indeed, several tribunals have highlighted the fact that satisfaction for the purposes of article 37 of the Draft Articles is not a an appropriate form of reparation for an investor in the sphere of investment arbitration.
475. Thus the Tribunal in *CMS Gas Transmission Company v. Argentina* decided that:

"It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction. As this is not a case of reparation due to an injured State, satisfaction can be ruled out at the outset"⁴³⁷.

⁴³⁵ **Ibid.**, § 256.2 as corrected by the rectification decision

⁴³⁶ **Document C2**, Original Award, § 704

⁴³⁷ **Document C52**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/1/8, Award (Orrego Vicuña, Marc Lalonde, Francisco Rezek), 12 May 2005, quoted in the original Award of 8-05-2008, **Document C2**, § 62. The CMS Award was confirmed on this point in the decision of the *ad hoc* Committee of 25 September 2007, **document C130**, available at <http://bit.ly/2wFJACu>

476. Likewise, the Tribunal in *Quiborax v. Bolivia* noted that "some types of satisfaction as a remedy are not transposable to investor-State disputes",⁴³⁸ and that "international case law strongly suggests that some types of satisfaction are a remedy exclusively designed for States."⁴³⁹
477. The same analysis has been made in doctrine, which has pointed out that the use of satisfaction as a type of reparation is exceptional, and is generally suitable for remedying non-material harm sustained by a State, but not by a physical person.⁴⁴⁰
478. The recognition of satisfaction by the resubmission Tribunal is therefore inappropriate, and involves the substitution by it of reasons contrary to the *res judicata* of the original Award.

(c) The reopening by the resubmission Tribunal of the question of the nature of the reparation to which Mr. Pey Casado and the President Allende Foundation are entitled constitutes a manifest excess of powers

479. We showed above that the resubmission Tribunal reopened a matter that had been decided by the original Award with *res judicata* effect, namely the nature of the reparation to which the Claimants were entitled,⁴⁴¹ and substituted its idea of the nature of reparation for that decided by the original Tribunal.⁴⁴²
480. Given the negative effect attached to the *res judicata* of the unannulled portions of the original Award, limiting the resubmission Tribunal's jurisdiction, this re-examination and the substitution of reasons constitute excesses of powers by the resubmission Tribunal.
481. Moreover, in the reasoning that led it to re-examine the nature of the reparation, the resubmission Tribunal disregarded the *res judicata* of the pecuniary nature of compensation according to the BIT, the request filed by Mr. Pey Casado and the President Allende Foundation setting the terms of debate, and also the parties' agreement as to the interpretation of the term "compensation", and thus as to the nature of reparation.
482. This agreement of the parties shows again that the matter of the nature of reparation to which Mr. Pey Casado and the President Allende Foundation were entitled was not submitted to the resubmission Tribunal.
483. Yet it is well established that an Arbitral Tribunal cannot not decide on matters that are not submitted it, at risk of exceeding its powers.
484. As Prof. Schreuer notes, in the preparatory work for the Convention, "Mr. Broches explained that the clause [Article 52(1)(b)] referred to cases where the tribunal would have gone beyond the scope of the parties' agreement or compromis or would have decided points which had not been submitted to it or had been improperly submitted to it."⁴⁴³
485. Thus the resubmission Tribunal, once again, exceeded its powers.

⁴³⁸ **Document CL330**, *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, §§ 554-559)

⁴³⁹ **Ibid.**, §§ 554-559); *LG&E v. Argentine* (final Award, para. 36, footnote 6)

⁴⁴⁰ **Document CL332**, Dumbery (P.), "Compensation for Moral Damages in Investor-State Arbitration Disputes", *Journal of Int'l Arb.*, 2010, Vol. 27, No 3, pp. 251-252

⁴⁴¹ *Supra*, § 298 and ss

⁴⁴² Cf *supra*, § 459-469

⁴⁴³ Schreuer (C.), *The ICSID Convention*, Art. 52, § 131

486. The excess of powers committed by the resubmission Tribunal in relation to its handling of the nature of the reparation is manifest, in that it is flagrant and moreover has serious consequences.⁴⁴⁴

487. Indeed, as was shown above:

- The conclusion that the original Tribunal settled the question of the nature of reparation and that the parties agreed on this interpretation emerges fully, clearly and self-evidently from a reading of the parties' submissions to the resubmission Tribunal, the transcript of the hearings at the Tribunal and the resubmission Award;⁴⁴⁵
- The conclusion that the resubmission Tribunal substituted its findings on satisfaction for the original Tribunal's decision on compensation is apparent from a simple reading of its Award, the original Award and the decision of the first *ad hoc* Committee.⁴⁴⁶

488. It follows that the excess of powers committed by the resubmission Tribunal is self-evident, flagrant or easily discernible.

489. Moreover the consequences of this excess of powers are especially serious.

490. Indeed, on deeming that it had the power to re-examine the matter of the nature of reparation to be granted to Mr. Pey Casado and the President Allende Foundation, and on construing the term "compensation" as not necessarily referring to a pecuniary reality, the resubmission Tribunal opened the way to reconsidering **the very existence** of harm sustained by the Claimants,⁴⁴⁷ which, however, derived necessarily from the original Award's conclusions regarding the Respondent's breach of article 4 of the Spain-Chile BIT.

491. It is in fact thanks to this reinterpretation of the term "compensation" in a way contrary to that made by the original Award that the resubmission Tribunal was able, in a word, to reach the conclusion that Mr. Pey Casado and the President Allende Foundation supposedly sustained no harm from the Respondent's breach of article 4 of the Spain-Chile BIT, as will be shown below.

492. The resubmission Tribunal thereby purely and simply stripped the original Award rendered in Mr. Pey Casado and the President Allende Foundation favour of effect, in an undeclared annulment.

493. For this reason alone, the annulment of the Award as requested by Mr. Pey Casado and the President Allende Foundation is justified.

2.3.3.3 The resubmission Tribunal questioned the very existence of the harm sustained by the Claimants

494. On deciding that Mr. Pey Casado and the President Allende Foundation "ont droit à compensation"⁴⁴⁸ owing to the breach by the Respondent of "son obligation de faire bénéficier les demanderesses d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout

⁴⁴⁴ *Supra*, § 401-430

⁴⁴⁵ *Supra* §459 et seq.

⁴⁴⁶ *Supra* §494 et seq.

⁴⁴⁷ **Document C9f**, Resubmission Award of 13 September 2016, § 218: "*ce qui doit être prouvé est à la fois l'existence d'un préjudice pour le demandeur et le fait que ce préjudice particulier est la conséquence suffisamment immédiate de la violation spécifique*".

⁴⁴⁸ **Document C2**, Original Award, § X.3

déni de justice"⁴⁴⁹, the original Award decided that Mr. Pey Casado and the President Allende Foundation had suffered harm caused by that breach (a).

495. The resubmission Award disregarded the original Award's *res judicata* on this point.
496. What is more, the resubmission Tribunal upheld an argument of Chile's as to the supposed lack of harm sustained by Mr. Pey Casado and the President Allende Foundation – which argument had already been dismissed by the original Award and the first *ad hoc* Committee (b).
497. By so disregarding the *res judicata* of the original Award, the resubmission Tribunal committed a manifest excess of powers within the meaning of Article 52(1)(b) of the Convention (c).

(a) The original Award deemed that Mr. Pey Casado and the President Allende Foundation had necessarily suffered harm caused by the breach of the Spain-Chile BIT by Chile

498. As was recalled above, the original Tribunal, after declaring itself competent to judge the alleged breaches by Chile of article 4 of the Spain-Chile BIT committed as from 28 April 2000⁴⁵⁰ ("Decision 43") and 3 November 2001, considered the following two questions:

"celle de savoir si l'absence de toute décision par les juridictions chiliennes pendant une période de sept années (1995-2002), d'une part, et l'absence de réponse de la Présidence aux requêtes de M. Pey Casado, d'autre part, sont constitutives d'un déni de justice";⁴⁵¹

"celle de savoir si les investissements reconnus par le Tribunal arbitral comme ayant été faits par M. Pey Casado ont bénéficié du "traitement juste et équitable" prescrit par l'API."⁴⁵²

499. The original Award then held the Chilean authorities liable for denial of justice, in which the lack of reply to Mr Pey's claims is one component.⁴⁵³

"Sur la première question, la réponse ne peut être que positive, au regard des faits établis et déjà retenus par le Tribunal arbitral, l'absence de toute décision par les tribunaux civils chiliens sur les prétentions de M. Pey Casado s'analysant en un déni de justice. En effet, l'absence de décision en première instance sur le fond des demandes des parties demanderesses pendant sept années, c'est-à-dire entre septembre 1995 et le 4 novembre 2002 (moment de l'introduction de la demande complémentaire dans la présente procédure) doit être qualifié comme un déni de justice de la part des tribunaux chiliens."⁴⁵⁴

500. It also held that Chile had breached its duty to give Mr. Pey Casado and the President Allende Foundation fair and equitable treatment:

"Sur la seconde question, celle de savoir si les investissements des demanderesses ont bénéficié d'un traitement juste et équitable, une réponse négative s'impose de l'avis du Tribunal arbitral, compte tenu des conclusions auxquelles il est parvenu précédemment aux termes de son appréciation des preuves et de son analyse juridique. En bref, il s'agit de la

⁴⁴⁹ Document C2, Original Award, § X.2

⁴⁵⁰ *Ibid.*, §§650-674

⁴⁵¹ *Ibid.*, § 658

⁴⁵² *Ibid.*, § 658

⁴⁵³ *Ibid.*, § 674

⁴⁵⁴ *Ibid.*, § 659 et seq.

conclusion selon laquelle M. Pey Casado a bien démontré avoir procédé à des investissements et être propriétaire de biens meubles ou immeubles qui ont été confisqués par l'autorité militaire chilienne"⁴⁵⁵.

501. Concluding its reasoning, the original Award decided that:

*"Dans le cas d'espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués, en même temps qu'elle paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable."*⁴⁵⁶

502. The original Tribunal's reasoning in the first few paragraphs of Chapter VIII – **reproducing and referring to the unannulled paragraphs of Chapter VII** – allow us to see that the original Tribunal derived from those breaches of the Spain-Chile BIT the duty for the Respondent to compensate Mr. Pey Casado and the President Allende Foundation for the harm necessarily sustained by the latter. Owing to the partial annulment, though, its scope and extent – and so the amount of compensation – remained to be determined, and hence the task for the resubmission Tribunal.

503. Thus in § 675, the original Award recalled the conclusions which it reached in the previous Chapters:

*"Le Tribunal arbitral a constaté précédemment, outre sa compétence pour statuer sur la demande d'arbitrage formulée auprès du CIRDI par la première et par la seconde demanderesse, que, sur le fond, M. Pey Casado était bien le propriétaire des biens confisqués par les autorités chiliennes et que l'investissement n'avait pas fait l'objet du "traitement juste et équitable" prescrit par l'API. En d'autres termes, il a constaté que la défenderesse avait commis un déni de justice et violé, avec la Décision n°43 du 28 avril 2000 et son application, l'obligation d'accorder à l'investissement un traitement juste et équitable"*⁴⁵⁷.

504. In § 679, it explains the steps that remain to be taken as follows:

"Ces faits ainsi rappelés, et la question de la qualité pour agir des demanderesses ayant été tranchée par le Tribunal arbitral, il reste à ce dernier à tirer les conséquences de ce qui précède, quant à l'obligation d'indemniser, son exécution concrète et le calcul de son montant" (emphasis added).⁴⁵⁸

505. In § 681, the original Tribunal notes that harm for Mr. Pey Casado and the President Allende Foundation must necessarily have resulted from the Respondent's breaches of article 4 of the Spain-Chile BIT:

"Quelle qu'ait pu être la base juridique retenue par la défenderesse dans sa décision d'indemniser, le Tribunal arbitral, lui, ne peut que se fonder sur le droit international pour

⁴⁵⁵ *Ibid.*, § 665 et seq.

⁴⁵⁶ *Ibid.*, § 674.

⁴⁵⁷ *Ibid.*, § 675.

⁴⁵⁸ *Ibid.*, § 679.

constater le déni de justice et le dommage résultant nécessairement du traitement (non "juste et équitable") réservé à l'investissement" (emphasis added)⁴⁵⁹.

506. The paragraph referred to above, recalling or referring to paragraphs of the Chapters not annulled by the first *ad hoc* Committee, show that the original Award deemed, by the combined effect of points 1, 2 and 3 of its dispositive part and the developments in the body of the Award forming the necessary basis, that Mr. Pey Casado and the President Allende Foundation had suffered harm caused by the Respondent's breaches of the Spain-Chile BIT after 3 September 2007.
507. The existence of this harm, as well as its causal linkage with the breaches of the Spain-Chile BIT found in the original Award, have *res judicata* effect.
508. It remained only for the Tribunal to establish the *quantum* to compensate for this harm.
509. It was on the "*raisonnement*" and the "*processus*" followed by the determination of the *quantum* that the original Award was partially annulled.
510. Indeed, the original Award notes first that "*l'argumentation des demandereses concernant l'évaluation du dommage (...) se réfère à l'expropriation intervenue au Chili dans la période 1973-1977, notamment en 1975, et confirmée par la suite.*"⁴⁶⁰
511. The original Award then deems that "*les demandereses n'ont pas apporté de preuve, ou de preuve convaincante, ni par pièces, ni par témoignage, ni par expertise, des importants dommages allégués et causés par les faits relevant de la compétence ratione temporis du Tribunal arbitral, et cela qu'il s'agisse du damnum emergens, du lucrum cessans, ou encore d'un dommage moral.*"⁴⁶¹
512. Nonetheless, without giving the parties the opportunity to take a view on this point, the original Tribunal then decided to calculate the *quantum* itself, on the basis of the compensation that would have been granted under "Decision 43".⁴⁶²
513. This decision led to the censure of the first *ad hoc* Committee, owing to a serious departure from a fundamental rule of procedure:

"Le Comité est de l'avis que, même si l'on suppose, pour les besoins de la discussion, que le Tribunal disposait d'un tel pouvoir, il aurait dû accorder à chaque partie le droit de présenter ses arguments et de contredire ceux de l'autre partie. Après examen de l'ensemble du dossier, notamment des arguments des parties, le Comité ne peut que conclure que les parties n'ont jamais débattu des dommages découlant des violations de l'article 4 de l'API" (emphasis added)⁴⁶³.

514. The *ad hoc* Committee evidently takes express account here of what Mr. Pey Casado and the President Allende Foundation said to it, namely that they had not been given a hearing by the original Tribunal as regards their main claim for calculating the *quantum*, i.e. its equivalence with the amount resulting from confiscation:

⁴⁵⁹ *Ibid.*, Original Award, § 681.

⁴⁶⁰ *Ibid.*, Original Award, § 686.

⁴⁶¹ *Ibid.*, Original Award, § 689.

⁴⁶² *Ibid.*, Original Award, § 692 et seq.

⁴⁶³ **Document C20**, Decision of the first *ad hoc* Committee of, § 262 et seq.

"Comme elles l'ont expliqué dans leur Contre-mémoire sur l'annulation, les Demanderesses ont soutenu, lors de l'audience de janvier 2007, que l'indemnisation due était équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation. Le Tribunal a cependant adopté un autre standard. Il a placé les Demanderesses dans la situation dans laquelle elles se seraient trouvées s'il n'y avait pas eu de violation de l'API, et il a accordé le montant fixé par la Décision n° 43." (emphasis added)⁴⁶⁴

"de l'avis du Comité, le Tribunal ne pouvait pas examiner les éléments de preuve et parvenir à une telle conclusion sans avoir donné aux deux parties la possibilité de présenter leurs arguments sur le critère d'indemnisation applicable et l'évaluation des dommages-intérêts au titre de la violation de l'article 4 de l'API. Le Comité est d'accord avec le comité ad hoc dans Klöckner I sur le fait que rouvrir la procédure avant d'arriver à une décision et permettre aux parties de faire valoir leurs vues (...) n'était pas simplement une question d'opportunité, mais une nécessité (...)." ⁴⁶⁵ (emphasis added)

515. The first *ad hoc* Committee was careful to note that it had "conclu à une erreur annulable dans le processus suivi par le Tribunal pour parvenir à sa conclusion, et non dans les modalités de calcul du montant des dommages-intérêts".⁴⁶⁶
516. The first *ad hoc* Committee then also partially annulled the original Award on the ground of contradictory reasons, which we will discuss below.⁴⁶⁷
517. The facts remain that on deciding that Mr. Pey Casado and the President Allende Foundation were entitled to compensation, the original Tribunal necessarily considered that there was a compensable harm caused by the Respondent's breaches of article 4 of the Spain-Chile BIT, that this conclusion had *res judicata* effect and that the *ad hoc* Committee allowed Mr. Pey Casado and the President Allende Foundation to assert the view that the *dies a quo* for calculating the amount of compensation was indeed that the seizure of the investment on 11 September 1973 "étant donné que la violation de l'API par le Chili" in the acts occurring as from May 2000 infringing article 4, "avait pour conséquence d'empêcher les Demanderesses d'obtenir une indemnisation au titre de la confiscation" (in other words, he consequences of "stalling" for more than seven years the domestic judgment that was to recognise the "invalidity of public law" vitiating the confiscatory Decree, by virtue of the imperative force of article 7 of the Constitution).
518. This right of Mr. Pey Casado and the President Allende Foundation, and the factual and legal evidence in support "de cette équivalence" in the *dies a quo* for assessing the amount of damages sustained, are wholly denied by the resubmission Tribunal *in limine litis* when it asserts, *contra evidentiam*, that this would be contrary to the decision of the *ad hoc* Committee:

"Le Tribunal ajoute (...) que, si la question avait été soumise à sa décision, il aurait été disposé à faire droit à l'objection de la Défenderesse à la recevabilité de toutes les parties des arguments des Demanderesses relatifs aux dommages qui étaient fondées directement ou implicitement sur la valeur de confiscation de l'investissement initial, comme étant

⁴⁶⁴ *Ibid.*, § 266

⁴⁶⁵ *Ibid.*, § 267

⁴⁶⁶ *Ibid.*, § 271.

⁴⁶⁷ *Infra*, § 263 et seq.

diamétralement contraires (...) à la Décision sur l'annulation rendue par le Comité ad hoc."⁴⁶⁸

"le Tribunal ne pouvait clairement pas permettre que la demande initiale fondée sur la confiscation soit de nouveau soumise de manière détournée sous couvert d'une violation du traitement juste et équitable subie plusieurs années plus tard ; cela (...) était en tout état de cause formellement exclu par (...) la Décision sur l'annulation."⁴⁶⁹

519. Yet as we have seen above, the *ad hoc* Committee's grounds for partially annulling the original Award included the Claimants' inability to substantiate their arguments precisely in support of this "equivalence".

520. In a word, the RT's reasoning shows manifest confusion between the question of the validity or invalidity of a figure based on the firm's value at the time of confiscation and a supposed surreptitious revival of a claim under article 5 of the BIT, which is unrelated here.

(b) The resubmission Award questions the very existence of the harm sustained by the Claimants

521. We recalled above that the resubmission Tribunal interpreted the term "compensation" as not meaning that the nature of the reparation to which Mr. Pey Casado and the President Allende Foundation were entitled had been decided, disregarding the original Award's *res judicata*.⁴⁷⁰

522. In particular the Tribunal deemed that:

*"[I]l n'interprète pas ce paragraphe [le paragraphe 3 du dispositif de la Sentence Initiale] comme dispensant une partie qui demande des dommages-intérêts de son obligation normale de prouver le préjudice ainsi que le lien de causalité"*⁴⁷¹.

523. Here the RT introduces a manifest confusion between existence of harm and substantiation of the extent of that harm.

524. Under this interpretation, the resubmission Tribunal reopened a debate on the existence of the harm sustained by Mr. Pey Casado and the President Allende Foundation and the causal link with the breaches of the Spain-Chile BIT (i), in the course of which the Tribunal allowed the Respondent's arguments that had previously been disallowed by the original Tribunal and the first *ad hoc* Committee (ii).

(i) The Tribunal conducted a re-examination of the question of the existence of harm and its causal link with the breaches of the Spain-Chile BIT

525. In § 207 of its Award, the resubmission Tribunal recognises that it "*doive s'interdire, conformément au Règlement d'arbitrage du CIRDI, d'examiner à nouveau, dans le cadre de la présente procédure de nouvel examen, toute partie de la Sentence Initiale qui n'a pas été annulée*",⁴⁷² but that "*cela ne l'empêche pas, à son avis, de procéder à une interprétation de la*

⁴⁶⁸ Document C9f, Resubmission Award, § 236

⁴⁶⁹ Ibid., § 244

⁴⁷⁰ *Supra*, §298 et seq.

⁴⁷¹ Document C9f, Resubmission Award, § 201

⁴⁷² Ibid., Resubmission Award, § 207

Sentence Initiale, aux fins d'accomplir sa mission en vertu of the Convention CIRDI et du Règlement d'arbitrage du CIRDI."⁴⁷³

526. Having taken note of the original Award's conclusions on the breaches of the Spain-Chile BIT,⁴⁷⁴ the resubmission Tribunal states that "sa mission se limite (comme indiqué ci-dessus) à établir le préjudice dont il est prouvé qu'il a causé aux Demanderesses par la violation ci-dessus, puis à déterminer la réparation adéquate de ce préjudice conformément au droit international" (emphasis added).⁴⁷⁵

527. This understanding is reiterated in § 217,⁴⁷⁶ and then the Tribunal states in § 218 that:

"Le Tribunal commence par souligner le fait que le préjudice en question doit être celui causé par la violation spécifique. Le lien de causalité est une condition essentielle. Ce qui doit être prouvé est à la fois l'existence d'un préjudice pour le demandeur et le fait que ce préjudice particulier est la conséquence suffisamment immédiate de la violation spécifique" (emphasis added).⁴⁷⁷

528. Then, after analysing the original Award, the resubmission Tribunal concludes in § 230 that:

"a) au-delà de sa description, dans des termes quelque peu obscurs, de ce qui a constitué la violation de la garantie d'un traitement juste et équitable, le Tribunal Initial n'a pas déterminé quel préjudice a été causé aux Demanderesses par cette violation ou ses éléments constitutifs ;

b) il reste donc à déterminer la nature et l'étendue de ce préjudice ;

c) comme les Demanderesses n'ont pas satisfait à la charge de la preuve correspondante dans l'arbitrage initial, il leur incombe toujours de rapporter cette preuve maintenant dans la présente procédure de nouvel examen" (emphasis added).⁴⁷⁸

529. This is where the RT's revision of the original Award is targeted:

- At (a), by asserting that the Award is supposed not to have determined "what harm" was caused, it denies the "impact" clearly identified in the original Award, which also contains, in embryonic form, the "effects". The OT is thus supposed to have found only abstract causes with no concrete development – so all remains to be found out.
- At (b), the confusion restated in § 231, justifying the notion (c) that as any "impact" found by the original Tribunal has vanished – the "effects" substantiated by Mr. Pey Casado and the President Allende Foundation are shrouded in mist.
- At (c), by overriding the decision of the *ad hoc* Committee of 18 December 2012 dismissing Chile's claim that Mr. Pey Casado and the President Allende Foundation had supposedly not satisfied the corresponding burden of proof in the original arbitration:

⁴⁷³ **Ibid.**, § 207

⁴⁷⁴ **Ibid.**, §§ 207-210

⁴⁷⁵ **Ibid.**, § 211

⁴⁷⁶ **Ibid.**, § 217: "Etant donné que la première étape, c'est-à-dire la constatation de la violation, a déjà donné lieu à une décision ayant force obligatoire dans la Sentence Initiale, le Tribunal peut passer à la seconde, la détermination du préjudice causé par la violation".

⁴⁷⁷ **Ibid.**, § 218

⁴⁷⁸ **Ibid.**, Resubmission Award, § 230

Décision of the *ad hoc* Committee⁴⁷⁹

"(ii) Charge de la preuve

272. La question soulevée par le Chili au regard de cet aspect de l'article 52(1)(d) est celle de savoir si les Demanderesses ont satisfait à la charge de la preuve de leur préjudice qui pesait sur elles.

"Position du Chili

273. Le Chili souligne le fait que le Tribunal a reconnu que les Demanderesses avaient la charge de prouver leur préjudice et qu'elles n'avaient pas apporté de preuves relatives à l'évaluation du préjudice dans le cadre des demandes fondées sur le déni de justice et la discrimination. Nonobstant ce postulat, le Tribunal a octroyé aux Demanderesses des dommages-intérêts au titre de la violation du principe de traitement juste et équitable.

274. Le Chili soutient que:

Because the Tribunal rendered such determination on damages against the Respondent despite the fact that it admitted both that the Claimants bore the burden of proof regarding damages, and that the Claimants had in fact provided no arguments or evidence at all in that regard with respect to the two claims that constituted the ultimate bases of responsibility, it is evident that the Tribunal disregarded even its own standards on the issue, and improperly reversed the burden of proof.

275. La Défenderesse ajoute que, si la charge de la preuve avait en fait été placée sur les Demanderesses, la Sentence aurait pu être très différente. Par conséquent, conclut le Chili, le Tribunal a violé une règle fondamentale de procédure.

Analyse du Comité

277. (...) afin de dissiper tout doute en ce qui concerne la Demande du Chili, le Comité décide de la rejeter."

530. Finally in § 231, the Tribunal explains that "la question qui demeure pour le Tribunal, et il s'agit de la question centrale dans la présente instance de nouvel examen, est celle de savoir si, et dans quelle mesure, les Demanderesses ont satisfait à la charge de prouver quel préjudice a été causé à l'une ou/et l'autre du fait de la violation par la Défenderesse de la norme de traitement juste et équitable du TBI, puis d'établir en termes financiers le dommage quantifiable correspondant" (emphasis added).⁴⁸⁰

531. The Tribunal's reasoning quoted above is contrary to the *res judicata* conclusion of the original Tribunal that Mr. Pey Casado and the President Allende Foundation suffered harm resulting from the Respondent's breaches of article 4 of the Spain-Chile BIT submitted to arbitration in May 2000 and on 4 November 2002,⁴⁸¹ whose impact is clear, and it is indicated on what considerations the consequences are determined.

⁴⁷⁹ Document C20, pp. 141-143

⁴⁸⁰ Document C9f, Resubmission Award, § 231

⁴⁸¹ Document C2, Original Award, §665-674, points 2 and 3 Dispositif

532. Contrary to the resubmission Tribunal's interpretation of the original Award, that Award had already ruled on the existence of harm and deemed that it was caused by the Respondent's breaches of article 4 of the Spain-Chile BIT.
533. It was thus the resubmission Tribunal's task just to establish the nature of the harm, from the clarification to be provided, and to put a figure on it.
534. The Tribunal went much further, deeming that *"les Demanderesses n'ont pas satisfait à cette charge de la preuve [de prouver le préjudice] ; en effet, elles ont centré leurs arguments sur l'évaluation du dommage, sans démontrer au préalable la nature précise du préjudice, le lien de causalité, et le dommage lui-même."*⁴⁸²
535. But as shown above, the original Award determined the existence of harm and the causal link between it and the breaches of the BIT, *res judicata*.
536. On overstepping its jurisdiction, the resubmission Tribunal thereby committed an excess of powers.
537. What is more, the Tribunal allowed the Respondent's argument according to which Mr. Pey Casado and the President Allende Foundation were supposed to have suffered no harm. Yet this argument had been rejected by the original Award and the first *ad hoc* Committee.

(ii) The Tribunal allowed an argument from the Respondent previously rejected by the original Award and the first *ad hoc* Committee

538. In § 232 of the resubmission Award, the Tribunal takes up arguments put forward by Chile so as to dismember the linkage that the OA identifies in §§ 210 *in fine*, 215, 217, 444 and 665-674 between the court decision of 29 May 1995, the lack of reply from the executive, administrative and judicial authorities to Mr. Pey's claims, "Decision 43" and the stalling of the judgment awaited from the 1st Court of Santiago – a linkage that established the harm caused to the investment as a whole – in order to conclude that Mr. Pey Casado and the President Allende Foundation had suffered no harm from the breaches of the BIT:
- Mr. Pey Casado and the President Allende Foundation are supposed to have suffered no injury as a result of the matter of the Goss machine because *"ce qui était demandé dans cette affaire, c'était la restitution de la rotative ou une indemnisation au titre de sa confiscation, demande qui a été le moment venu englobée dans la version longue des demandes des Demanderesses dans l'arbitrage initial et a été rejetée par le Tribunal Initial au motif qu'elle était en dehors du champ du TBI."*
 - Mr. Pey Casado and the President Allende Foundation are supposed to have suffered no injury as a result of "Decision 43" because *"[elles] n'auraient pas pu bénéficier d'un processus d'indemnisation auquel elles avaient délibérément et explicitement choisi de ne pas participer (en raison de la clause d'option irrévocable ("fork-in-the-road") du TBI). Ou la Défenderesse a présenté la question d'une manière différente, en soutenant que, si les Demanderesses pouvaient être présumées avoir subi quelque dommage, la cause immédiate du dommage était constituée par leurs propres actes, rompant ainsi le lien de causalité exigé pour l'octroi d'une compensation financière sur le fondement du projet d'Articles 31 et 36 de la CDI."*
539. In paragraph 233 of its Award the resubmission Tribunal declares this line of argument to be *"parfaitement fondée"*.

⁴⁸² Document C9f, Resubmission Award, § 232

540. Yet Chile's arguments, like those of the Award upholding them, are contrary to the original Award's *res judicata*.
541. On one hand, we have shown above that the existence of harm suffered by Mr. Pey Casado and the President Allende Foundation was established by the original Award as regards the investment as a whole, as *res judicata*.⁴⁸³
542. The Tribunal could not therefore uphold an argument asserting the contrary.
543. On the other hand, the original Award clearly identifies the breaches of the BIT for which Chile was held liable. These breaches whose impact – involving the prospect of consequences – is once again perfectly clear, stems from the linkage (§ 674) of events occurring as from May 2000, involving:
- (i) granting compensation for the investment as a whole to persons who, in the Tribunal's view, did not own the confiscated assets,
 - (ii) at the same time as it stalled the proceedings in the 1st Civil Court of Santiago (where Mr Pey had sought a recognition of the invalid public law vitiating decree 165 *ex officio* with a view to recovering the Goss machine), whereas the State Defence Council (CDE) asserted "*la validité du Décret Suprême n° 165*",⁴⁸⁴
 - (iii) or rejected Mr Pey's claims,
 - (iv) regarding all of the confiscated assets,
 - (v) and the consequence of all these actions was that it had "*manifestement commis un déni de justice et refusé de traiter les demandereses de façon juste et équitable*",
 - (vi) as a result of which the harm caused to Mr. Pey Casado and the President Allende Foundation was to be compensated for (point 3 of the OA's dispositive part).
544. So it was on the basis of these acts subsequent to the year 2000 that the original Award recognised the existence of harm necessarily caused to Mr. Pey Casado and the President Allende Foundation, and recognised their right to pecuniary compensation to remedy it.
545. On asserting that the "*violation réelle*" established by the original Award consisted of two mutually independent acts – the non-restitution of the Goss machine and the lack of compensation under "Decision 43" – the RT thus cast aside the *res judicata* of the internal structure and the cause-effect linkage between the breaches of article 4 of the BIT, the damage and the pecuniary compensation provided for the original Award.
546. It is also worth noting that the Respondent had already submitted similar arguments to the first *ad hoc* Committee, which were rejected.⁴⁸⁵
547. Indeed, before the first *ad hoc* Committee the Respondent also argued that Mr. Pey Casado and the President Allende Foundation could not have suffered harm as a result of "Decision 43",

⁴⁸³ *Supra*, § 693, 694

⁴⁸⁴ **Document C2**, Original Award, § 78

⁴⁸⁵ Application for annulment of 10 November 2017, §§ 229 et seq.

because of the initiation of the ICSID proceeding barring them from taking part in compensation procedures with the Chilean administrative authorities.⁴⁸⁶

548. This argument had also been rejected by the first *ad hoc* Committee, which judged that "le Tribunal a amplement motivé sa conclusion selon laquelle la Décision n° 43 du Chili était discriminatoire à l'encontre des Demanderesses et violait donc l'article 4 de l'API."⁴⁸⁷
549. So the resubmission Tribunal could not uphold a claim by Chile that had previously been dismissed by the OT and the first *ad hoc* Committee, which declared that dismissal *res judicata*.

(c) The Tribunal's reasoning constitutes a manifest excess of powers

550. As shown above and in the application for annulment,⁴⁸⁸ the resubmission Tribunal, by requiring Mr. Pey Casado and the President Allende Foundation to demonstrate the harm sustained, along with the causal relationship with the breaches of article 4 of the BIT established in the original Award, reopened issues already settled in that Award in disregard of its *res judicata*.
551. The same applies to the Tribunal's acceptance of Chile's argument according to which Mr. Pey Casado and the President Allende Foundation supposedly suffered no harm as a result of the Respondent's breaches of article 4 of the Spain-Chile BIT, whereas this same argument had been dismissed by the first *ad hoc* Committee.
552. The Tribunal thereby committed an excess of powers.
553. This excess of powers, plain to see on a comparative reading of the original Award and the resubmission Award, is manifest.
554. It is also especially serious. For after deeming that it lacked jurisdiction over the issues arising between the parties after 3 November 1997, that it fell to Mr. Pey Casado and the President Allende Foundation to provide **evidence of the harm** suffered, while dismissing *in limine litis* evidence that the compensation due for the breach of article 4 of the BIT was equivalent to that resulting from the confiscation of the investment – which point should have been clarified in the resubmission proceeding given that it could not be addressed in the original proceeding, thereby constituting one of the grounds for the partial annulment – the resubmission Tribunal concluded that the Respondent's arguments regarding the supposed lack of **harm** sustained by Mr. Pey Casado and the President Allende Foundation as a result of the breaches of the BIT identified in the original Award where well founded, the RT ultimately dismissed the Claimants' claims for compensation on account of non-satisfaction of the burden of proof. Yet it was not up to the Claimants to again provide such proof, as **the existence of harm had already been determined by the original Tribunal with *res judicata* effect**, along with the duty of compensation, so all that was left for the resubmission Tribunal was "*le calcul de son montant*" (§ 679 of the original Award and §§ 223, 271 and 286 of the decision of the first *ad hoc* Committee), evidently involving the prior determination of the scope and extent of harm, as legitimately sought by Mr. Pey Casado and the President Allende Foundation.
555. For these reasons the Award is liable to be annulled in whole.

⁴⁸⁶ Document C20, Decision of the *ad hoc* Committee, § 229 et seq.

⁴⁸⁷ *Ibid.*, § 233.

⁴⁸⁸ See Sections III.3, III.4 et III.5

2.3.3.4 The Tribunal unduly declined jurisdiction in the case of the denial of justice recognised by the original Award

556. The original Tribunal determined its jurisdiction over acts subsequent to the arbitration request (a).

557. The resubmission Tribunal, contrary to the *res judicata* attached to the above determination, declined jurisdiction over any facts relating to denial of justice occurring after the original Award (b), thereby manifestly exceeding its powers (c).

(a) The original Award concluded that the original Tribunal had jurisdiction over the acts of Chile subsequent to the initial arbitration request

558. In points 1 and 2 of the dispositive part of the original Award, the original Tribunal accepted jurisdiction to hear the disputes arising between Mr. Pey Casado and the President Allende Foundation and the Chilean Republic as from 2000, and established that the Respondent had breached its duty to give the Claimants fair and equitable treatment and refrain from any denial of justice.⁴⁸⁹

559. Specifically, a large part of the dispute for which the original Award accepted jurisdiction relates to facts occurring after the initial arbitration request of 3 November 1997.

560. Thus, in §§ 419 et seq. of the original Award, the original Tribunal undertakes to consider whether the BIT's requirement for application *ratione temporis* is met.

561. First, in §§ 434 et seq. of the original Award, the original Tribunal looks at whether the disputes referred to by Mr. Pey Casado and the President Allende Foundation arose after the entry into force of the Spain-Chile BIT, i.e. 29 March 1994.

562. The original Tribunal concluded that this is indeed the case:

- for the dispute concerning Mr. Pey Casado and the President Allende Foundation claims covering all of their investment, arising following the decision of a Court in Santiago de Chile of 29 May 1995 to recognise Mr Pey Casado's ownership of all of the shares of the firm CPP;⁴⁹⁰
- for the dispute relating to the consequences of "Decision 43", arising as from May 2000;⁴⁹¹
- for the dispute relating to denial of justice linked to the stalling of the proceedings conducted by the 1st Civil Court of Santiago, arising in 2002-2003.⁴⁹²

563. The original Award's conclusion in § 465 of the original Award leaves no room for doubt: "[L]e Tribunal conclut que les trois différends invoqués par les demanderesses sont bien survenus postérieurement à l'entrée en vigueur de l'API et qu'il est en conséquence compétent *ratione temporis* pour en connaître."⁴⁹³

⁴⁸⁹ Document C2, Original Award, §§ X.1 et X.2.

⁴⁹⁰ *Ibid.*, Original Award, §§ 444-447; and 563 et seq.

⁴⁹¹ *Ibid.*, §§ 452-453; and 563 et seq.

⁴⁹² *Ibid.*, §§ 459 et s; and 563 et seq.

⁴⁹³ *Ibid.*, §§ 465; and 563 et seq.

564. As explained immediately afterwards by the original Tribunal in § 466 of the original Award, it then fell to it to determine whether the BIT's substantive provisions applied to the various breaches alleged by Mr. Pey Casado and the President Allende Foundation.⁴⁹⁴

565. Second, the original Tribunal made this analysis in §§ 575 et seq. of the original Award.

566. This determines that:

- the BIT's provisions are not applicable to acts of expropriation prior to its entry into force,⁴⁹⁵ and so the initial request of 3 November 1997 (expropriation) was dismissed;
- the BIT's provisions are applicable to the disputes arising after "Decision 43" of 28 April 2000;⁴⁹⁶
- the BIT's provisions are applicable to the acts of denial of justice and discrimination after 3 November 1997 submitted by Mr. Pey Casado and the President Allende Foundation to arbitration on 4 November 2002.⁴⁹⁷

567. In short, the original Tribunal determines that its jurisdiction covers disputes concerning acts occurring after the initial arbitration request of 3 November 1997.

568. As recalled above, the original Tribunal then held that Chile had breached article 4 of the Spain-Chile BIT in relation to acts after 3 November 1997,⁴⁹⁸ especially by its failure to give fair and equitable treatment, including denial of justice, as regards the whole of Mr. Pey Casado and the President Allende Foundation investment covered by the BIT (article 2(2)).

569. The decisions of the original Award quoted above are *res judicata*.

(b) The resubmission Tribunal unduly declined jurisdiction in the case of acts of denial of justice subsequent to the original Award

570. In § 216, the resubmission Tribunal examines the question of Mr. Pey Casado and the President Allende Foundation claim regarding alleged acts by the Respondent subsequent to the original Award, constituting a denial of justice.

571. The Tribunal then deems that such acts do not fall within its jurisdiction:

"[L'] ensemble de cet argument n'est clairement pas dans le champ de compétence de ce Tribunal, qui (comme cela a déjà été indiqué) est limité, en vertu de l'article 52 de la

⁴⁹⁴ *Ibid.*, §§ 466: "Cela ne signifie pas pour autant que les dispositions de fond de l'API sont applicables à l'intégralité des violations alléguées par les Demandereses. En effet, en vertu du principe de non-rétroactivité des traités, l'applicabilité des obligations de fond d'un traité est déterminée, sauf accord contraire des parties que le Tribunal estime ne pas être intervenu en l'espèce, en fonction de la date à laquelle s'est produit le fait illicite et non en fonction du moment où apparaît et se cristallise le différend, critère distinct ne servant qu'à établir la compétence *ratione temporis* du Tribunal. Ce n'est que si la violation alléguée est postérieure à l'entrée en vigueur du traité que les dispositions de fond de ce dernier seront applicables à ladite violation".

⁴⁹⁵ *Ibid.*, § 612.

⁴⁹⁶ *Ibid.*, §§ 613 et seq.

⁴⁹⁷ *Ibid.*, §§ 624 et seq.

⁴⁹⁸ *Infra*, § 543-545

Convention CIRDI et de l'article 55 du Règlement d'arbitrage du CIRDI, exclusivement au "différend" ou aux parties de celui-ci qui demeurent après l'annulation."⁴⁹⁹

572. We showed above that the dispute for which the original Tribunal accepted jurisdiction included acts committed after the filing of the initial request in relation to "Decision 43" of 28 April 2000 and acts of denial of justice in the handling of proceedings in the 1st Civil Court of Santiago, where the Judgment of 24 July 2018 was to be finally rendered, recognising the "invalid public law" vitiating Decree 165.⁵⁰⁰

573. Yet in sharp contradiction with this determination by the original Award, which has *res judicata* effect, the resubmission Tribunal decided that:

*"Ces termes [Article 52 of the Convention and Rule 55] ne peuvent être interprétés que comme une référence au "différend" qui avait été initialement soumis à l'arbitrage, différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses" (3 November 1997, emphasis added)*⁵⁰¹.

574. The Tribunal also explains that:

*"Les questions qui ont surgi entre les Parties après cette date - et a fortiori les questions découlant d'une conduite postérieure à la Sentence - ne peuvent pas, même avec un gros effort d'imagination, entrer dans le champ de la procédure de nouvel examen en vertu des dispositions citées ci-dessus, et le Tribunal estime qu'il n'est pas nécessaire d'en dire plus sur cette question dans la présente Sentence"*⁵⁰².

575. This view reflects a manifest dismissal by the resubmission Tribunal of a vital issue settled in the original Award, in which all the breaches identified result from disputes arising after date of the arbitration request.

576. This is the case in particular of the request regarding the denial of justice deriving from the stalling of the domestic judgment beyond 3 November 1997.

577. So on deeming that it could not examine the alleged denial of justice committed after the arbitration request was filed, whereas the original Tribunal had expressly accepted jurisdiction to do so, the resubmission Tribunal disregarded the original Award's *res judicata*.

(c) The resubmission Tribunal manifestly exceeded its powers

578. We showed above that the resubmission Tribunal unduly restricted its jurisdiction by deeming that it was called upon only for a "*différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses*"⁵⁰³, i.e., November the 3, 1997.⁵⁰⁴

579. This decision is contrary to the *res judicata* of the original Award.⁵⁰⁵

⁴⁹⁹ **Document C9f**, Resubmission Award, § 206

⁵⁰⁰ *Supra*, § 263 et seq.

⁵⁰¹ **Document C9f**, Resubmission Award, § 216

⁵⁰² **Ibid.**, § 216

⁵⁰³ **Ibid.**, § 216

⁵⁰⁴ **Document C2**, Original Award, §6

⁵⁰⁵ *Supra* § 263 et seq.

580. As described above, an excess of powers may derive from the fact, for a tribunal, of not exercising the jurisdiction that it has,⁵⁰⁶ as in this case.
581. The excess of powers committed by the resubmission Tribunal is manifest in that it is plain to see on a comparative reading of the original Award, as confirmed by the first *ad hoc* Committee, and the resubmission Award.
582. Moreover the consequences of this excess of powers are especially serious in so far as the resubmission Tribunal refused to consider issues of discrimination and denial of justice arising between the parties since May 2000, which must necessarily have affected its Award.
583. Once again, the Tribunal's conduct justifies the annulment of the Award in whole due to manifest excess of powers.

2.4 An Award whose treatment of the burden of proof justifies its annulment

584. The points of fact and of law relating to this ground for annulment were covered in section III.4 of the application for annulment. This may be complemented as follows.
585. Two aspects of the Tribunal's treatment of the burden of proof justify the Award's annulment: the refusal to let Mr. Pey Casado and the President Allende Foundation submit arguments and documents relating to issues arising between the parties after 3 November 1997 (2.4.1), and the decision according to which Mr. Pey Casado and the President Allende Foundation were supposed not to have provided proof or moreover to have even sought to do so (2.4.2).

2.4.1 The dismissal of Mr. Pey Casado and the President Allende Foundation arguments and documents relating to issues subsequent to 3 November 1997 justifies the Award's annulment

586. The Tribunal's decision to dismiss the Claimants' arguments and evidence relating to issues arising between the parties after 3 November 1997 stems from a manifestly unfounded interpretation of the original Award and of the decision of the first *ad hoc* Committee (2.4.1.1).
587. This decision is moreover contrary to the original Award's *res judicata* (2.4.1.2).
588. On this point, therefore, the resubmission Tribunal manifestly exceeded its powers (2.4.1.3).

2.4.1.1 The manifestly unfounded interpretation of the decision of the first *ad hoc* Committee and of the original Award

589. The resubmission Tribunal inferred from the decision of the first *ad hoc* Committee and from the original Award that it fell to it to dismiss the Claimants' arguments and documents for a consideration of the BIT infringements identified in §§ 665-674 of the original Award for the purposes determining the harm sustained as a result of the Respondent's breach of article 4 of the BIT (a).
590. Yet no such restriction may be inferred from those rulings, which the resubmission Tribunal interprets in an unfounded and manifestly unreasonable way (b).

⁵⁰⁶ *Supra*, §§39, 40

(a) The Tribunal decided to dismiss the Claimants' arguments and documents applying to a consideration of the conclusions of §§ 665-674 of the original Award

591. In §§ 212 et seq. of its Award the resubmission Tribunal considers the reasons for which the original Award incurred the censure of the first *ad hoc* Committee.

592. According to the resubmission Tribunal, there were two reasons for the partial annulment granted by the first *ad hoc* Committee:

- The lack of debate between the parties on the harm arising from the breaches of article 4 of the Spain-Chile BIT, which was supposed to justify the partial annulment of the original Award on the basis of Article 52(1)(d),⁵⁰⁷
- The contradiction between the forms of compensation decided by the original Tribunal, and its conclusions on the nature of the breach identified.⁵⁰⁸

593. The annulment granted by the first *ad hoc* Committee on the ground provided in Article 52(1)(d) was discussed above,⁵⁰⁹ and most notably it was not so much the general lack of "*possibilité équitable de débattre de la réparation au titre de la violation de l'article 4*", as the RA asserts, which led the *ad hoc* Committee to annul point 4 of the OA's dispositive part, but rather and specifically that Mr. Pey Casado and the President Allende Foundation had not had the chance to submit arguments on whether "*l'indemnisation due était équivalente à celle résultant de la confiscation, étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demandereses d'obtenir une indemnisation au titre de la confiscation.*"⁵¹⁰ [emphasis added]

594. The resubmission Tribunal remarks generally on its task in § 215 in such a way as to totally dismiss any consideration of this first flaw underlying the OA's partial annulment and accepts only the second one, wrapping it up so as to distort:

a) the decision of the *ad hoc* Committee – which confined itself to censuring a contradiction in terms in the original Award in the form of quantification adopted, without making a choice as to whether any particular method of quantification would be acceptable or not – and in turn,

b) the original Award:

"Le Tribunal concentrera donc son attention sur le second vice, dans le but essentiel de s'assurer que ses conclusions relatives à la compensation sont dans la ligne, et ne contredisent pas, les conclusions du Tribunal Initial sur la nature de la violation, telles qu'elles figurent dans la Sentence Initiale" (emphasis added).⁵¹¹

595. Indeed, this general remark leads it to a conclusion as to the type of argument and evidence that Mr. Pey Casado and the President Allende Foundation may or may not submit in support of their arguments for quantifying the harm sustained:

⁵⁰⁷ Document C9f, Resubmission Award, § 214

⁵⁰⁸ Ibid., § 214

⁵⁰⁹ Supra, § 312-313

⁵¹⁰ Document C20, Decision of the *ad hoc* Committee of 18 December 2012, §§ 263, 266, 267

⁵¹¹ Document C9f, Resubmission Award, § 215.

"Etant donné que la première étape, c'est-à-dire la constatation de la violation, a déjà donné lieu à une décision ayant force obligatoire dans la Sentence Initiale, le Tribunal peut passer à la seconde, la détermination du préjudice causé par la violation. Il note toutefois que le Tribunal Initial a constaté la violation de manière négative aussi bien que positive. En d'autres termes, la constatation (positive) que la violation est constituée par le fait composite de ne pas avoir garanti un traitement juste et équitable (en ce compris d'avoir manqué à l'obligation de s'abstenir de tout déni de justice), de même que la constatation (négative) que la confiscation de l'investissement initial est en dehors du champ temporel du TBI, ont toutes deux autorité de chose jugée, de telle sorte que tous les éléments de preuve et les arguments relatifs à cette confiscation doivent être exclus comme n'étant pas pertinents pour le différend, sauf à titre de contexte factuel" (emphasis added)⁵¹².

596. This condition is reiterated in § 228:

"La confiscation initiale d'El Clarin et des actifs s'y attachant qui appartenaient à M. Pey Casado a été consommée en 1975 et est donc hors champ du TBI ; tous les arguments fondés sur la confiscation ou en découlant ne peuvent pas être pris en compte, sauf dans la mesure où ils constituent des éléments factuels pour les questions qui entrent valablement dans le champ du différend au regard du TBI" (emphasis added).⁵¹³

597. And finally § 230, point (d):

"toute évaluation du préjudice et des dommages-intérêts fondée sur l'expropriation initiale est incompatible avec la Sentence Initiale et doit donc être rejetée."⁵¹⁴

598. These conclusions show a manifest excess of powers to the Claimants' detriment. The original Award (see §§ 665-674) and the decision of the first *ad hoc* Committee, contrary to what the resubmission Tribunal asserts, accepted and clearly highlighted the linkage of the consequences of the "**invalidité**" of the confiscation of the assets of CPP SA and EPC Ltd and the "**devoir d'indemniser**" the owners – acknowledged to the original Tribunal by the Respondent – and the calculation of compensation for the damage caused by the breaches of article 4 of the BIT committed after 3 November 1997. This linkage was expressly considered by the original Tribunal and the *ad hoc* Committee:

"La seule fois où la question des dommages pour violation de l'article 4 de l'API a été soulevée, c'est lors de l'audience de janvier 2007, lorsque le Président du Tribunal a demandé aux parties si **le préjudice ou dommage résultant de la violation hypothétique de la disposition relative au traitement juste et équitable était le même que celui résultant de l'expropriation** ou bien s'il était différent de celui-ci. (...) Il est évident pour le Comité que la Défenderesse (et **les Demanderesses**) a (ont) eu très peu de temps lors de l'audience pour répondre à la question posée par le Président."⁵¹⁵ [Soulignemet ajouté]

(b) The interpretation by the Tribunal of the decision of the first *ad hoc* Committee and the original Award is unfounded and manifestly unreasonable

599. The Tribunal's decision results from an unfounded and manifestly unreasonable reading of the decision of the first *ad hoc* Committee and of the original Award, *res judicata*.

⁵¹² *Ibid.*, § 218

⁵¹³ *Ibid.*, § 228.

⁵¹⁴ *Ibid.*, § 230.

⁵¹⁵ **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012, § 263

600. Indeed, the effect of the first *ad hoc* Committee's decision was not, as the resubmission Tribunal decides, that the Claimants' arguments regarding the damages deriving from the **invalidity** of the confiscations and the **duty to compensate** "*n'étaient pas pertinents pour les demandes fondées sur le déni de justice et la discrimination.*"⁵¹⁶
601. It is well established that, though the decision of an *ad hoc* committee may confirm or annul an award's *res judicata*, it cannot create it anew.⁵¹⁷
602. On refusing to consider the arguments and evidence concerning the linkage of Chile's infringements highlighted in §§ 665 to 674 of the original Award, the Tribunal disregards the *res judicata* of a vital part of that Award's Chapter VII – Responsibility of the State.
603. It also confuses the extent of the original Award's *res judicata* attached to the original Tribunal's decision on its lack of jurisdiction *ratione temporis* to hear claims concerning the value of the investment on the eve of its seizure.
604. For this decision declining jurisdiction does not mean that the Resubmission Tribunal cannot entertain arguments and documents concerning the *dies a quo* of the damages whose amount the Tribunal was tasked with determining.
605. As Prof. Benjamin Rémy explains, the resubmission Tribunal's decision on this point succeeds in distorting the scope of the original Award's *res judicata*:

"La partie non annulée de la sentence initiale énonce en effet que l'Etat ne peut voir sa responsabilité engagée du fait de la confiscation intervenue en 1973, dès lors que le TBI n'était pas entré en vigueur à cette époque.

Fallait-il pour autant considérer que toute évocation de cette confiscation devait être bannie du prétoire, ne fût-ce que pour établir la preuve d'un préjudice subi à raison du déni de justice dont le Chili s'est rendu coupable après l'entrée en vigueur du TBI ? Telle semble être la position du tribunal qui exclut "les éléments de preuve" ainsi que "les arguments" relatifs à la confiscation en raison de l'autorité de la chose jugée (§ 217).

*Les effets de l'autorité de chose jugée nous semblent ici mal définis" (emphasis added).*⁵¹⁸

606. The same author then explains that the *res judicata* attached to the original Tribunal's decision that it lacks jurisdiction over claims for compensation under article 5 of the BIT (expropriation) for the value of the investment on the eve of its seizure did not mean that the evidence relating to it could not be considered in determining the harm sustained as a result of the breach of article 4 of the BIT:

"Ce qu'interdit l'autorité de chose jugée est qu'une même prétention, opposant les mêmes parties et fondée sur le même complexe de faits, soit portée plusieurs fois devant des juges différents. Concrètement, l'autorité de chose jugée de la sentence initiale s'oppose à ce que

⁵¹⁶ **Document C9f**, Resubmission Award, § 229

⁵¹⁷ **Document CL312**, R. Doak Bishop & S. M. Marchili, *Annulment under the ICSID Convention*, OUP, 2012, § 10.48: "Because an annulment committee is not a court of appeal, it cannot create a new *res judicata*. Committees can only decide not to annul an award, thus confirming the existing *res judicata*, or annul the award, in which case the affected decision - or portion thereof - ceases to be *res judicata*". C. Schreuer, *The ICSID Convention*, a commentary, Article 52, §§ 656 et seq.

⁵¹⁸ **Document CL333**, Rémy (B.), "Centre international pour le règlement des différends relatifs aux investissements (CIRDI) Chronique des sentences arbitrales", *JDI (Clunet)*, 2017, chron. 1, pp. 217 et seq., § 24.

soit intentée une nouvelle procédure dont l'objet serait de faire déclarer que les confiscations de 1973 sont une expropriation illicite au regard du TBI.

En revanche, elle n'interdit pas que, dans le cadre de l'examen de la demande d'indemnisation du préjudice subi du fait du déni de justice, la réalité de la confiscation soit évoquée. Plus précisément, ce préjudice consistait en une perte de chance pour l'investisseur d'obtenir gain de cause auprès des juridictions chiliennes. Il ne s'agissait aucunement de tenter une nouvelle fois de qualifier ces confiscations de fait internationalement illicite. Il est seulement question de savoir si, au regard du seul droit chilien, la prétention formulée par l'investisseur devant les juges chiliens avait des chances de prospérer et de fixer le montant des indemnités que l'investisseur aurait pu espérer. Les éléments de preuve et les arguments relatifs aux confiscations de 1973, ainsi utilisés, ne devraient donc pas se heurter à l'autorité de la chose jugée de la sentence initiale" (emphasis added)⁵¹⁹.

607. This author's conclusion is quite clear, and reflects the gravity of the consequences of the Tribunal's decision to exclude arguments and documents from the debate:

"En excluant néanmoins ces éléments de preuve et ces arguments du débat mené devant lui, le nouveau tribunal arbitral prive indûment l'investisseur de la possibilité de justifier l'existence et le montant de son préjudice et commet, par là-même, un déni de justice" (emphasis added)⁵²⁰.

608. Further, the conclusion reached by the resubmission Tribunal appears to be contrary to the original Award's *res judicata*.

2.4.1.2 The original Award held that evidence concerning the value of the investment when it was seized could be considered in factual terms

609. Contrary to the Tribunal's conclusions set out above, the original Award did not, any more than the first *ad hoc* Committee, settle the question of the relevance of arguments and evidence relating to the value of the Clarin Group companies when they were seized by troops revolting against the institutions representing the Chilean people.

610. Indeed, although the original Tribunal declined jurisdiction *ratione temporis* in the case of claims concerning expropriation,⁵²¹ this did not mean that it barred the consideration of arguments and evidence relating thereto at the stage of determining the harm sustained as a result of the breach of article 4 of the Spain-Chile BIT.

611. On the contrary, the original Tribunal expressly envisaged taking account, as factual context, of arguments and evidence regarding the seizure of the Claimants' investment by the *de facto* regime.

612. Thus in § 611 of the original Award, the original Tribunal decided that:

"Une fois le traité en vigueur, il n'est toutefois pas interdit au Tribunal de prendre en considération des faits antérieurs à la date d'entrée en vigueur du traité pour examiner le

⁵¹⁹ **Ibid.**, § 24.

⁵²⁰ **Ibid.**, § 24.

⁵²¹ **Document C2**, Original Award, § 608.

contexte dans lequel sont intervenus les actes que les demanderesses estiment devoir être qualifiés de violations postérieures à l'entrée en vigueur du traité" (emphasis added).⁵²²

613. Similarly, in § 612, the Tribunal deemed that:

"En conséquence, même si en l'espèce les dispositions de fond de l'API ne sont pas applicables aux actes d'expropriation antérieurs à son entrée en vigueur, le Tribunal pourra examiner les violations de l'API qui se sont produites après son entrée en vigueur, en prenant en compte au titre du contexte des événements qui ont eu lieu avant cette date" (emphasis added).⁵²³

614. The paragraphs quoted above were not annulled by the decision of the first *ad hoc* Committee. So they were *res judicata* for the resubmission Tribunal and binding on it.

615. We may also note the internal contradiction in the resubmission Award, which states in § 228(a) that *"tous les arguments fondés sur la confiscation ou en découlant ne peuvent être pris en compte, sauf dans la mesure où ils constituent des éléments factuels pour les questions qui entrent valablement dans le champ du différend au regard du TBI"* (emphasis added).⁵²⁴ Yet this is precisely the case of the demonstration made by Claimants of the amount of harm sustained.

616. The facts described above constitute a further manifest excess of powers by the Tribunal.

2.4.1.3 The dismissal of the Claimants' arguments and documents concerning the value of the investment and its seizure constitute a manifest excess of powers

617. As shown above, the consequences that the Tribunal drew from the decision of the first *ad hoc* Committee and the original Award concerning the treatment to be given to the Claimants' arguments and documents regarding the value of the investment on the eve of its violent seizure were unjustified.

618. They were moreover contrary to the original Award's *res judicata*.

619. Accordingly the Tribunal exceeded its powers.

620. This excess of powers is manifest in that it is easily discernible on a reading of the original Award, the decision of the first *ad hoc* Committee and the resubmission Award, not to mention one elementary point – of how a basis for calculation may be declared inadequate for any assessment on the pretext that a claim was not accepted *ratione temporis*.

621. Moreover it has serious consequences, as the resubmission Tribunal, after dismissing the Claimants' arguments and documents concerning the assessment of the harm sustained, deemed simply that the burden of proof was not satisfied, resulting in the dismissal of their claims for compensation.

622. This manifest excess of powers justifies the annulment of the resubmission Award as a whole.

⁵²² Document C2, Original Award, § 611.

⁵²³ *Ibid.*, § 612.

⁵²⁴ Document C9f, Resubmission Award, § 228.

2.4.2 The Tribunal's decision according to which Mr. Pey Casado and the President Allende Foundation are supposed not have satisfied the burden of proof justifies the Award's annulment

623. We showed above that on requiring the Claimants to demonstrate the existence of harm, whereas this question had already been settled by the original Award, the Tribunal manifestly exceeded its powers.⁵²⁵
624. Having deemed that it fell to Mr. Pey Casado and the President Allende Foundation to demonstrate the existence of harm, and then dismissed *in limine litis* the arguments and documents relating to the value of the investment on the eve of its seizure, the Tribunal then decided that the Claimants had not satisfied the burden of proof incumbent on them (2.4.2.1).
625. This decision is vitiated by failure to state reasons (2.4.2.2) and a serious departure from a fundamental rule of procedure (2.4.2.3).

2.4.2.1 The resubmission Tribunal deemed that Mr. Pey Casado and the President Allende Foundation had not satisfied the burden of proof

626. In § 231 of the RA, after concluding that the Claimants' arguments and documents concerning the investment's value on the eve of its seizure should be dismissed, the Tribunal deems that the question still to be decided is "*si, et dans quelle mesure, les Demanderesses ont satisfait à la charge de prouver quel préjudice a été causé à l'une ou/et l'autre du fait de la violation par la Défenderesse de la norme de traitement juste et équitable du TBI, puis d'établir en termes financiers le dommage quantifiable correspondant.*"⁵²⁶
627. In § 232 of the RA, the Tribunal deems that the burden is not satisfied:
628. "*Une fois posée dans les termes du paragraphe précédent, il devient clair que **les Demanderesses n'ont pas satisfait à cette charge de la preuve ; en effet, on pourrait dire que dans un sens, elles n'ont même pas cherché à le faire**, dans la mesure où elles ont centré leurs arguments sur l'évaluation du dommage, sans démontrer au préalable la nature précise du préjudice, le lien de causalité et le dommage lui-même*" (bold added, underlining in the original).⁵²⁷
629. Consequently the resubmission Tribunal considers in § 234 that "*les Demanderesses n'ont pas démontré de dommage matériel causé à l'une ou l'autre d'entre elles et qui est le résultat suffisamment direct de la violation par la Défenderesse de l'article 4 du TBI. Le Tribunal ne peut donc pas, par principe, octroyer de dommages-intérêts.*"⁵²⁸
630. The RA's conclusions as to the Claimants' not having really set out their arguments concerning the cause-effect linkage that caused the damage, and the nature of the resulting harm, are vitiated by a total failure to state the reasons on which they are based.

⁵²⁵ See ground III.3 of the Application for annulment of 10 November 1997

⁵²⁶ **Document C9f**, Resubmission Award, § 231

⁵²⁷ **Ibid.**, Resubmission Award, § 232.

⁵²⁸ **Ibid.**, Resubmission Award, § 234.

2.4.2.2 The Tribunal's decision according to which Mr. Pey Casado and the President Allende Foundation are supposed not have satisfied the burden of proof is vitiated by a failure to give reasons

631. The Tribunal's undeveloped assertion according to which "*les Demanderesses n'ont pas satisfait à cette charge de la preuve ; en effet, on pourrait dire que dans un sens, elles n'ont même pas cherché à le faire*" constitutes a failure to state reasons, and is incomprehensible in view of the debate held before the Tribunal, both in the written phase and in the hearings.
632. As Mr. Pey Casado and the President Allende Foundation say in their application for annulment,⁵²⁹ in their submission to the Tribunal they set out solid arguments concerning the harm sustained as a result of unfair and non-equitable treatment and denial of justice.
633. For example, in §§ 201 to 342 of their Memorial of 27 June 2014, the Claimants set forth successive arguments on the "*préjudice subi par les demanderesses*" (Section 5), the "*préjudice résultant du déni de justice*" (Section 5.1), the "*préjudice lié à la paralysie des juridictions internes*" (Section 5.1.2.1), and the "*préjudice résultant de la violation du traitement juste et équitable et notamment de la Décision n°43*" (Section 5.2).⁵³⁰
634. They also show that arbitral tribunals have accepted that the full reparation principle entails that the investor may be compensated for the value of the assets seized, even where their claim is based not on expropriation but on a lack of fair and equitable treatment after the BIT's entry into force on 29 March 1994.⁵³¹
635. This point was discussed at length at the hearing with Mr Kaczmarek, the legal expert provided by Chile, who acknowledged the possibility, for a tribunal asked to take a view on a failure to give fair and equitable treatment, of the remedy for the harm being equivalent to that resulting from expropriation and of applying the calculation methods normally used in calculations for expropriation.⁵³²
636. Thus the mere assertion by the Tribunal that Mr. Pey Casado and the President Allende Foundation were supposed not even to have sought to supply proof of the harm sustained is incomprehensible.
637. We recall, as shown above, that a tribunal's award is vitiated by a failure to state reasons where it is not possible from a reading of the decision to understand the process followed by the tribunal in reaching its conclusion.
638. To quote the *ad hoc* Committee in *MINE v. Guinea*:

*"In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact and law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons"*⁵³³.

⁵²⁹ Application for annulment of 10 November 1997 (revised), p. 116, § 231 et seq.

⁵³⁰ **Document C8**, Memorial for the resubmission Tribunal, §§ 201 et seq.

⁵³¹ See **Document C40**, Rejoinder of 9 January 2015, §§ 342 et seq., and the extensive legal literature cited in defence of their arguments: **documents C47 to C65**.

⁵³² **Document C271**, Hearings, 15 April 2015, transcript of day 3, 14:33, p. 102 (107) et seq.

⁵³³ **Document CL313**, *MINE v. Guinea*, ICSID Case No. ICSID Case No. 84/4, Decision of the *ad hoc* Committee on annulment, 22 December 1989, § 5.08-5.09.

639. As the *ad hoc* Committee stresses in this decision, and as other tribunals have also asserted, frivolous reasons, or grossly insufficient or inadequate reasons,⁵³⁴ do not meet this requirement for substantiation.
640. More recently, the Committee in *TECO v. Guatemala* also noted that the lack of discussion by a tribunal of evidence submitted by the parties could constitute a failure to state reasons.⁵³⁵
641. In that case the tribunal had, in its determination of the damages due to the investor, largely glossed over the expert reports submitted by the parties.
642. The *ad hoc* Committee then decided that:

"The Committee takes issue with the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim. While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion" (emphasis added).⁵³⁶

643. The resubmission Tribunal's decision that Mr. Pey Casado and the President Allende Foundation supposedly did not satisfy the burden of proof is far removed from the standards referred to above.
644. Whereas the question of the harm sustained by Mr. Pey Casado and the President Allende Foundation and the relevant method of calculation was of vital importance to them, as this was the sole matter remaining to be settled, the Tribunal, before deciding that Mr. Pey Casado and the President Allende Foundation had not satisfied the burden of proof and had not "*même pas cherché à le faire*":⁵³⁷
- did not refer to Mr. Pey Casado and the President Allende Foundation submissions accounting for the nature of the harm they had suffered as a result of the denial of justice and lack of fair and equitable treatment by Chile, reckoning it as equivalent to the total loss of the investment;
 - did not apply Chilean law as it is applied by the Supreme Court in the many judgments attached in the arbitration file;
 - did not apply the principles of international law or even refer to the many arbitral awards and doctrinal articles envisaging the possibility of a tribunal compensating investors for breach of the duty to give "fair and equitable treatment" just as if their investments had been expropriated, pursuant to the principle of full reparation;
 - did not, finally refer to the Claimants' cross-examination of the financial expert provided by the Respondent, who confirmed the aforesaid principles.

⁵³⁴ *Supra*, § 82

⁵³⁵ **Document CL316**, *TECO v. Guatemala*, §§ 123-139.

⁵³⁶ **Ibid.**, §§ 131.

⁵³⁷ **Document C9f**, Resubmission Award, § 232.

645. Here, the Tribunal's reasons as given do not allow us to understand the solution that it reached.

646. This failure to state reasons on a vital aspect justifies the annulment of the Award in whole.

2.4.2.3 The RT's decision according to which Mr. Pey Casado and the President Allende Foundation are supposed not to have satisfied the burden of proof is vitiated by a serious departure from a fundamental rule of procedure

647. The Tribunal's decision that the Claimants had not satisfied the burden of proof incumbent on them is the product of systematically biased reasoning by the Tribunal which, every time it had the chance, treated Mr. Pey Casado and the President Allende Foundation in such a way as to deny them their right to due process.

648. The right to due process is incontestably part of the fundamental rules of procedure referred to by Article 52(1)(d).

649. Within this general principle we may distinguish several other equally fundamental procedural rules, such as the requirement for an independent impartial tribunal, the principle of equal treatment of the parties, the right to be heard, or the treatment of evidence or the burden of proof.

650. As was recently summed up by the *ad hoc* Committee in *SAUR International v. Argentina*:

*"Parmi les normes de procédure qui peuvent être considérées comme "fondamentales" figurent le traitement égalitaire des parties, le droit à être entendu, le traitement des éléments de preuve et la charge de la preuve, l'indépendance et l'impartialité du tribunal et les délibérations entre les membres du tribunal"*⁵³⁸.

651. The *ad hoc* Committee in *Lemire v. Ukraine* likewise decided that:

*"Ad hoc committees have consistently held that not every departure from a fundamental rule of procedure justifies annulment. Within the examples of fundamental rule of procedure identified by ad hoc committees are: (i) the equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial tribunal; (iv) the treatment of evidence and burden of proof; and (v) deliberations among members of the Tribunal."*⁵³⁹

652. In their application for annulment⁵⁴⁰ Mr. Pey Casado and the President Allende Foundation described how, from the first paragraph of its Award, the Tribunal took a partial approach favouring the Respondent on stating that *"le temps est venu, toutefois, de mettre définitivement un terme à cette procédure arbitrale; reipublicae interest ut finis sit litium."*⁵⁴¹ The resubmission Tribunal's bias and partiality distorted this principle, applaudable *per se*, by turning it into an aspiration allowing the order to compensate the claimant investors given in the Arbitral Award, as *res judicata*, to be stripped of effect.

653. Indeed, it is hard to imagine that the Tribunal was in a state of mind conducive to equal treatment of the parties if it believed, from the outset, that its role was to put a final end to

⁵³⁸ **Document C103**, *SAUR International v. Argentina*, ICSID Case No. ARB/04/4, Decision on Argentina's application for annulment, 19 December 2016, § 182.

⁵³⁹ **Document CL334**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Excerpts of Decision on Annulment, 8 July 2013, § 263

⁵⁴⁰ Application for annulment of 10 November 1997, §§ 3 et seq.

⁵⁴¹ **Document C9f**, Resubmission Award, § 172

litigation which it regarded (one senses) as having taken a long time to render the duty to compensate provided in the original Award ineffective.

654. The simplest way to arrive at this predetermined conclusion was undoubtedly to methodically deconstruct and then reject the original Award's various *res judicata* findings and the Claimants' claims, as the Tribunal set about doing.
655. The Claimants showed in their application for annulment that the Tribunal on occasion expressed regret that the decision of the first *ad hoc* Committee did not go further.⁵⁴²
656. It will be remembered, for example, that the Tribunal saw fit to point out, of its own accord, a further criticism that might have been made (by it) of the original Award:

*"Le Tribunal pourrait en outre relever qu'une autre critique aurait éventuellement pu être portée à l'encontre des parties annulées de la Sentence Initiale, à savoir la manière selon laquelle elles tendent à faire abstraction de la distinction entre le préjudice (et la question connexe du lien de causalité) et l'évaluation de la compensation due au titre de ce préjudice."*⁵⁴³

657. Mr. Pey Casado and the President Allende Foundation also indicate in their application for annulment,⁵⁴⁴ as again shown above,⁵⁴⁵ that the Tribunal allowed Chile to submit arguments that had already been rejected by the first *ad hoc* Committee, and even upheld them, contrary to the *res judicata* of the original Award.
658. Similarly, on the last day of the hearings, the Tribunal reopened issues that were *res judicata* in the original Award,⁵⁴⁶ inviting the parties to explain:
- Whether Mr Pey Casado had investor status for the purposes of the BIT;⁵⁴⁷
 - Whether there was any link between paragraphs 2 and 3 of the dispositive part of the original Award⁵⁴⁸ that might spare the Respondent State from having to financially compensate the claimant investors; and also
 - Whether "Decision 43" constituted a breach of the Spain-Chile BIT.⁵⁴⁹
659. The Award's considerations recalled above, in so far as they follow only Chile's arguments, sometimes in disregard of the *res judicata* effect of the original Award, constitute a breach of the principles of equal treatment and the requirement of an independent and impartial tribunal.
660. On this point we may note the *dictum* of the *ad hoc* Committee in *Enron v. Argentina*, where the Tribunal pointed out that a breach of the requirement of an independent and impartial tribunal could be ascertained from a series of rulings or findings that side with one of the parties with no basis in evidence:

⁵⁴² Application for annulment of 10 November 1997, §§ 243 et seq.

⁵⁴³ **Document C9f**, Resubmission Award, § 215

⁵⁴⁴ Application for annulment of 10 November 2017, §§ 246 et seq.

⁵⁴⁵ *Supra*, §341 et seq.

⁵⁴⁶ *Supra*, §292 et Application for annulment, §§ 251 et seq.

⁵⁴⁷ **Document C43**, Hearing of 15 April 2015, 16:49, p. 162, lines 1-6

⁵⁴⁸ **Ibid.**, Hearing of 15 April 2015, 16:52, p. 163, lines 1-19

⁵⁴⁹ **Ibid.**, Hearing of 15 April 2015, 16:55, p. 164, lines 14-25 et p. 165, lines 1-2.

*"The Committee notes that lack of impartiality may be a ground of annulment under Article 52(1)(d) of the ICSID Convention, and leaves open the possibility that such lack of impartiality might be evidenced, for instance, by the fact that an Award consistently and perversely makes findings favourable to one party without any basis in the evidence"*⁵⁵⁰.

661. Moreover the Tribunal's decision, detailed above,⁵⁵¹ to rule out *in limine litis*, on the false pretext of lack of jurisdiction with the dismembering of the OA, the Claimants' arguments and evidence for taking into account the value of the investment on the eve of its seizure to determine the amount of damages as a result of the breaches of article 4 of the BIT since 2000 constitutes not only a manifest excess of powers but also an infringement of the Claimants' right to be heard, and of rules of procedure on the treatment of evidence.

662. The importance of the treatment of evidence in a party's right to be heard was noted by the *ad hoc* Committee in *Wena v. Egypt*:

*"Article 52(1)(d) refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defence and to produce all arguments and evidence in support to it" (emphasis added).*⁵⁵²

663. Similarly, the *ad hoc* Committee in *Tulip v. Turkey* held that:

*"The right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments and evidence presented to them. In particular, the fact that an award does not explicitly mention an argument or piece of evidence does not allow the conclusion that a tribunal has not listened to the argument or evidence in question. A refusal to listen, amounting to a violation of the right to be heard, can only exist where a tribunal has refused to allow the presentation of an argument or a piece of evidence" (emphasis added).*⁵⁵³

664. These considerations apply entirely to the situation here, in which the Tribunal merely ruled out of the debate the arguments and evidence furnished by Mr. Pey Casado and the President Allende Foundation to demonstrate the nature of the harm sustained as a result of the breaches of the BIT by the Respondent subsequent to 3 November 1997, as established in the original Award.

665. All the various departures from fundamental rules of procedure described above are of a serious nature.

666. For these departures undermine the very principle of the right to due process, and denied the Claimants the benefit of that fundamental rule.

En effet, ces inobservations mettent à mal le principe même du droit à un procès équitable, et ont privé les Demanderesses du bénéfice même de cette règle fondamentale.

⁵⁵⁰ **Document CL307**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, § 278.

⁵⁵¹ *Supra*, § 518, 554

⁵⁵² **Document CL314**, *Wena hotels v. Egypt*, Decision of the *ad hoc* Committee of 5 February 2002, § 56-57

⁵⁵³ **Document C14**, *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, § 82

667. These serious and repeated departures from fundamental rules of procedure justify the annulment of the whole Award on the ground of Article 52(1)(d).

2.4.3. The dismembering of the original Award and of the decision of the *ad hoc* Committee in the resubmission Award

668. The original Award was torn apart by the resubmission Tribunal as follows:

1st) setting aside the *res judicata* effect of §§ 666-674, linking:

- i) Chile's acknowledgment on 6 May 2003 of the invalidity of the confiscation of the investment owned by Mr Pey Casado,
- ii) the breach of article 4 of the BIT (failure to give and equitable treatment, refraining from any denial of justice) by Chile,
- iii) and the Claimants' right to pecuniary compensation for the investment as a whole (points 1 to 3 of the dispositive part of the original Award),

2nd) infringing the *res judicata* of points 1 to 3 of the dispositive part of the original Award, so that the RA denied *ex officio* and *inaudita parte* – for no party had raised an objection under Rule 41(1) – the RT's jurisdiction over issues arising between the parties as from 2000,⁵⁵⁴

3rd) excluding from the resubmission Tribunal's jurisdiction, consequently, all of the Claimants' evidence and arguments based on §§ 666-674, points 1 to 3 of the dispositive part of the original Award and article 4 of the BIT,

4th) and finally, transforming the evidence produced and the corresponding arguments into a plea relating to an infringement of article 5 (expropriation) of the BIT:

§ 236. "Le Tribunal ajoute (...) que, si la question avait été soumise à sa décision, il aurait été disposé à faire droit à l'objection de la Défenderesse à la recevabilité de toutes les parties des arguments des Demanderesses relatifs aux dommages qui étaient fondées directement ou implicitement sur la valeur de confiscation de l'investissement initial (...)"

669. A very brief comparison of what, to this end, the resubmission Award attributes to the original Award (OA) and/or to the decision of the *ad hoc* Committee, infringing the *res judicata* of the OA and/or distorting what the *ad hoc* Committee says to confirm it, gives the following result.

Resubmission Award (RA) by the resubmission Tribunal (RT)

- Footnote No 354. "Comme le note le Tribunal Initial aux paragraphes 690-691 de sa Sentence."

Contradiction with the OA. Paras. 690-691 of the OA are unrelated to what the RA attributes to them:

⁵⁵⁴ **Document C9**, Resubmission Award, § 216: "le champ de compétence de ce Tribunal (...) est limité (...) exclusivement au "différend" ou aux parties de celui-ci qui demeurent après l'annulation. Ces termes ne peuvent être interprétés que comme une référence au "différend" qui avait été initialement soumis à l'arbitrage, différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses [du 3 novembre 1997]. Les questions qui ont surgi entre les Parties après cette date (...) ne peuvent pas, même avec un gros effort d'imagination, entrer dans le champ de la procédure de nouvel examen."

§ 690. "Le Tribunal arbitral ne sous-estime pas les difficultés pratiques pouvant confronter les demanderesses, le cas échéant, dans la recherche et l'obtention des preuves, dont la charge leur incombe, des dommages allégués et de leur montant. Il ne saurait pour autant prendre l'initiative de recourir à une ou plusieurs expertises au motif que ces dernières seraient susceptibles d'apporter ou de faciliter les preuves nécessaires, que les demanderesses n'ont pu fournir jusqu'ici" ;

§ 691." Il est clair aussi, quoi qu'il en soit, que tout recours à une expertise, l'expérience arbitrale le montre, est en soi généralement de nature à augmenter, parfois fortement, la durée et les coûts d'un arbitrage. En tout état de cause, le Tribunal arbitral est conscient de son devoir de mettre un terme, dès que l'état du dossier le permet, à une procédure d'une durée qui, dépassant la moyenne, a été allongée, ainsi qu'on l'a vu, pour des raisons diverses, dont la complexité inhabituelle des questions litigieuses et l'attitude même des parties."

§ 176. "Il apparaît donc évident que le Comité ad hoc a pris grand soin de définir clairement les contours de l'annulation partielle qu'il a prononcée dans sa Décision du 18 décembre 2011."

Contradiction with the OA. The decision of 18 December 2011 does not exist. In the case of that of 18 December 2012, the RT does not respect these "contours" and adds others, contrary to *res judicata*, on which the RA's dispositive part is based, including:

1) § 216 of the RA confines *"la compétence du Tribunal au 'différend' (...) qui avait été initialement soumis à l'arbitrage, différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses [du 6-11-1997], portant sur la confiscation de l'investissement. Les questions qui ont surgi entre les Parties après la date critique [de] la requête d'arbitrage initiale"* ne peuvent pas *"entrer dans le champ de la procédure de nouvel examen"*.

This infringes the *res judicata* (OA §§ 432, 437, 600, 674) confirmed by the *ad hoc* Committee.

2) § 199 et seq. of the RA replace the OA's notion of monetary compensation with that of "satisfaction", accompanying it with a reference⁵⁵⁵ to the OA, which applied satisfaction only to moral damage (§ 704 of the OA).

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- § 198 attributes to Mr. Pey Casado and the President Allende Foundation a premise invented by the RT, i.e. that the OT supposedly committed a "grave error". This is absolutely incorrect, as at no point did Mr. Pey Casado and the President Allende Foundation assert that the OT committed such an error.

What is more, contrary to the RA's assertion, the *ad hoc* Committee rejected all of Chile's claims according to which the OA had committed a grave error in deeming that the breach of article 4 of the BIT had caused compensable damage.

Decision of the *ad hoc* Committee of 18-12-2012

1. § 196. "Le Chili soutient que, compte tenu des circonstances, le Tribunal a renversé à tort la charge de la preuve relative à la demande fondée sur le déni de justice (ainsi que la demande fondée sur la discrimination)

2. § 224." La principale question soulevée par le Chili au regard de l'article 52(1)(b) est celle de savoir si le Tribunal a manifestement excédé ses pouvoirs en se reconnaissant à tort

⁵⁵⁵ This reference to § 704 of the OA was deleted in the rectification decision of 6 October 2017 at the Claimants' request, **document C201**, §§ 44, 45, 55

compétent pour connaître d'une demande fondée sur une prétendue discrimination liée à la Décision n° 43, en violation de l'article 4, qui, aux dires de la Défenderesse, n'aurait pas été présentée par les Demanderesses."

3. § 273. Le Chili souligne le fait que le Tribunal a reconnu que les Demanderesses avaient la charge de prouver leur préjudice et qu'elles n'avaient pas apporté de preuves relatives à l'évaluation du préjudice dans le cadre des demandes fondées sur le déni de justice et la discrimination. Nonobstant ce postulat, le Tribunal a octroyé aux Demanderesses des dommages-intérêts au titre de la violation du principe de traitement juste et équitable.

The *ad hoc* Committee's decision rejected all of these claims by Chile.⁵⁵⁶ Yet the RT accepted them by means of excluding from its jurisdiction all issues arising between the parties after 3 November 1997 and, consequently, all of the corresponding evidence submitted by Mr. Pey Casado and the President Allende Foundation, based solely on issues arising since 2000 in relation to breaches of article 4 of the BIT.

- § 176 : "En bref, pour reprendre la décision point par point, il a été déterminé de manière définitive: que le différend relève de la compétence du CIRDI ; que le Chili (la Défenderesse) avait violé son obligation de faire bénéficier les Demanderesses d'un traitement juste et équitable (en ce compris celle de s'abstenir de tout déni de justice) ; que les Demanderesses ont droit à compensation⁵⁵⁷ ; et enfin, que toutes autres ou plus amples prétentions devaient être rejetées. En d'autres termes, l'ensemble de ces décisions ont autorité de chose jugée, y compris, notamment, le rejet définitif de toutes les demandes des Demanderesses dans le différend autres que celles couvertes par les paragraphes 2 et 3 du dispositif de la Sentence Initiale."

Contradiction with the OA in that the RA dismisses *in limine* (§ 216 *in fine*) the issues arising between the parties which Mr. Pey Casado and the President Allende Foundation submitted, pursuant to points 2 and 3 of the dispositive part of the OA, in connection with breaches of article 4 of the BIT occurring a) *pendente lite* (between 3-11-1997, the initial request's filing date, and the date of the OA), and b) as from 8 May 2008, relating to or deriving directly from issues arising between the parties as from May 2000 decided in the OA.

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- § 178 : "Devant ce Tribunal, les seules questions qui font encore l'objet d'un "différend" entre les Parties dans la présente procédure de nouvel examen (au regard de l'article 52(6) de la Convention CIRDI) est la nature de la compensation due au titre de la ou des violations déjà établie(s) par le Tribunal Initial et, si le présent Tribunal devait conclure qu'une telle compensation doit se faire sous une forme pécuniaire, son montant."

Contradiction with the OA. The sole "*nature de la compensation due*" in the OA is pecuniary. No compensation of any other nature is envisaged in the OA, or in the resubmission proceeding or in the procedural orders, or in the Memorial (§§ 373-377)⁵⁵⁸ or in the Claimants' Reply (§§

⁵⁵⁶ **Document C20**, Decision of the *ad hoc* Committee, §§ 199, 227, 277 *in fine*: "afin de dissiper tout doute en ce qui concerne la Demande du Chili, le Comité décide de la rejeter."

⁵⁵⁷ Footnote 356 of the OA (**document C9f**): "Voir note 356 ci-dessus. (356 Le terme français 'compensation' est traduit, dans les développements qui suivent, de manière littérale par "compensation". Le Tribunal est conscient que, par l'emploi de ce terme, il risque ainsi de présumer résolue une question importante, qui sera discutée plus amplement ci-dessous, mais il ne semble pas possible de trouver une meilleure traduction)". In other words, here the RA reopens the question already decided in the OA concerning the pecuniary nature of the compensation.

⁵⁵⁸ **Document C8**

476-488)⁵⁵⁹, or by the Respondents' Counter-Memorial of 27-10-2014 (§§ 130, 131, 221-227; 250), or in the Rejoinder on Resubmission of 8-03-2015 (§§ 5, 66).

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-§ 187. Mme. Pey Grebe n'a pas de *ius standi*.

Contradiction with Article 25 of the Convention as applied in the *res judicata* grounds of the OA (§§ 144, 415, 237; 542 ; 556, 557, 558 ; 551, 553, 554).⁵⁶⁰

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-§ 195. "*Cela (...) semble toutefois, à première vue, constituer un obstacle insurmontable au souhait des Demanderesses de faire valoir maintenant un droit à des dommages-intérêts qui, par essence, est fondé sur cette dépossession initiale, en recourant, à titre d'élément essentiel de sa demande, à la valeur des biens alors confisqués.*"

Contradiction with the OA (§§ 419-466; 665-674), and with the decision of the *ad hoc* Committee, of which § 168 states:

"(...) le Comité considère que, aux fins des motifs invoqués, le Tribunal a appliqué l'article 2(2) de l'API⁵⁶¹ et le droit chilien applicable pour conclure que l'investissement effectué par M. Pey Casado en 1972 était bien couvert par l'API. En outre, le Comité est d'accord avec les Demanderesses sur le fait que l'on aurait pu faire valoir que l'obligation d'accorder une réparation au titre de la violation de droits perdure même si les droits en tant que tels ont pris fin, dès lors que l'obligation au titre du traité en question était en vigueur à l'égard de l'État concerné au moment de la violation alléguée. Ces principes ont été respectés par le Tribunal dans la section de la Sentence consacrée à l'application de l'API ratione temporis" (References omitted).

-§ 198. "[les Demanderesses cherchent à tirer la conclusion que] ce qui a constitué en fait (si non dans la forme) la confiscation est intervenue avec la Décision n° 43"

Contradiction with the OA (§ 674) and the decision of the *ad hoc* Committee (§ 233):

"Les Demanderesses ont démontré d'une manière tout à fait convaincante pour le Comité que le Tribunal a amplement motivé sa conclusion selon laquelle la Décision 43 était discriminatoire à l'encontre des Demanderesses et violait donc l'article 4 de l'API"⁵⁶²

Mr. Pey Casado and the President Allende Foundation have at no point sought to assert, in the proceeding for resubmission of the issues arising between the parties in 2000 and 2002, that the confiscation occurred with "Decision 43".

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⁵⁵⁹ **Document C40**

⁵⁶⁰ See *infra* Section 2.7: " La Sentence en resoumission a commis un excès manifeste de pouvoir en refusant le *ius standi* de la successeur aux droits de M. Victor Pey " "

⁵⁶¹ Article 2(2): "Le présent Traité (...) bénéficiera également aux investissements réalisés antérieurement à son entrée en vigueur et qui, selon la législation de la Partie contractante concernée, auraient la qualité d'investissement étranger."

⁵⁶² **Document C20**, Decision of the *ad hoc* Committee

- § 201. *"Le Tribunal prend note de ces opinions, mais ne souscrit pas entièrement à l'interprétation selon laquelle le Tribunal Initial a utilisé le terme "compensation" au paragraphe 3 en tant que terme technique, spécifique et limitatif, avec l'intention de le distinguer des termes "indemnisation" ou "réparation", plus généraux. Le Tribunal ne voit dans la Sentence Initiale aucun signe que le Tribunal Initial entendait faire un usage systématique sur le plan conceptuel de ces divers termes qui justifierait de traiter le paragraphe 3 comme une décision délibérée que des dommages-intérêts doivent nécessairement être octroyés ..."*

Manifest contradiction with the OA and the decision of the *ad hoc* Committee, which systematically refer to compensation in the form of pecuniary reparation:

- In the Committee decision, §§ 29, 30, 31, 65, 66, 229, 258, 504, 569, note 206, 521, 522, 525, including for non-material damage (§§ 59, 60, 258)
- In the OA, §§ 78, 29, and albeit annulled – due solely to contradiction *"dans le raisonnement suivi par le Tribunal pour déterminer les modalités de calcul"* of the *quantum*⁵⁶³ – but indicative of the OT's intention as to the nature of the compensation, §§ 715 (note 647 refers to six awards and two decisions for pecuniary compensation), 689, 685, 662, 661, 648. The only mention of *"satisfaction morale"* was in the context of *"la demande relative au dommage moral"* (§ 704).

dans la SI, pp. 78 ; 29 ; et bien qu'annulés -exclusivement pour contradiction *"dans le raisonnement suivi par le Tribunal pour déterminer les modalités de calcul"* du *quantum* -mais indicatifs de l'intention du TI à l'égard de la nature de la compensation, les §§ 715 –la Note 647 renvoie à six Sentences et deux Décisions de compensation pécuniaire-, 689, 685, 662, 661, 648. La seule mention à la *"satisfaction morale"* a été faite dans le contexte de *"la demande relative au dommage moral"* (§ 704)

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- § 201. *"Replaçant le paragraphe 3 dans son contexte, le Tribunal l'interprète comme établissant le droit à une réparation qui résulte nécessairement de la constatation de la violation d'une obligation internationale, mais sans déterminer d'avance la forme ou la nature que cette réparation doit prendre, sauf peut-être le postulat non explicite que, dans le cas normal, elle peut prendre la forme de dommages-intérêts."*

Contradiction with the OA, as all the grounds of point 3 of the dispositive part relate to pecuniary reparation. As stated in the IJJ Order of 17-03-2016, *Colombia v. Nicaragua*, § 61:

"§ 61. La décision de la Cour est contenue dans le dispositif de l'arrêt. Cependant, afin de préciser ce qui est couvert par l'autorité de la chose jugée, il peut s'avérer nécessaire de déterminer le sens du dispositif par référence aux motifs de l'arrêt en question"

This same principle was asserted by Mr. Pey Casado and the President Allende Foundation.⁵⁶⁴

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- § 198. *"En ce qui concerne la seconde conséquence (à savoir que la confiscation effective n'est intervenue qu'avec la Décision n° 43)*

⁵⁶³ *Ibid.*, Decision of the *ad hoc* Committee, § 283

⁵⁶⁴ See for example in **document C43** the transcript of the hearings of April 2015 (pp. 35-36, 61, 82, 83, 158, 159, 167, 168), in **document C40**, Rejoinder of 9 January 2015, §§ 191-235.

Contradiction with the OA and the decision of the *ad hoc* Committee, see § 233 of the *ad hoc* Committee decision:

"Les Demanderesses, dans la longue citation extraite de leur Contre-mémoire et reproduite ci-dessus, ont démontré, d'une manière tout-à-fait convaincante pour le Comité, que le Tribunal a amplement motivé sa conclusion selon laquelle la Décision n° 43 du Chili était discriminatoire à l'encontre des Demanderesses et violait donc l'article 4 de l'API. La demande en annulation présentée par la Défenderesse sur le fondement de ce motif est donc rejetée".

The OA linked "Decision 43" with the discrimination and denial of justice arising after 3 November 1997, and at no point in the resubmission proceeding did Mr. Pey Casado and the President Allende Foundation claim that "Decision 43" constituted a "confiscation", and less still that *"la confiscation effective n'est intervenu qu'avec la Décision n° 43."*

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- § 203. *"Pour ce faire, le Tribunal doit appliquer, à défaut de règles spécifiques dans le TBI, les règles applicables du droit international général."*

Contradiction between the RA and article 10(4) of the BIT and Article 42(1) of the Convention. The RA does not at all apply applicable law. Mr. Pey Casado and the President Allende Foundation had requested in their Memorial:

"116. En l'espèce, l'accord des parties est contenu dans l'API de 1991, en vigueur depuis le 29 mars 1994, et en particulier en son article 10 (4) qui prévoit : L'organe arbitral statuera sur la base des dispositions du présent Traité, du droit de la partie contractante qui serait partie à la controverse - y compris les règles relatives aux conflits de lois - et des termes d'éventuels accords particuliers conclus en rapport avec l'investissement, de même que des principes du droit international en la matière (emphasis added). 117. Il résulte de cet article 10 (4) de l'API que le Tribunal arbitral devra se prononcer sur l'indemnisation due aux Demanderesses en application des dispositions de l'API (4.1.1), des dispositions de droit chilien pertinentes (4.1.2) et des principes du droit international et notamment des principes généraux du droit international (4.1.3)."

The RA wholly ignored constitutional and legal rules as they are applied by domestic jurisdictions, invoked in support of Mr. Pey Casado and the President Allende Foundation claims on the basis of evidence supplied in their submissions of the causal link between the breaches of article 4 of the BIT, the resulting damage and the nature of compensation due.

Hearings, page 35-41:⁵⁶⁵

- Page 35. *"En quoi a consisté le dommage découlant du déni de justice? Notre Mémoire en Réplique a affirmé qu'un fait constitutif de déni de justice a consisté à retenir pendant toute la durée de l'arbitrage initial le jugement sur le fond de la Première Chambre de Santiago, afin de priver les Demanderesses, et donc le Tribunal arbitral initial, de la preuve judiciairement établie des rapports de droit de leur investissement avec l'État, à savoir que lorsque le premier différend est né le 6 septembre l'investissement n'était pas légalement sorti du patrimoine des Demanderesses, celles-ci avaient droit à sa restitution ou compensation conformément aux normes de droit que les tribunaux du Chili appliquent aux investisseurs chiliens visés par les décrets confiscatoires édictés en application du décret-loi 77 de l'année 1973. Depuis ce jour du 6 septembre 1995 l'État du Chili s'est systématiquement appliqué à*

⁵⁶⁵ Document C43

détruire ces droits des investisseurs étrangers par tous les moyens, licites ou illicites. Et il les a détruits effectivement. Nous pourrions nous arrêter ici. Mais nous y avons ajouté et étayé dans le Mémoire en Réplique, aux paragraphes 260 à 291, que cette destruction des droits des investisseurs a été faite, en plus, par le biais d'une escroquerie à la procédure et à la Sentence arbitrale (...) "

What the damage deriving from the denial of justice consisted of (Hearings, pages 42-48):

- Page 42 :*"le paragraphe 666 [de la SI] dans lequel le Tribunal rappelle, premièrement, la propriété de M. Pey sur les actions des sociétés et le fait que cela résultait d'un jugement interne chilien [en 1995] (...) la loi de 1998, dont on a parlé ce matin, n'est pas le seul moyen d'obtenir une réparation au Chili pour les confiscations qui sont intervenues dans les années 1973 et suivantes. En effet, (...) nombre de personnes et d'entreprises dont les biens avaient été saisis lors du coup d'État ou à la suite de ce coup d'État, ont porté leurs réclamations, une fois la démocratie rétablie au Chili, devant les juridictions chiliennes non pas sur le fondement de la loi de 1998 mais sur le fondement de la Constitution, la nullité de droit public des décrets de confiscation, et, finalement, les fondements de droit civil (...) Dès lors, l'affirmation de la République du Chili, dans sa duplique que l'on trouve au paragraphe 141⁵⁶⁶, qui tend à dire que le seul droit, et je vais faire cette citation en anglais: "The only right to compensation that Claimants possibly could have acquired in Chile — but in fact did not acquire — for the expropriation of El Clarín would have been a right created by virtue of the adjudication of a claim asserted by Claimants under the 1998 Reparations Law", cette affirmation est inexacte [néanmoins acceptée par la SR]⁵⁶⁷. En fait, en reconnaissant que le Chili a indemnisé des tiers au titre de la loi de 1998, la conséquence que tire le Tribunal initial [p. 674] c'est que les biens concernés doivent bien faire l'objet d'une réparation [conformément aux normes constitutionnelles et légales appliqués aux investissements nationaux visés par le Décret-loi confiscatoire n° 77 de 1973 et invoquées par les Demanderesses]. Les revendications étaient les mêmes, et ils ont été indemnisés. (...) Voilà les éléments constitutifs du traitement discriminatoire, un traitement différencié tout simplement entre, d'une part, un investisseur étranger, M. Pey et, d'autre part, les autres victimes ou prétendues victimes, en l'occurrence pour les bénéficiaires de la Décision 43, des confiscations prises en application du décret-loi 77. Quel est donc le préjudice qui résulte de cette violation ? Les Demanderesses considèrent qu'à partir du moment où il y a un traitement discriminatoire reconnu et avéré, elles ont le droit d'être traitées de la même manière que les autres personnes [indemnisées après la date critique de 1994 pour avoir été visées par le Décret-loi confiscatoire n° 77 de 1973] et donc, d'obtenir réparation pour les confiscations qu'elles ont subies (...) "*

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- § 211. *"Ce qu'a annulé le Comité c'est la méthode défectueuse selon laquelle le Tribunal Initial est arrivé à la compensation due au titre de la violation ainsi constatée."*

Contradiction with the decision of the *ad hoc* Committee, which in § 271:

*"a conclu à l'existence d'une erreur annulable dans le processus suivi par le Tribunal pour parvenir à sa conclusion, et **non dans les modalités de calcul du montant des dommages-intérêt**"*

⁵⁶⁶ Document C262, Chile's Rejoinder, 9 March 2015

⁵⁶⁷ Document C9, Resubmission Award, §§ 232 *in fine* and 233: *"si les Demanderesses pouvaient être présumées avoir subi quelque dommage, la cause immédiate du dommage était constituée par leurs propres actes, rompant ainsi le lien de causalité exigé pour l'octroi d'une compensation financière sur le fondement du projet d'Articles 31 et 36 de la CDI. Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés."*

And in § 286:

que "la question qui se pose en l'espèce n'est pas en soi celle du **quantum** des dommages-intérêts déterminés par le Tribunal. Le problème ne réside pas non plus en soi dans la méthode retenue par le Tribunal pour évaluer les dommages subis par les Demandereses. La question réside précisément dans le raisonnement suivi par le Tribunal pour déterminer les modalités de calcul appropriées qui (...) est manifestement contradictoire."⁵⁶⁸ [emphasis added]

The RA infringed the very essence of the OA's *res judicata* by supplanting the reparation to be set by means of the "*calcul du montant*" and "*l'évaluation des dommages-intérêts*" with reparation in the form of "satisfaction".

Resubmission Award:

§ 201 "Le Tribunal ne voit dans la Sentence Initiale aucun signe que le Tribunal Initial entendait faire un usage systématique sur le plan conceptuel de ces divers termes qui justifierait de traiter le paragraphe 3 comme une décision délibérée que des dommages-intérêts doivent nécessairement être octroyés."

Dispositive part: "2) que, comme cela a déjà été indiqué par le Tribunal Initial, sa reconnaissance formelle des droits des Demandereses et du déni de justice dont elles ont été victimes constitue en soi une forme de satisfaction au regard du droit international au titre de la violation par la Défenderesse de l'article 4 du TBI."

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-§ 211." Ce Tribunal éprouve des difficultés à tirer avec précision les conséquences que le Tribunal Initial a considéré découler de ses conclusions aux paragraphes 659, 665 et 674 qui viennent d'être cités, et il n'a ni le pouvoir ni la permission de rouvrir le dossier ni de substituer ses propres conclusions à celles du Tribunal Initial. Sa mission se limite (comme indiqué ci-dessus) à établir le préjudice dont il est prouvé qu'il a été causé aux Demandereses par la violation ci-dessus."

On refusing to exercise its jurisdiction over issues arising between the parties as from May 2000 for which the OT had found Chile liable, the RT reopened the case-file and substituted its conclusions for those of the OA.

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- § 215. "le motif de fond [de l'annulation partielle de la SI par le Comité a.h.] était que la méthode que le Tribunal Initial a décidé d'adopter de sa propre initiative, afin de réparer la violation, était en contradiction directe avec ses conclusions sur la nature de la violation elle-même."

Contradiction with the decision of the *ad hoc* Committee, which at no point mentions "*la nature de la violation*" committed by the State, or "*la nature de la réparation*". On the contrary, in §§ 271 and 286 the decision of the *ad hoc* Committee was careful to confirm "**les modalités de calcul du montant des dommages-intérêt**" and "**la méthode retenue par le Tribunal pour évaluer les dommages subis par les Demandereses**" applied in the OA. Once again, beyond the OT's failure to reopen the debate, which meant the parties did not have the chance to appropriately submit their arguments on the equivalence in the *quantum* of the damage caused by the breach of article 4 of the BIT with that of the expropriation – "*étant donné que la violation de l'API par le Chili avait pour conséquence d'empêcher les Demandereses d'obtenir une indemnisation au titre de la confiscation*"⁵⁶⁹ – the *ad hoc* Committee only noted a

⁵⁶⁸ Document C20, Decision of the *ad hoc* Committee

⁵⁶⁹ *Ibid.*, § 266

contradiction in the reasoning followed by the Tribunal, which the RA transformed by replacing the concepts, thereby infringing *res judicata*.

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- § 215. *"Le Tribunal pourrait en outre relever (...) une autre critique (...) à l'encontre des parties annulées de la Sentence Initiale, à savoir la manière selon laquelle elles tendent à faire abstraction de la distinction entre le préjudice (et la question connexe du lien de causalité) et l'évaluation de la compensation due au titre de ce préjudice. (...) le Comité ad hoc avait en tout état de cause déterminé que les parties pertinentes de la Sentence Initiale devaient être annulées pour d'autres motifs. Mais il s'agit d'un point qui doit demeurer au premier plan dans l'examen de ce Tribunal lorsqu'il abordera avec un nouveau regard la question de la compensation."*

Contradiction with the OA as confirmed by the *ad hoc* Committee. Whereas in its Ch. VII ("*Responsabilité de l'État*", *res iudicata*) the OA determined the causal relationship between the breach of article 4 of the BIT, the harm and the damage, in Ch. VIII ("*Dommages*", whose points relating to the assessment of damage were annulled by the *ad hoc* Committee), the RA introduced, without warning Mr. Pey Casado and the President Allende Foundation or giving them the chance to be heard, a new "criticism" and a "point" disagreeing with what had been decided in Ch. VII. With this "surprise", ***inaudita parte***, la RA "*aborde avec un nouveau regard*" no less than "*le préjudice*", "*le lien de causalité*" and "*la compensation due au titre de ce préjudice*." The RA here engages in a manifest excess of powers, a serious departure from a fundamental rule of procedure and contradictions constituting a failure to state reasons.

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- § 216. *"Le Tribunal relève également à ce stade qu'une partie de l'argument qui lui est présenté par les Demanderesses dans la présente procédure de nouvel examen consiste à soutenir que les actions de la Défenderesse, depuis la transmission de la Sentence Initiale, ont constitué un nouveau déni de justice, au titre duquel une compensation est due et peut être accordée dans la présente procédure de nouvel examen. (...) "*

The RA dismisses the fact that these "actions by the Respondent" provide part of the proof indispensable to identifying the amount of damages as a result of the breach of article 4 of the BIT for which the OA found Chile liable, and therefore crucial to assessing the compensation, i.e. the RT's very mission.

"cet argument n'entre clairement pas dans le champ de compétence de ce Tribunal, qui (...) est limité (...) au "différend" qui avait été initialement soumis à l'arbitrage, différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses [du 3-11-1997]. Les questions qui ont surgi entre les Parties après cette date - et a fortiori les questions découlant d'une conduite postérieure à la Sentence - ne peuvent pas, même avec un gros effort d'imagination, entrer dans le champ de la procédure de nouvel examen"

An irreconcilable contradiction with the OA, which established (§ 437) its jurisdiction over issues arising between the parties after 3 November 1997 and found Chile liable for its actions subsequent to that date: a) "Decision 43" of 28 April 2000, b) the denial of justice in the handling of the case of the Goss presses by the 1st Court of Santiago submitted to arbitration in the additional request of 4 November 2002, c) the whole dispute in the 2007 hearings.⁵⁷⁰

This exceeding of powers by the RT resulted in another excess of powers and a breach of the Claimants' right to defence, namely the failure to take any account of the evidence produced by

⁵⁷⁰ Document C2, Original Award, see in particular §§ 598 *in fine*, 624 and 665-674

the Claimants since, by definition, they related to issues and circumstances arising after 3 November 1997 (what was masked by the denial of justice submitted in 2002 to the OA – a key component in the extent of compensable damage – could be elucidated only subsequently), allowing the RA to assert (§ 233) that Mr. Pey Casado and the President Allende Foundation did not supply even a:

"commencement de preuve que la Défenderesse, en sa qualité de partie adverse, devrait réfuter",

and in points 2 and 4 of the dispositive part that:

*"les Demanderesses, sur lesquelles pesait la charge de la preuve, n'ont pas démontré de préjudice quantifiable qui leur aurait été causé par la violation de l'article 4 constatée par le Tribunal Initial dans sa Sentence ;
que le Tribunal ne peut donc pas octroyer aux Demanderesses de compensation financière à ce titre."*

- § 223. To clarify "**le raisonnement du Tribunal Initial dans les parties non annulées de sa Sentence**", the RA notes in § 227 that:

"le Tribunal Initial indique ... (au 677) que l'État chilien reconnaît l'illégalité de la confiscation initiale et l'obligation correspondante d'accorder une indemnisation".

The RA again follows a process here that strips of effect two of the grounds for points 1 to 3 of the OA's dispositive part, namely that the judicial ruling of 29 May 1995 had recognised Mr Pey's ownership of all of the shares of CPP SA (IA §§ 77,163, 210,215, 444), and that Chile had recognised to the OT the invalidity of the confiscation of CPP SA's assets and the duty to compensate for the damage caused (OA, §§ 665-674). This process was as follows:

- i. First, in § 223 of the RA the Tribunal re-examines the OA and *"prend en compte (...) les paragraphes 675, 677 et 680, qui (...) [ont] été annulés"*;
- ii. Then § 227 of the RA places in §§ 675 et 677 of the OA (annulled);
"que le Tribunal Initial indique (au paragraphe 675) qu'il a constaté que M. Pey Casado était bien le propriétaire des biens confisqués et (au paragraphe 677) que l'État chilien reconnaît l'illégalité de la confiscation initiale et l'obligation correspondante d'accorder une indemnisation".
- iii. Yet as we have seen, the OA places the State's acknowledgment to the OT of *"l'invalidité des confiscations et [du] devoir d'indemnisation"* to the owners *"des biens de CPP S.A. et Clarin Ltée."* in § 667, in footnote 617 and in §§ 668-669 (not annulled);
- iv. Instead of this § 223 of the RA places in § 677 of the OA – which it says is “annulled” – this acknowledgment by Chile which resulted in in § 674 (not annulled) – characterising “Decision 43” and the stalling of Mr Pey's claims as a denial of justice and failure to give fair and equitable treatment – and points 1 to 3 of the OA's dispositive part.
- v. A third party reading the RA would therefore be led to believe that the *ad hoc* Committee had annulled these two vital grounds of points 1 to 3 of the dispositive part of the OA. And so that party would probably see as reasonable the process leading the RT:
 - a) To fail to exercise its jurisdiction (in a proceeding which, according to § 188 of the RA itself, *"est le prolongement de l'arbitrage initial"*) over the consequences of the breaches of the

BIT on the basis of regarding the OA as “aberrant”, as stated by the Chilean president’s personal representative in this proceeding, Mr Jorge Carey, anticipating almost exactly a year earlier the thrust of §§ 198 and 227, radically contrary to *res judicata*:

*“Chile, por su parte, ha sostenido, entre otras cosas, más allá de que el señor Pey nunca fue dueño de El Clarín, que Chile no le debe suma alguna a Pey porque él decidió voluntaria y expresamente sustraerse de los procedimientos que estableció la Ley de Reparación y, por ende, no sufrió ningún daño como consecuencia de la Resolución 43. Es de esperar que en el próximo fallo primen razones jurídicas y Chile no se enfrente, una vez más, a un fallo aberrante, como lo fue el del año 2008.”*⁵⁷¹

The wording of the RA is substantially in keeping with the flagrant bad faith of this argument: after saying that Mr Pey never owned El Clarín (§ 223, 227 of the RA), it asserts that, because he voluntarily opted out of the procedure established by Law 19,568 of 1998, the State owed him nothing (§§ 232-234 and 198 of the RA)

- a) To dismiss all the evidence produced by Mr. Pey Casado and the President Allende Foundation for assessing the damage whose main basis in the OA is presented as annulled,
- b) Given that the common basis of a) and b) in the OA was precisely “*l’invalidité de la confiscation*” of the assets of CPP SA and “*le devoir d’indemniser*” that Chile acknowledgment to the OT.

Yet the proof of the fact that this reasoning by the RA is a transformation emptying the OA’s *res judicata* of substance appears in the footnote to this § 677 (Ch. VIII): **for this note refers expressly to § 667, not annulled, of the OA** (Ch. VII).

The RA’s reasoning and conclusions according to which the *ad hoc* Committee is supposed to have annulled the OA’s essential grounds as appears in the re-examination of them in § 227 of the RA are refuted by the OA itself. This paragraph should be annulled, along with the paragraphs deriving from it, i.e. §§ 228-231, and the sections for which this is a vital premise, namely: “I. *Les Demanderesses ont-elles satisfait à la charge de prouver le préjudice*”, “J. *Les Demanderesses ont-elles rempli la charge de prouver un dommage quantifiable ?*”, “K. *La demande fondée sur l’enrichissement sans cause*”, “L. *La demande fondée sur le préjudice moral*”, “M. *Les options qui s’offrent au Tribunal*”, “IV. *Coûts*”, “C. *La décision du Tribunal sur les coûts*”, and paragraph 2 to 7 of the Decision (§ 256).

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-§ 228. “*Ce Tribunal tire de ce qui précède les conclusions suivantes (...) la confiscation initiale d’El Clarín et des actifs s’y rattachant qui appartenaient à M. Pey Casado a été consommée en 1975 et est donc hors du champ du TBI ; tous les arguments fondés sur la confiscation ou en découlant ne peuvent pas être pris en compte (...) sauf dans la mesure où ils constituent des éléments factuels pour les questions qui entrent valablement dans le champ du différend au regard du TBI.*”

A twin contradiction:

⁵⁷¹ **Document C281**, Jorge Carey: “¿En qué está el Caso Clarín”: “Chile, por su parte, ha sostenido, entre otras cosas, más allá de que el señor Pey nunca fue dueño de El Clarín, que Chile no le debe suma alguna a Pey porque él decidió voluntaria y expresamente sustraerse de los procedimientos que estableció la Ley de Reparación y, por ende, no sufrió ningún daño como consecuencia de la Resolución 43. Es de esperar que en el próximo fallo primen razones jurídicas y Chile no se enfrente, una vez más, a un fallo aberrante, como lo fue el del año 2008”, El Mercurio (Santiago), 19 September 2015

1) with the OA's *res judicata*, recording the recognition by the decision of a Santiago court of 29 May 1995 that Mr Pey was the owner of all of the shares of CPP SA, as well as of the State's responsibility,

2) with the reasoning of the RA itself, as this dismisses the factual elements validly belonging to the scope of the dispute for the purposes of the BIT and the RT, indispensable to the task entrusted to the latter, namely to assess the *quantum* – the extent of the harm;

Whereas the OA ordered the State to compensate Mr. Pey Casado and the President Allende Foundation (§ 674), in view, notably:

- a) Of the *res iudicata* of §§ 665-669, i.e. the "*déclarations [le 6 mai 2003]⁵⁷² de l'invalidité des confiscations et du devoir d'indemnisation* parfaitement claires de la défenderesse dans la présente procédure", and
- b) Of the discrimination involved in the fact that "*cette politique [d'indemnisation par l'État] ne s'est pas été traduite dans les faits, en ce qui concerne les demanderesses, pour des raisons diverses qui, au moins pour partie, n'ont pas été révélées ou clairement expliquées par les témoignages ou les autres preuves fournies au Tribunal arbitral*" (§ 669 of the OA);

The RT refused to take into account:

- a) that the *ad hoc* Committee declared as *res judicata* §§ 667-669, a ground of § 674 and points 1 to 3 of the dispositive part of the OA,
- b) that the RA dismissed *in limine* all the evidence supplied by Mr. Pey Casado and the President Allende Foundation regarding *the invalidity of the confiscations and the Respondent's perfectly clear duty to compensate in this proceeding*;
- c) that the RT isolated this evidence from §§ 667-674 (one of the grounds of points 1 to 3 of the dispositive part of the OA), wrapping them up in considerations relating to Decree 165, without distinguishing the matter of the consequences of the status of this Decree during the initial proceeding – which the Award of 8 May 2008 had to regard (§ 603) as not having been "*mis en question par les juridictions internes*" – from the content of §§ 667-674, which have *res judicata* force;
- d) that the RA goes so far as to regret not having dismissed *in limine* the Claimants' arguments also based on the *res judicata* effect of points 1 to 3 of the dispositive part of the OA and their grounds in §§ 665-674:

§ 236. "*Le Tribunal ajoute (...) que, si la question avait été soumise à sa décision, il aurait été disposé à faire droit à l'objection de la Défenderesse à la recevabilité de toutes les parties des arguments des Demanderesses relatif aux dommages qui étaient fondées directement ou implicitement sur la valeur de confiscation de l'investissement initial (...)*"

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- § 228. "*Les questions qui entrent valablement dans le champ du différend au regard du TBI, à savoir les allégations, soutenues par les Demanderesses, tirées d'une violation de l'article 4 du TBI (traitement juste et équitable) résultant des retards dans l'affaire de la rotative*

⁵⁷² Document C2, Original Award, p. 214, footnote 617

Goss et de la Décision n° 43, sont distinctes, tant sur le plan factuel que juridique, de l'expropriation initiale."

This assertion, incidentally perfectly fair in itself, nonetheless constitutes an internal contradiction in the RA. The “delay” and “Decision 43” are actions occurring after the *dies ad quem* – 3 November 1997 – that the RA has opted for. The RA here rightly requires arguments and evidence other than those produced before the OT (owing to its not reopening the debate on the *quantum*, leading to the annulment of this part of the OA), but which the RT materially forbade Mr. Pey Casado and the President Allende Foundation from citing by ruling out of its jurisdiction, *inaudita parte*, “*les questions qui ont surgi entre les Parties après la date du 3 novembre 1997*” (§ 216).

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- § 231. “*La question qui demeure pour le Tribunal, et il s’agit de la question centrale dans la présente instance de nouvel examen, est celle de savoir si, et dans quelle mesure, les Demandereses ont satisfait à la charge de prouver quel préjudice a été causé à l’une ou/et l’autre du fait de la violation par la Défenderesse de la norme de traitement juste et équitable du TBI, puis d’établir en termes financiers le dommage quantifiable correspondant.*”

The RT previously (§ 216) ruled out of its jurisdiction the issues arising between the parties after 3 November 1997, thereby finding the way to a dismissal of ALL the evidence furnished by Mr. Pey Casado and the President Allende Foundation, necessarily relating to the breaches of article 4 of the BIT, which actions took place as from May 2000 – the only ones for which the OA found Chile liable.

The RA also dismisses the *ad hoc* Committee’s rejection of Chile’s claim that Mr. Pey Casado and the President Allende Foundation had not “*satisfait à la charge de la preuve de leur préjudice qui pesait sur elles*”.⁵⁷³

As the RA fails to respect the OA’s *res judicata* effect as regards jurisdiction *ratione temporis*, it leaves Mr. Pey Casado and the President Allende Foundation defenceless:

§ 232. “*Une fois la question posée dans les termes du paragraphe précédent, il devient clair que les Demandereses n’ont pas satisfait à cette charge de la preuve ; en effet, on pourrait dire que dans un sens, elles n’ont même pas cherché à le faire...*”

This assertion is truly extraordinary, for Mr. Pey Casado and the President Allende Foundation never stopped seeking to provide proof. Could they have imagined, in all good faith, before reading the RA, that the RT was going engage in the excess of powers and apparent bias involved in reconsidering and amending the jurisdiction established in the OA as *res judicata*, so as to allow it to be dumb, blind and mute before the abundant proof provided by Mr. Pey Casado and the President Allende Foundation?

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- § 232. “*La Défenderesse soutient que, en vérité, si l’on se concentre sur la violation réelle (et ses éléments constitutifs) établie par la Sentence Initiale, les Demandereses n’ont subi absolument aucun dommage matériel pouvant être démontré. Aucun dommage en raison de l’affaire de la rotative Goss, car ce qui était demandé dans cette affaire, c’était la restitution de la rotative ou une indemnisation au titre de sa*

⁵⁷³ **Document C20**, Decision of the *ad hoc* Committee, § 272-275, 277 (“*afin de dissiper tout doute en ce qui concerne la Demande du Chili, le Comité décide de la rejeter*”)

confiscation, demande qui a été le moment venu englobée dans la version longue des demandes des Demanderesses dans l'arbitrage initial et a été rejetée par le Tribunal Initial au motif qu'elle était en dehors du champ du TBI ; et aucun dommage en raison de la Décision n° 43, car les Demanderesses n'auraient pas pu bénéficier d'un processus d'indemnisation auquel elles avaient délibérément et explicitement choisi de ne pas participer (en raison de la clause d'option irrévocable ("fork-in-the-road ") du TBI). Ou la Défenderesse a présenté la question d'une manière différente, en soutenant que, si les Demanderesses pouvaient être présumées avoir subi quelque dommage, la cause immédiate du dommage était constituée par leurs propres actes.

- § 234. "Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés."

Here we reach the climax: a wholesale denial of the OA. This paragraph shows once again the RT's apparent bias: it completely ignores the *res judicata* effect of §§ 658-664 (denial of justice) and 665-674 (failure to give fair and equitable treatment) for which the OA found Chile liable.

Here the RA brushes aside the unequivocal meaning of this conclusion in the OA, *res judicata*, putting on record the recognition of the following fact to the OT:

- § 647. "En ce qui concerne la Décision n°43, la défenderesse a soutenu, comme le Tribunal l'a rappelé ci-dessus, que "les réclamants n'ont jamais été propriétaires des biens confisqués. (...)
- § 648. Comme le Tribunal arbitral l'a rappelé ci-dessus, pour la partie défenderesse, "la Décision N°43 ne se référait qu'à des tiers et non aux Demanderesses, et qu'en tout cas elle n'avait causé aucun préjudice aux Demanderesses compte tenu du fait qu'elle avait simplement donné un avis sur la compensation à des tiers, sans prétendre se prononcer sur un quelconque droit de propriété que pourraient avoir les Demanderesses."⁶⁰⁵⁷⁴⁴

Yet the RA accepts that Chile has altered these same facts during the resubmission proceeding:

§ 232. "La Défenderesse soutient que, en vérité, si l'on se concentre sur la violation réelle (et ses éléments constitutifs) établie par la Sentence Initiale, (...) aucun dommage en raison de la Décision n° 43, car les Demanderesses n'auraient pas pu bénéficier d'un processus d'indemnisation auquel elles avaient délibérément et explicitement choisi de ne pas participer."

We recall what is *res judicata* in the OA, and which the RA implicitly rejects:

§ 667. "Quant à l'invalidité des confiscations et au devoir d'indemnisation, il y a lieu de rappeler aussi des déclarations parfaitement claires de la défenderesse dans la présente procédure.⁶¹⁷

§ 668. Après le rétablissement au Chili d'institutions démocratiques et civiles, **les nouvelles autorités ont proclamé publiquement leur intention de rétablir la légalité et de réparer les dommages causés par le régime militaire.** (...)

§ 669. Le Tribunal arbitral ne peut que prendre note avec satisfaction de telles déclarations, qui font honneur au Gouvernement chilien. Malheureusement, cette politique ne s'est pas été

⁵⁷⁴ [604 Contre-mémoire de la défenderesse du 3 February 2003, p. 144. V. aussi la transcript of the hearing of 6 May 2003, p. 399 (Mr Di Rosa).]

traduite dans les faits, en ce qui concerne les demanderesses, pour des raisons diverses qui, au moins pour partie, n'ont pas été révélées ou clairement expliquées par les témoignages ou les autres preuves fournies au Tribunal arbitral."

§ 674. Dans le cas d'espèce, en résumé, **en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués**, en même temps qu'elle paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, **la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable**.

Dispositif : "Le Tribunal arbitral, à l'unanimité, 1. décide qu'il est compétent pour connaître du litige entre les demanderesses et la République du Chili ; 2. constate que la défenderesse a violé son obligation de faire bénéficier les demanderesses d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice ; 3. constate que les demanderesses ont droit à compensation."

The RA takes no account of the fact that Chile has given no sign of any formal undertaking to compensate Mr. Pey Casado and the President Allende Foundation pursuant to the OA, or that in its new submission it continues to deny Mr Pey's ownership of the shares of CPP SA, and consequently that there was ever a foreign investment for the purposes of the BIT. This it reiterated in its closing pleadings at the hearing of 16 April 2015, in reply to the RT's reopening of this matter the day before (see § 295 above).

As to the harm sustained as a result of the denial of justice constituted by the delay in the Goss case, far from being confined to the matter of the presses, it masked the status of the confiscatory Decree – a major component of that harm, of which the RT dismissed all evidence.

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- § 233. "Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés. (...) il n'y a pas de commencement de preuve que la Défenderesse, en sa qualité de partie adverse, devrait réfuter."

See above our comments on §§ 216 and 223 of the RA.

What the Respondent denied throughout the resubmission proceeding is, in fact, the OA's *res judicata*, following which the RA revisits the OA, including the paragraphs of the OA quoted above, and rules out the evidence produced by the Respondent on the basis of the OA.

The RA casts aside the *res judicata* of the OA according to which the denial of the Claimants' rights acknowledged in the domestic court decision of 29 May 1995 and clearly characterised in the OA (§§ 210 *in fine*, 215, 244, 666; 665-674) constitutes the breach of article 4 of the BIT that gave rise to the harm sustained by the investors.

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- § 236. "Le Tribunal ajoute - bien que ce soit nécessairement un obiter dictum - que, si la question avait été soumise à sa décision, il aurait été disposé à faire droit à l'objection de la Défenderesse à la recevabilité de toutes les parties des arguments des Demanderesses relatifs aux dommages qui étaient fondées directement ou implicitement sur la valeur de confiscation de l'investissement initial, comme étant diamétralement contraires aux parties de la Sentence Initiale assorties de l'autorité de la chose jugée et à la Décision sur l'annulation rendue par le Comité ad hoc.

Manifest apparent bias leading the RT to a contradiction with the OA (points 1 to 3 of its dispositive part) and a wholly unjustified assertion.

The decision of the *ad hoc* Committee expressly accepted (§ 226) that an estimate based on an approach linked to the value of the investment on the eve of its seizure may legitimately provide an accurate quantification of the value to be taken into account in the framework of the breach of article 4 of the BIT for failure to give fair and equitable treatment. This is not remotely in contradiction with the OT's rejection of the initial request under article 5 of the BIT, to which the last phrase of § 236 refers.

The assertion in § 236 is nonsensical, other than as the expression of apparent partiality.

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-§ 238. *"Il y a deux manières possibles d'analyser la demande fondée sur l'enrichissement sans cause. L'une consiste à la considérer comme une demande autonome à part entière. C'est ainsi que le Tribunal interprète le paragraphe 380 de la Réponse des Demandereses, qui est fondé sur la simple allégation que, du fait que la Défenderesse a été en possession des biens confisqués"* (emphasis added). § 239: *"(...) Cette version de la demande fondée sur l'enrichissement sans cause doit donc être rejetée."*

§§ 378 and 380 of the Claimants' Reply of 9 January 2015⁵⁷⁵ stated:

§ 378. *"Comme les investisseurs ont indiqué dans leur Mémoire en Demande⁴¹⁴ ⁵⁷⁶, la restitution du montant de l'enrichissement sans cause est conforme au droit interne et international, sans que le Contre-mémoire y oppose des arguments valables."*

§ 380. *"Même dans l'hypothèse -quod non- où les agissements de l'Etat Défendeur à l'encontre des investisseurs ne seraient pas dolosifs, ni constitutifs d'escroquerie à la procédure et à la Sentence arbitrale, ou le Décret n° 165 ne serait pas entaché ex tunc de la nullité de droit public, l'obligation de dédommagement perdure et l'Etat du Chili s'est enrichi sans juste cause au détriment de M. Pey Casado et, par voie de conséquence des investisseurs. Ceux-ci ont droit à la restitution de la valeur de tous les fruits naturels et civils de la chose possédée de mauvaise foi, avec les intérêts correspondants, actualisée au jour de la Sentence à intervenir."*

This assertion was not a "mere allegation", for it was based on domestic law and the principles of international law cited in the resubmission Memorial of 27 June 2014⁵⁷⁷ (section 5.4.2, §§ 394-408, 486; section 6, §§ 486 -503), and in the hearing of 13 April 2013:⁵⁷⁸

"Le rapport de causalité entre l'enrichissement injuste et l'infraction à l'article 4 de l'API découle du fait que, alors que les investisseurs avaient le 6 septembre 1995 l'expectative légitime que l'État du Chili respecterait la Constitution [les arts. 7, 10 et autres invoqués dans le Mémoire et la Requête] et les principes de droit international et leur restituerait et indemniserait l'ensemble de leur investissement, l'État du Chili s'est appliqué à nier et à annihiler leurs droits sur l'investissement, en rejetant toutes leurs réclamations, en échafaudant la Décision 43, en paralysant le jugement du premier Tribunal de Santiago avant le prononcé de la Sentence. L'accumulation de ces actions a détruit entièrement, de

⁵⁷⁵ **Document C40**

⁵⁷⁶ [414 Voir le Mémoire en Demande, section 5.4.2, ¶¶ 394-408, 486, et la demande à titre subsidiaire de la section 6, ¶¶ 486 -503], **documents C8** et **C40**, respectively

⁵⁷⁷ **Document C8**

⁵⁷⁸ **Document C43**, p. 62

manière directe et délibérée, les droits des investisseurs. Le dernier clou du cercueil a été l'annulation ex parte du jugement interne daté le 24 juillet 2008."

The breach of the BIT causing the harm is established in the OA itself, i.e. in the reasons for the disputes arising between the parties after 3 November 1997 submitted to arbitration as from 2000 giving rise to the damage from which derives the right to compensation for the value of the whole investment as stated in points 1 to 3 of the dispositive part.

By ruling out of its jurisdiction any facts arising after 3 November 1997, against *res judicata*, the RA finds a way not to apply points 2 to 3 of the OA's dispositive part, domestic law and international law as regards the claim relating to unjust enrichment, as indicated in the application for annulment (ground III(5)(4)).

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- § 240. *Les calculs particuliers de M. Saura, ils échouent tous car ils ne sont rien de plus que des approches alternatives pour mesurer la valeur en capital des biens confisqués ainsi que les profits retirés de leur utilisation, ce qui ne serait recevable qu'en présence d'une demande valable fondée sur l'expropriation. Encore une fois, le Tribunal est d'accord avec cette critique."*

A further baseless assertion according to which it is assumed to go without saying that a precise assessment of the company's value could not be valid outside a request under article 5 of the BIT (cf. above 680-684, § 706).

It also contradicts the *res judicata* effect of § 665-674 of the OA (see comments on §§ 228, 323 of the RA above), which bases the right to compensation on the **invalidity** of the confiscation and the **duty to compensate** the owners of the CPP SA shares acknowledged by Chile before the original Tribunal on 6 May 2003. The grounds for point 5 of the RA's dispositive part – *that the Claimants' subsidiary claim on the basis of unjust enrichment is without legal basis* – thus constitutes an excess of powers, with failure to state reasons and manifest bias.

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- § 243. Non-material damage. *"Si le Tribunal avait estimé que la demande relative au dommage matériel était étayée par des preuves, il aurait été disposé à examiner l'argument subsidiaire des Demanderesses selon lequel le préjudice moral (à supposer qu'il fût démontré) était un facteur à prendre en compte dans l'évaluation de la réparation appropriée au titre de la violation de la garantie d'un traitement juste et équitable ; mais, comme la demande relative au dommage matériel a elle-même été rejetée, cet argument doit également être écarté" (emphasis added)*

As the claim relating to non-material damage was rejected contrary to the *res judicata* of the OA (see comments above on §§ 228, 323 of the RA), the fact of having dismissed on this basis any examination of the Claimants' subsidiary argument is unfounded *per se*.

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- § 244. *"Le Tribunal regrette que les Demanderesses ne se soient pas elles-mêmes fixées pour tâche spécifique de démontrer quel préjudice et dommage particulier pouvait leur avoir été causé par la violation de la garantie d'un traitement juste et équitable prévue par l'article 4 du TBI, constatée dans la Sentence Initiale, qui, le Tribunal Initial l'avait également établi, était distincte, sur le plan juridique et factuel, de la demande initiale fondée sur la confiscation, qui avait été rejetée ratione temporis. La présente procédure de nouvel examen, qui a été très complète et détaillée, a donné aux Demanderesses la possibilité la plus large de le faire, mais elles n'ont pas saisi cette opportunité. "*

Apparent bias and internal contradiction in the RA: having declined jurisdiction in § 216 *in fine* over acts occurring after 3 November 1997, thereby infringing the *res judicata* of the OA, the RA rules out and thereby rejects *in limine litis* all of the Claimants' evidence relating to damage deriving from acts occurring as from 2000 and 2002 in breach of article 4 of the BIT – precisely those for which the OA ordered the Respondent State to compensate Mr. Pey Casado and the President Allende Foundation. The RA thereby devises a way to censure Mr. Pey Casado and the President Allende Foundation for “failure to present evidence” and to reach decisions such as those of points 3 to 7 of its dispositive part.

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- § 244. *"le Tribunal ne pouvait clairement pas permettre que la demande initiale fondée sur la confiscation soit de nouveau soumise de manière détournée sous couvert d'une violation du traitement juste et équitable subie plusieurs années plus tard."*

Apparent bias. On ruling out of its jurisdiction the issues arising between the parties in 2000 and 2002 – the only ones submitted by Mr. Pey Casado and the President Allende Foundation for the Tribunal's examination in the resubmission application of 18 June 2013 – and on dismissing *proprio motu* all factual and legal grounds other than those involved in the OT's ruling on the request submitted on 3 November 1997, while itself recalling the requirement for it (cf. § 19 above), the RA has devised a way of attributing to Mr. Pey Casado and the President Allende Foundation, contrary to the OA's *res judicata* and to all the evidence, the submission of the same initial request submitted on 3 November 1997 in disguised form (sic).

The confusion is increased, if possible, by the baseless assumption that that an accurate assessment, based on the company's value on the eve of its seizure in order to calculate the damage caused by the failure to give fair and equitable treatment, including denial of justice (art. 4 of the BIT), would in some way be *ipso facto* the same as a re-filing of the request of 3 November 1997 based on expropriation (art. 5 of the BIT), whereas Mr. Pey Casado and the President Allende Foundation have always asserted that the amount of the damage sustained under article 4 of the BIT is equivalent to that which would have been compensable in the framework of §§ 665-674 of the OA, which is quite different (cf. § 23 above).

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- § 244. *"La présente procédure de nouvel examen, qui a été très complète et détaillée, a donné aux Demanderesses la possibilité la plus large de le faire, mais elles n'ont pas saisi cette opportunité."*

Apparent bias. On the contrary, Mr. Pey Casado and the President Allende Foundation never ceased to do just that. It is the RT that excluded from the re-examination, contrary to *res judicata*, the only questions submitted to it, for the purpose of calculating the amount of damages, i.e. the background to the disputes arising between the parties since 2000.

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- § 244. *"Compte tenu de l'expérience, des compétences et de l'expertise des conseils des Demanderesses et de leur connaissance depuis longtemps de cette affaire, ainsi que des arguments sans équivoque avancés et réitérés par la Défenderesse concernant le défaut de preuves, cette omission ne peut être considérée comme accidentelle."*

We can only repeat: the evidence supplied relates to the damage caused by the breaches of article 4 of the BIT submitted to arbitration in 2000 and 2002 for which the OA held the Respondent State liable.

The fact for the RA of 1) ruling out actions subsequent to 3 November 1997 from the Tribunal's jurisdiction, as a means of 2) ruling out *in limine litis* all the evidence supplied by Mr. Pey Casado and the President Allende Foundation and 3) concluding there was a lack of evidence, constitutes three manifestations of apparent bias and moreover an excess of powers contrary to the OA's *res judicata*.

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- § 244. "*Le Tribunal n'aurait pas pu non plus élaborer sa propre théorie sur les dommages-intérêts, distincte des arguments des Parties*"

This conclusion, also infringing the *res judicata* of the OA ordering the Respondent State to pay Mr. Pey Casado and the President Allende Foundation pecuniary compensation, constitutes a manifest excess of powers and apparent bias, given in particular the principle of international law (not "its own theory", *sic*) that M. V. V. Veeder, QC did not fail to apply himself seven months after the Arbitral Award of 18 April 2017, in *Marco Gavazzi v. Romania*.⁵⁷⁹

⁵⁷⁹ Document CL285, ICSID Case No. ARB/12/25 Award, 18 April 2018, available at <http://bit.ly/2FBbHaJ>

Marco Gavazzi v Romania, Award, 2017-04-18, VV.V. Veeder, Co-Arbitrator appointed by Claimants	Pey Casado v. Chili, Award, 2016-09-13, VV.V. Veeder, Co-Arbitrator appointed by Claimants
124. Under international law, there is thus by now a well-established and well-known jurisprudence constante to the effect that, however difficult, an international tribunal must do its best to quantify a loss provided that it is satisfied that some loss has been caused to the claimant by the wrongdoing of the respondent. The alternative of simply dismissing the claim for want of sufficient proof is not regarded as a fair or appropriate result. Almost invariably, this approach requires the tribunal to reject the full extent of the parties' primary cases on quantum and their expert witnesses' methodologies. For tactical reasons, a claimant may not wish to discount downwards the full amount of its pleaded claim; and a respondent similarly may not wish to offer a result resulting in any damages being awarded in the claimant's favour. In the absence of any principle akin to "baseball arbitration" (as is absent in this case), the tribunal must then work by itself in the rational middle ground left vacant by the parties and their expert witnesses, as best it can. [emphasis added]	199. (...) la Sentence Initiale est en français et il indique, au paragraphe 3 du dispositif, qui a autorité de chose jugée, que les Demanderesses "ont droit à compensation ". Le Tribunal a examiné la question de savoir si cette formulation doit être comprise comme signifiant, en soi, que les Demanderesses ont un droit bien établi à une compensation pécuniaire et que la seule question qui reste à trancher dans la présente procédure de nouvel examen est l'évaluation du montant adéquat de cette compensation. Le Tribunal est toutefois parvenu à la conclusion que ce n'est pas ainsi que doit être compris le sens et l'effet de la Sentence Initiale. 201. (...) Le Tribunal ne voit dans la Sentence Initiale aucun signe que le Tribunal Initial entendait faire un usage systématique sur le plan conceptuel de ces divers termes qui justifierait de traiter le paragraphe 3 comme une décision délibérée que des dommages-intérêts doivent nécessairement être octroyés (à condition, bien entendu, que leur montant ait été correctement déterminé). 202. Il reste alors à ce Tribunal à déterminer la nature et la forme de la "compensation "ainsi due. DISPOSITIF : ...2) que, comme cela a déjà été indiqué par le Tribunal Initial, sa reconnaissance formelle des droits des Demanderesses et du déni de justice dont elles ont été victimes constitue en soi une forme de satisfaction au regard du droit international au titre de la violation par la Défenderesse de l'article 4 du TBI

1st. In the case of Pey Casado and President Allende Foundation v. Republic of Chile there has been a "loss" according to the *res judicata* decision of the original Award, and the resubmission Tribunal was to estimate the *quantum* of compensation. The appropriation of an investment by a measure that the State itself acknowledged to be illegal to the OT (§ 667-669 of the OA) is generally accepted to constitute "a loss".

2nd. The RT discharges itself, while, manifestly contrary to the OA and applicable principles of international law, its own theory of jurisdiction/compensation.

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- § 244. "La Sentence du Tribunal n'affecte pas la conclusion dans la Sentence Initiale selon laquelle la Défenderesse avait commis une violation de l'article 4 du TBI en ne garantissant pas un traitement juste et équitable aux investissements des Demanderesses, en ce compris un déni de justice ; cette conclusion a autorité de chose jugée et n'était pas l'objet de la

présente procédure de nouvel examen. Elle correspond donc à une obligation qui pèse toujours sur la Défenderesse et une obligation qui, comme l'a conclu le Tribunal Initial, est la conséquence d'une défaillance dans le fonctionnement du système interne du Chili pour la réparation des injustices passées qui ont été reconnues. Le Tribunal n'a aucun doute que, une fois la présente procédure de nouvel examen terminée, la Défenderesse restera consciente de cette obligation et appréciera les conséquences à en tirer d'une manière adéquate."

Here is additional proof of the RT's inconsistency, arbitrariness and partiality. There was indeed a loss, and the duty to compensate with which the RT was tasked – all *res judicata*. Yet the RT decides this is not its business. It thereby gives the Respondent State – whose keen interest in “remaining aware of its obligation” is not hard to imagine – a way to avoid meeting its obligation deriving from the original Award by placing that obligation outside its mission: “une fois la présente procédure de nouvel examen terminée”.

Whereas points 1 to 3 of the dispositive part of the original Award have been enforceable since the decision of the *ad hoc* Committee of 18 December 2012 confirming them, the conditionality as of 13 September 2012 of that Award's binding force – and the RT *proprio motu* deems it suspended *de facto* – infringes articles 53(1) of the Convention and 10(5) of the BIT.

Conclusions. Ratio decidendi and obiter dicta

670. All the claims, all the arguments and all the evidence of Mr. Pey Casado and the President Allende Foundation relate to issues arising between the parties after 3 November 1997. Ruling them out of the RT's jurisdiction *in limine litis* in §§ 216 and 236 gives these two paragraphs the material quality of *ratio decidendi* for paras. 2 to 6 of the RA's dispositive part.
671. The RT's rejection of jurisdiction means the Tribunal simply did away with its mission *in limine*. With this established in §§ 216 and 236 of the RA, the general statements in the RA's “Analysis” section concerning the Claimants' claims and arguments with a view to the enforcement of points 1 to 3 of the dispositive part of the OA take on the quality, in the particular circumstances of the RA, of *obiter dicta*.
672. This paradox springs from the fact that the key question of the rejection of claims and arguments relating to the quantification of the compensation due to Mr. Pey Casado and the President Allende Foundation is to be found in these §§ 216 and 236 of the RA. In the rest of the “Analysis” the RT engages, according to the criterion pronounced by Mr Broches in the SOABI case, in *obiter dicta, mutatis mutandi*.
673. Whereas in SOABI the key question was “nationality”, in our case the key question is a refusal to apply paras. 1 to 3 of the dispositive part of the OA to a quantification of the compensation due to the investors:

*"La question du contrôle direct ou indirect n'était pas déterminante pour la décision du tribunal de rejeter le déclinatoire et les déclarations d'ordre général auxquelles il s'est livré sont des obiter dicta."*⁵⁸⁰

674. That said, the RA as a whole is in any case vitiated by infringement of the OA's *res judicata* and apparent bias against Mr. Pey Casado and the President Allende Foundation, which means the preceding and following objections to the RA concern not the substance but a demonstration of the systematic and generalised disregard for *res judicata*, for the right to compensation

⁵⁸⁰ **Document CL286**, Declaration by Broches, *Société Ouest Africaine des Bétons Industriels (SOABI) v. State of Senegal*, ICSID Case No. ARB/82/1, 2 ICSID Reports 333, para. 4.

granted to Mr. Pey Casado and the President Allende Foundation and for fundamental rules of procedure, and manifest excess of powers and failure to state reasons (articles 52(1), letters a), b), d) and e) of the Convention).

675. The RA alters the resubmission request's cause of action (*mutatio libelli*) and the link between §§ 665-674 of the OA and points 1 to 3 of its dispositive part, namely the issues arising between the parties since 2000 concerning the Respondent State's breaches of article 4 of the BIT (art. 52(1)(b) of the Convention);
676. The RA infringes the Claimants' right to be heard before the closure of the proceeding (art. 52(1)(d) of the Convention):
- a) Regarding the exclusion from the RT's jurisdiction of issues arising after 3 November 1997 (and art. 52(1)(b) of the Convention), taken fully into account by the OT,
 - b) Regarding the assertion that the original Award is supposed not to have clearly established that the compensation was solely pecuniary (art. 52(1)(b) of the Convention);
 - c) Regarding the *res judicata* which the RT substantially amends in the RA without previously allowing Mr. Pey Casado and the President Allende Foundation to know of such issues and to react (art. 52(1)(b) of the Convention).

The RA's grounds infringe the OA's *res judicata*, especially as regards the recognition by Chile to the OT, on 6 May 2003, of the invalidity of the confiscation of the assets of CPP SA and EPC Ltd and the duty to compensate their owners (§§ 665-674) – art. 52(1), letters b) and d) of the Convention;

677. The RA did not in any way apply Chilean law – neither the Constitution nor law as it is applied by the courts of Chile – or the principles of international law, on which Mr. Pey Casado and the President Allende Foundation based their claims, nor *lege artis* (art. 52(1)(b) of the Convention);
678. The RA incurred contradictions resulting in inconsistencies in its reasoning with serious consequences, especially as regards the RT's jurisdiction, the corresponding exclusion of all the evidence supplied by Mr. Pey Casado and the President Allende Foundation – while asserting that the legal and factual framework must be quite different to that in which the OT adopted its decision on the claim under article 5 of the BIT, settled by the OT – and the subject of quantifying the compensation for the breach of article 4 of the BIT (art. 52(1)(d) and (e) of the Convention);
679. The RT failed in its duty to set the amount of compensation for which the OA found Chile liable (art. 52(1)(b));
680. It follows that the dispositive part of the resubmission Award should be annulled in whole.

2.5 The resubmission Tribunal did not apply the law applicable to the Respondent State's actions committed between 29 May 1995 and 8 May 2008, and their consequences

681. As is apparent from §§ 665-674 of the original Award, from the decision of a Santiago Court of 29 May 1995⁵⁸¹, from the articles of the Chilean Constitution directly and imperatively applicable as interpreted by the Supreme Court, Mr. Pey Casado and the President Allende Foundation today remain the legal owners of all the assets and rights of the Clarin Group.

682. The resubmission Tribunal also had full jurisdiction over the acts in breach of article 4 of the BIT occurring between 29 May 1995 – the recognition by domestic courts of Mr Pey's ownership of all of the shares of CPP SA – and the date on which the initial request was filed, i.e. 3 November 1997 (for the original Award of 8 May 2008) to consider and assess the evidence allowing the *quantum* of compensation to be set for the investment covered by the BIT (art. 2.2), *res judicata*.

683. The RT's refusal to apply applicable law thus appears a way of covering over the denial of Mr. Pey Casado and the President Allende Foundation right to international arbitration, recognised by the BIT and by the original Award on admitting the whole dispute over denial of justice to arbitration, with no time limit for the citing of facts subsequent to the filing date of the additional arbitration request of 4 November 2002:

§ 624. "(...) *Lors des audiences de janvier 2007, les demanderesses ont élargi leur demande fondée sur le déni de justice "à l'ensemble du contentieux soumis au Tribunal arbitral [...]"*.⁵⁸²

684. The resubmission Award discharged itself from the duty to apply Chilean law (art. 10(4) of the BIT), which, like the court decision of 29 May 1995 or the statement by the Respondent State's representative before the OT on 6 May 2003, denies the validity of the decrees issued under Decree-Law 77 of 1973 as regards Chilean investors. One example is that of the limited company that published the daily paper COLOR:⁵⁸³

"DOUZIÈMEMENT : Qu'a cet égard il convient de signaler que c'est un fait accrédité dans l'arrêt que les demandeurs étaient les propriétaires des biens dont ils ont été privés de la pleine propriété en vertu des décrets attaqués dans le dossier judiciaire, de telle façon que si lesdits actes administratifs sont nuls, le fait qu'ils soient, à toute fin pertinente, privés d'effet n'a pu que provoquer que soient maintenus dans le patrimoine des demandeurs les droits réels dont il était illégalement prétendu les priver, de telle sorte que si leur restitution en nature n'est pas possible, ils soient remplacés par leurs valeurs. »

685. In this case, the statement by the Respondent State's representative before the OT on 6 May 2003 confirmed the invalidity and the illegality of the confiscation of the Mr Pey's investment, as put on record in § 667 of the OA.

⁵⁸¹ **Document C2**, Initial Award, §§210 *in fine*, 215, 444, 217 ("*La décision de la juridiction chilienne constitue ainsi un élément supplémentaire permettant de conclure que M. Pey Casado doit être considéré comme l'acquéreur et le propriétaire des titres de CPP S.A.*")

⁵⁸² [589. *Transcription de l'audience du 16 janvier 2007*, p. 46 (*Me Garcés*). *V. également la transcription de l'audience du 16 janvier 2007*, p. 47 (*Me Malinvaud*): "le refus répété d'indemnisations à partir de 1995 est bien un déni de justice qui est un fait de l'Etat en réalité distinct de l'expropriation invoquée au titre de l'article 5 du Traité et qui est applicable à toutes les demandes qui sont présentées devant votre Tribunal"]

⁵⁸³ **Document CRM64f** of the resubmission proceeding, 2000-06-21 Supreme Court Order of 21-06-2000, *Sociedad de Prensa Chile Ltda* case, 11th Recital

686. Mr. Pey Casado and the President Allende Foundation position before the resubmission Tribunal was that it should not reconsider any of the original Award or rework its conclusions, but rather that its task it should involve, pursuant to articles 2(2), 4 and 10(4) of the BIT and paras. 1 to 3 of the dispositive part of the original Award, exercising its jurisdiction and quantifying the compensation payable by Chile according to these paragraphs of the OA's dispositive part and their respective grounds, in particular in §§ 210 *in fine*, 215, 217, 444, 665-674 of the OA.
687. Yet the resubmission Tribunal failed to perform this duty. In § 198 of its Award ("*one of the core paragraphs in the 2016 Award*", according to the Respondent)⁵⁸⁴ it explains its flat refusal to exercise its jurisdiction by invoking the presence of "*deux difficultés insurmontables*", contradicting the parts of the original Award with *res judicata* effect and further expressing the resubmission Tribunal's bias to the Claimants' detriment.

The 1st difficulty was that "*le Tribunal n'a aucun doute que le Tribunal Initial (...) était de l'avis que la confiscation était un fait consommé avec la saisie physique en 1975 et n'entraîne donc pas dans le champ d'application du TBI*".

Yet in §§ 611⁵⁸⁵, 612⁵⁸⁶ and 623⁵⁸⁷ the OT clearly stated that the legal and factual framework in which it had decided on the initial request under article 5 of the BIT (expropriation), to which this "1st difficulty" refers, was radically different from the legal and factual framework applicable to the claims filed in 2000 and 2002 under article 4 of the BIT (discrimination and denial of justice):

§ 459. "*Les parties demanderesses ont introduit une procédure judiciaire le 4 octobre 1995 devant la Première Chambre civile de Santiago visant à obtenir la restitution de la rotative Goss.408 Toutefois, même si certaines décisions concernant des questions d'ordre probatoire ont été rendues dans cette procédure,409 les pièces produites montrent que la Première Chambre civile ne s'était pas prononcée sur le fond lorsqu'est intervenue **la Décision n°43** [du 28 avril 2000] et lorsque les demanderesses ont déposé leur demande complémentaire devant le Tribunal arbitral **le 4 novembre 2002**.*"

§ 626. "*Après examen des faits et des prétentions des parties, il ne fait pas de doute que le **déni de justice allégué par les demanderesses s'étend sur une période postérieure à l'entrée en vigueur de l'API**. L'article 4 de l'API lui est donc bien applicable ratione temporis*"

§ 627. "*les dispositions de fond de l'API sont applicables à la Décision n°43 du 28 avril 2000 ainsi qu'au déni de justice allégué [dans la demande déposée le 4 novembre 2002], le Tribunal doit à présent examiner le bien-fondé des deux violations alléguées.*"

⁵⁸⁴ **Document C263**, Chile Observations on Rectification, 9 June 2017, § 6

⁵⁸⁵ **Document C2**, Original Award, § 611: "*Une fois le traité en vigueur, il n'est toutefois pas interdit au Tribunal de prendre en considération des faits antérieurs à la date d'entrée en vigueur du traité pour examiner le contexte dans lequel sont intervenus les actes que les demanderesses estiment devoir être qualifiés de violations postérieures à l'entrée en vigueur du traité.*"

⁵⁸⁶ **Id.**, Original Award, § 612: "*En conséquence, même si en l'espèce les dispositions de fond de l'API ne sont pas applicables aux actes d'expropriation antérieurs à son entrée en vigueur, le Tribunal pourra examiner les violations de l'API qui se sont produites après son entrée en vigueur, en prenant en compte au titre du contexte des événements qui ont eu lieu avant cette date.*"

⁵⁸⁷ **Id.**, Original Award, § 623: "*un acte composite comprenant une série d'atteintes au traitement juste et équitable de l'investissement des parties demanderesses, résidant essentiellement dans la Décision n°43 et le déni de justice allégué qui lui est lié concernant la rotative Goss. Ces faits sont tous postérieurs à l'entrée en vigueur de l'API.*"

[emphasis added]

688. This radical difference in legal and factual framework – and so in the reasoning required – between what applied to the OT’s decision disallowing the request of 3 November 1997 under article 5 of the BIT and the framework applying, **for the RT**, after the annulment of para. 4 of the OA’s dispositive part, to the treatment of the claims of 2000 and 2002 under article 4 of the BIT – accepted by the OT and the *ad hoc* Committee – is one of the great contradictions in the process followed by the RT.
689. This contradiction makes the RA liable to be annulled for **bias, failure to state reasons and manifest excess of powers**. By excluding activities arising after 3 November 1997 from its jurisdiction, the RT vitiated and dismembered the factual and legal logic and sequence of the original Award relating to the breaches under article 4 of the BIT, *res judicata*, forming the links – necessary to quantifying compensation – between paras. 1 to 3 of the dispositive part and their grounds in Chapters I to VII of the OA which all have *res judicata* effect, especially §§ 210 *in fine*, 215, 217, 444, 611 et seq., concluding in §§ 665 to 674.
690. In supplying proof of the causal link between the breaches of article 4 of the BIT committed since the court ruling of 29 May 1995 and the damages sustained as a result of those breaches established in the OA, Mr. Pey Casado and the President Allende Foundation have always relied on a recognition and strict respect for the grounds cited in the decision of the *ad hoc* Committee for annulling point 4 of the dispositive part and its basis in Ch. VIII of the OA, as witnessed in its Reply of 9 June 2015:

§ 212, "L’effacement des effets du déni de justice ne consiste pas à dire ce que le Tribunal arbitral initial aurait décidé, mais à statuer aujourd’hui en connaissance de cause en lieu et place du Tribunal arbitral initial, puisque cette partie de la décision a été annulée (le Chapitre VIII et le para. 4 du Dispositif), et que la partie dont la solution est *res iudicata* s’inscrit dans un cheminement juridique traité à partir d’une prémisse opposée à celle devant –pour raison de *res iudicata*– présider à la solution de la partie annulée (...)".

691. The 2nd difficulty mentioned by the RA in § 198 is supposed to be that:

i. "le présent Tribunal n’a tout simplement pas le pouvoir de statuer sur un appel formé contre une telle conclusion",

a strange ground given that the “new submission” under Article 52(6) of the Convention is not “an appeal” but "*le prolongement de l’arbitrage initial*" to use the RA’s own terms (§ 188). And what matters is to know:

- a) that the legal and factual framework underpinning the decision of the original Tribunal relating to the initial request of 3 November 1997 under article 5 of the BIT (expropriation), which the OA rejected (§§ 608, 610, para. 8 of the dispositive part)
- b) is not the same as that in which the resubmission Tribunal was to decide on the claims under article 4 of the BIT: there can be no “appeal” in a radically different legal and factual framework.
- c) The OA accepted the issues submitted to arbitration in 2000 and 2002 (failure to give fair and equitable treatment, denial of justice) – points 1 to 3 of the dispositive part, §§ 611-674;

ii. "*ni de substituer son propre avis à celui du Tribunal Initial*",

a basis which distorts the Claimants' claim, as witnessed by their Reply of 9 January 2015, § 162:

*"La mission du présent Tribunal est de déterminer les conséquences des violations par l'État du Chili de l'article 4 de l'API et **non pas de se substituer au Tribunal arbitral initial pour corriger la Sentence.** Les parties ne sont pas dans une procédure de révision mais bien dans une re-soumission après annulation de son VIIIème Chapitre et du quantum de l'indemnisation" [emphasis added] ;*

iii. *"ni encore d'octroyer une réparation de quelque nature que ce soit à ce titre",*

a basis which distorts (and then serves to reject) the Claimants' claim for compensation only for breach of fair and equitable treatment, including denial of justice (article 4 of the BIT). With this distortion the Award bars the effective application of points 1 to 3 of the dispositive part of the original Award;

iv. *"En ce qui concerne la seconde conséquence (à savoir que la confiscation effective n'est intervenue qu'avec la Décision n° 43), elle est également elle-même incompatible avec les conclusions du Tribunal Initial quant à la chronologie de la confiscation, mais aussi avec la Décision n° 43 elle-même, dont le sens général est qu'il s'agissait de l'octroi d'une compensation au titre d'une confiscation qui était déjà intervenue."*

This ground of the resubmission Award is highly partial because it invents a reason only to refute it: for Mr. Pey Casado and the President Allende Foundation **never contended before the resubmission Tribunal** that there was any such "confiscation" by "Decision 43". What they contended was that the original Award asserted and the *ad hoc* Committee confirmed, namely:

"Les Demanderesses (...) ont démontré, d'une manière tout-à-fait convaincante pour le Comité, que le Tribunal a amplement motivé sa conclusion selon laquelle la Décision n° 43 du Chili était discriminatoire à l'encontre des Demanderesses et violait donc l'article 4 de l'API. La demande en annulation présentée par la Défenderesse sur le fondement de ce motif est donc rejetée".⁵⁸⁸

692. This ground of the resubmission Award (§ 198) is however in line with Chile's statement at the hearing of 15 April 2015 in a context calling into question the grounds of the Arbitral Award, accepted by the RA when it attributes to "Decision 43" effects which the original Award had expressly ruled out on entertaining the Claimants' claim of damage sustained as a result of the fact that all the discrimination, caused by "Decision 43" to their detriment, had been aggravated by the various Chilean administrative and judicial authorities between 2000 and 2002, as stated in the original Award.

693. This links "Decision 43" – which relates to the investment as a whole – to the denial of justice, i.e. the dismissal *in limine litis* of the Claimants' claims regarding "Decision 43" by the domestic judicial and administrative bodies (emphasis added, References omitted):

§ 455. *"Les demanderesses soulignent également que leurs recours auprès du pouvoir exécutif et du pouvoir judiciaire visant à mettre en cause la compatibilité de **la Décision n°43 avec la procédure judiciaire introduite en 1995** ont tous été rejetés. Elles indiquent avoir attiré en vain l'attention du Contralor general sur l'incompatibilité de la Décision n°43 avec*

⁵⁸⁸ Document C20, Decision of the *ad hoc* Committee of 18 December 2012, § 233

l'action intentée devant la Première Chambre civile de Santiago. Leur demande de rétractation des décrets de paiement de l'indemnisation accordée par la Décision n°43, déposée le 29 juillet 2002, aurait également été rejetée in limine litis le 14 octobre 2002. Par ailleurs, la demande de mesures conservatoires des demanderesses déposée auprès de la Première Chambre civile de Santiago à l'encontre de la Décision n°43 a été rejetée le 2 octobre 2001 et la requête déposée par les demanderesses auprès de la Cour suprême le 5 juin 2002 arguant d'un conflit de compétence entre le pouvoir exécutif et le pouvoir judiciaire a été déclarée irrecevable. Enfin, les parties demanderesses indiquent que leur recours en protection constitutionnelle pour violation de leur droit de propriété sur la rotative Goss, porté devant la Cour d'appel de Santiago, a lui aussi été déclaré irrecevable et sans fondement par cette dernière le 6 août 2002."

§ 456. "Le rejet de l'ensemble de ces recours est constitutif, selon les demanderesses, d'un déni de justice à l'origine d'un différend né après l'entrée en vigueur de l'API, lorsque, d'une part, les parties demanderesses ont déposé un recours en rétractation devant le Contralor le 29 juillet 2002 et lorsque, d'autre part, la Première Chambre civile de Santiago a rejeté leur demande de mesures conservatoires le 2 octobre 2001."

§ 632. "la Décision n°43 indemnise des requérants autres que les demanderesses pour la confiscation des biens en question et le Ministre des biens nationaux maintiendra cette décision que les demanderesses contesteront en vain.

§ 635. "Les demanderesses ont tenté en vain de faire reconnaître l'incompatibilité de la Décision n°43 avec cette procédure judiciaire."

§ 652. "la Décision n°43 doit s'analyser en une application discriminatoire d'une loi postérieure à l'API et des droits que celle-ci a créés. Par conséquent, il convient pour le Tribunal d'analyser les violations alléguées, au moins en premier lieu, sur la base de l'article 4 de l'API, les articles 3 et 5 ayant été invoqués par les demanderesses dans le cadre de leur thèse de l'acte illicite continu, qui a été rejetée. Le même fondement, l'article 4 de l'API serait applicable au déni de justice allégué des parties demanderesses."

694. The original Award develops the link between the domestic ruling of 29 May 1995, "Decision 43" of 2000 and the denial of justice "allant à tout le moins jusqu'en 2002":⁵⁸⁹

§ 653. "La question se pose en particulier de savoir si le comportement des autorités chiliennes, législatives, administratives et judiciaires, peut ou non être considéré comme constituant un 'déni de justice' et une violation du devoir d'accorder à l'investissement étranger une protection suffisante, soit plus précisément, un "traitement juste et équitable "au sens de l'article 4 (1) de l'API ainsi conçu (...)"

§ 658. "Dans le contexte spécifique du présent litige (...) l'application de la notion de "déni de justice "et celle de l'obligation de "traitement juste et équitable "n'appellent pas de longue analyse. Elles se laissent résumer à deux questions relativement simples :

- La première est celle de savoir si l'absence de toute décision par les juridictions chiliennes [la procédure devant constater impérativement la nullité de droit public du Décret n° 165] pendant une période de sept années (1995-2002), d'une part, et l'absence de réponse de la Présidence aux requêtes de M. Pey Casado [aux réclamations sur l'ensemble de l'investissement], d'autre part, sont constitutives d'un déni de justice.

⁵⁸⁹ Document C2, Original Award, § 624. "Les parties demanderesses prétendent être victimes d'un déni de justice qui aurait eu lieu durant une période commençant en 1995 et allant à tout le moins jusqu'en 2002."

- *La seconde est celle de savoir si les investissements reconnus par le Tribunal arbitral comme ayant été faits par M. Pey Casado ont bénéficiés du "traitement juste et équitable" prescrit par l'API."*

§ 659. "**Sur la première question, la réponse ne peut être que positive**, au regard des faits établis et déjà retenus par le Tribunal arbitral (...)."

§ 665. "**Sur la seconde question, celle de savoir si les investissements des demandereses ont bénéficié d'un traitement juste et équitable, une réponse négative s'impose** de l'avis du Tribunal arbitral (...) **M. Pey Casado a bien démontré avoir procédé à des investissements et être propriétaire** de biens meubles ou immeubles qui ont été confisqués par l'autorité militaire chilienne."

And immediately afterwards the original Award establishes the cause-effect linkage between a) the breach of article 4 of the BIT with regard to the whole investment, b) the damages sustained by Mr. Pey Casado and the President Allende Foundation, and c) the order to the Respondent State to pay compensation for them (points 1 to 3 of the dispositive part of the OA):

1. the recognition by the judgment of 29 May 1995⁵⁹⁰ of the ownership of all of the shares of CPP SA thus constituting a ground of points 1 to 3 of the dispositive part of the original Award:

§ 666. "**On rappellera à ce propos l'existence d'un jugement chilien reconnaissant la propriété de M. Pey Casado sur les actions** confisquées ainsi que le fait que les autorités chiliennes, exécutives et administratives (comme judiciaires) étaient informées des revendications et demandes formulées par les demandereses" [relatives à la totalité de leur investissement]

2. the recognition by Chile to the original Tribunal of the **invalidity** of the confiscation of all of the shares of CPP SA and the **duty to compensate its owners**:

§ 667. "Quant à l'invalidité des confiscations et au devoir d'indemnisation, il y a lieu de rappeler aussi des déclarations parfaitement claires de la défenderesse dans la présente procédure. (...) V., par exemple, la transcription de l'audience du 6 mai 2003, pp. 262-263 (Me Castillo) : *Il ne s'agit pas non plus de justifier la légitimité des actes qui ont découlé de la confiscation de bien de CPP S.A. et Clarin Ltée. Bien au contraire, la République du Chili est constante des dommages causés par ces confiscations et c'est pour cela qu'elle a indemnisé ces titulaires légitimes*" [footnote 617]

3. the finding that:

§ 669 : "cette politique ne s'est pas été traduite dans les faits, en ce qui concerne les demandereses"

§ 670 : "Il est constant dans la jurisprudence internationale et dans la doctrine qu'un traitement discriminatoire de la part d'autorités étatiques envers ses investisseurs étrangers constitue une violation de la garantie de traitement 'juste et équitable' ",

4. and the conclusion of this factual and legal linkage also relates to the whole of the investment and so the duty to compensate for the whole:

⁵⁹⁰ Document C45

§ 674. "Dans le cas d'espèce, en résumé, **en accordant des compensations (...) à des personnages qui (...) n'étaient pas propriétaires des biens** confisqués, en même temps qu'elle **paralysait** [le traitement de la procédure devant constater impérativement la nullité du Décret confiscatoire] ou **rejetait les revendications** de M. Pey Casado [adressées aux autorités exécutives, administratives et judiciaires] **concernant les biens** confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesse de façon juste et équitable."

695. Yet on the basis of the biased ground "iv" above, § 198 of the resubmission Award (in either the original or the rectified version), the RT dismembers the close interrelation of facts and legal reasons forming the grounds of points 1 to 3 of the dispositive part of the original Award, refuses to consider the evidence supplied for calculating the damage – on the abusive pretext of lacking jurisdiction over acts subsequent to 3 November 1997 – and throws Mr. Pey Casado and the President Allende Foundation off their irreversible path (the “fork on the road”) to international arbitration:

"si la prétendue nullité de la Décision n° 43 au regard du droit chilien avait effectivement une importance décisive, la conséquence en serait certainement que l'investissement est, en droit, resté la propriété de M. Pey Casado et/ou de la Fondation et le recours à ce titre pourrait relever de la sphère domestique, mais clairement pas du présent Tribunal dans le cadre de la présente procédure de nouvel examen." [emphasis added]

696. As the subject of a hypothetical *invalidity of Decision 43 for the purposes of Chilean law* evidently appears nowhere, neither in the original Award of 2008 nor in the pleadings to the resubmission Tribunal, attributing such a proposition to Mr. Pey Casado and the President Allende Foundation (whether with regard to Decision 43 or to Decree 165) serves to cover the fact that the resubmission Award here challenges the *res judicata* part of the OA and its consequences for determining the amount of compensation due.

As we know from the corrections introduced by the decision of 6 October 2017, it is to the invalidity *ab initio* of Decree 165 that the resubmission Tribunal intended to attribute "*effectivement une importance décisive*". Yet the RT deemed that it was pointless to examine the proof of such invalidity submitted by Mr. Pey Casado and the President Allende Foundation on the pretext that none of the effects desired by them would flow from it.

2.6 The biased reasoning of the RA: the distortion of the Claimants' statements

697. The following brief sample shows the extent of the Tribunal's bias vis-à-vis Mr. Pey Casado and the President Allende Foundation:

Resubmission Award (RA)

§ 196. "[Les Demanderesse] soutiennent à certains endroits que des éléments des parties non annulées de la Sentence Initiale doivent être réexaminés et modifiés par le présent Tribunal."

A total invention. See the transcript of the hearing of 13-04-2015, page 4:

*"Les Demanderesses proposent de ne pas modifier un iota, pas un iota, la partie non annulée de la Sentence. C'est res judicata."*⁵⁹¹

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§ 196. *"Selon les Demanderesses, si elles avaient été en mesure de faire valoir cet argument, elles auraient pu récupérer les biens qui leur avaient été confisqués au Chili, ou, tout au moins, elles auraient pu démontrer devant le Tribunal Initial que la confiscation de ces biens n'était pas un acte instantané définitivement consommé en 1975, mais qu'elle n'a en fait été consommée que plusieurs années plus tard, et le résultat en aurait été que la confiscation relevait bien de la compétence du Tribunal Initial au regard du TBI, contrairement aux conclusions de la Sentence Initiale."*

The rationale presented here is evidently similar. But at no point did Mr. Pey Casado and the President Allende Foundation put themselves in the place of the original Tribunal to speculate as to what it might have decided if Chile had not forced that Tribunal to make its decision in ignorance of the ruling of the 1st Civil Court of Santiago on the status of Decree 165 in the Chilean judicial system (see § 72(5) above).

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§ 196. *"Il s'ensuit, toujours selon les Demanderesses, que le préjudice subi par elles du fait du déni de justice est la perte de ce droit à compensation dans l'arbitrage initial, de sorte que c'est ce préjudice qu'elles peuvent maintenant invoquer dans la présente procédure."*

The RA ignores the discrimination covered by para. 2 of the dispositive part of the OA, along with the Claimants' claims relating to "discrimination" asserted in their Memorial (§§ 320, 338, 341), their Reply (§§ 3, 186, 203, 228, 268, 291(e), 304-316, 334, 408), and in the addresses by Ms Malinvaud and Ms Muñoz at the hearings of 16 May 2015.⁵⁹²

Moreover the primary equivalence of the amount claimed with the value of the investment reflects just *the loss*, not the loss of the possibility of "compensation" before the OT.

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§ 196. *"(...) est la perte ce droit à compensation dans l'arbitrage initial de sorte que c'est ce préjudice qu'elles peuvent maintenant invoquer dans la présente procédure."*

The reference here to "original arbitration" distorts what Claimants are seeking; where this "right to compensation" is declared, in the dispositive part of the OA as *res judicata*, it is not "lost".

What Mr. Pey Casado and the President Allende Foundation contend is different: that the denial of justice and discrimination by Chile after the BIT's entry into force (1994) led to the loss, in Chile, *"de la valeur de l'investissement"* (Ms Malinvaud, hearing of 13-04-2015, page 19),⁵⁹³ *"la perte totale [au Chili] de son droit à indemnisation sur l'ensemble des biens confisqués"* (Ms Muñoz, hearing of 13-04-2015, page 31).

- Address by Ms Malinvaud at the hearing of 13-04-2015, page 19:

⁵⁹¹ Document C43, transcript of the hearing of 13 April 2015

⁵⁹² Document C43, pp. 16 and 31

⁵⁹³ Ibid.

"la perte de la valeur de l'investissement est bien la conséquence directe des deux violations qui ont été reconnues : le déni de justice d'une part pour la Goss, la discrimination d'autre part qui est plus large. La problématique, c'est le rapport de causalité entre ces violations et ce dommage".

- Hearing of 16-05-2015, address by Ms Malinvaud (page 16):

"La position des Demanderesses, telle qu'elle a été exposée au Tribunal et sur laquelle nous reviendrons plus tard à la lumière de ce qui a été dit au cours des audiences, est et reste que le préjudice résultant de [la violation de] l'article 4 de l'API est la perte du droit à compensation [au Chili], que ce soit tant à raison du déni de justice qu'à raison de la discrimination. Le fait que le droit à compensation dont les Demanderesses ont été privées en raison du comportement du Chili après l'entrée en vigueur du Traité soit équivalent au droit à compensation résultant de l'expropriation n'est certainement pas anormal et ne contredit en rien les parties qui [n']ont [pas] été annulées de la Sentence. Je le rappelle, les Demanderesses ne formulent pas de demande de réparation fondée sur la violation de l'article 5 de l'API."

- Address by Ms Muñoz (page 31):

"Dès lors que le préjudice qui a été démontré pendant ces audiences est la perte totale de son droit à indemnisation sur l'ensemble des biens confisqués, il est normal que la valorisation du préjudice se fasse sur la Fair Market Value de cet investissement".⁵⁹⁴

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§ 197. *"la nullité absolue d'un décret-loi exige une décision judiciaire à cet effet"; "le demandeur n'a pas demandé de déclaration de nullité dans l'affaire de la rotative Goss."*

Serious and absolute failure to apply article 7 of the Chilean Constitution and its uniform implementation in case law: a court decision taking note of "invalidity of public law", with or without a request seeking a "declaration" of invalidity – fully establishes such "invalidity of public law".

Mr. Pey Casado and the President Allende Foundation also produced the judgment of the 1st Civil Court of Santiago of 28 July 2008⁵⁹⁵ whose 9th recital records *ex officio*, properly, the "invalid public law" vitiating Decree 165 of 10 February, recognising Mr Pey's right to act on behalf of the company EPC Ltd, which, we may recall, that Decree had wound up.

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§ 197. *"Les Demanderesses n'ont pas produit de rapport d'expert de leur côté, se contentant de donner, par le biais de leurs conseils (dont aucun n'est avocat au Chili), leur propre interprétation du droit chilien"*

The Chilean legal system, of civil Roman inspiration, is based on the direct application of law, far from the case-law system. At the initial proceedings in Chile, with the president of the Constitutional Court in person at the final hearings, Mr. Pey Casado and the President Allende Foundation produced no expert reports but rather just listed the applicable law and, through their counsels, their interpretation of Chilean law on the basis of the Constitution

⁵⁹⁴ **Ibid.**

⁵⁹⁵ **Document C282**

and the supporting jurisprudence and doctrine. The OT accepted the interpretation made by the latter and rejected the biased interpretation of the acting President.⁵⁹⁶ *Iura novit curia*.

Mr. Pey Casado and the President Allende Foundation produced proof (Reply, §§ 88-105)⁵⁹⁷ of the regular jurisprudence of the Chilean Supreme Court contrary to that accepted in the RA based on an edited version of the contribution by the Respondent's witness, for he clearly acknowledged the purport of the domestic judgment of 24 July 2008 putting on record the "invalidity of public law" vitiating decree 165.⁵⁹⁸

Mr. Pey Casado and the President Allende Foundation also supplied proof that the question of the invalidity *ab initio* of Decree 165 was debated and resolved before the 1st Civil Court of Santiago (Reply §§ 136-161).⁵⁹⁹

In the resubmission file of issues arising between the parties as from the year 2000 there are 16 orders of the Chilean Supreme Court (Reply § 108) asserting that an "express" decision centred on a declaration of invalidity was not at all necessary, as opposed to "note being taken" so as to establish the invalid public law vitiating the Decree.

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§ 197 "*Le Tribunal, pour sa part, reconnaît le bon sens de l'explication, donnée par le Dr Libedinsky.*"

Contradiction. Mr Libedinsky's statement to the Tribunal acknowledges that the domestic ruling of 24-07-2008 took note of the invalid public law vitiating Decree 165.⁶⁰⁰

Mr. Pey Casado and the President Allende Foundation produced the applicable law, the imperative constitutional provisions and the applicable legal standards.

The RA applied no provisions whatsoever of Chilean law, infringing article 10(4) of the BIT.

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§ 197. [Le TR] "*prend note de la formule complexe avec laquelle les Demanderesses ont habillé leur proposition, à savoir qu'un tribunal chilien "aurait l'obligation de prendre en compte la réalité de la nullité du Décret n° 165 ex tunc", et il estime que la nature très tortueuse de cette proposition [relative à l'obligation du tribunal chilien] laisse largement entendre qu'elle est plus spéculative qu'opérationnelle.*"

This supposed "*formule complexe...*" purportedly disqualifying the presentation made by Mr. Pey Casado and the President Allende Foundation happens to be nearly identical to that of the Chilean Supreme Court. Here the failure to apply applicable law is absolute,⁶⁰¹ and the apparent bias is glaring.

⁵⁹⁶ **Document C2**, Original Award, §§ 303-323, and footnotes 215, 248, 249, 253, 257

⁵⁹⁷ **Document C40**

⁵⁹⁸ Cfr. in pages 189-190 above the comment to §197 of the RA and in the Application for annulment §259 and **document C68**

⁵⁹⁹ **Document C40**

⁶⁰⁰ See footnote 378 to the Application for annulment

⁶⁰¹ This question is developed in the Application for annulment of 10 November 2017, p. 154, and in this Memorial.

Mr. Pey Casado and the President Allende Foundation again stated at the hearing of 16 April 2015:⁶⁰²

"le présent Tribunal a le devoir, dans la rédaction de la partie annulée de la Sentence (chapitre 8, point 4 du Dispositif), d'appliquer directement la Constitution. Mais avant cela je souhaiterais également indiquer l'importance de disposer de la réponse de M. Libedinsky à Me Muñoz lorsqu'elle lui a posé la question de savoir si une société dissoute avait ou n'avait pas la personnalité juridique. Il a dit : " Non, elle n'a pas de personnalité juridique." Et quelques minutes après, elle l'a invité à lire la partie du jugement où le juge dit que : "Le droit d'agir appartient à la Société Limitée." Et il a reconnu : " En effet, le jugement dit cela." Donc, on voit là, n'est-ce pas, un décalage encore patent - c'est déjà le juge qui parle, qui reconnaît que la Société Limitée a le droit d'agir. Donc elle n'est pas morte en termes de droit, comme la dissolution signifie d'après la première partie de la déclaration de M. Libedinsky, la première partie de sa déclaration. Je dis donc que le Tribunal aujourd'hui a la possibilité, avec l'information dont il dispose, d'appliquer directement la Constitution du Chili. Et là, je me rappelle d'un débat qui a eu lieu [modéré par M. Veeder] à la London School of Economics entre deux illustres arbitres, Jan Paulsson, d'un côté, et Pierre Mayer, de l'autre côté. Le sujet était quelle était l'obligation et la capacité du Tribunal arbitral international d'appliquer directement la Constitution lorsqu'il voit que les administrations internes ou les juridictions internes n'agissent pas conformément à la hiérarchie des normes de l'État en question.

Il y avait deux positions, la position du Prof. Jan Paulsson était : si on vient nous demander justice, le Tribunal arbitral a l'autorité d'appliquer la Constitution même si les administrations internes de l'État ne l'ont pas appliquée, s'il y a une contradiction entre la loi suprême et son application. Le point de vue de Pierre Mayer était de dire : oui, le Tribunal international doit respecter la hiérarchie des normes, mais conformément à l'interprétation des juridictions internes à cette application de la Constitution. Voilà la divergence de position entre Jan Paulsson et Pierre Mayer. Dans votre cas, je crois que cette opposition n'a pas lieu parce que, si vous prenez la position de M. Paulsson, vous avez l'autorité d'appliquer directement la Constitution, de la faire respecter dans votre interprétation du droit interne auquel renvoie l'article 10(4) de l'API. Mais si vous prenez l'interprétation de Pierre Mayer, vous aussi avez cette compétence et cette obligation, parce que vous avez l'interprétation de la jurisprudence chilienne sur l'application de la Constitution dans l'interprétation et application du Décret-loi 77 dans les décrets de confiscation. (...) Donc, je crois que, à la différence du premier Tribunal arbitral, vous pouvez et vous devez, me semble-t-il, faire respecter la hiérarchie des normes. "

The RA also distorted this claim made by Mr. Pey Casado and the President Allende Foundation in their Memorial:⁶⁰³

"34. Il est essentiel d'observer que le Tribunal arbitral n'a jamais affirmé que le Décret 165 ne pouvait pas être entaché de la nullité de droit public. Bien au contraire. En confinant son raisonnement "à la connaissance "qu'il pouvait avoir du statut du Décret n°165 dans l'ordre juridique chilien, le Tribunal arbitral reconnaissait devoir trancher dans un cadre indéterminé

"35. C'est à la lumière de ces éléments que les Demanderesses considéraient que les préjudices résultant des faits intentionnels des autorités de la République du Chili ayant enfreint l'article 4 (traitement juste et équitable) de l'API étaient équivalents aux préjudices

⁶⁰² Document C43

⁶⁰³ Document C8

résultant de la violation de l'article 5 (expropriation). [Soulignement ajoute, voir le § 28 ci-devant]

"36. Cependant, le Tribunal arbitral initial n'ayant pas ouvert le débat sur la détermination du quantum pour les violations de l'article 4 de l'API, les Demanderesses n'eurent pas l'occasion d'apporter la démonstration de cette équivalence, et d'en tirer les conséquences. L'absence de débat a entraîné l'annulation de la Section VIII de la Sentence par le Comité ad hoc.

"37. Ce débat est ouvert aujourd'hui devant le présent Tribunal arbitral.

"38. La portée du déni de justice a été révélée après l'émission de la Sentence arbitrale, lorsque la 1ère Chambre civile de Santiago a rendu son jugement le 28 juillet 2008 –soit près de treize (13) ans après l'introduction de la demande par M. Pey- reconnaissant la nullité de droit public du Décret n°165 de 1975 et donc l'absence de titre de l'État hôte sur la Presse Goss (mais plus généralement sur l'ensemble de l'investissement) lors de l'entrée en vigueur de l'API et jusqu'à ce jour.

"42. (...) il appartient au présent Tribunal –lequel dispose désormais du jugement de la 1ère Chambre Civile de Santiago du 24 juillet 2008 retenu jusqu'après la Sentence et déterminant le statut réel du Décret n° 165 - de replacer les Demanderesses dans la situation la plus proche de celle où elles se trouveraient si l'action constitutive du déni de justice et de la discrimination n'avait pas eu lieu.

"43. La production de cette preuve, occultée par le déni de justice, devant le nouveau Tribunal permet l'effacement de l'effet dommageable majeur du déni de justice.

"44. Ainsi, les Demanderesses doivent se voir indemniser, au titre des violations de l'article 4 de l'API, pour les saisies subies en 1973.

"45. Les Demanderesses parviennent à cette conclusion sans remettre en cause, de quelque manière que ce soit, l'autorité de la chose jugée de la Sentence initiale, bien au contraire, puisqu'il ne s'agit que de la conséquence directe des violations de l'article 4 de l'API et de l'effacement de leur effet dommageable édicté par le Dispositif de la Sentence.

"47. En excluant tout débat sur le préjudice résultant de l'article 4 de l'API, le Tribunal initial appliquait arbitrairement, dans la Section VIII, les conséquences de son confinement dans le cadre procédural pour lequel il avait légitimement opté, à savoir, que ce qui concernait la validité, ou non, de l'allégation de violation de l'art. 5 de l'API introduite par les Demanderesses en 1997, lorsqu'elles étaient privées de la preuve déterminant le statut du Décret n° 165, pouvait, également, s'imposer pour l'estimation de la compensation des effets du déni de justice dans le cadre procédural de l'article 4 de l'API avec le constat duquel ce confinement était dépourvu de lien organique. Il s'agit de deux démarches juridiques qui s'excluent mutuellement." [Voir à ce propos le TR lui-même, citant le TAI, § 19 ci-dessous]

"48. Le débat qui devait écarter de façon pertinente de telles contradictions dans la Section VIII de la Sentence constitue, aujourd'hui, la mission du nouveau Tribunal arbitral.

"49. Or, dans le cadre de ce débat il sera spécifiquement confirmé que la privation de la preuve de l'absence de titre de l'État défendeur sur l'investissement est le modus operandi du déni de justice, dont il s'agit d'effacer les effets.

"50. En l'espèce, le nouveau Tribunal arbitral dispose de toute latitude pour effacer entièrement l'effet du déni de justice après en avoir percé à jour la nature, l'intention et la portée exactes.

"51. En effet, conformément à l'article 26 de la Convention de Vienne sur le droit des traités, du 23 mai 1969¹⁷, ratifié par l'Espagne et le Chili, ce dernier aurait dû exécuter l'API de bonne foi. Or en l'espèce se trouvent réunies les conditions de l'escroquerie aggravée au jugement par tromperie:

1. la simulation, à savoir que la rétention intentionnelle du jugement interne crée des apparences extérieures qui induisent le Tribunal arbitral à se former une représentation erronée de la réalité, à savoir qu'en 1995 le statut du Décret 165 à l'égard de la nullité de droit public pouvait être indéterminé, alors que sa nullité opérait ab initio, imprescriptible, à déclarer impérativement ex officio ;

2. l'erreur provoquée, à savoir que la personne trompée (le Tribunal arbitral) ait effectivement une fausse représentation de la réalité. L'auteur de l'escroquerie, en sa qualité d'État, a tiré les ficelles des institutions en retenant le jugement interne, alors qu'en sa qualité de partie à la procédure d'arbitrage il trompait intentionnellement le Tribunal arbitral en lui faisant croire que le constat de la nullité de droit public du Décret 165 par les juridictions internes était sujet à incertitude, et créant une condition artificielle d'indispensabilité que l'auteur de l'escroquerie maintenait indisponible ;

3. prises de dispositions patrimoniales et préjudice, à savoir une action ou omission du sujet passif de la tromperie (le Tribunal arbitral) provoquant une diminution du patrimoine des parties contre lesquelles a agi l'auteur de l'escroquerie ;

4. rapport de causalité, à savoir que la simulation a provoqué la prise de dispositions patrimoniales causant le préjudice ;

5. de surcroît, la mauvaise foi ou le dol recouvre tous les éléments désignés ci-dessus.

"52. C'est à la lumière de ces éléments que les Demanderesses considèrent que les préjudices résultant, à titre principal, **des violations par la République du Chili de l'article 4 de l'API**, sont équivalents aux préjudices résultant des saisies des biens des sociétés éditrices d'El Clarin, préjudices pour lesquels elles établissent le quantum dans le présent Mémoire.

"53. C'est donc **au titre de la violation de l'article 4 de l'API** que les Demanderesses présentent leur demande en réparation des préjudices précités devant le présent Tribunal arbitral, et sollicitent respectueusement qu'il se prononce dans ce cadre sur le quantum de l'indemnisation due par la République du Chili aux Demanderesses".

And in their Reply:⁶⁰⁴

"161. Le fait est que la 1^{re} Chambre civile de Santiago a effectivement pris en compte la réalité de la nullité de droit public de ce Décret.

"162. La mission du présent Tribunal est de déterminer les conséquences des violations par l'État du Chili de l'article 4 de l'API et non pas de se substituer au Tribunal arbitral initial pour corriger la Sentence. Les parties ne sont pas dans une procédure de révision mais bien

⁶⁰⁴ Document C40

dans une re-soumission après annulation de son VIIIème Chapitre et du quantum de l'indemnisation."

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§ 198. "Cela étant dit, le Tribunal estime qu'il n'est pas nécessaire d'aller plus avant dans cette question."

Incongruity: here the RA suddenly interrupts its consideration of the proof produced by Mr. Pey Casado and the President Allende Foundation as to the nature of the harm caused by the withholding of the domestic judgment (constituting a denial of justice according to the OA), vital to estimating the amount of compensation and forming the causal link of the harm with the damages, without settling the matter.

In para. 232 the RA censures Mr. Pey Casado and the President Allende Foundation for not having satisfied:

la "charge de la preuve ; en effet, on pourrait dire que dans un sens, elles n'ont même pas cherché à le faire, dans la mesure où elles ont centré leurs arguments sur l'évaluation du dommage, sans démontrer au préalable la nature précise du préjudice, le lien de causalité et le dommage lui-même".

We might say that the RT did not even seek to acquaint itself with the thrust of the evidence accumulated by Mr. Pey Casado and the President Allende Foundation seeing as as it all related to the issues arising between the parties after 3 November 1997 that the original Tribunal settled by finding Chile liable for having infringed article 4 of the BIT.

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§ 198. "puisque'il [le TR] a conclu que, même si les Demanderesses étaient en mesure de démontrer la proposition qu'elles ont soutenue celle-ci n'aurait pas d'incidence importante sur la présente procédure de nouvel examen. Ce que les Demanderesses souhaitent soutenir, c'est que, dans la mesure où le Décret n° 165 n'a jamais (selon elles) constitué un acte juridique valable, il n'y a jamais eu de confiscation juridiquement efficace de l'investissement, de sorte que la propriété légale d'El Clarín et des actifs qui s'y rattachent est demeurée là où elle était en 1973 et 1975 (sous réserve uniquement de la cession ultérieure à la Fondation). Cependant, la principale difficulté ne réside pas tant dans cette proposition elle-même que dans les conclusions que les Demanderesses cherchent à en tirer, en ce qui concerne les recours disponibles dans la présente procédure. Selon le Tribunal, il n'y en a que deux : la première est que le Tribunal Initial a conclu **à tort** ..."

Could the RT not have found out just what Mr. Pey Casado and the President Allende Foundation intended to "draw from it", rather than making up a wholly arbitrary and unjustified substitute?

Mr. Pey Casado and the President Allende Foundation expressly said that the OA was not "mistaken":

-Memorial :⁶⁰⁵ p. "32. Cette rétention, constitutive d'un déni de justice, a en effet permis à la République du Chili de contraindre le Tribunal arbitral initial à statuer dans un cadre où la

⁶⁰⁵ Document C8

nullité de droit public du Décret n° 165 n'avait pas été établie, dans un sens ou un autre, par une juridiction interne chilienne, ce qui l'a conduit a) à admettre la validité de ce Décret lorsque le statut de celui-ci restait indéterminé devant la 1ère Chambre Civile de Santiago, et, b) à condamner de ce fait l'État du Chili pour déni de justice."

-Reply:⁶⁰⁶ p. 62 : "La mission du présent Tribunal est de déterminer les conséquences des violations par l'État du Chili de l'article 4 de l'API et non pas de se substituer au Tribunal arbitral initial pour corriger la Sentence. Les parties ne sont pas dans une procédure de révision mais bien dans une re-soumission après annulation de son VIIIème Chapitre et du quantum de l'indemnisation."

And they clearly established what they intended to draw from it. The art of distorting a party's positions is here taken to the limit.

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§ 198. "Chacune d'elles apparaît, sous diverses formes, dans les écritures des Demanderesses au cours de la présente procédure de nouvel examen"

They do not appear in any form in the Claimants' submissions.

What Mr. Pey Casado and the President Allende Foundation said sets out from the full recognition, without alteration, of what is *res judicata*, and they produced proof of the causal link between the breach of article 4 of the BIT and the damage sustained.

-Reply:⁶⁰⁷ "§ 68. La raison pour laquelle le Tribunal arbitral est parvenu à cette conclusion est mentionnée au paragraphe 603 de la Sentence qui précise : 'A la connaissance du Tribunal, la validité du Décret n°165 n'a pas été remise en cause par les juridictions internes et ce décret fait toujours partie de l'ordre juridique interne chilien.'"

§ 69. Or, le Tribunal initial n'aurait pas pu faire cette déclaration si la 1re Chambre civile de Santiago avait rendu son jugement avant la Sentence du 8 mai 2008, en somme, en l'absence de déni de justice.

§ 70. En effet, comme l'ont indiqué les Demanderesses dans leur Mémoire en Demande, dans l'affaire en jugement devant la 1re Chambre civile de Santiago, le juge devait prendre en compte la réalité de la nullité du Décret n°165 dont l'objet était de dissoudre CPP S.A. et EPC Ltée et de transférer la propriété de leurs biens l'État, puisque c'était la prémisse de la *causa petendi* et des arguments essentiels de l'investisseur.

§ 71. Ainsi, le Tribunal arbitral initial serait sorti de l'indétermination à cet égard dans laquelle il se trouvait concernant le statut du Décret n°165 dans l'ordre juridique interne chilien et aurait pu décider en toute connaissance de cause."

- Reply:⁶⁰⁸ § 212, "le déni de justice a consisté en ce que les Demanderesses ont été privées de la preuve des rapports de droits de leur investissement avec l'État du Chili. L'effacement des effets du déni de justice ne consiste pas à dire ce que le Tribunal arbitral initial aurait décidé, mais à statuer aujourd'hui en connaissance de cause en lieu et place du Tribunal

⁶⁰⁶ Document C40

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

arbitral initial, puisque cette partie de la décision a été annulée (le Chapitre VIII et le para. 4 du Dispositif), et que la partie dont la solution est res iudicata⁶⁰⁹ s'inscrit dans un cheminement juridique traité à partir d'une prémisse opposée⁶¹⁰ à celle devant –pour raison de res iudicata– présider à la solution de la partie annulée⁶¹¹ (...)” ;

§ 217 : *“Le présent Tribunal arbitral dispose de la preuve que ce décret n°165 n'avait, selon les juridictions chiliennes, jamais existé dans l'ordre juridique chilien, que ce soit en 2008 à la date de la Sentence, en 1994 à la date d'entrée en vigueur de l'API, en 1995 (...) ou même en 1975 à la date de publication de ce décret (les juridictions chiliennes considérant que par l'opération de la nullité de droit public "l'acte administratif vicié est nul depuis l'instant même de son énonciation"224)” ;*

-Hearings, pages 176-177:⁶¹² “Ensuite, le paragraphe [608 de la SI] continue : *“Aussi le Tribunal considère que l'expropriation dont se plaignent les Demandereses doit être qualifiée d'acte instantané antérieur à la date d'entrée en vigueur de l'API”*. On voit bien que, dans ce paragraphe, le Tribunal arbitral fait un lien entre, d'une part, l'existence du Décret 165, qui prononce le transfert de propriété, et le fait que cet acte doit être qualifié d'acte instantané. (...) le Tribunal indique que : *“La jurisprudence n'est pas applicable en l'espèce - encore une fois - parce qu'il y a bien eu transfert de propriété.”* Là, je vous renvoie aux paragraphes 606, 607 et 609, (...). En réalité, les décisions de la CEDH, qui ont été produites devant le Premier Tribunal arbitral, considéraient que l'acte d'expropriation était un acte instantané dès lors qu'il y avait un acte légal transférant la propriété. En revanche, quand c'était des confiscations *de facto*, elle considérait que c'était un acte illicite continu. Ainsi, la position des Demandereses est de considérer que, si le Tribunal arbitral initial avait eu la preuve que, dans l'ordre juridique chilien, le Décret 165 était nul *ab initio* de manière reconnue par un juge chilien, il n'aurait pas conclu de la même manière sur l'applicabilité *ratione temporis* des dispositions de l'API au fait de confiscation.”].

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§ 198. *“Et surtout, le présent Tribunal n’a tout simplement pas le pouvoir de statuer sur un appel formé contre une telle conclusion ni de substituer son propre avis à celui du Tribunal Initial, ni encore d’octroyer une réparation de quelque nature que ce soit à ce titre”*

The RA distorts the Claimants’ claim, see their **Reply**,⁶¹³ § 162:

“La mission du présent Tribunal est de déterminer les conséquences des violations par l’État du Chili de l'article 4 de l'API et non pas de se substituer au Tribunal arbitral initial pour corriger la Sentence. Les parties ne sont pas dans une procédure de révision mais bien dans une re-soumission après annulation de son VIIIème Chapitre et du quantum de l'indemnisation.”

As to the RT, despite claiming the contrary, it does not fail to “substituer son propre avis” for that of the OT, and systematically to the detriment of one of the parties.

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⁶⁰⁹ [Le traitement de la Requête initiale du 3 September 1997]

⁶¹⁰ [La possibilité d’effectuer un choix à partir de l’indétermination du statut du Décret n° 165]

⁶¹¹ [La recherche complète des effets dommageables du déni de justice et de la discrimination]

⁶¹² **Document C43**

⁶¹³ **Document C40**

§ 244. "Le Tribunal n'aurait pas pu non plus octroyer des dommages-intérêts pour préjudice moral à titre de consolation."

Excessive contempt for Mr. Pey Casado and the President Allende Foundation, who at no point hinted at any "consolation" but rather sought the mere enforcement, on their own terms, of points 1 to 3 of the dispositive part of the Award of 8 May 2008, with *res judicata* effect.

2.7 The resubmission Award committed a manifest excess of powers on denying *jus standi* to the successor to Mr Pey's rights

698. To qualify as a party vis-à-vis *res judicata* it suffices to have been linked to the proceeding by being present in it. The parties' identity "*résulte à l'évidence d'un rapprochement entre les qualités de la première décision et celle de l'instance en cours*".⁶¹⁴

699. The resubmission request was signed by the legal representative of the "President Allende" Foundation, Mr Victor Pey Casado and Mrs Coral Pey Grebe.

700. The Spanish Foundation's capacity as Claimant and its powers of attorney appear in the initial arbitration request of 6 November 1997 (document no. 2), in the Award of 8 May 2008 (§§ 1, 5, 109, 238, 499, 500, 503, 506, 526, 534, 553, 566, notes 1, 382, 404, 551) and in document DI-04 in the application for resubmission of the issues arising between the partes as from May 2000.

2.7.1 Mr Victor Pey is a Claimant in the resubmission proceeding

701. Arbitration Rule 18 states that:

"Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party."

For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party."

702. The *ad hoc* Committee of 5 April 2010⁶¹⁵ recalled in this case that:

"¶36. L'autre article du Règlement d'arbitrage qui (...), est pertinent pour l'analyse du Comité est l'article 18, intitulé "Représentation des parties". Il est ainsi rédigé :

(1) Chaque partie peut être représentée ou assistée par des agents, des conseillers ou des avocats dont les noms et les pouvoirs doivent être notifiés par ladite partie au Secrétaire général, qui en informe sans délai le Tribunal et l'autre partie.

(2) Aux fins du présent Règlement, le terme "partie" comprend, si le contexte le permet, l'agent, le conseiller ou l'avocat autorisé à représenter ladite partie" (emphasis added).

703. It is thus quite clear that the only requirement applicable to Mr Pey Casado relevant in the context of this phase of arbitration proceedings is a notification to the ICSID Secretary-General through an agent in the proceedings. This was served on 7 November 1997.⁶¹⁶

⁶¹⁴ Roland (Henri), *Chose jugée et tierce opposition*, L.G.D.J. Paris, 1958, p. 1

⁶¹⁵ **Document CL295**, Decision of 5 April 2010 of the *ad hoc* Committee on the admissibility of the application for annulment of the original Award

704. There is no doubt that, pursuant to Arbitration Rule 18, Mr Pey Casado has been present in this phase of the arbitration proceedings, in his capacity as investor and claimant recognised in the original Award, without interruption, in a *perpetuatio legitimatiois* regarding Mr Pey Casado on the part of the Arbitral Tribunal.

2.7.2 The *jus standi* of Mrs Pey Grebe, assignee of Mr Víctor Pey Casado

705. At the age of 96, Mr Víctor Pey Casado assigned his shares, titles, rights and duties to his daughter Mrs Coral Pey Grebe.⁶¹⁷ We shall see below that she qualifies as co-claimant in her capacity as assignee.

706. It is worth recalling here the principles of international law as applied by the ICJ:⁶¹⁸

"Dans les affaires relatives à la Licéité de l'emploi de la force, la Cour a déclaré que 'il y a[va]it lieu d'établir une distinction entre une question de compétence liée au consentement d'une partie et celle du droit d'une partie à ester devant la Cour conformément aux prescriptions du Statut, qui n'impliquent pas un tel consentement'".

707. The Court then indicated the legal nature of access to the Court:

"La question qui se pose est de savoir si, en droit, au moment où elle a introduit les présentes instances, la Serbie-et-Monténégro était habilitée à saisir la Cour en tant que partie au Statut. Cette question étant indépendante des vues ou des souhaits des Parties, la Cour ne serait pas, quand bien même les Parties partageraient à présent le même point de vue à cet égard, tenue pour autant de considérer ce dernier comme nécessairement exact." (Underlined in the original).

708. And the Court concluded with an important *dictum*:

"Ainsi la Cour se doit-elle d'examiner la question pour tirer ses propres conclusions indépendamment du consentement des parties, ce qui n'est en aucun cas incompatible avec le principe selon lequel la compétence de la Cour est subordonnée à un tel consentement."

709. The Court reached the conclusion here that:

"au moment où il a déposé sa requête pour introduire la présente instance devant la Cour, le 29 avril 1999, le demandeur en l'espèce ...n'était pas membre de l'Organisation des Nations Unies ni, dès lors, en cette qualité, partie au Statut de la Cour internationale de Justice ".

710. In the ICSID case *CSOB v. Slovakia* the Tribunal rejected the Respondent's assertion questioning the Tribunal's jurisdiction because the Claimant had transferred the benefit of its claim to the State of which he was a national, the Czech Republic, after the start of arbitration. The Tribunal ruled that:

⁶¹⁶ The power of attorney granted by Mr Pey Casado to Mr Juan E. Garcés on 2 June 1997 appears in annex 1 to the initial Request, of 24 March 2018, and a copy was attached in this phase of the proceeding.

⁶¹⁷ The notarised instruments appear in documents DI-01 and DI-03

⁶¹⁸ **Document CL296**, ICJ, *Legality of Use of Force (Serbia-Montenegro v. Belgium)*, preliminary objections, order of 15 December 2004, Reports 2004, p. 295, §§ 36 et 91, available at <http://www.icj-cij.org/docket/files/105/8440.pdf>

*[A]bsence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party.*⁶¹⁹

711. The application of this principle to our case confirms the co-claimant standing of Mr Víctor Pey in this proceeding for interpretation of the Award.

2.7.2.1 ICSID Tribunal doctrine applied by the original Tribunal whose application was rejected by the resubmission Tribunal

712. Now as the original Award ruled finally that Mr Víctor Pey Casado was entitled to call on the Arbitral Tribunal pursuant to the BIT and the ICSID Convention, in a decision with *res judicata* effect (point 1 of the dispositive part, art. 10(5) of the BIT, art. 52(1) of the Convention), the basis of this decision applies to his successor in the person of his daughter and assignee Mrs Coral Pey Grebe.

713. In the ICSID case *FEDAX NV v. Venezuela*, widely quoted in this arbitration,⁶²⁰ the issue was the enforcement of a BIT. Points 38 to 43 accept the displacement of the continuous identity rule for the holder of the right at issue. The Tribunal declares its jurisdiction.⁶²¹

714. This precedent was applied in this arbitration by the original Award:

§ 542 : *"De l'avis du Tribunal arbitral, le fait que, dans le cas d'espèce, M. Pey Casado ait cédé les actions en vertu d'une donation ne change rien au fait que la Fondation a obtenu la qualité d'investisseur par cette cession. Tant que la cession d'actions qui constituent l'investissement initial est valable (comme le Tribunal arbitral l'a confirmé dans la présente affaire), elle transmet la qualité d'investisseur au cessionnaire.*⁴⁹¹⁶²² (...)

§ 543 *"(...) la Fondation a obtenu la qualité d'" investisseur "en vertu de cette cession. La cession d'actions de la part de M. Pey Casado ne constituait pas une cession du "droit de réclamation "ou "droit de demande "(termes utilisés par la défenderesse), mais de la qualité d'" investisseur ".*

715. In *Amco Asia v. Indonesia*,⁶²³ also widely quoted in the OA, once the Tribunal had declared its jurisdiction in the disputes between PT Amco and Indonesia, the original Tribunal decided the Centre also had jurisdiction in respect of Amco Asia and Pan American.

716. Though the arbitration clause did not refer to Amco Asia, the Convention did not require that written consent *"soit exprimé selon une formulation solennelle, rituelle et unique"* [page 369].

⁶¹⁹ **Document CL297**, *CSOB v Slovak Republic* (Preliminary Objections), Decision of the Tribunal on Objections to Jurisdiction, 24 May 1994, p. 263, available at <https://bit.ly/2tpFlbU>

⁶²⁰ **Document C2**, Original Award, §§ 231, 541, 542 and footnotes 107, 181, 489, 490

⁶²¹ **Document CL298**, *Fedax N.V. v. Venezuela*, Decision on Jurisdiction, July 11, 1997 available at <https://bit.ly/2t4YPmA>

⁶²² [“491. Dans ce contexte, le Tribunal arbitral note également que, dans le cas d'espèce, le contrat de cession entre M. Pey Casado et la Fondation Allende prévoyait expressément qu'un des objectifs de la cession était de permettre à la Fondation Presidente Allende de présenter des réclamations liées aux confiscations au Chili en septembre 1973. V. annexe 18 au mémoire des demanderesses du 17 mars 1999.”]

⁶²³ **Document CL299**, *AMCO v Indonesia*, Award, 25-09-1983

717. The Tribunal's reasoning was that the rights of Amco Asia at ICSID were "*attachés à son investissement, représenté par ses actions dans PT Amco*", and so a transfer of these shares transferred access to ICSID jurisdiction [page 373].
718. Though it did not mention ICSID arbitration, the approval given by the government in 1972 for the transfer of shares to Pan American nonetheless resulted in the government consenting:
- 'to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this later right would be expressly excluded in the approval decision.'* (p. 373)⁶²⁴
719. The agreement between PT Amco and Indonesia was *intuitu personae*, the sole reason for the host State's approval of the share transfer.
720. Now in the BIT between Spain and Chile the transfer of shares by the Spanish investor Mr Pey to his daughter does not require the host State's approval.
721. The Tribunal in the *Amco* case deemed that it was irrelevant that Amco Asia had transferred a block of shares giving control of PT Amco to Pan American. Amco Asia's rights vis-à-vis ICSID derive from its being the original investor, not from its being the controlling shareholder of PT Amco:
- "Consequently, the right to invoke the arbitration clause is transferred by Amco Asia with the shares it transfers, Amco Asia not losing the same right, be it as the initial investor or to the extent to which it keeps partly the shares it possessed originally."* [point 373]⁶²⁵
722. The Tribunal in the *Amco* case intimated that even if Amco Asia had transferred all of its shares to Pan American, it could still have kept its right to ICSID arbitration "*en tant qu'investisseur initial*".⁶²⁶

2.7.2.2 The assignee has investor capacity covered by the BIT under the jurisdiction of the ICSID Convention

723. The original Award confirmed that a transfer of shares to a legal person such as CPP SA also transferred investor capacity covered by the BIT:
- "§ 539. Le Tribunal arbitral partage le point de vue exprimé par le Tribunal arbitral dans l'affaire Amco Asia v. Indonésie, qui, en analysant la compétence du CIRDI et du Tribunal arbitral quant à l'une des défenderesses, Pan American, a décidé que cette défenderesse avait obtenu la qualité d'investisseur au sens de l'article 25 de la Convention CIRDI par la cession d'actions de la part de l'investisseur original, Amco Asia. Comme l'ont souligné les demanderesses à plusieurs reprises dans la présente procédure, le Tribunal arbitral dans Amco Asia a jugé que : "[...] the right acquired by Amco Asia to invoke the arbitral clause is attached to its investment, represented by its shares in PT Amco, and may be transferred with those shares. [...]"*

⁶²⁴ Quoted in Tupman (W. Michael): "Case studies in the jurisdiction of the International Centre for Settlement of Investment Disputes", *International and Comparative Law Quarterly*, vol. 35, part 4, Oct. 1986, p. 829, **Document CL300**

⁶²⁵ Quoted in Tupman (W. Michael): "Case studies...", p. 829, **ibid.**

⁶²⁶ (1984) XXIII *I.L.M.*, 351, 373. Quoted in Tupman (W. Michael): "Case studies...", p. 836, **Ibid.**

[...] the right to invoke the arbitration clause is transferred by Amco Asia with the shares it transfers, Amco Asia not losing the same right, be it as the initial investor or to the extent to which it keeps partly the shares it possessed originally. As a result, the right to invoke the arbitration clause is transferred with the transferred shares, whether or not the same constitute a controlling block, being it understood that for such a transfer of the right to take place, the government's approval is indispensable".⁴⁸⁷⁶²⁷

"§ 540. Bien que la compétence du Tribunal CIRDI dans Amco Asia ait été fondée sur une convention d'arbitrage classique, et non pas sur un API, le même principe s'applique dans la présente affaire."

"§ 542. Tant que la cession d'actions qui constitue l'investissement initial est valable (...), elle transmet la qualité d'investisseur au cessionnaire".

724. The original Award then looked at what constitutes an investment for the purposes of the BIT, in the following paragraphs:

§ 556. Il convient de rappeler que l'article 1.2 de l'API prévoit une notion très large d'"investissement" en stipulant : "Par 'investissements' on désigne toutes sortes d'avoirs, tels que biens et droits de toute nature, acquis en accord avec la législation du pays recevant l'investissement et en particulier, encore que non exclusivement, les suivants :

Actions et autres formes de participation dans les sociétés. [...]"

§ 557. "Au regard de cette définition très large, incluant "toutes sortes d'avoirs", et vu le fait que l'API stipule expressément que les "actions et autres formes de participation dans les sociétés" constituent un "investissement", la Fondation Presidente Allende peut, de l'avis du Tribunal arbitral, être considérée comme "investisseur" en vertu de l'API, et cela même en examinant la position de la Fondation de manière "indépendante" et en soi, c'est-à-dire abstraction faite de la cession de droits opérée en sa faveur par M. Pey Casado. Le seul fait d'être propriétaire des actions des sociétés CPP S.A. et EPC Ltda justifie la qualité d'investisseur de la Fondation".⁵⁰⁸⁶²⁸

§ 558. "Cette conclusion est renforcée par le fait que, en tout état de cause, la Fondation Allende a obtenu la qualité d'investisseur par la cession de la part de l'investisseur initial, M. Pey Casado, d'une grande partie de son investissement. A ce propos, les mêmes règles que le Tribunal arbitral a énoncées quant à la notion d'investissement au sens de l'article 25 de la Convention CIRDI s'appliquent. Compte tenu de la rédaction très large de l'API, une interprétation plus stricte ne se justifierait pas. En particulier, l'API ne requiert pas que l'investisseur ait fait l'investissement lui-même, ce qui laisse ouverte la possibilité qu'un

⁶²⁷ ["487. Amco Asia Corporation et al. v. République de l'Indonésie, affaire CIRDI n° ARB/81/1, décision sur la compétence du 25 septembre 1983, 1 ICSID Reports (1993), p. 389, 403 ; JDI 202,1986"]

⁶²⁸ ["508. L'article 1.1 de l'API n'exclut pas de la définition d'investisseur les personnes morales dont les activités ne seraient pas à caractère lucratif, et que les parties demandereses ont invoqué la clause de la nation la plus favorisée en rapport avec des API ratifiés par le Chili ayant défini les Fondations comme des "investisseurs" (par exemple avec l'Allemagne, article 4). Selon cette thèse, la Fondation a au Chili des intérêts à portée économique, culturelle, sociale et humanitaire. Elle aurait donc en elle-même la qualité d'investisseur en vertu de l'article 1er de l'API et, à titre subsidiaire, de la clause de la nation la plus favorisée de l'API Espagne-Chili en rapport avec l'article 1.2.b de l'API Chili-Australie. L'argument ne saurait prospérer, la satisfaction des conditions d'application du traité sur le fondement duquel l'action est introduite devant être constatée avant même que l'investisseur ne puisse se prévaloir de la clause de la nation la plus favorisée"]

investissement (et la qualité d'investisseur) puisse résulter d'une cession de la part de l'investisseur initial."

725. Consequently, by virtue of the doctrine in the grounds of point 1 of the dispositive part of the original Award regarding the transfer of Victor Pey Casado's shares to his assignee, it follows from the corresponding application of the BIT (art. 10(5)) and of the Convention (Rule 55(3)), that the latter has investor capacity covered by the BIT under the jurisdiction of the Convention.

2.7.2.3 Transfer of rights to arbitrate to the assignee and the ICSID Convention

726. This question was also settled in the Arbitral Award.

727. In art. 25(2)(b) the Washington Convention does apply the condition of "original" nationality or a continuity rule in a strict sense. Blaser noted this in La nationalité et la protection internationale de l'individu.⁶²⁹

"l'assouplissement des principes traditionnels dont font preuve les traités de paix paraît être la marque des tendances actuelles vers une plus grande protection des droits de l'individu dans l'ordre international".

728. The ICSID Convention (Article 27) and the Spain-Chile BIT are placed outside the diplomatic protection system. Article 10. 6 of the Spain-Chile BIT states:

"Les Parties contractantes s'abstiendront d'échanger, au travers des canaux diplomatiques, des arguments concernant l'arbitrage ou une action judiciaire déjà entamée jusqu'à ce que les procédures correspondantes aient été conclues; hormis quant au fait que les Parties à la controverse n'auraient pas exécuté la décision de la Cour arbitrale ou l'arrêt du Tribunal ordinaire, selon les modalités d'exécution stipulées dans la décision ou l'arrêt."

729. The ICSID-BIT system's *raison d'être* is the international protection of individual "investor" rights, with the question of national interest taking a back seat. The result is the disappearance of two continuity rules: those for nationality and for right-holder identity, which originated at a time when individuals lacked legal significance on the international stage; it was thus through States and State discretion that individuals could assert their rights, provided they held nationality.

730. This premise is in line with the trend in international law towards a diminished role for the nation-State and a growing recognition of human rights, including the rights to property and due process, regardless of nationality. Hence diplomatic protection becomes subsidiary in the ICSID system (art. 10(6) of the BIT).⁶³⁰

⁶²⁹ Thèse Lausanne, Imprimerie Rencontre, 1962, p. 32.

⁶³⁰ **Document C3f**, Spain-Chile BIT, art. 10(6): *"Les Parties contractantes s'abstiendront d'échanger, au travers des canaux diplomatiques, des arguments concernant l'arbitrage ou une action judiciaire déjà entamée jusqu'à ce que les procédures correspondantes aient été conclues; hormis quant-au fait que les Parties à la controverse n'auraient pas exécuté la décision de la Cour arbitrale ou l'arrêt du Tribunal ordinaire, selon les modalités d'exécution établies dans la décision ou l'arrêt."*

2.7.2.4 Discharge of the continuous identity rule for the holder of the right to arbitrate under the Washington Convention

731. According to Aron Broches, such a discharge is possible provided that the successor is a national of a Contracting State in the Convention:

*The convention is silent as to the assignability of ICSID arbitration agreements and there is no reason to consider that assignment is not permitted. In order to be effective under the Convention, however, the assignee or successor must have the status required by the Convention, i.e., must be a national of another Contracting State. That is to say that assignment to an entity which does not have that status would destroy the arbitration clause. The question might be asked whether, in addition, the successor or assignee must itself consent in writing in order to come within the jurisdiction of the Centre. The answer to this would seem to be in the negative if the clause is so drafted as to make clear that it is binding not only on the original parties to the agreement but also on successors or assignees.*⁶³¹

732. It is established in this case that Mrs Coral Pey Grebe has Spanish nationality and that she is the successor to her father's shares and rights.⁶³²

2.7.2.5 ICSID doctrine relating to the transfer of rights as applied in the original Award was not applied in the resubmission Award

733. In the *Holiday Inn (H.I.)* case⁶³³ (based on an investment contract rather than on a BIT), the Respondent government claimed it had never consented expressly in writing to arbitration regarding *H.I. of America and OPC*. Prof. Pierre Lalive's reasoning in this regard is applicable here to this investment grounded on a BIT:

"This formalistic argument ran counter to both the letter and the spirit of the Washington Convention, which does indeed require 'consent in writing' to arbitration of a 'legal dispute arising directly out of an investment', but does not require that the other party be identified in writing at the outset and specifically. The fundamental condition of jurisdiction is the consent (in writing) of the 'parties to the dispute'. But this condition may well be fulfilled, e.g. in case of subrogation, succession, etc., although not all the parties have been or could be named in the original contract.

A contrary interpretation would result in paralysing in practice any transfer or assignment of contracts or contractual rights and duties. It would be unrealistic to expect that, throughout the life of a contract containing an arbitration clause, any succession to or transfer of rights and duties would only be fully effective if the original consent to arbitration was each time renewed or confirmed in writing. What is indeed essential under the Convention is (1) that the actual dispute be shown clearly to fall within the scope of the arbitration clause and (2) that each claimant (or each defendant) be shown to be, in the particular case, a 'party to the dispute' -whether or not such party happens to be named or identified as signatory to the original contract."⁶³⁴

⁶³¹ **Document CL301**, Broches (A.), "Arbitration Clauses and Institutional Arbitration. ICSID: A Special Case," (1974) in Broches (A.), Selected Essays, World Bank, ICSID, and Other Subjects of Public and Private International Law, Dordrecht, Martinus Nijhoff, 1995, p. 247.

⁶³² **Document C264f**

⁶³³ *Holiday Inns/Occidental Petroleum v. Government of Morocco*, Decision on jurisdiction, 1 July 1983, not published

⁶³⁴ **Document CL302**, Lalive (Pierre): "The first 'World Bank' arbitration (*Holiday Inns v. Morocco*) –some legal problems", in The British Year Book of International Law (1980), 511, p. 671

734. Regarding *Holiday Inn S.A.*, Morocco claimed that the parties lacked capacity to agree to ICSID arbitration because, at the time of the agreement, in 1966, neither Morocco nor Switzerland were parties to the ICSID Convention. Moreover the company did not yet have a legal personality under Swiss law. The Tribunal however ruled that:

*“The Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of a company envisaged by the agreement. On this assumption, it is the date when these conditions are definitely satisfied, as regards one of the parties involved, which constitutes in the sense of the Convention the date of consent by that party.”*⁶³⁵

735. Morocco claimed that *Holiday Inn* and *Occidental* were not entitled to be parties to the arbitration because they had not signed the agreement with the ICSID clause. The Tribunal however ruled:

*“that any party on whom rights and obligations under the Agreement have devolved is entitled to the benefits and subject to the burdens of the arbitration clause.”*⁶³⁶

736. Under the BIT, the same principles apply to Mr Pey’s transfer of rights to his successor in 2013, and to the latter’s right to ICSID arbitration under art. 10 of the Spain-Chile BIT of 2 October 1991.

2.7.2.6 Transfer of rights underlying the international claim according to the original Award

737. The Arbitral Tribunal’s considerations relating to the transfer of Mr Pey’s right to claim to the Spanish Foundation are also applicable to the transfer to Mrs Coral Pey Grebe (§§ 525-530; 531; 532-44):

*“§ 542 : De l’avis du Tribunal arbitral, le fait que, dans le cas d’espèce, M. Pey Casado ait cédé les actions en vertu d’une donation ne change rien au fait que la Fondation a obtenu la qualité d’investisseur par cette cession. Tant que la cession d’actions qui constituent l’investissement initial est valable (comme le Tribunal arbitral l’a confirmé dans la présente affaire), elle transmet la qualité d’investisseur au cessionnaire.”*⁶³⁷

“§ 544. (...) Pour décider du sort des objections d’incompétence soulevées par la défenderesse à l’égard de la Fondation Président Allende, le Tribunal arbitral doit donc analyser la question de savoir si la Fondation Presidente Allende remplit toutes les autres conditions posées tant par la Convention CIRDI que par l’API quant à la compétence du Tribunal Arbitral. En l’espèce, ceci concerne notamment les conditions de la nationalité au sens de la Convention CIRDI ainsi que le consentement des parties de recourir à l’arbitrage CIRDI pour résoudre leur litige” (emphasis added).

738. We shall see below that these conditions are met by Mrs Pey Grebe.

⁶³⁵ Transcript, p. 11, quoted in Tupman (W. Michael): “Case studies in the jurisdiction of the International Centre for Settlement of Investment Disputes”, *International and Comparative Law Quarterly*, vol. 35, part 4, Oct. 1986, p. 818, **document CL300**

⁶³⁶ Transcript, p. 14, quoted in Tupman (W. Michael), *ibid.*, p. 818, **document CL300**

⁶³⁷ [“491. Dans ce contexte, le Tribunal arbitral note également que, dans le cas d’espèce, le contrat de cession entre M. Pey Casado et la Fondation Allende prévoyait expressément qu’un des objectifs de la cession était de permettre à la Fondation Presidente Allende de présenter des réclamations liées aux confiscations au Chili en septembre 1973. V. annexe 18 au mémoire des demandresses du 17 mars 1999”]

(a) The nationality requirement is met by Mrs Pey Grebe

739. Both Chilean law and Spanish law, in accordance with the Roman and “continental” legal tradition, establish a distinction between:

- a) Substantive law applicable to the transferred right, i.e. the generic agreement designed to produce succession *inter vivos*, and which may be contained in some standard and or non-standard contracts governed by the *tempus regit actum* principle, and
- b) Procedural law governing the procedure for asserting this right, including judicial action and arbitration *inter alia*,
- c) Procedural questions, including those relating to a court’s jurisdiction and competence, are governed by the law applicable when the judicial or arbitral proceeding is applied for.

(i) According to the original Award’s criteria, the assignee’s nationality is in accordance with the BIT

740. The grounds for point 1 of the dispositive part of the original Award are applicable *mutatis mutandis* to the nationality of Mrs Pey Grebe for the purposes of the Spain-Chile BIT.

741. In §§ 323, 414 and 416 the OA establishes that the conditions provided in Article 25(2)(a) of the ICSID Convention are met for the claimant/investor Victor Pey Casado on the dates on which he consented to arbitration and on which the initial request was registered in 1997. The fact that his successor in 2013 has the benefit of Spanish and Chilean dual nationality is not invocable in this proceeding for interpretation of the Award (regardless of the fact that Victor Pey retains his capacity as claimant):

§ 414. *"La condition de la nationalité au sens de l'API se distingue de celle de la nationalité au sens de l'article 25 de la Convention CIRDI en deux aspects fondamentaux. D'abord, contrairement à l'article 25 de la Convention CIRDI, l'API ne précise pas le moment de l'appréciation de la nationalité de la partie requérante. De l'avis du Tribunal, la condition de nationalité au sens de l'API doit être établie à la date du consentement de l'investisseur à l'arbitrage. L'offre d'arbitrer contenue dans le traité doit en effet exister, ce qui suppose que les conditions d'application du traité soient satisfaites, à la date du consentement de l'investisseur pour que celui-ci puisse parfaire la convention d'arbitrage résultant de l'offre générale d'arbitrer contenue dans le traité. Par ailleurs, les conditions d'application du traité, dont la condition de nationalité, doivent également être satisfaites, en l'absence de précision contraire du traité, à la date de la ou des violations alléguées, faute de quoi l'investisseur ne pourrait se prévaloir devant le tribunal arbitral mis en place en application du traité d'une violation de celui-ci."*

415. *"Deuxièmement, le traitement des doubles nationaux par l'API est différent dans son champ d'application et son contenu de celui prévu par la Convention CIRDI. Pour remplir la condition de la nationalité au sens de l'API, il suffit pour la partie demanderesse de démontrer qu'elle possède la nationalité de l'autre État contractant. Contrairement à ce qui a été soutenu par la défenderesse,⁶³⁸ le fait que la demanderesse ait une double nationalité, comprenant la nationalité de la défenderesse, ne l'exclut pas du champ de protection de l'API. De l'avis du Tribunal arbitral, il n'existe pas de condition de nationalité "effective et dominante" pour les double-nationaux dans ce contexte. Un double-national n'est pas exclu du champ d'application de l'API, même si sa nationalité "effective et*

⁶³⁸ [344 V. contre-mémoire de la défenderesse du 3 February 2003, pp. 6-7; pp. 123 et seq.; transcript of the hearing of 15 January 2007, pp. 45-46 (Mr Leurent); see also la transcript of the hearing of 6 May 2003, p. 401 (Mr Di Rosa)]

dominante "est celle de l'État de l'investissement (contrairement à ce qui a été soutenu dans l'avis de droit du Professeur Dolzer, produit par la défenderesse).⁶³⁹ La considération du but même de l'API et sa rédaction excluent au contraire l'idée d'une condition de nationalité effective et dominante. Ainsi que l'a souligné le Professeur Dolzer, l'API accorde sa protection aux "investisseurs de l'autre Partie "ou "investisseur d'une Partie Contractante sur le territoire de l'autre "(v., par exemple les articles 2(1), 2(2), 3(1), 4(1), 5, 6, 7(1), 8(1), 10(1) de l'API). L'API n'aborde pas expressément la question de savoir si les double-nationaux hispano-chiliens seraient couverts par son champ d'application. De l'avis du Tribunal arbitral, il ne se justifierait pas d'ajouter (sur la base de ce qui a été prétendu être des règles de droit coutumier international) une condition d'application qui ne résulte ni de sa lettre ni de son esprit.⁶⁴⁰ (emphasis added).

§ 416. "Dans le cas d'espèce, il suffit pour M. Pey Casado de démontrer qu'il possédait la nationalité espagnole au moment de l'acceptation de la compétence du tribunal arbitral sur le fondement de l'API et, pour bénéficier de la protection de fond du traité, au moment de la ou des violations alléguées de l'API. Comme on l'a vu dans les développements qui précèdent, cette condition est satisfaite.⁶⁴¹"

742. Indeed, in *Serafin Garcia Armas and Karina Garcia Gruber v. Venezuela*, the Award of 15 December 2014 looked at all of the BITs signed by Spain between 1900 and 2000 and concluded that dual nationals were not excluded from the scope of investment protection in any of them, with just one exception.⁶⁴¹

743. Moreover the conditions provided in §§ 413, 144, 415, 416 of the original Award as regards the BIT are not invocable against the assignee Mrs Pey Grebe since she is a beneficiary of the Dual Nationality Convention between Spain and Chile.

(ii) According to the original Award, the date of 3 November 1997 concerning nationality for the purposes of the ICSID Convention is not invocable against the transfer of 2013

744. In determining the nationality of the assignee of Victor Pey's rights for the purposes of Article 25 of the ICSID Convention we must consider that the grounds of point 1 of the Award's dispositive part assert that the critical date is that of Victor Pey's consent, as investor, to arbitration and the date on which the request was registered, and accepts that Victor Pey gave his consent in 1997, which consent gives the assignee of his shares in CPP SA the capacity to be party to the arbitration:

"§ 238. Le moment pertinent pour apprécier la nationalité de M. Pey Casado est donc celui de la date à laquelle les parties ont consenti à soumettre le différend à l'arbitrage, ainsi que la date à laquelle la requête a été enregistrée. Dans le cas d'espèce, M. Pey Casado a consenti à l'arbitrage du CIRDI, par une déclaration écrite à Santiago, le 2 octobre

⁶³⁹ [345 V. spéc. consultation p. 15 et le contre-mémoire de la défenderesse du 3 février 2003, p. 7]

⁶⁴⁰ [346 Le Tribunal arbitral partage à ce propos l'opinion des parties demanderesse, notamment qu'en analysant la condition de la nationalité au sens de l'API, le Tribunal doit partir de l'API et l'analyser "sans aller rechercher des conditions supplémentaires implicites" transcription de l'audience du 15 janvier 2007, p. 61 (Me Malinvaud). Les règles concernant le domaine de la protection diplomatique invoquées par la défenderesse (transcription de l'audience du 15 janvier 2007, pp. 46 et 51 (Me Leurent)) ne changent rien à cette conclusion]

⁶⁴¹ **Document CL303**, Permanent Court of Arbitration: *Serafin Garcia Armas and Karina Garcia Gruber v. Venezuela*, decision on jurisdiction, 15 December 2014 (UNCITRAL), available at <http://bit.ly/2kQPNbU>

1997.¹⁹¹ *La requête d'arbitrage des demanderessees a été enregistrée par le CIRDI le 20 avril 1998.*"

745. Prof. Schreuer⁶⁴² also states that the two critical dates are those of the consent and of the registering of the request.

"Both the positive and the negative nationality requirements must be met at the time of consent as well as at the time the request for conciliation or arbitration is registered. The nationality of the other Contracting State must exist at both dates and the nationality of the host state must not exist at either date."

746. The Convention does not disapprove of changes of nationality, and may even allow an investor to acquire that of the Respondent State after consenting to arbitration:

"The convention would even permit the rather unlikely situation that the investor acquires the host state's nationality after the date of consent and loses it before the date of registration."

747. With regard to natural persons, Article 25(2)(a) requires that the nationality criterion be met on the date of consent – on which both parties give effective consent – and the date on which the request is registered:

"With respect to natural persons the Convention (Article 25(2)(a)) requires that the nationality criterion be met both on the date when consent is given—and this must be understood as the date on which both parties had effectively given their consent—and on the date when the request for conciliation and arbitration is registered..."

748. In this case, as the requirement of exclusive Spanish nationality for the investor Mr Pey Casado on the critical dates in 1997 under article 25 of the Convention was met and recognised in the OA (§§ 322, 323), the *bona fide* transfer in 2013 of the CPP SA shares to a beneficiary of the dual nationality convention between Spain and Chile entails no change as regards the resubmission Tribunal's jurisdiction *ratione personae*.

749. The grounds for point 1 of the dispositive part of the original Award regarding the assignee of 90% of Mr Pey Casado's shares in CPP SA in 1990 are equally applicable to the assignment of the remaining 10% in 2013 to Mrs Pey Grebe:

§ 551. *"En ce qui concerne la condition de consentement, les demanderessees ont soutenu que, pour le successeur ou le cessionnaire d'un investissement, le consentement écrit à la juridiction du Centre n'est pas nécessaire.⁵⁰¹⁶⁴³ L'investisseur ayant accordé son consentement, ce consentement étend au cessionnaire la faculté d'être partie à l'arbitrage. Les demanderessees ont également fait référence à la déclaration de M. Pey Casado en date du 2 octobre 1997,⁵⁰²⁶⁴⁴ dans lequel M. Pey Casado affirme expressément son consentement pour la Fondation (en tant que président et partie du directoire de la*

⁶⁴² Schreuer (Ch.), *Commentary on the ICSID Convention*, ed. 2009, Art. 25, pp. 274, 263 276, respectively

⁶⁴³ ["501 *Requête d'arbitrage*, p. 4: "La doctrine admet l'accès à l'arbitrage du CIRDI dans l'hypothèse d'une cession spontanée de droits de la part d'un Investisseur personne physique." ; *mémoire des demanderessees* du 17 mars 1999, p. 30 ; *réponse des demanderessees au mémoire soutenant l'incompétence* soumis par la défenderesse du 18 septembre 1999, pp. 127-128 ; *réplique à la réponse soumise par la République du Chili au contre-mémoire réfutant le déclinatoire de compétence* du 7 février 2000, p. 21 ; *transcription de l'audience* du 4 mai 2000, pp. 77-78 (Me Garcés)"]

⁶⁴⁴ ["502 *Annexe 10 à la requête d'arbitrage* du 3 novembre 1997"]

Fondation).503⁶⁴⁵ De plus, en tout état de cause, et malgré le fait qu'aucun consentement de la part de la Fondation n'aurait été nécessaire, la Fondation aurait donné formellement son consentement le 6 octobre 1997.504⁶⁴⁶"

§ 553. *"De l'avis du Tribunal arbitral, il est clair que la Fondation Presidente Allende a consenti à l'arbitrage (à l'exclusion de ce qui concernait la rotative Goss) le 6 octobre 1997.506⁶⁴⁷*

(b) The assignee consented to ICSID arbitration

750. At all events, the assignee of 10% of CPP SA's shares also expressly consented to arbitration on the terms required by the original Tribunal (§§ 551, 553, 554), and on this account Mrs Pey Grebe also had standing to act in the resubmission proceeding.

(c) Additional procedural considerations

751. Since the investor/claimant Mr Victor Pey is represented in this proceeding, is the presence of the assignee Mrs Pey Grebe compatible with the presence of her father?

752. The reply to this question must take account of the following facts:

- a) that the assignee did not formally ask ICSID or the Arbitral Tribunal to replace Mr Pey. She is appearing in this arbitration as assignee of the claimant's rights and duties, but has not requested the latter's replacement;
- b) that in the resubmission application Mrs Pey Grebe appears in her capacity of assignee of ten percent (10%) of the total assets and liabilities, of all kinds, of Consortium Publicitaire et Périodique S.A. (CPP SA), owner, in turn, of 99% of the shares of Empresa Periodistica Clarin Ltd (EPC Ltda);
- c) that the resubmission request registered by the Centre relates to a treaty-claim;
- d) that Mr Victor Pey held effective control of the shares of CPP SA when Chile infringed article 4 of the BIT as from 1995;
- e) that Chile did not object to the fact that, since March 2013, Mrs Pey Grebe has been the legal holder of material rights over 10% of the shares in the public limited company, of which she served notice to Chile one month later by judicial means (on the enforcement of point 5 of the Award's dispositive part in First Instance Court No 101 of Madrid), and four months later to ICSID;
- f) that Mrs Pey Grebe accepted ICSID jurisdiction and the composition of the Arbitral Tribunal in the assignment contract to be found in document DI-01 of the resubmission proceedings (article 5),⁶⁴⁸
- g) that in this case there has been no treaty-shopping or forum-shopping;
- h) that the assignee's participation in this phase for arbitration has not in any way diminished the substantive and procedural rights of the Chilean Republic.

⁶⁴⁵ ["503 Réponse des demandereses au mémoire soutenant l'incompétence soumis par la défenderesse du 18 septembre 1999, pp. 128-129"]

⁶⁴⁶ ["504 Requête d'arbitrage du 3 novembre 1997, p. 4 ; mémoire des demandereses du 17 mars 1999, p. 36 ; réponse au mémoire soutenant l'incompétence soumis par la défenderesse du 18 septembre 1999, p. 128 ; réplique à la réponse soumise par la République du Chili au contre-mémoire réfutant le déclinatoire de compétence du 7 février 2000, p. 21"]

⁶⁴⁷ ["506 V. annexe 2 à la requête d'arbitrage du 3 novembre 1997"]

⁶⁴⁸ Document C264

2.7.3 Conclusion

753. Paragraph 1 of the Decision (§ 256) and its grounds in the paragraph quoted above manifestly infringe or contradict the *res judicata* of the OA and should be annulled.

2.8 The RA's Decision on rectification is vitiated by excess of powers, a serious departure from a fundamental rule of procedure and failure to state reasons

754. The factual and legal framework of this grounds for annulment appears in Section III.6 of the annulment application.
755. After allowing all the rectifications requested by Mr. Pey Casado and the President Allende Foundation, the Decision of 6 October 2017 imposed on the latter all the costs of the rectification proceeding. A penalty and a criterion that Mr V.V. Veeder, QC did not apply four months earlier when adopting the Decision of 13 July 2017 on the rectification of material errors in *Marco Gavazzi v Romania*:

<i>Marco Gavazzi v Romania</i> , Decision on rectification, ⁶⁴⁹ 13-07-2017 (Mr. V.V. Veeder co-arbitrator appointed by)	<i>Pey Casado v. Chili</i> , Decision on rectification 06-10-2017 (Mr. V.V. Veeder co-arbitrator appointed by Claimant)
§ 78. <i>Taking into account the Tribunal's decision, which resulted in one arithmetical rectification to the Award, and the rejection of other rectifications, the Tribunal determines that each Party shall bear its own legal and other costs. There are no costs charged to the Parties for the costs of the rectification proceeding and therefore no costs to be allocated</i>	§ 57. (...) <i>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. Taking these factors into account, the Tribunal decides (...) that the costs incurred by the Centre in respect of these rectification proceedings (...) shall be borne by the Claimants.</i>

756. § 57 of the Decision on rectification moreover contradicts § 249 of the resubmission Tribunal on which it is based:

"249. Le Tribunal est de l'avis que, en règle générale, la partie qui a gain de cause, qu'il s'agisse du demandeur ou du défendeur, doit être protégée contre le coût et les frais liés à la

⁶⁴⁹ Document CL284, *Marco Gavazzi v Romania*, ICSID Case No. ARB/12/25, Decision on rectification, 13 July 2017

nécessité de participer au contentieux. Ce principe contribue à la réduction des coûts et à l'efficacité."

757. Pursuant to the reasoning set out in the annulment application, point 7 of the dispositive part of the resubmission Award and its grounds in §§ 58, 61 et 62(b) of the Decision of 6 October 2017 should be annulled on the grounds of: serious departure from a fundamental rule of procedure, excess of powers and failure to state reasons.

3. FOR THE ABOVE REASONS

759. Mr. Pey Casado and the President Allende Foundation respectfully ask that

THE *AD HOC* COMMITTEE SHOULD

1. Accept this Memorial, and its documents attached, seeking the annulment
 - i. of the whole resubmission Award notified on 13 September 2016, on the grounds of Article 52(1) of the Convention, including points (a), (b), (d) and (e) thereof,
 - ii. and the annulment of §§58, 61 and 62(b) of the Decision of 6 October 2017, on the grounds of points (b), (d) et (e) of Article 52(1) of the Convention;
2. Order the Republic of Chile in due course to bear the costs of this annulment proceeding and of incidental issues – such as the one that arose on 12, 15 et 16 February 2018⁶⁵⁰ – along with the fees and expenses of the members of the *ad hoc* Committee, the charges for use of ICSID facilities, the translation expenses and the professional fees and expenses of Mr. Pey Casado and the President Allende Foundation, lawyers, experts and/or any other persons called upon to appear before the *ad hoc* Committee, and pay the relevant amounts for any other infringements established as the *ad hoc* Committee may deem fair and equitable, with compound interest.
3. Adopt any other measures that the members of the Committee consider fair and equitable in the circumstances of this case.

Madrid/Washington 27 April 2018

⁶⁵⁰ The factual and legal context of the incident of February 2016 is set out in the request of April 2018 for the defence of procedural integrity and equity, attached to this Memorial.