# Looking Back: In Pey Casado v. Chile (1), arbitrators weighed in on dual nationality and ratione temporis jurisdictional objections, and ultimately found Chile liable for denial of justice

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The May 8, 2008 award in Victor Pey Casado and President Allende Foundation v. Chile (1) (available in Spanish and French) is notable for finding that Mr. Pey Casado, a dual Spanish and Chilean national at the time of the investment, but not at the time of some of the alleged breaches and when the request for arbitration was submitted, was entitled to bring ICSID claims against Chile under the Chile-Spain BIT.

At the time when the award was rendered*, the tribunal was composed of Swiss arbitrator Pierre Lalive (chair, appointed by ICSID), Emmanuel Gaillard (appointed by ICSID on behalf of Chile) and Algerian arbitrator Mohammed Chemloul (appointed by the claimants).

In the award, the arbitrators dismissed Chile's jurisdictional objections, which were based on the dual nationality of Mr. Pey, an alleged lack of ownership of the Chilean company running the newspaper at the centre of the dispute, and an alleged lack of jurisdiction *ratione personae* over the President Allende Foundation.

The tribunal also dismissed Chile's allegations that the dispute had arisen before the BIT's entry into force, or that it could not be heard by the tribunal in light of the BIT's fork-in-the-road provision.

On the merits, the tribunal rejected the theory that the 1973 taking of the newspaper, and the failure to return the assets to the claimants in the 1990s, could be seen as a composite act. Thus, the arbitrators refused to apply the substantive protections of the BIT to the 1973 taking.

However, the tribunal found that the state did not accord Mr. Pey fair and equitable treatment with respect to the 1990s measures, and that delays in resolving the claimants' requests for restitution amounted to a denial of justice. On this basis, the tribunal awarded the claimants over 10 million USD in damages.

The award was the first decision in what was one of the longest sagas in investment arbitration. As we have reported, the award was partially annulled in 2012. A resubmission tribunal later found, in 2016, that the claimants had not made out their case for compensation regarding the 1990s measures, a decision which was recently upheld by a second ICSID annulment committee. Also, in December 2019, an UNCITRAL tribunal declined to hear a second set of claims submitted by the claimants under the BIT.

The claimants were represented by Garces y Prada Abogados in Madrid, Gide, Loyrette Nouel in Paris, Ropes & Grey in Washington D.C., and William W. Park.

Chile relied on counsel from Carey in Santiago de Chile and Arnold & Porter in Washington D.C.

**Background: taking of newspaper in Pinochet era, and failure to compensate its owner after the reestablishment of democracy, prompted ICSID claims**

The claimants were Victor Pey Casado, a Spanish (and also a former Chilean) national, and the President Allende Foundation, a non-profit organisation incorporated in Spain in 1990.

Over the course of 1972, Mr. Pey, a Chilean national and resident at the time, executed several agreements for the acquisition of the shares of the companies Consorcio Publicitario y Periodistico S.A. (CPP) and Empresa Periodistica Clarin (EPC).

On September 11, 1973, following the military coup of Pinochet, the new government shut down the newspaper and took over its facilities. Mr. Pey Casado took refuge at the Venezuelan embassy in Santiago and left the country in October 1973. Following a short stay in Venezuela, Mr. Pey Casado shifted his residence to Madrid in 1974.

Between 1974 and 1977, the Chilean government ordered the taking of all assets belonging to CPP and EPC, and subsequently dissolved the two companies. These measures were later declared null and void after the fall of Pinochet's regime, but Mr. Pey Casado did not receive any compensation.

In 1990, Mr. Pey Casado incorporated the President Allende Foundation. Upon its constitution, Mr. Pey Casado assigned his interests in CPP and EPC to the Foundation. As a result, 90% of the interest in the capital of this non-profit organisation belonged to Mr. Pey.

On February 1, 1995, Mr. Pey Casado lodged a claim with the criminal courts in Santiago, seeking restitution of the shares. The court found in Mr. Pey's favour in May 1995.

In October 1995, Mr. Pey requested the restitution of certain assets belonging to the companies, or compensation for the damages suffered as consequence of the taking. The authorities advised Mr. Pey that the law which would allow Mr. Pey to be compensated had yet to be adopted. Chile's civil courts, which had also been seized, failed render any judgment in the matter.

On October 2, 1997, Mr. Pey Casado instituted ICSID arbitration against Chile, alleging several violations to the Chile-Spain BIT. The request for arbitration was later amended to include the President Allende Foundation as a claimant.

In April 2000, the Chilean Ministry for National Assets granted compensation for the taking of the assets belonging to CPP and EPC to third parties. The tribunal also addressed this fact in the award.

**Mr. Pey Casado lawfully acquired shares in CPP and EPC**

The tribunal first rejected Chile's arguments that Mr. Pey Casado had not lawfully acquired the shares of CPP and EPC.

The arbitrators noted that Mr. Pey Casado had made payments of 1,2 million USD in exchange for his shares in CPP (which, in turn, owned 99% of EPC's shares). For the tribunal, the fact that certain shares were nominally issued to third parties in this transaction did not prove that Mr. Pey Casado was not the actual owner of these companies. In the tribunal's view, these shares were issued to third parties either (i) to comply with a minimum number of shareholders required by Chilean law, or (ii) to facilitate potential partnerships in the future.

The tribunal also noted that this finding was consistent with a 1975 report by the Chilean Internal Revenue Service, and other documents from Chile's Ministry of Internal Affairs. In addition, the arbitrators took into account that, in 1995, Santiago's criminal courts had recognised Mr. Pey Casado as the owner of CPP and EPC.

Lastly, the arbitrators concluded that the lack of fulfilment of certain formalities during the transfer of the shares' ownership had not rendered the acquisition of the companies by Mr. Pey null and void. The tribunal noted that Mr. Pey Casado could have cured any formal irregularities, had he not been precluded from doing so through the taking of the shares in 1973.

**Article 25 of the ICSID Convention contains an objective definition of investment; contribution to development of the host state is not required**

The tribunal first considered that case law was not "completely uniform" as to whether the ICSID Convention contained an objective notion of protected investment, or whether it was sufficient that the assets in question presented certain "characteristics" usually associated with investments (the latter view

was supported by previous decisions in Fedax v. Venezuela, CSOB v. Slovakia, and M.C.I. Power Group v. Ecuador).

Relying on the findings in Joy Mining Machinery v. Egypt, the arbitrators considered that Article 25 of the ICSID Convention contained indeed a requirement that an objective definition of investment must be met.

The tribunal reckoned, however, that this objective definition only imposed three requirements (contribution, risk and duration), and not a fourth requirement of contribution to the development of the host state. The tribunal noted that, while the Joy Mining tribunal had applied this fourth requirement, contributing to the host state's economy was, in reality, a consequence of an investment rather than a jurisdictional requirement.

In light of these considerations, the tribunal concluded that Mr. Pey Casado held a protected investment as:

- He had made a capital contribution to acquire the shares of CPP and EPC;
- The contribution had been made for an indefinite period of time; and
- This enterprise entailed a risk, especially in light of the companies' journalistic activities, and the political and economic context in which the newspaper operated at the time.

**Effective nationality test is only relevant under the ICSID Convention if the nationality of the host state is completely artificial or inefficient**

The tribunal then examined whether Mr. Pey fulfilled the nationality requirements of the ICSID Convention. For the arbitrators, the relevant times to determine this nationality were only the time of his consent to arbitration (October 2, 1997), and the date on which the request for arbitration was registered (April 20, 1998).

The tribunal stressed that Article 25 of the ICSID Convention precluded claims by dual nationals against one of their home states, regardless of the effectiveness of the claimant's nationalities.

Thus, the effective nationality test would only be relevant if the host state's nationality was "completely artificial" or "completely inefficient". This was not the case for Mr. Pey Casado.

**Deprivation of Mr. Pey Casado's Chilean nationality must be assessed in accordance with Chilean law**

One of the claimants' arguments was that Chile had deprived Mr. Pey Casado of his Chilean nationality before the arbitration was initiated.

Relying on the Nottebohm case from the ICJ, the tribunal noted that questions of nationality fall, in principle, "within the domestic jurisdiction of each State". Therefore, the question of whether Chile had deprived Mr. Casado of his nationality must be assessed primarily under Chilean law.

**Mr. Pey Casado was never lawfully deprived of his Chilean nationality**

The arbitrators then concluded that, even if many measures taken by the Chilean government during the Pinochet regime were questionable and arbitrary, nothing suggested that, under Chilean law, Mr. Pey Casado had legally been deprived of his Chilean nationality.

The tribunal further considered that certain measures adopted by Chilean authorities (such as the granting of a safe-conduct to Mr. Pey in 1973) could not be considered as a legal deprivation of nationality. The fact that Chile had refused to grant some protections to Mr. Pey as a national of that state, the arbitrators reasoned, did also not prove that the link of nationality between the state and Mr. Pey had effectively disappeared.

Lastly, the tribunal analysed Mr. Pey's nationality between 1974 and 1997, concluding that, between these dates, he continued to be a national of both Chile and Spain. The tribunal, however, noted that, in light of a 1958 dual nationality treaty in force between the two states, Mr. Pey's "primary" nationality became Spanish when he established his legal residence in Madrid, in 1974.

**Mr. Pey Casado validly renounced his Chilean nationality prior to submitting the dispute to ICSID arbitration**

Mr. Pey Casado also argued that he had validly renounced his Chilean nationality prior to submitting the dispute to ICSID arbitration, in October 1997.

The tribunal rejected Chile's position, noting that nothing prohibited a Chilean national from unilaterally renouncing his or her Chilean nationality.

The tribunal also did not see any formal requirements for such a renunciation.

The arbitrators were further satisfied that Mr. Pey Casado had notified the Chilean authorities of his voluntary renunciation to his Chilean nationality on September 16, 1997 at the latest. The tribunal further held that the acknowledgment of this act by the Chilean authorities (in August 1998) could be "significant", but was not "indispensable".

Invoking the reasoning of the tribunal in Soufraki v. United Arab Emirates (1), the tribunal reasoned that international tribunals have discretion to assess and apply the local legislation to issues of nationality. The rationale behind this power was the need to avoid abusive attempts by a state to forcibly impose a nationality upon a claimant as a means of avoiding its obligation to arbitrate a dispute.

Therefore, the tribunal concluded that Mr. Pey Casado was not a Chilean national when he submitted the dispute to ICSID arbitration, and thus satisfied the jurisdictional requirement of nationality under Article 25 of the ICSID Convention.

**Tribunal disregarded interpretative declarations made by Spain and Chile after the dispute was submitted to arbitration**

Turning to the jurisdictional requirements of the BIT, the tribunal first noted that the shares of CPP and EPC were protected investments under this treaty as well.

According to the arbitrators, Article 1.2 of the BIT contained a broad definition of investments, including shares. In accordance with Article 2.2 of the BIT, investments made prior to the BIT's entry into force were also protected, insofar as they were considered foreign investments in accordance with Chilean law.

In this respect, the Tribunal disregarded certain interpretative declarations made by Spain and Chile in the minutes of a meeting that took place in October 1998 at Chile's proposal, after the claimants had submitted their request for arbitration (in October 1997), in which the two states stated that only investments that implied a transfer of capital from one state to the other qualified as protected investments. The arbitrators considered that these declarations breached Article 10.6 of the BIT, which prohibited the use of diplomatic channels until any related proceedings were terminated.

**Shares of CPP and EPC were protected investments under the BIT**

Chile argued that the shares in CPP and EPC were not protected investments under the BIT because (i) in accordance with its preamble, the BIT required a transfer of capital between Spain and Chile, and (ii) the investment had not been properly registered as a foreign investment pursuant to the regime established by the Cartagena Agreement, a treaty entered by the members of the Andean Community**.

The tribunal rejected both arguments.

The arbitrators reasoned that the reference to transfers of capital in the BIT's preamble could not add a

supplemental jurisdictional requirement which was not expressly provided in the body of the BIT. In the tribunal's view, such an interpretation would be contrary to the BIT's purpose, and also to the rules of interpretation of the Vienna Convention on the Law of Treaties.

In relation to the application of the Cartagena Agreement regime, the tribunal noted that, indeed, this agreement had been in force since 1971. However, the arbitrators added that the registration system had never been implemented by the members of the Andean Community (except for Peru), and that Chile had failed to produce any evidence showing that it had effectively established a system for the registration of foreign investments.

The tribunal added that no other Chilean laws imposed a mandatory registration or authorisation for foreign investments.

The arbitrators concluded that the claimants' shares were protected investments under the BIT.

**BIT allowed claims by dual-nationals; nationality requirement must be met at the time of the investor's consent to arbitration and at the time of the alleged breach**

The tribunal then turned to the nationality requirement under the BIT, noting that the BIT differed from the ICSID Convention in two respects.

First, the BIT did not establish the relevant time to assess a claimant's nationality. The tribunal opined that, for jurisdictional purposes, it was sufficient to establish that Mr. Pey was a Spanish national when he consented to arbitration. However, in order to benefit from the substantive protections of the BIT, Mr. Pey must also have been a Spanish national at the time of the alleged breaches.

(The time at which the nationality requirement must be fulfilled was recently discussed in the Pugachev v. Russiaarbitration. Notably, in that case, a majority of the arbitrators found that, under the applicable France-Russia BIT, Mr. Pugachev must have been a French national not only at the time of the request for arbitration and at the time of the alleged breaches, but also when he made the underlying investments. A third arbitrator, Thomas Clay, disagreed, and opined that only the times of the request for arbitration and of the alleged breaches were relevant.)

Second, the tribunal considered that the BIT does not prevent dual nationals from submitting disputes with one of their home states to arbitration.

(In more recent times, all three tribunal members in Sergei Viktor Pugachev v. Russia reached a similar conclusion. In contrast, an UNCITRAL tribunal in Manuel Garcia Armas and others v. Venezuela, extended ICSID's dual-nationality requirement to the Spain-Venezuela BIT, after pointing out that the BIT explicitly provided for ICSID arbitration as the primary dispute resolution option.)

The tribunal also excluded the relevance of effective or dominant nationality as a jurisdictional requirement under the BIT. This requirement was not expressly mentioned in the text of the BIT, according to the tribunal. In any event, Mr. Pey Casado would have met this requirement as, since 1974, his "primary" nationality was Spanish in accordance with the 1958 dual nationality treaty between Chile and Spain.

**Three disputes arose after the BIT's entry into force**

Chile also argued that the claims were outside of the temporal scope of the tribunal's jurisdiction, noting that such jurisdiction only covered disputes arising after the BIT's entry into force (on March 29, 1994).

The tribunal invoked the considerations of the PCIJ in the Mavromatis case and the tribunal in Emilio Augustin Maffezini v. Spain, which defined a dispute as a difference of views in which "one party tak[es] up the matter with the other, with the latter opposing the Claimant's position directly or indirectly". As to the moment when a dispute arises, the arbitrators agreed with the views of the tribunal in Helnan

International Hotels v. Egypt in that "[the parties' disagreement] crystallizes as a 'dispute' as soon as one of the parties decides to have it solved, whether or not by a third party".

(As similar approach, according to which a different dispute crystallizes with each opposition between the parties, had previously been adopted by the tribunals in Lucchetti v. Peru and Vieira v. Chile. In contrast, in the African Holding Company of America v. DRC award, which was rendered only a few months after the first Pey Casado award, another ICSID tribunal considered that a dispute only crystallized when a claim was confirmed by the most recent event.)

The tribunal gave significant weight to the manner in which the claimants had characterised the disputes in their interactions with the Chilean authorities.

The arbitrators concluded that three distinct disputes submitted by the claimants fell within the temporal scope of the tribunal's jurisdiction:

- A first dispute arose in 1995, following a statement by the Ministry for the National Assets that the law which would allow Mr. Pey to be compensated had yet to be adopted;
- A second dispute arose in 2000, when Chile granted compensation for the taking of the assets belonging to CPP and EPC to third parties;
- Lastly, a third dispute arose in 2002, with a resolution by the first civil court in Santiago.

Therefore, the tribunal declared its jurisdiction *ratione temporis* over the claimants' claims.

**Claimants' claims are not barred by fork-in-the-road provision**

Chile also argued that Mr. Pey Casado had chosen the domestic jurisdictional avenue in 1995, and was therefore barred from bringing the arbitration pursuant to the BIT's fork-in-the-road provision.

The tribunal disagreed.

The arbitrators first considered, invoking the rulings of the tribunals in Azurix v. Argentina (1) and CMS v. Argentina, that the fork-in-the-road objection could only be validly raised if the claims passed the so-called triple identity test (identity of objects, parties, and causes of action).

On this basis, the tribunal concluded that the claims brought before the Chilean courts were different than the ones submitted to ICSID arbitration. The arbitrators considered that the claims before the civil court in Santiago concerned a specific asset of the newspaper (the rotary printing press) and sought its restitution (or compensation) on the basis of Chilean law. In addition, the arbitrators noted, Mr. Pey Casado had specifically excluded this asset from the dispute brought before the tribunal.

The tribunal further held that the fork-in-the-road provision did not prevent the claimants from submitting a claim for denial of justice. For the tribunal, it was evident that such a claim, made under international law, is different from the claim made under the domestic law before the local jurisdiction that allegedly committed the denial of justice.

**Free transfer of interests in CPP to the President Allende Foundation was valid**

The tribunal then turned to the assignment of Mr. Pey's interests in CPP to the President Allende Foundation. Chile argued that this assignment was fraudulent and invalid since Chile had not consented to it.

The tribunal disagreed, and held that, regardless of the applicable law (Spanish or Chilean), the assignment of receivables (such as the claims and rights attached to Mr. Pey Casado's shares in CPP) did not require the debtor's consent. The tribunal also failed to see anything nefarious in the transfer of these interests to the Foundation, since it had taken place in 1990, five years before the first dispute between the parties over which the tribunal had jurisdiction crystallised, and seven years before the commencement of

the arbitration.

Chile also argued that the Foundation was not a protected investor, as it had not made any contribution to acquire its investment.

The tribunal also disagreed with this second argument.

Applying the reasoning of the tribunal in Amco Asia Corporation v. Indonesia (1) and Fedax v. Venezuela, the tribunal concluded that the right to invoke an arbitration agreement was attached to the investment in question, and therefore may be validly transferred.

The arbitrators further clarified that the assignment in this case concerned the status of investor itself, and not the claims related to a protected investment, as was the case in Mihaly v. Sri Lanka. Unlike in that case, the arbitrators reasoned, Mr. Pey Casado did not assign his interests in CPP because he was not a protected investor himself.

**The tribunal had jurisdiction over the President Allende Foundation**

The tribunal briefly dismissed a series of other jurisdictional objections raised by Chile related to the nationality of the President Allende Foundation, its consent to submit a dispute to ICSID arbitration, and the *ratione temporis* jurisdiction. The tribunal concluded that:

- The Foundation was incorporated in Spain and, as such, was to be considered a national from that state;
- The Foundation had consented to submit the dispute to ICSID arbitration in writing on October 6, 1997;
- The Foundation held a protected investment in the sense of Article 1 of the BIT and Article 25 of the ICSID Convention; and
- The tribunal also had jurisdiction *ratione temporis* over the Foundation's claims, as the three disputes crystallised after the BIT's entry into force.

Therefore, the Tribunal declared its jurisdiction over both claimants and their claims.

**Mr. Pey Casado made efforts to amicably resolve the dispute and, in any event, amicable discussions were "obviously futile"**

The arbitrators also rejected Chile's argument that the claims were inadmissible as the claimants did not seek to resolve the dispute amicably, as mandated by Article 10 of the BIT.

The tribunal considered that Mr. Pey Casado had attempted, on his behalf and on behalf of the President Allende Foundation, to convene meetings as a means to resolve the dispute amicably. The tribunal also considered that, in light of the Chilean government's lack of proactiveness in entertaining Mr. Pey's requests for compensation, the claimants could validly deem any further attempt to be "obviously futile".

**Chile's obligations under the BIT were not retroactive**

The claimants argued that Article 2.2 of the BIT (which set out the conditions on which investments made prior to its entry into force would be protected), authorised the retroactive application of the treaty.

The arbitrators disagreed. The tribunal considered that, under Article 28 of the Vienna Convention, states may decide to apply a treaty retroactively. However, the text of the treaty made it clear that it did not apply to violations that occurred prior to its entry into force.

**Taking of newspaper assets was not part of a composite act**

The claimants also argued that the taking of the newspaper assets in 1973 constituted a continued violation of Chile's international obligations (or a composite illicit act) that was still taking place when

the BIT entered into force. The claimants supported this view with rulings by the European Court of Human Rights (especially the Loizidou case) and, by analogy, with an allegation that the expropriation decree was invalid under Chile's 1925 Constitution (which was in force as at the time of the expropriation).

The tribunal considered that it was not for the arbitrators to question the validity, under Chilean law, of the expropriation measure, especially since it had never been challenged before Chilean courts. The arbitrators also declined to apply the ECHR's reasoning in the Loizidou case, noting that they did not share the ECHR's expansive approach in that decision.

The tribunal concluded that the expropriation of the newspaper assets was an instantaneous act, and it dismissed the claimants' theory of a continuing violation.

Therefore, the substantive obligations of the BIT were not applicable, *ratione temporis*, to the 1973 measures. Citing the award in M.C.I. Power Group v. Ecuador, the arbitrators noted that "[p]rior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force".

**Ministerial decision of 2000 and lack of judicial resolution were covered by the BIT's substantive obligations**

The tribunal also considered whether the BIT's substantive obligations were applicable to (i) the ministerial decision of 2000 granting compensation for the expropriated assets to third parties, and (ii) the denial of justice claim for lack of judicial resolution of Mr. Pey Casado's requests before the Chilean civil courts.

The arbitrators concluded that these measures took place after the entry into force of the BIT in 1994 and could therefore be examined on the merits.

**Denial of justice is one element of FET**

Turning to the FET standard, the tribunal first reasoned that the notions of fair and equitable treatment and denial of justice were often treated indistinctly. The arbitrators also noted that, while there was little consensus on the definitions of these concepts, there was some agreement that the FET obligation comprised a prohibition against denials of justice.

**Chile breached its FET obligation and committed a denial of justice for extremely long judicial proceedings**

The arbitrators next held that Chile's courts committed a denial of justice by failing to deliver a decision on the merits of Mr. Pey Casado's restitution claims in over seven years. Invoking Robert Azinian v. Mexico, the tribunal considered that the lack of a judicial resolution for a prolonged period of time was a classic form of denial of justice.

Relying on the Anglo-Mexican Special Claims Commission in El Oro Mining and Railway Company, the tribunal stressed that a seven-year period without a judicial resolution was not in line with international standards.

The tribunal also concluded that the state had violated its obligation to accord FET by issuing the 2000 ministerial decision, which granted compensation for the 1973 taking of the claimants' investments to third parties. The tribunal reckoned that the Chilean authorities had refused to grant compensation to Mr. Pey Casado on "obscure grounds". The arbitrators also noted that the ministerial decision contradicted a prior judicial ruling that had recognised Mr. Pey Casado as CPP's and EPC's owner.

**Tribunal awarded compensation despite the claimants' failure to produce specific evidence**

On damages, the tribunal noted that the parties had only submitted estimates for compensation owed due to the 1973 expropriation. The tribunal considered that the parties' submissions on these issues were irrelevant to assess the damages caused by the two measures that were ultimately found to be treaty violations.

In spite of this lack of submissions and specific evidence, the tribunal proceeded to award damages, noting the need for a prompt resolution of the case and the significant costs that additional expert reports and submissions on damages would imply.

The tribunal assessed the compensation of damages on the basis of "objective elements" in the record. The arbitrators took into account the valuation of the newspaper assets made by the Chilean authorities pursuant to the 2000 ministerial resolution, which amounted to a global sum of 10 million USD. The tribunal considered that awarding this compensation to the claimants would put them in the situation in which they would have been if the treaty violations had not taken place.

As for the interest rate, the arbitrators considered that a 5% compound interest rate was reasonable, absent any specific provision on the matter in the BIT or the ICSID Convention.

(Readers may recall that this damages decision was partially annulled in 2012.)

**Chile was ordered to bear majority of costs**

The claimants' legal costs amounted to approximately 8.8 million EUR and 1 million USD. Chile's legal costs amounted to approximately 4.4 million USD. The arbitration costs were 4 million USD.

The tribunal considered that it had broad discretion to allocate the costs.

The tribunal noted that the claimants prevailed on the merits, and that it was of little relevance that the amount of compensation awarded was not as significant as the one initially requested.

The tribunal also stressed that Chile had raised more objections than one would usually expect or consider "normal", and therefore unduly increased the time and costs of the proceedings.

Taking these elements into account, the arbitrators ordered Chile to reimburse the claimants' "reasonable" legal costs, fixed at 2 million USD. The arbitrators also ordered the state to bear 75% of the arbitration costs.

* As we reported in 2008, the original tribunal president, Francisco Rezek, resigned after he was challenged by the claimants. He was replaced by Pierre Lalive. Following a subsequent challenge by Chile to all three current tribunal members, the other two original members, Galo Leoro Franco and Mohammed Bedjaoui exited the tribunal – the former through resignation, and the latter through disqualification, as a result of his position as Areglia's Minister of Foreign Affairs.

** Chile was a full member of the Andean Community until 1976.

*** The tribunal considered that the 2000 ministerial decision, and a series of governmental measures, could have been characterised as a composite act of discrimination and violation of the FET standard of the BIT. However, this characterisation was not submitted by the claimants and therefore not examined by the tribunal in the award. The tribunal considered the 2000 ministerial decision as part of the denial of justice claim, as characterised in the claimants' submissions.