INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

VICTOR PEY CASADO AND PRESIDENT ALLENDE FOUNDATION VERSUS THE REPUBLIC OF CHILE

Case No. ARB/98/2

REJOINDER TO THE RESPONDENT'S COUNTER-MEMORIAL

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 to Procedural Order No. 1 of 7 March 2018 (§ 14.1) and Procedural Order No. 2 of 30 August 2018 (§ 28).

Submitted by Dr Juan E. Garcés (Garcés y Prada Abogados, Madrid), representative of the Claimants, with the cooperation of Prof. Robert L. Howse (New York University), counsels Carole Malinvaud and Alexandra Muñoz (Gide, Loyrette, Nouel, Paris), Hernan Garcés Duran (Garcés y Prada Abogados, Madrid) and Mr Toby Cadman (Guernica 37 Chambers, London).

Madrid/Washington, 9 November 2018

* Courtesy translation from the original in French

Contents

1. INTRODUCTION

1. The facts, claims and conclusions set out in the Request for Annulment and the Memorial on Annulment of the resubmission Award of 13 September 2016 (the "RA") are reiterated in this Rejoinder, unless otherwise stated. Their non-repetition does not mean that they have changed or been withdrawn, contrary to what is claimed by the Respondent,[1] which, at the same time, complains of their occasional repetition.[2]

2. This Rejoinder will focus on the points that the Respondent State raises explicitly or implicitly in its Counter-Memorial.

3. The Claimants will not however reply to all the falsehoods and contradictions in its Counter-Memorial regarding the original Award of 8 May 2008 (the "OA") or the Decision of the first *ad hoc* Committee or their own submissions,[3] or even the resubmission Award[4] (the "RA"), making dialogue all but impossible, such is the manipulation of the literal and contextual meaning of most of what the Claimants

---

[1] See for example in § 326 and footnote 930 of the **Counter-Memorial:** "*Claimants ... arguments ... have changed over time ... in their Annulment Request, Claimants had invoked ... In their Annulment Memorial, however, Claimants abandon these arguments*".

[2] **Ibid**., footnote 931: "*repetition fallacy ... because familiarity is not easily distinguished from truth, frequent repetition is [a] reliable way to make people believe in falsehoods*."

[3] **Ibid**., an example: according to § 358 and footnote 1022, what the Respondent describes as "*Claimants' own argument that the issuance of Decision No. 43 had somehow prevented them from obtaining compensation for the expropriation of El Clarín*" seems to be, on the contrary, the logic cited by the Respondent itself in **Ex. RA-0055**, Claimants' Resubmission Memorial, ¶ 334 (arguing that Decision 43 '*constituait l'un des moyens imaginés par la République du Chili pour frustrer la procédure d'arbitrage* ***en*** *niant la pleine et entière propriété des Demanderesses vis-à-vis de l'État existant après leur réclamation du 6 septembre 1995 et échapper, ainsi, à la condamnation d'un tribunal arbitral international'*"). Key facts are manipulated throughout the Counter-Memorial: §§ 46-50 omit that the basis of Mr Pey's claims to the government between 6 September 1995 and when he resorted to arbitration was the status as invalid public law of Decree 165 of 1973; § 54 omits that the basis of the original Request of 3 November 1997 was the acts committed by the State after 6 September 1995; § 60 omits that the reason for the resignation of the first arbitrator appointed by the State was the concealment of the fact that he was Chilean *iure soli et iure sanguinis;* § 62 omits that in the communication of 24 June 1999 to the Minister of National Assets, the Claimants informed him that they were basing their original claim on the "continuing" wrongful act involved in the status as invalid public law, *ab initio*, of Decree 165; § 70(c) omits that ICSID had as of 3 November 1997 notified Chile of the arbitration request concerning the investors' assets and rights in CPP SA; § 82 omits that all the confiscatory decrees issued under Decree-Law 77 of 1973 have been treated as invalid *ab initio* by the Chilean courts since the end of the military dictatorship; §§ 85 and 120 omit that the Claimants have contended that the denial of justice committed in the domestic proceeding submitted to arbitration in 2002 is incompatible with the "fork in the road", as stated in the OA itself (§ 642); §§ 88, 183, 289, *inter alia*, quote the Claimants' words out of context, either manipulated (footnote 453) or falsified (footnotes 454, 455); § 89 omits that the OA (§§ 665-674) states that the Law of 1998 created rights on the basis recognising the illegality of the confiscations under the military regime, and that the State acknowledged to the IT in 2003 that the confiscation of CPP SA was invalid and that there was a duty to compensate its owners … and the Counter-Memorial continues in this vein up to its last page.

[4] See for example in §§ 370-374 of the Counter-Memorial the distorted presentation in § 216 of the RA and the analysis thereof as a basis of the dispositive part made by the Respondents, and a rejoinder in section 5.2 *infra*, § 85 et seq.

have written, of the OA, of the Decision of the first *ad hoc* Committee or even of the RA, as quoted by the Chilean State.

4. These manipulations of submissions, arguments and conclusions represent yet another reiteration of the Respondent's claims made between 2008 and 2012 in support of the annulment of all of the OA – which claims were for the most part rejected by the first *ad hoc* Committee after detailed analysis of the parties' submissions. The present *ad hoc* Committee is respectfully asked to read the Respondent's submissions to the OA annulment proceedings and in particular its Memorial[5] and Reply[6] on Annulment of 2010, and then to find again in its Counter-Memorial of 2018, explicitly or implicitly reasserting the rationale for dispositive points 1 to 6 of the RA of 2016, the selfsame arguments already disallowed by the first *ad hoc* Committee.

5. To quote one example among many, in §§ 498-506 of section V.G(1) of the Reply on Annulment of 2010, the State requested the annulment of the OA on the ground that, in its words, "*The Tribunal Failed To Explain How Decision 43 Could Have Discriminated Against Mr. Pey Given That He Voluntarily Chose Not To Participate In The Relevant Administrative Proceeding"*.

Though the initial Tribunal (the "IT") and then the first *ad hoc* Committee expressly rejected this contention,[7] Chile nonetheless repeated it (this third time *contra rem iudicatam*) before the resubmission Tribunal (the "RT"), which in its Award accepted it as valid despite the Claimants' protestations that the matter was already judged:

"La Défenderesse soutient que (...) les Demanderesses n'ont subi absolument 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

---

[5] **Document C294,** Chile's Memorial on Annulment of 10 June 2010, see in particular section III.C.(d) The Tribunal Improperly Allocated the Burden of Proof on The Issue of Damages (**§§ 365-370**); section IV.B.(2)(d) The Tribunal Improperly Asserted Jurisdiction over a Dispute Involving an Investment That No Longer Existed at the Time of the BIT's Entry Into Force or at the Time of the State Acts that Gave Rise to Responsibility (**§§ 560-566**); section IV.B.(3) (a) and (b), Improper Assertion of Jurisdiction Over the Alleged Denial of Justice Claim, et Improper Assertion of Jurisdiction Over the Alleged Discrimination Claim Concerning Decision 43 (**§§ 573-581**).

[6] **Document C269,** Chile's Reply on Annulment of 22 December 2010, see in particular section III.D.(2) (b) et (c), "The Tribunal Improperly Allocated The Burden Of Proof On The Two Merits "Claims" For Which The Tribunal Found Chile Responsible" (**§§ 234-234**); "On The Issue Of Damages" (§§ 235-239); section IV.E, "The Tribunal Failed To Apply Article 1(2) Of The BIT Or Article 25 To, And Improperly Asserted Jurisdiction Ratione Materiae Over, The Alleged 'Investment' By Co-Claimant …"(**§§ 411-414**) – claimed against the *ius standi* of Mrs Pey Grebe and tacitly accepted in the RA; in letter "F, The Tribunal Failed To Apply BIT Articles 1(2) And 2(2) And Improperly Asserted Jurisdiction Over A Dispute Involving An Alleged Investment That No Longer Existed At The Time The BIT Entered Into Force Or At the Time Of The State Acts That Gave Rise To Responsibility" **(§§ 415-422**); section V.E.(3), "The Tribunal Failed To State Reasons For Asserting Jurisdiction Even Though The Claimed Investment Was Wholly Extinguished More Than Twenty Years Prior To The BIT's Entry Into Force, And Therefore There Was No 'Existing Investment' Either At That Time Or At the Time Of The Relevant State Acts" (**§§ 485-489**); section G(1), "The Tribunal Failed To Explain How Decision 43 Could Have Discriminated Against Mr. Pey Given That He Voluntarily Chose Not To Participate In The Relevant Administrative Proceeding" (**§§ 498-506**)

[7] **Document C20,** Decision of the first *ad hoc* Committee, §§176, 184-194; 209-211, 215-218.

choisi de ne pas participer (...) 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."[8] (Emphasis added)

The members of the present *ad hoc* Committee will also reencounter in the Respondent's submissions (§§ 63, 69, 191 of its Counter-Memorial of 2018) the claim already twice rejected, in 2008 by the IT and in 2012 by the first *ad hoc* Committee, that:

There also was a similarly imaginative theory — involving an alleged free-standing right under Chilean law to compensation for the expropriation of El Clarín[510] *— which was designed to attempt to connect the request for expropriation damages to Decision 43. This second theory rested in part upon the notion that, but for Decision 43, Mr. Pey and the Foundation would have been compensated for the expropriation of El Clarín.*[511][9]

In fact, this is what the Claimants said of "Decision 43" in §§ 335-336 of their Rejoinder of 9 January 2015:

On soulignera également, comme exposé dans le Mémoire en Demande[357]*, que l'obligation de l'Etat du Chili était une obligation de réparation intégrale, et l'évaluation établie par le Ministre des Biens Nationaux dans le cadre de la Décision n°43 n'a aucune pertinence dans la détermination de son montant. (...) En outre, comme cela a déjà été démontré, cette Décision n°43 est le résultat d'une stratégie consciencieusement élaborée par la Défenderesse afin de s'opposer à la compétence du Tribunal arbitral initial et fût adoptée, in extremis, l'avant-veille des audiences finales sur sa compétence afin de démontrer que les investisseurs n'étaient pas les propriétaires légitimes de CPP S.A. et EPC Ltée*.[10] (Emphasis added)

6. Manipulations of this sort litter the Counter-Memorial to such an extent, albeit without following a method allowing items to be systematically and precisely identified, as the Claimants were able to do in their reply of 2 February 2018 to the present *ad hoc* Committee[11] or for the hearing of 16 February 2018,[12] that the Claimants have to object to all of the State's statements and claims which are not expressly identified as accepted.

**

[8] **Document C9**, SR, §§ 232-233.
[9] [511. See **Ex. RA-0140**, Claimants' Resubmission Reply, ¶ 334].
[10] **Document C40,** Claimants' Rejoinder of 9 January 2015.
[11] See in **document C214**, Échantillon des inexactitudes contenues dans la réponse du Chili du 19-01-2018, communiqué par les Demanderesses le 2 février 2018.
[12] See the Request in defence of the integrity and equity of the proceeding submitted by the Claimants on 27 April 2018.

2. THE RA REJECTED IN *LIMINE LITIS* ALL THE CLAIMS AND ISSUES SUBMITTED BY THE CLAIMANTS SUBSEQUENT TO 3 NOVEMBER 1997

7. In illustrating the meaning of the term "*in limine litis*",[13] the Counter-Memorial mentions nowhere that it was the resubmission Tribunal itself which explicitly used it in the basis[14] of the RA's dispositive part, and implicitly throughout the Award, as follows:

> *"la demande au titre du dommage causé par la conduite de la Défenderesse dans la procédure arbitrale doit également être rejetée in limine litis, pour les raisons énoncées au paragraphe 216 ci-dessus".* [Emphasis added]

§ 216 states:

> *"le champ de compétence de ce Tribunal, qui (comme cela a déjà été indiqué) 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. Les questions qui ont surgi entre les Parties après cette date* [le 3 novembre 1997] *– 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".* [Emphasis added]

Yet all the claims, all the issues submitted by the Claimants regarding *restitutio in integrum* for the harm caused by the breaches of Article 4 of the BIT arose between the parties after 28 April 2000 (with Decision 43). Thus, as we will see in section 5 below, § 216, the keystone of the RT's reasoning, is the RA's intrinsic and underlying basis, and this could only lead to the dismissal of the claim for compensation, at which the RA arrives via substitute reasoning (including *in limine litis*, as it says), with numerous lacunae and inconsistencies justifying its annulment.

For what is involved, and more so in the present circumstances (especially the *res judicata* force of the body of the OA and of the Decision of the first *ad hoc* Committee), is a manifest excess of powers (in particular a failure by the RT to exercise its jurisdiction and a total failure to apply applicable law), a departure from a fundamental rule of procedure (including the RT's partiality), a failure to state reasons (those cited in the RA are untenable given in particular the *res judicata* of the OA and of the Decision of the first *ad hoc* Committee), as set out in the Claimants' Memorial on Annulment of 27 April 2018.

***

[13] See §§ 188, 272, 342-345, 348, 387 of the Counter-Memorial.

[14] **Document C9f,** SR, § 243: "*[T]he claim to damage caused by the Respondent's conduct in the arbitral proceedings must also fall in limine, for the reasons given in paragraph 216 above*".

3. FAILURE TO STATE REASONS ON DISMISSING THE CLAIM FOR CONSEQUENTIAL DAMAGES RESULTING FROM THE DEFENCE OF THE INVESTMENT AND OF THE RIGHT OF ACCESS TO ARBITRATION

8. Our Application for Annulment of 10 October 2017[15] and Memorial of 27 April 2018[16] stated that the RA is vitiated by a failure to state reasons. The Counter-Memorial includes aspects leading us to make the following arguments in support of this ground for annulment.

In the *Klöckner II* case, the committee concluded:

*It is … necessary for the applicant to indicate further the reasons justifying the existence of each annulment ground as specified in Article 52(1) of the Convention in its Memorial. And these reasons must be susceptible to be linked to the annulment grounds invoked in the application. But n****o provision of the Convention or the Rules requests that these reasons be explained in the application. Both the Convention and the Rules speak only of 'grounds', and not of 'reasons' justifying their existence****.*[17]

In *Soufraki v. UAE*, the *ad hoc* Committee deemed that:

... because of the existence of strict time limits in the ICSID Convention, a new ground for annulment cannot in principle be admitted in the course of the proceedings, while ***of course new arguments fleshing out grounds already admitted can be developed.***[18]

In *Togo Electricité et al v. Togo*, the *ad hoc* Committee adopted an interpretation according to which, pursuant to Arbitration Rule 50(1)(c):

"il n'est pas nécessaire qu'une demande en annulation énumère de façon détaillée tous les arguments au soutien de la demande. ***Il reste donc possible de développer d'autres arguments par la suite (à la différence des motifs d'annulation*** *(…)"*[19]

and

"*la Convention CIRDI est muette sur le degré de détail requis dans la rédaction d'une demande en annulation. Elle n'exige pas que la demande invoque "l'un quelconque des motifs "énumérés à l'article 52(1). Ainsi,* ***la Convention CIRDI n'empêche pas les parties de soulever de nouveaux arguments à l'appui de leur demande en annulation à un stade ultérieur de la procédure.***"[20]

---

[15] Request for Annulment of the RA of October 2017, §§ 11, 33, 58, 667, 676, 678, *inter alia*.
[16] Memorial on Annulment of the RA 27 April 2018, §§ 58, 667, 676, 678, *inter alia.*
[17] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision Rejecting the Parties' Applications for Annulment, May 17, 1990 ('*Klöckner II*'),§ 4.41.
[18] **Document C131,** *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, §§ 33.
[19] **Document C13,** *Togo Electricité et al. v. Togo*, Decision on Annulment, 6 September 2011, § 88.
[20] **Ibid.,** § 89.

The same line was taken by the *ad hoc* Committees in *Wena Hotels v. Egypt*[21], and *Venoklim Holding v. Venezuela*.[22]

9. The Rejoinder of 9 January 2015 stated to the RT, in the section concerning *restitutio in integrum* for the breach of the BIT established in the OA as a result of Decision 43 and the associated denial of justice, that, *inter alia*:

> *"Conformément au droit international coutumier, la finalité du dédommagement étant 'd'effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis' ; ce standard Cherzów exige de comparer la situation financière actuelle des investisseurs avec celle où ils se seraient vraisemblablement trouvé en l'absence des actions illicites.*
>
> *Selon le commentaire à l'article 36 du Projet de convention de la CDI sur la responsabilité de l'État pour fait internationalement illicite:* 'Il est bien établi que les dépenses accessoires donnent lieu à indemnisation si elles sont raisonnablement engagées pour remédier aux dommages ou atténuer d'une autre manière les pertes découlant de la violation.'
>
> *La CPIJ et la CJI ont appliqué la méthode subjective et différentielle pour l'évaluation des dommages découlant d'actes illicites des Etats pour tous les dommages concrets et actuels causés par les actes illicites, par exemple dans les affaires Wimbledon419 et Canal de Corfou."*
>
> *Dans un cas de déni de justice, l'affaire Amco, le Tribunal CIRDI a appliqué le critère de l'affaire Chorzów :* "the measure of compensation ought to be such as to approximate as closely as possible in monetary terms the principle of restitutio in integrum (…)"
>
> *Dans l'affaire Antoine Goetz c. Burundi, le Tribunal CIRDI après avoir accordé la restitutio in integrum a également décidé que le dommage financier additionnel cause par l'acte illicite de l'État devait être inclus dans le quantum du dédommagement*." [23]

The Claimants produced invoices accounting for consequential damages occurring between the date of the original arbitration request, on 3 November 1997, and the enforcement of dispositive point 5 of the OA in 2013.[24] None of these invoices were contested or indeed could have been, as they were all approved by the corresponding courts – the IT, the first *ad hoc* Committee, First Instance Court No. 101 of Madrid – in decisions that are *res judicata*.

10. This claim to the RT was therefore based on Article 4 of the BIT, the Cherzów standard – *"wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"* – and Article 36 of the ILC Draft Articles on the Responsibility of States

---

[21] **Document CL314,** *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, § 19.
[22] **Document CL353**, *Venoklim Holding v. Venezuela*, Decision of the *ad hoc* Committee on Respondent's Preliminary Objections, 8 March 2016, §§ 86-99.
[23] **Document C40**, §§ 382, 383, 385, 387, 389, 405.
[24] The supporting documents appear in the resubmission proceeding as ND06, CRM92, CRM93, CRM99, CRM100, CRM129, CRM133, CRM138, CRM145, CRM160 and CRM161.

for Internationally Wrongful Acts, and their application in case law at the ICJ,[25] at ICSID[26] and in qualified doctrine,[27] cited in support of the following conclusion:

"Les investisseurs soumettent que, dans la présente phase de la procédure, portant sur la quantification du montant de leur dédommagement après la condamnation de l'État du Chili pour violation de l'article 4 de l'API, le principe de réparation intégrale doit être pris également en considération en rapport avec la restitution aux investisseurs de tous les frais et coûts encourus par ceux-ci pour soutenir la défense de leurs droits sur l'investissement dans les litiges où sont présentes les exigences de

- Causalité, compte tenu du lien évident entre les actions discriminatoires et de déni de justice de l'État chilien prises dans leur ensemble et les dommages et préjudices qu'ont dû supporter les investisseurs pour défendre les droits que leur confèrent, notamment, les articles 3 et 4 de l'API, la Convention CIRDI et l'article 7 de la Constitution chilienne, dans tous ces litiges ;

- Rapport immédiat et nécessaire des actions illicites de l'État chilien avec la causa petendi et les actions des investisseurs exercées dans chacun de ces litiges."[28]

3.1 The claim for *restitutio in integrum* for consequential damages resulting from the defence of the investment and of the right of access to arbitration at ICSID

11. The rights deriving from the investment in CPP SA have been clearly established in the arbitration proceedings. Milestones in this were the OA of 8 May 2008 and the

[25] S.S. Wimbledon case (Gr., Br., Fr., It., Jap. V. Germany), Judgment of 17 August 1923, PCIJ 1923 Ser A, No 1,15, page 3, and Corfu Canal case (UK v. Albania), Fixing of the amount of reparations, Judgment of 15 December 1949, ICJ Reports 1949, pages 243, 247 et seq., **documents CL355** and **CL354** in this annulment proceeding, respectively.

[26] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award of 6 February 2007, ¶¶ 352, 387-389 [**document CL356**]; *Amco v. Indonésie*, Award of 5 June 1990 (Amco II), ¶¶ 137, 185 [**document CL350**]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11, Award of 5 October 2012, note 165 [**document CL357**]; *Watkins-Johnson v. The Islamic Republic of Iran*, Award of 27 July 1989, Iran-U.S. C.T.R., volume 22 (1990) 218, ¶¶114-117; *Uiterwyk v. The Islamic Republic of Iran*, Partial Award of 6 July 1988, 19 Iran-U.S. C.T.R. 107, ¶117"; *Antoine Goetz et al v. Burundi*, ICSID Case No. ARB/01/2, Award of 10 February 1999 (2000) 15 ICSID Rev.-FILJ 457, ¶¶ 135, 143, 151, 169, 173-174, 178, 197- 211, 238-260, 261-266, 297-298 [**document CL358**]; Award in *Pey Casado v. Chile* of 8 May 2008, ¶¶ 719, 730 [**document C2**]; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007, ¶¶ 309, 365, **366**, 367, 376.3(IV) and 376.4(V) [**document CL359**]; *Youkos Universal Ltd v. Russian Federations*, Permanent Court of Arbitration, Award of 18-07-2014, pp. 1773-1774 [**document CL283**]; *Pope & Talbot v. Canada*, Award on Damages, 31 May 2002, ¶ 85 and note "*62. Canada argued that the Interim Hearing expenses should be considered as costs rather than damages. For the reasons stated in the Award of April 10, 2001, the Tribunal considers it more appropriate to treat those expenses as damages*" [**document CL360**].

[27] **Document CL361,** Marboe (I.): Calculation of Compensation and Damages in International Investment Law, page 312.

[28] **Document C40,** Claimants' reply of 9 January 2015, § 405.

decisions of the first *ad hoc* Committee, which constitute an integral part of the investment within the meaning of the BIT[29] and protected by it.

12. Now, on infringing the obligations established by the BIT in Decision 43 of 29 April 2000, and on denying the investors' right to settle the dispute in arbitration before and after the OA and the decisions of the first *ad hoc* Committee, the State caused consequential damages for which remedy was sought from the RT, as investors' right to arbitration is an integral part of the Claimants' investment according to investment case law, as stated, *inter alia*:

1) By the tribunal in the Chevron case:

Once an investment is established, it continues to exist and be protected until its ultimate disposal 'has been completed'.[30]

2) By the tribunal in S.p.A Saipem v. Bangladesh:[31]

that for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation. In the present case, the entire or overall operation ***includes*** *(...) the related ICC* ***Arbitration****. (....) the notion of investment pursuant to Article 25 of the ICSID must be understood as covering all the elements of the operation, that is not only the ICC Arbitration, but also (...)* [32] (Emphasis added)

The *Saipem* tribunal applied the ICSID Convention and the BIT in establishing the State's responsibility in that case. This functional equivalence suffices to trigger the State's responsibility and protection of the investment, and, if the circumstances allow, additional support for the arbitral award.

3) In *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*[33] the Arbitral Tribunal deemed:

that the right to arbitration is a distinct "investment" within the meaning of the BIT because Article I(2)(a)(ii) defines an investment inter alia as "claims to [...] any other rights to legitimate performance ***having financial value related to an investment****". The right to arbitration could hardly be considered as something other than a "right [...] to*

---

[29] The *Romak S.A. v. Uzbekistan* Arbitral Award under the UNCITRAL Rules of 26 November 2009 noted that "*the term* '*investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT. (...) The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings)*", **document CL362**.

[30] **Document CL363**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008), § 185, citing *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB (A)/99/2, Award of 11 October 2002, § 81, **document CL364**.

[31] **Document CL365**, *S.p.A Saipem v. Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

[32] **Ibid.**, §§ 110 and 114.

[33] **Document CL385**, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award of 18 May 2010.

legitimate performance having financial value related to an investment (….) *the right to arbitration is considered a distinct investment (…)*".[34] [Emphasis added]

In White Industries v. India:[35]

"*the Tribunal concludes that rights under the Award constitute part of White's original investment (i.e., being a crystallization of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT*."[36] [Emphasis added]

13. In our case, when after 28 April 2000 the Claimants applied for arbitration in the dispute over Decision 43 and the associated denial of justice, they legitimately expected that the State would respect constitutional guarantees of due process, the right to property (obligations lying with it according to the BIT), the general principle of *pacta sunt servanda* and, consequently, the right to arbitration.

14. As these legitimate expectations were not met by the Respondent, the Claimants submitted their claim for compensation for consequential damages on the basis of their rights as established by the OA and the Decision of the first *ad hoc* Committee, in the renewed expectation of compliance by the State, all of which is part of their investment, including access to arbitration.[37]

3.2 The claim for consequential damages was dismissed without stating reasons

15. The claim for compensation for consequential damages was debated before the RT.[38]

The RA identifies five reasons in the Respondent's objection to the claim:

1) it is purportedly not pursuant "*à la nature ni à l'objet de la procédure de nouvel examen*";

2) it purportedly contradicts "*directement les décisions antérieures qui ont autorité de la chose jugé*";

3) it is purportedly "*dépourvue d'un lien suffisant avec les deux violations du TBI qui tombent dans le champ de la procédure de nouvel examen*";

4) "*le Chili a déjà payé une partie de ces frais et honoraries"*;

---

[34] **Ibid**., §§ 115, 117, 120, 130
[35] **Document C47**, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Award of 30 Novembre 2011.
[36] **Ibid.**, § 7.6.10.
[37] See on the treatment in the investment sphere of consequential damages in document **CL388**, Marboe (I.) Calculation of Compensation and Damages in International Investment Law, "Costs and Expenses for Pursuing the Claim", pages 311-315, document CR01 in the resubmission proceeding.
[38] See in §§ 120, 121, 132 of the RA the Repondent's case against.

5) "*le paragraphe 3 du dispositif de la Sentence Initiale n'ayant pas été annulé et continuant à avoir force obligatoire, empêche le Tribunal d'ordonner la restitution ou l'indemnisation.*"

16. This 5th ground for objection was not mentioned by the Respondent in its submissions or in the hearings, and the RA includes it here for reasons that remain unexplained given that the State expressly said to the Tribunal that the right to compensation established in the OA's dispositive point 3 is of a financial nature,[39] and the RA did not reject the claim for consequential damages for any of these five reasons or any other.

17. It is likewise true that as the amounts of consequential damages were set in arbitral and judicial decisions that are *res judicata*, and that the amount of consequential damages is part of the *restitutio in integrum* for the harm caused by the breach of Article 4 of the BIT, the reasons cited in the RA's section "III. ANALYSIS" as a basis for dispositive points 2 to 6 do not apply to the claim for consequential damages, viz.:

i. That the amount of damages caused by the breach of Article 4 of the BIT could not be estimated as equivalent to that applicable in the event of a breach of Article 5 of the BIT (§§ 191, 192);

ii. That the confiscation of the investment by Decree No. 165 of 1975 was made on a date prior to the BIT's entry into force (§§ 195, 198) ; *"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"* (§ 244);

iii. That if the proposition relating to the invalidity *ex tunc* of Decree 165 "*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***..." (§ 198) [emphasis added];

[we note in passing that the RA gives no reason for it being impossible to set an equivalent figure either in these circumstances or in principle, or for the statement that this would be like submitting to "*la confiscation de nouveau de manière*

[39] **Document C200**, hearing of 16 April 2015, page 96, Chile's reply to a question from the RT: "*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 recognised 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*."

détournée",[40] were it to be validly proven that the amounts were indeed equivalent];

iv. That "*ce qui a constitué en fait (sinon dans la forme) la confiscation est intervenue avec la Décision n° 43 (...) apparaît, sous diverses formes, dans les écritures des Demanderesses au cours de la présente procédure de nouvel examen"* is "*incompatible avec les conclusions du Tribunal initial…mais aussi avec la Décision 43 elle-même*" (§ 198);

v. That even if "*la Défenderesse, pour sa part, était d'accord avec une grande partie de la réponse des Demanderesses, à savoir que (..) en vertu du paragraphe 3* [du Dispositif de la SI]*, les* 'Demanderesses ont droit à des réparations, à une compensation pour des dommages qui …peuvent être financièrement évalués', *il n'en demeure pas moins que cette forme de réparation, ou d'autres formes de réparation en droit international* 'serait disponible dans la mesure où les Demanderesses peuvent établir une causalité, c'est-à-dire le lien nécessaire entre la violation au titre du Traité et la forme de dommages monétaires qu'elles recherchent et deuxièmement assument la charge de la preuve pour démontrer qu'il y a eu un préjudice économique' (…) *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. Mais il n'interprète pas ce paragraphe comme dispensant une partie qui demande des dommages-intérêts de son obligation normale de prouver le préjudice ainsi que le lien de causalité*" (§ 200);

vi. That "*les questions qui ont surgi entre les Parties après* [between 3 November 1997 and the notification of the OA of 8 May 2008] *(...) ne peuvent pas (...) entrer dans le champ de la procédure de nouvel examen…*" (§216);

vii. That the RT "*estime que les arguments avancés par la Défenderesse sont parfaitement fondés*", viz.: '*les Demanderesses n'ont subi absolument aucun dommage matériel pouvant être démontré. Aucun dommage en raison de l'affaire de la rotative Goss (...) ; et aucun dommage en raison de la Décision n° 43 (...), si les Demanderesses pouvaient être présumées avoir subi quelque dommage, la cause immédiate du dommage était constituée par leurs propres actes'* (…)" (§§ 232-233);

viii. That "l*es 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,*

[40] **Document C9**, RA, § 244.

par principe, octroyer de dommages-intérêts (…), *en l'absence de toute preuve suffisante d'un préjudice ou d'un dommage causé aux Demanderesses par la violation du TBI établie dans la Sentence Initiale, la question de l'évaluation ou de la quantification de ce dommage ne se pose pas. Le Tribunal n'a donc pas besoin d'analyser de manière plus détaillée les rapports d'expertise de M. Saura pour les Demanderesses et de M. Kaczmarek pour la Défenderesse*" (§ 234-235);

ix. That the subsidiary claim based on unjust enrichment "*est fondé sur la simple allégation que, du fait que la Défenderesse a été en possession des biens confisqués et qu'elle les a utilisés, elle s'est enrichie 'sans juste cause'" au détriment des Demanderesses investisseurs (...) ne peut pas être utilisé comme un moyen détourné de réintroduire sous une autre forme la demande fondée sur l'expropriation qui a été rejetée*" (§ 237-240);

x. That "*aucune tentative n'a été faite pour faire valoir, ou pour justifier, une demande spécifique en ce qui concerne la demande relative au dommage moral* (…) [qui] *doit également être rejetée* in limine litis. (…)" (§ 241-243);

xi. That "*le Tribunal n'aurait pas pu non plus élaborer sa propre théorie sur les dommages-intérêts, distincte des arguments des Parties*" (§ 244).

18. The RA contains no reasons relating to the claim for consequential damages allowing one to understand the grounds for its refusing, in its 8th dispositive point,[41] compensation for the nearly 12 millions euros that the Claimants have been obliged to plough into the defence of their investment over the 18 years elapsed since the date on which the original Request for Arbitration was filed, i.e. 3 November 1997, and that of the enforcement of dispositive point 5 of the original Award, i.e. 2 November 2015.[42]

19. This total absence of reasons is especially manifest given that Article 48(3) of the ICSID Convention provides that the award (*sentence* or *laudo*) "s*hall state the reasons upon which it is based*", "*doit être motivée*", "*será motivado*".

20. Moreover the RA rejected the claim without in any way considering the uncontested supporting documents for the amount of damages caused to the Claimants, constituting a failure to appropriately share the burden of proof and a manifestation of partiality by the RT as sanctioned in Article 52(1)(d) of the Convention.

[41] **Document C9f,** RA, § 256: "*Par ces motifs, le Tribunal décide, à l'unanimité: (...) 8. Que toutes les autres demandes sont rejetées*."
[42] Memorial on Annulament of 27 April 2018, § 752(e).

3.3 The infringement of Articles 42(1) and 48(3) of the ICSID Convention makes the Award annullable

21. If the rules provided in Article 52(1)(c) and (e) had been observed regarding the claim for compensation for consequential damages, the RT could have reached a different conclusion in the RA's dispositive points 3, 4, 6 and 7, given that the right to arbitration whose defence gave rise to the consequential damages in itself constitutes an investment within the meaning of the BIT.

22. This means that the RA should be annulled pursuant to Article 52(1) letters (c) and (e) as interpreted and applied by the first *ad hoc* Committee and of which the Claimants respectfully ask that the same application be made by the present *ad hoc* Committee, so as to ensure consistency in the application of the Convention within the same case, viz.:

> *"82. (…) Si la partie qui objecte a pris connaissance, effectivement ou implicitement, de la violation d'une règle seulement après que la sentence a été portée à la connaissance des parties, elle ne peut pas être considérée comme ayant renoncé à son droit d'objection.*
>
> ***"D. Défaut de motifs***
>
> *"83. Le premier comité d'annulation dans l'affaire Vivendi a commenté ce motif dans les termes suivants :*
>
> *[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons […] Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e).*
>
> *Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.*
>
> ***In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision**. (…)41*[43]
>
> *"84. Des comités dans d'autres cas d'annulation ont exprimé des avis similaires42.*[44]
>
> *"85. **Le Comité souscrit à l'interprétation de cette norme énoncée par le premier comité d'annulation dans l'affaire Vivendi**. En outre, les parties semblent avoir accepté ces*

[43] 41 Voir Décision Vivendi I, §§ 64-65 [**document CL310**]
[44] 42 Voir Décision Amco I, §§ 38-44; Décision MINE, §§ 5.07-5.13; Décision Amco II, §§ 7.55-7.57; Décision Wena, §§ 77-82; Décision CDC, §§ 66-72; Décision Mitchell, § 21 [**documents CL315**]

critères. Cependant, elles sont en désaccord sur la manière de traiter des motifs incohérents ou contradictoires. Tandis que la Défenderesse soutient que des explications incohérentes, contradictoires ou futiles sur des points déterminants pour le résultat constituent un défaut de motifs, les Demanderesses avancent que seul un défaut de motifs qui est manifeste peut conduire à l'annulation d'une sentence. En d'autres termes, seules (i) une absence totale de motivation ou (ii) des raisons manifestement futiles ou contradictoires sont susceptibles de constituer une erreur annulable43.[45]

"86. Le Comité estime que, dès lors qu'il n'existe aucun fondement exprès pour étayer les conclusions sur un point crucial ou déterminant pour le résultat, l'annulation doit être prononcée, que le défaut de fondement soit dû à une absence totale de motivation ou soit le résultat d'explications futiles ou contradictoires.

Étendue de l'annulation

87. Comme l'ont relevé plusieurs comités, l'annulation est distincte de l'appel. Le pouvoir de contrôle est limité aux motifs d'annulation énoncés à l'article 52(1) de la Convention CIRDI44.[46] *Dans l'affaire Soufraki, le comité a fait observer que45*[47] *:*

[T]he annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, it is not contested that "... an ad hoc committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings." (quoting Guide to ICSID Arbitration). This has been stressed very recently in the case MTD Equity and MTD Chile v. Republic of Chile:

'Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.*'*

"88. Le Comité approuve ces déclarations sans aucune réserve. (...)"

[Underlining and other emphasis added]

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

23. This reasoning of the first *ad hoc* Committee is moreover consistent with that of the *ad hoc* Committee in *Klöckner v. Cameroon*, which the Claimants invoke here, requesting its application to this case.[48]

---

[45] 43 Voir Tr. Annulation [1] pour la Défenderesse: [pp. 45-46] (Ang.), [pp. 18-19] (Fr.) et [pp. 44-47] (Esp.); pour les Demanderesses: [pp. 184-185] (Ang.), [p. 76] (Fr.) et [pp. 200-202] (Esp.)]

[46] 44 Voir Décision Wena, § 18 (qui cite Klöckner I, §§ 3, 62, 119 et Décision MINE, § 4.05), [**documents CL314** et **CL313,** respectivement]

[47] 45 Voir Décision Soufraki, § 20, [**document C131**]

[48] **Document C7**, *Klockner v. Cameroon*, Decision on Annulment, 3 May 1985: "*§ 58. In the opinion of the ad hoc Committee, the provisions of Article 42 could not be interpreted as stating simple advice or recommendations to the arbitrators or an obligation without sanction. Obviously, and in accordance with*

***

4. EXCESS OF POWERS. THE RA REFUSES TO APPLY ARTICLES 2(2) AND 10(1) OF THE BIT AND TO EXERCISE JURISDICTION ON MATTERS RELATING TO THE AMOUNT OF COMPENSATION FOR THE BREACHES OF THE BIT OF 28 APRIL 2000 AND AFTERWARDS

24. Prof. Pierre Mayer writes:

> *"Imaginons qu'une sentence sur le principe de la responsabilité du défendeur a été rendue ; il reste à traiter la question du* quantum *dans une autre sentence, mais au moment de la rendre le tribunal éprouve un doute sur la justesse de ce qu'il a précédemment dit. (...) Lorsque ce doute surgit, que doit faire le tribunal ? Cette situation s'est présentée notamment dans une affaire qui a donné lieu à une sentence bien connue, rendue sous la présidence de Claude Reymond en 1984.*[49] *Dans les motifs de la seconde sentence, il avait parfaitement démontré que l'autorité de la première sentence devait s'étendre à ses motifs.*[50] *Il est d'abord évident que la sentence déjà rendue a autorité de chose jugée et que l'arbitre ne peut pas remettre en cause la décision prise sur le principe de la responsabilité."* [51]
>
> This is yet more evident, and even compelling, in our case, in the context of an award on jurisdiction and on the merits with *res judicata* force under the ICSID Convention, in view of Article 53(1) and Rule 55(3).

25. In our case, the annulment of point 4 of the dispositive part and its basis in Ch. VIII of the OA by the Decision of the *ad hoc* Committee of 18 December 2012 turned that award into a "partial" award, determining the principle of a breach of the BIT resulting in a loss – *res judicata* – for which the amount of damages payable remained to be assessed.

---

principles of interpretation that are recognized generally-for example, by Article 31 of the Vienna Convention on the Law of Treaties-Article 52 on the annulment of awards must be interpreted in the context of the Convention and in particular of Articles 42 and 48, and vice versa. It is furthermore impossible to imagine that when they drafted Article 52, the Convention's authors would have forgotten the existence of Articles 42 or 48(3), just as it is impossible to assume that the authors of provisions like Articles 42(1) or 48(3) would have neglected to consider the sanction for non-compliance"; § 116. As for "contradiction of reasons", it is in principle appropriate to bring this notion under the category "failure to state reasons" for the very simple reason that two genuinely contradictory reasons cancel each other out. Hence the failure to state reasons. The arbitrator's obligation to state reasons which are not contradictory must therefore be accepted."

[49] Award rendered in ICC case No. 3267, Rec., II, 43. See along the same lines Paris, 11 May 2006, *Groupe Antoine Tabet*, Rev. arb., 2007.201, note by S. Bollée, **documents CL366** and **CL367**.

[50] "*[T]his arbitral tribunal is of the opinion that the binding effect of its first award is not limited to the contents of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e. to the ratio decidendi of such award. Irrespective from the academic views that may be entertained on the extent of the principle of res judicata on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues*".

[51] **Document CL372**, Mayer (P.), *L'autorité de chose jugée des sentences entre les parties*, Revue de l'Arbitrage, 2016, Volume 2016, Issue 1, pp. 97 – 98.

26. In this case, the OA found Chile responsible, *inter alia*, for having stalled for more than seven years (in fact more than twelve years) the judgment which was due to take note of the invalidity of Confiscatory Decree No. 165 (see *infra* §§ 129-136).

Moreover the original Tribunal had dealt with all the issues later raised in the resubmission request, and unlike in the *Tokios*[52] or *Amco II* cases, **the Claimants did not ask the resubmission Tribunal to revisit them or to amend dispositive point 1 on jurisdiction, or points 2 and 3 or their respective bases**; they asked only for these points to be applied taking account, organically and consistently, of the context in which the facts and issues had been submitted to the original proceeding, i.e. that of the uncertainty, when the OA was rendered, as to the legal status in domestic law of Decree No. 165.

For the difficulty encountered by the original Tribunal owing to the stalling of the domestic judgment – a key component of the compensable denial of justice according to the OA – was dispelled two months after the OA had been rendered, when the First Civil Court of Santiago gave its ruling, which, continuing the denial of justice, was made known to the Claimants' only on 31 January 2011.[53]

In this context we may recall the following consideration made by the ICJ relating to "indefinite" legal status, as such an indefinite status was all that was known to the IT (as with the status of Decree No. 165 during the original arbitral proceeding, *mutatis mutandis*), when the Court initially had to make a decision:

"Ainsi que la Cour l'a fait observer dans ses arrêts de 2004 relatifs à la Licéité de l'emploi de la force, 'l'importance de cette évolution survenue en 2000 tient au fait ***qu'elle a clarifié la situation juridique, jusque-là indéterminée****, quant au statut de la République fédérale de Yougoslavie vis-à-vis de l'Organisation des Nations Unies. C'est en ce sens que la situation qui se présente aujourd'hui à la Cour concernant la Serbie-et-Monténégro est manifestement différente de celle devant laquelle elle se trouvait en 1999. Si la Cour avait alors eu à se prononcer définitivement sur le statut du demandeur à l'égard de l'Organisation des Nations Unies, cette tâche aurait été compliquée par* ***les incertitudes entourant la situation juridique, s'agissant de ce statut****. Cependant, la Cour se trouvant aujourd'hui à même d'apprécier l'ensemble de la situation juridique, et compte tenu des conséquences juridiques du nouvel état de fait existant depuis le 1er novembre 2000, la Cour est amenée à conclure que (...)" (Licéité de l'emploi de la force (Serbie-et-Monténégro c. Belgique), exceptions préliminaires, arrêt, C.I.J. Recueil 2004, p. 310-311, par. 79.)*"[54]

27. In this arbitration case, the Decision of the first *ad hoc* Committee of 18 December 2012:

---

[52] **Document CL335,** *Tokios Tokelės v. Ukrain*e, ICSID Case No. ARB/02/18, Award (26 July 2007) (Mustill, Price, Bernardini), ¶ 98.

[53] See the Claimants' Rebuttal of 28 Februry 2011 in the proceeding on annulment, at Chile's initiative, of the original Award, page 10, note 23, **document C207**.

[54] **Document CL273**, ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, p. 131.

a) annulled dispositive point 4 of the OA relating to the *quantum* of compensation payable to the claimant investors with the agreement of all parties, who sought its annulment for different reasons;[55]

b) declared as *res judicata* the whole body of chapters I to VII of the OA concerning jurisdiction and the the State's responsibility, including the basis for dispositive points 1 to 3 establishing the causal link existing between:

i. acts committed by the State as of 28 April 2000 "*résidant essentiellement dans la Décision n°43 et* ***le déni de justice allégué qui lui est lié …***"[56]

ii. which constitute discrimination and denial of justice,

iii. which infringe Article 4 of the BIT,

iv. and which caused harm, with the resulting damages to be made good by the Chilean State.

Consequently, as the *ad hoc* Committee said in the *Vivendi I* case:

> *The ad hoc Committee did not annul this finding but instead confirmed it. Hence, like all other non-annulled findings of the First Tribunal, this one is res judicata (...)*[57]*,*

or Prof. Reisman:

> *With the exception of nullification on grounds of total absence of jurisdiction or because of fraud or corruption of a member of the tribunal, even a total nullification decision is likely to indicate that there are findings of law or fact by the original tribunal which have not been nullified, whether because the moving party did not challenge them, because they did not come within one of the grounds of Article 52, or because the ad hoc committee chose not to nullify. Principles of economy and fairness to the parties would suggest that subsequent tribunals dealing with the same dispute should not reconsider such matters.*[58]

28. Point 1 of the OA's dispositive part determined that the Tribunal had jurisdiction *ratione temporis*, *ratione materiae* and *ratione personae* over the disputes arising between the parties as of 28 April 2000, concerning all of the investment:

> Original award:
>
> *§635. "Les demanderesses ont tenté en vain de faire reconnaître l'incompatibilité de* ***la Décision n°43*** *avec cette procédure judiciaire* [interne]. ***Le 2 octobre 2001****, la Première Chambre civile de Santiago s'est déclarée incompétente pour juger de l'incompatibilité*

[55] The Claimants' reasons given before the first *ad hoc* Committee for the partial annulment of dispositive point 8 (and indirectly point 4), appear in their Rebuttal of 28 Febrary 2011 (§§ 218-246), **document C207**.
[56] **Document C2**, OA, §§ 464, 623, 679, underlining added.
[57] **Document CL262**, *Vivendi v. Argentina* (Vivendi II), Decision on Jurisdiction (resubmitted case), Nov 14, 2005, para 107.
[58] Reisman (W.M.), Systems of Control in International Adjudication & Arbitration, Durham, NC: Duke University Press, 1992, 105.

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.*

§636. Finalement, comme le Tribunal arbitral a récapitulé ci-dessus, ***les demanderesses ont intenté de nombreux recours auprès du pouvoir exécutif et du pouvoir judiciaire contre ces décisions en 2002*** *et visant à mettre en cause la comptabilité de la Décision n°43 avec la procédure judiciaire introduite en 1995, recours qui ont tous été rejetés."*

§453. "(...) le Tribunal estime sans hésitation que l'opposition qui s'est manifestée entre les parties lors des audiences de ***mai 2000****, dès que les parties demanderesses ont pris connaissance de la Décision n°43, est constitutive d'un différend. Là encore, le différend étant survenu postérieurement à l'entrée en vigueur du traité,* ***la condition de compétence ratione temporis est satisfaite****."*

§" 464. Le Tribunal estime que le dernier différend entre les parties, s'est cristallisé au cours de ***la période 2002-2003****. Avec l'introduction de leur demande complémentaire le* ***4 novembre 2002****, les demanderesses ont, pour la première fois dans cette procédure, reproché à l'État chilien un déni de justice et ainsi formulé une réclamation. C'est en demandant au Tribunal arbitral dans son mémoire du* ***3 février 2003*** *de rejeter la demande complémentaire des demanderesses que la défenderesse a confirmé l'existence d'un différend sur la question du déni de justice."*

§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* […]'" (citation omitted, underlining added),

[Footnotes 589[59] and 599[60] indicate that the reason for extending the claim was the denial of justice resulting from the State having refused *restitutio in integrum* for the whole investment.][61]

[59] ["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'État 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' ".]

[60] ["599 Les parties demanderesses ont résumé leur position lors de l'audience du 15 janvier comme suit: "En l'espèce, la Chili a commis un acte de déni de justice, d'un côté, par le délai extraordinaire à établir une vraie solution. A l'heure où nous parlons, nous nous situons plus de dix ans après la requête originale et, à ce jour, il n'y a pas eu de résolution en première instance. Le délai de résolution d'un différend porté à la connaissance des cours est en soit un motif de déni de justice si ce délai est irraisonnable. "599 Transcription de l'audience du 15 janvier 2007, p. 93, § 10-16 (Me Garcés). V. aussi réplique des demanderesses au contre-mémoire de la défenderesse, du 23 février 2003, p. 107; 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'État 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. "En outre, selon les demanderesses, dans le cas où la Première Chambre civile de Santiago rendrait une décision au fond dans cette affaire, l'adoption de la Décision

§" 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.****"*

§" 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."

[Underlining added]

29. The Decision of the first *ad hoc* Committee of 18 December 2012, for its part, rejected the selfsame assertion that the State restated before the RT and **which that Tribunal upheld in barely concealed way**, infringing *res judicata*, **by declining jurisdiction over the issues arising between the parties between 3 November 1997 and the date of the OA's notification**.

The Chilean State now asks the present *ad hoc* Committee[62] to confirm this assertion rejected by the OA and by the first *ad hoc* Committee, viz.:

Decision of the first *ad hoc* Committee:

"*162. La principale question soulevée par le Chili au regard de l'article 52(1)(e) est celle de savoir si le Tribunal a omis de motiver sa décision de se reconnaître compétent pour statuer sur le dommage allégué causé à un investissement qui, selon le propre raisonnement du Tribunal, avait disparu plus de vingt ans avant l'entrée en vigueur de l'API, et, par conséquent, n'aurait pu constituer un "investissement existant "ni à ce moment-là, ni au moment des actes ultérieurs de l'État constituant selon le Tribunal le fondement de la responsabilité* [la Décision 43 et le déni de justice qui lui est lié].

"163. *Le Chili soutient que le Tribunal n'a pas appliqué les articles 1(2) et 2(2) de l'API selon les termes suivants101 :*

"416. Here, the Republic asserts that the Tribunal manifestly exceeded its powers because it improperly asserted jurisdiction over alleged post-BIT acts by Chile that could not have affected any investment of Claimants, for the simple reason that Claimants had no

---

n°43 priverait d'effet le jugement de la juridiction chilienne dans la mesure où les bénéficiaires de la Décision n°43 ont déjà été indemnisés pour la rotative en question (demande complémentaire des demanderesses, du 4 novembre 2002, p. 6.)]

[61] **Document C2**, original Award, § 651, "*l'impossibilité d'obtenir une décision sur le fond des tribunaux chiliens dans l'affaire concernant la restitution de la rotative Goss constituerait une violation de l'article 4 de l'API*"; note 607: See the Claimants' rejoinder to the Respondent's Counter-Memorial of 23 February 2003, pp. 103 et seq. See also the transcription of the hearing of 16 January 2007, pp. 42 et seq., esp. p. 45: '*le fondement juridique du déni de justice se trouve à l'évidence dans l'article 4 de l'API Espagne-Chili*' (Mr Garcés)"; note 599: transcription of the hearing of 16 January 2007, p. 47 (Ms Malinvaud): "*[…] le refus répété d'indemnisations à partir de 1995 est bien un déni de justice qui est un fait de l'État 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*."

[62] See in §§ 351-353 of Counter-Memorial the description of what is to be understood by the RT's first question at the hearings of April 2015: "*the award simply did not explain what investment had survived the expropriation and still existed at the time of the fair and equitable treatment violation.*"

investment still existing at the time of the alleged acts. The Tribunal correctly noted at the outset of its analysis in the Award that Articles 1(2) and 2(2) of the BIT permitted claims only for investments that were "already existing at the time of entry into force of the BIT":

Il est clair, en revanche, que les articles 1(2) et 2(2) de l'API exigent de l'investisseur qu'il effectue un investissement qui soit conforme à la législation chilienne en vigueur à l'époque et, s'agissant d'investissements existant au moment de l'entrée en vigueur du traité, qui puisse être qualifié d'investissement étranger au sens de cette législation.

*"*417. The foregoing necessarily means that an investment that had terminated before the date of the BIT's entry into force (i.e., that was no longer "existing" on that date) would be outside the scope of the BIT. However, and incongruously, the Tribunal then failed to identify an investment by Mr. Pey that was still "existing" upon entry into force of the Chile-Spain BIT in 1994. In other words, having first articulated correctly what the BIT required by way of analysis for application of Articles 1(2) and 2(2), it then simply failed to apply such requirements to Claimants.

"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). The Tribunal itself conceded this key point when it concluded that the expropriation of *El Clarín* was an "instantaneous" act that concluded when it happened in the 1970s. This means necessarily that Claimants' investment was extinguished at that time. The Tribunal did not purport to suggest that the "investment" somehow continued to exist independently of the property that was expropriated, or that every subsequent disposition by the Government of the expropriated property constituted a new "expropriation" affecting the original owners. To the contrary, the Tribunal's conclusion was precisely the opposite: that the expropriation of *El Clarín* was not a "continuing" act.

*"*419. Given the Tribunal's conclusions in this regard, it is impossible to discern what "investment" the Republic harmed when it undertook the acts that the Tribunal concluded were post-entry into force violations of the BIT. The Tribunal simply does not address this issue at all in the Award. But if *El Clarín* was expropriated definitively at the latest by 1975, as the Tribunal conceded, and if Claimants furthermore did not allege the existence of any other investment, what investment by Claimants could possibly have existed past 1994, the year the BIT entered into force? What was the investment that was harmed by the post-1994 acts that formed the basis of the Tribunal's finding of responsibility against Chile?

*"*420. The Tribunal assumed jurisdiction despite the fundamental logical and legal flaws identified above, eliding the absence of an investment and then ruling in Claimants' favor. The Republic could not have foreseen this outcome during the underlying proceedings, as no acts other than the expropriation itself had been the subject of a claim in the arbitration. Claimants had argued that the

expropriation of their original investment should be deemed a "continuing" one that for that reason should be deemed to exist past the date of the BIT's entry into force, but they had never argued either (a) that the investment *itself* was somehow a "continuing" one; or (b) that they had made some other (different) investment that was covered by the BIT and that was harmed by Chile's purported post-BIT acts.

"421. Accordingly, there was no reason for Chile to make any arguments in this regard, and no way it could have predicted that the Tribunal would rule in Claimants' favor on the basis of events that occurred long after Mr. Pey's investment, which by the Tribunal's own reasoning had long before been definitively extinguished. It was only upon reviewing the Award that the Republic realized this fundamental inconsistency of the Tribunal's ruling, and that it had based its finding of responsibility on alleged post-1994 violations without identifying any investment still existing at the time of those acts. Claimants' waiver argument therefore fails.

"422. Claimants also now contend, in their Counter-Memorial, that despite the language of the treaty, and despite the Tribunal's acceptance that such language required an "existing" investment at the time of the BIT's entry into force, the BIT in fact does not require that the alleged investment still be in existence at the time of the BIT violation. They therefore apparently argue that it is possible to breach a particular BIT even if there is no investment in place that is subject to the BIT's protection. This is an unsustainable position, because it means that any investment made at any point in the past (no matter how long before the BIT's entry into force) somehow continues to enjoy protection under the BIT *ad aeternitatem*. As a matter of logic and common sense, this cannot be correct; more importantly for purposes of this annulment proceeding, and in particular of the question of manifest excess of powers, it is directly at odds with the actual treaty language. As the Tribunal noted, the BIT requires an "existing" investment at the time of the BIT's entry into force, and yet, it failed to identify any investment owned by Claimants that was still "existing" in 1994. This clear failure by the Tribunal to apply Articles 1(2) and 2(2) of the BIT was a manifest excess of powers, which compels annulment of the Award under Article 52(1)(b) of the ICSID Convention. [Soulignement et caractères italiques dans l'original]

"164. À l'appui de son affirmation selon laquelle le Tribunal n'a pas motivé ses conclusions sur ce point, le Chili déclare[102] :

485. The Tribunal also failed to state reasons on what the "existing investment" was; i.e. what investment Mr. Pey still had in Chile at the time the BIT entered into force and/or at the time the Republic undertook the challenged post-BIT acts. On this issue, the Tribunal reached the following conclusions in the Award: (1) Articles 1(2) and 2(2) of the BIT required that there be an *existing investment* by Mr. Pey in 1994, when the BIT entered into force; and (2) the El Clarín newspaper had been completely expropriated—and thus the relevant investment had become extinguished—by 1975 at the latest; (3) the expropriation was instantaneous, and thus contrary to Claimants' argument, it did not constitute a

violation that was still continuing at the time the BIT entered into force; and (4) the post-BIT acts by Chile that the Tribunal ultimately found to be treaty violations—Decision 43 and the alleged delay in local court proceedings regarding the Goss Machine—were completely different, and distinct from, the 1975 expropriation.

"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. Yet the Tribunal simply proceeded to assert jurisdiction without explaining its solution to the foregoing conundrum. It did not explain if it was basing its assertion of jurisdiction on some theory that the investment made in El Clarín was somehow a "continuing" one even though, as explained above, it had determined that the exprop[r]iation of El Clarín had been definitely completed and terminated no later than 1975. But on the other hand, the Tribunal also did not explain if it was basing its assertion of jurisdiction on the existence of a *different* investment; that is, some *other* investment by Mr. Pey or by the President Allende Foundation—aside from the long-extinguished *El Clarín* investment—that could have been deemed to exist in 1994, when the BIT entered into force, or after that, when Chile committed the post-BIT acts that the Tribunal found objectionable. Instead, the Tribunal simply assumed—without any explanation or reasoning—the existence of some investment: "En revanche, les dispositions de fond de l'API sont applicables ratione temporis à la violation résultant de la Décision n°43 et au déni de justice allégué par les demanderesse[s], ces actes étant post[é]rieurs à l'entrée en vigueur du traité."

"487. The Tribunal seemingly contented itself with noting that it had the authority to take into consideration pre-BIT events in order to give context to the post-BIT acts. However, this did not give the Tribunal the authority to elevate to the status of an "existing" investment one that, by the Tribunal's own finding, had been clearly extinguished long before the BIT's entry into force. [Caractères italiques dans l'original]." [Citations omisses] (…)

"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'API105.[63]

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 fin106[64]*, 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 alléguée107*[65]*.*

Ces principes ont été respectés par le Tribunal dans la section de la Sentence consacrée à l'application de l'API ratione temporis108.[66] *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****."*[67]

[End of quote from the Decision of the 1st *ad hoc* Committee, underlining added]

30. Indeed, in the original proceeding the State did not question the investment's <u>existence</u> (while contesting its status as "foreign" investment within the meaning of Article 2(2) of the BIT), as shown by:

- The letter from the Chilean Finance Minister to the ICSID Secretary-General of 30 November 1998:

  "Le demandeur lui-même a déclaré en des occasions réitérées qu'il n'avait jamais effectué de transferts de capitaux au Chili pour réaliser son investissement supposé. En effet, déjà dans sa demande d'arbitrage, présentée le 3 novembre 1997, il déclare que les fonds destinés à acquérir les 40.000 actions du "Consortium Publicitaire et Périodique S.A" furent remis au vendeur en Europe ; c'est-à-dire, il reconnait qu'il n'y a pas eu de transferts de capitaux au Chili pour effectuer cet investissement étranger (...).
  Nonobstant ce qui précède, le Centre a procédé à l'enregistrement [le 24-04-1998] d'une demande qui ne pouvait pas ni n'a pu accréditer avoir la qualité d'investissement étranger en accord avec la législation du pays récepteur, au cas présent le Chili, enfreignant en cela, à nouveau, l'Accord qui confère compétence au CIRDI pour connaître de ces controverses.

---

[63] 105 Voir Sentence, §§ 431-432
[64] 106 Voir Jan de Nul N.V. et Dredging International N.V. c. République arabe d'Égypte, Affaire CIRDI ARB/04/13, Décision sur la compétence en date du 16 juin 2006, § 135 [**document CL384**]
[65] 107 Voir Mondev International Ltd. c. les États-Unis d'Amérique, Affaire CIRDI ARB(AF)/99/2, Sentence en date du 11 octobre 2002, § 68 (ci-après "Sentence Mondev").
[66] 107 Voir Mondev International Ltd. c. les États-Unis d'Amérique, Affaire CIRDI ARB(AF)/99/2, Sentence en date du 11 octobre 2002, § 68 (ci-après "Sentence Mondev").
[67] § 186 of the Counter-Memorial objects to this confirmation by the first *ad hoc* Committee, ignoring the latter's rejection of Chile's contention – and as regards the proof of "injury" in the OA (see below section 5.5, in particular §§ 117-118) – to conclude, *contra rem iudicatam*, that: *"Of these three elements — 'violation', 'investment', and 'injury caused' — only the 'violation' element had been addressed in the un-annulled portion of the First Award (and, as the Resubmission Tribunal later observed, that part of the Award was 'Delphic'. (...) Accordingly, those issued needed to be adressed ab ovo in the Resubmission Proceeeding.*"

De l'information et des dires du demandeur lui-même, il découle que le différend se trouve manifestement en dehors de la juridiction du CIRDI, et selon le contenu de ce que stipule l'article 36 (3) de la Convention, il n'aurait pas dû être enregistré" [68].

- The Respondent's Memorial on jurisdiction of 1999:[69]

- The Chilean representative, on acknowledging on 6 May 2003 to the original Tribunal the invalidity of the confiscation of the assets of CPP SA and EPC Ltda and the State's duty to compensate the owners,[70] after recognising in June 2001:

  "dans l'hypothèse 'où le Chili serait condamné' sur le fond (par un Tribunal Arbitral CIRDI s'étant reconnu compétent), la conséquence pratique évidente pour le Chili, principale ou exclusive, ne pourrait être que, soit l'obligation de restituer les actions revendiquées à leurs propriétaires légitimes (c'est-à-dire une restitution en nature), soit, en cas d'impossibilité d'une 'restitutio in integrum', l'obligation d'indemniser"[71],

- The original Award, in pages 33 to 105.

31. The Counter-Memorial brushes aside these conclusions of the OA, confirmed by the first *ad hoc* Committee, thus ignoring the latter's rejection of Chile's contention – as with the conclusions concerning the fact that the Claimants had indeed produced proof of the "injury" caused by the breach of the BIT (see below, section 5.5 of this Rejoinder) – so as to conclude, contesting the OA, the Decision of the first *ad hoc* Committee and *contra rem iudicatam*, that:

"Of these three elements — 'violation', 'investment', and 'injury caused' — only the 'violation' element had been addressed in the un-annulled portion of the First Award [sic] *(and, as the Resubmission Tribunal later observed, that part of the Award was 'Delphic'. (...) Accordingly, those issues needed to be addressed ab ovo in the Resubmission Proceeding."*[72]

---

[68] **Document C348e**, pages 2 and 4: *"el propio solicitante ha declarado en reiteradas ocasiones que nunca ha efectuado transferencias de capital a Chile para realizar su supuesta inversión. En efecto, ya en su solicitud de Arbitraje, presentada el 3 de noviembre de 1997, declara que los fondos destinados a adquirir las 40.000 acciones del Consorcio Publicitario y Periodístico Sociedad Anónima* fueron entregados al vendedor en Europa*; es decir, reconoce que no hubo transferencias de capitales a Chile para efectuar esta ficticia inversión extranjera* (…). *No obstante lo anterior, el Centro procedió a registrar* [el 4-04-1998] *una solicitud que no pudo ni ha podido acreditar que tenía la calidad de inversión extranjera de acuerdo a la legislación del país receptor, en este caso Chile, infringiendo con ello, nuevamente, el Acuerdo que otorga competencia al CIADI para conocer de estas controversias. De la información y dichos del propio solicitante, se desprende que la diferencia se halla manifiestamente fuera de la jurisdicción del CIADI, y que al tenor de lo establecido en el Artículo 36 (3) del Convenio, no debió haberse registrado."*

[69] **Document RA-0057**, §§ 2.3, 2.4, 6.3.4.2. See also along the same lines the background of the Chilean government's reply to Mr Pey of 9 October 1997 (**document C357f**); the ICSID Secretary-General's letters to the Claimants concerning jurisdiction of 10 December 1997 (**document C351e**) and 12 February 1998 (**document 353a**), the reply by the latter of 19 December 1997 and 20, 23 and 30 February 1998 (**documents C352 to C356f**) regarding matters of jurisdiction tabled by the State.

[70] **Document C2**, OA, see §§ 665-674, 677, 678 and footnotes 617 and 623.

[71] **Document C30f**, Decision by the IT on the Claimants' request for provisional measures regarding Decision 43, § 63.

[72] See Counter-Memorial, § 186.

And indeed, these questions were reopened and revisited by the RT[73] in the RA, by surprise and contrary to *res judicata*, as the basis of its dispositive part. This constitutes one ground for annulment for excess of powers and a serious departure from a fundamental rule of procedure (infringement of *res judicata*, bias).

32. The RT, whose task was precisely to set the amount of damages, excluded from its jurisdiction the issues arising between the parties between 3 November 1997 and 8 May 2008, confining its purview to the matter submitted in the original Request of 3 November 1997 based on Article 5 of the BIT – already rejected by the IT for lack of jurisdiction *ratione temporis*, based on what was known at that time of the status of Decree No 165 in domestic law.

By limiting its jurisdiction to the date of 3 November 1997, the RA is contrary to:

1) what the OA determined and the first *ad hoc* Committee confirmed, namely the existence of an investment covered by the BIT when in 2002 the State adopted Decision 43, as witnessed by the IT's decision of 8 May 2002 asserting substantive jurisdiction:

"Étant donné les désaccords importants entre les Parties sur plusieurs questions de de fait et de droit, le Tribunal arbitral 'a besoin des informations les plus précises concernant les thèses juridiques énoncées par les Parties et les motifs à l'appui de ces thèses', en particulier sur la question fondamentale de l'existence d'un investissement conforme aux Convention CIRDI et le Traité hispano-chilien";[74]

2) dismissed what in the OA is the key aspect of the quantification of damages sustained by the Claimants, i.e. the possible equivalence of the amount of harm caused by the breaches of Article 4 of the BIT in 2000 and 2002 "*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*",[75] which equivalence was confirmed by the first *ad hoc* Committee in the particular circumstances of this case, in the framework of the BIT;

3) by removing the key point, i.e. the view expressly taken by the OS on the disputes arising in 2000 and 2002 and the correlative breaches of article 4, the RA removes the basis – the breach of the BIT in 2000 and 2002 – on which the Claimants place the equivalence in the calculation of the amount of harm caused by the breach of Article 4 and that which would have been caused by a breach of Article 5 of the BIT;

[73] See Memorial on Annulment of 27 April 2018, §§ 292-297.
[74] **Document CL402,** Decision of the original Tribunal of 8 May 2002 asserting substantive jurisdiction.
[75] **Document C20,** Decision of the first *ad hoc* Committee of 18 December 2012, § 266.

33. The RT, whose sole task was to establish the *quantum* of the compensation for damage caused by the breach of Article 4 of the BIT as of 28 April 2000, said:

- that for it, "*il est clair que la présente instance est le prolongement de l'arbitrage initial…"*[76],

- that "*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*"*"[77] [underlining added].

34. Yet the RA manifestly contradicts itself when it deems in § 216 that:

"*le champ de compétence de ce Tribunal (…) est limité, en vertu de l'article 52* (sic) *de la Convention CIRDI et de l'article 55* (sic) *du Règlement d'arbitrage du CIRDI, 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. 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."*

35. Beyond the manifest contradiction in reasons, this contention is also a blatent infringement:

- of the *res judicata* force of the OA, of which dispositive points 1 to 3 establish the Tribunal's jurisdiction on the basis, *inter alia*, of the State's recognition of the invalidity of the confiscations of the assets of CPP SA to the IT on 6 May 2003,[78]

- of Article 2(2) of the BIT, which gives the Arbitral Tribunal jurisdiction over "*investissements réalisés antérieurement à son entrée en vigueur et qui, selon la législation de la Partie contractante concernée, auraient la qualité d'investissement étranger*", as is our case,[79]

- of Article 10(1) of the BIT, which gives the Arbitral Tribunal jurisdiction to settle "*Toute controverse relative aux investissements, au sens du présent Traité,*" [80]

- is incompatible with the basis and dispositive parts of the OA and the Decision of the first *ad hoc* Committee, which established the Tribunal's jurisdiction over the issues arising after the BIT's entry into force on 29 March 1994, pursuant to

[76] **Document C9f**, RA, § 188.
[77] **Ibid.**, § 244.
[78] **Document C2**, PA, §§ 665-674, 677, 678 and footnotes 617 and 623.
[79] See **document C2,** OA, §§ 231, 560 and **document C20,** of the first *ad hoc* Committee, § 226.
[80] **Document C3**.

Articles 48(3)[81] and 52(4)[82] of the ICSID Convention and Article 10(5) of the BIT,
- is incompatible with Article 53(1) of the ICSID Convention, which provides that "*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.*"

- is incompatible with Arbitration Rule 55(3), which provides that "*If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled*"

- is also incompatible with the Claimants' claims to the RT, as summarised in § 55 of the RA:

"Les Demanderesses reconnaissent que les parties non annulées de la Sentence Initiale ont autorité de la chose jugée et qu'elles ne peuvent pas donner lieu à un nouvel examen, en particulier celles qui portent sur la compétence du Tribunal pour connaître du différend opposant les parties, et sur les violations par la Défenderesse de ses obligations aux termes du TBI. Les Demanderesses maintiennent toutefois que, dès lors qu'il ne s'agit pas de demandes nouvelles, l'introduction de nouvelles informations ou de nouveaux faits apparus après le prononcé de la Sentence ('intervening effects'*) est admissible"* [citations omitted]

36. By contrast, the reason for and meaning of the preliminary conclusion in § 216 of the RA lie in the State's contentions that the Decision of the first *ad hoc* Committee had rejected, on confirming the *res judicata* force of dispositive points 1 to 3 of the OA and the basis thereof, viz.:

Decision of the first *ad hoc* Committee:

"*3.* ***Défaut de motifs***

"204. Les principales questions soulevées par le Chili en ce qui concerne la demande fondée sur le "déni de justice "au regard de l'article 52(1)(e) sont celles de savoir si le Tribunal n'a pas indiqué les raisons pour lesquelles :

- *il a conclu que les Demanderesses avaient bien présenté la demande particulière fondée sur le "déni de justice "dont le Tribunal a jugé le Chili responsable (...) ; et*

- *il a conclu qu'il existait bien un "déni de justice "sur le seul fondement de la durée de la procédure judiciaire locale (...)*

"205. Le Chili soutient notamment, à l'appui de ce motif d'annulation, que :

[81] Article 48: "*The Award. (...) (3) The award shall deal with every question submitted to the Tribunal, and shall* ***state the reasons*** *upon which it is based*" [underlining added].
[82] Article 52(4): "*The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.*"

"494. In the end, and Claimants' protestations notwithstanding, the only real "reason" the Tribunal offered in its Award for its finding of a "denial of justice" was that seven years was too long to wait for a final merits decision. (…)

"495. Given the foregoing, on this point the Award again sets forth a stated "reason" that in fact does not amount to a reason at all within the meaning of Article 52(1)(e); insofar as it fails to articulate the totality of the premises that are necessary to lead to its conclusion. Due to the absence of reasons for its finding of denial of justice, the Award should be annulled. [Italics in the original]" [Citations omitted] (…)

"Analyse du Comité

"207. Le Comité est d'accord avec les Demanderesses. Le Tribunal a amplement motivé sa conclusion quant à l'existence d'un déni de justice, qu'il a développée longuement dans sa Sentence. La demande en annulation présentée par la Défenderesse sur le fondement de ce motif est par conséquent rejetée."

"E. Discrimination

"(1) Inobservation grave d'une règle fondamentale de procédure

"(i) Principe du contradictoire

"208. De la même façon que pour la demande fondée sur un prétendu "déni de justice ", la principale question soulevée par le Chili au regard de cet aspect de l'article 52(1)(d) est celle de savoir si les Demanderesses ont effectivement présenté la demande particulière fondée sur la discrimination dont le Tribunal a jugé le Chili responsable – dans ce cas, sur le fondement de l'article 4 de l'API Chili-Espagne – en raison de l'adoption par le Chili de la Décision n° 43.

209. En ce qui concerne la demande fondée sur la discrimination, le Chili soutient que, étant donné que cette demande n'a jamais été spécifiquement soumise par les Demanderesses, le Chili n'a jamais eu la possibilité de se défendre. Il fait valoir les arguments suivants :

"110. Although Claimants had asserted a claim for discrimination due to Decision 43 under Article 3 (the specific "discrimination" provision) and Article 5 (the expropriation provision) of the Chile-Spain BIT—all as part of Claimants' theory of a "continuing" expropriation—the Tribunal in the Award explicitly rejected all of Claimants' discrimination claims pursuant to Articles 3 and 5. However—and in direct contrast to the Tribunal's finding in the Decision on Provisional Measures that the execution of Decision 43 could *have no effect* on Claimants' rights under the BIT—the Tribunal found Chile liable under Article 4 (the fair and equitable treatment provision) for discrimination in connection with Decision 43.

"111. This finding of discrimination, which the Tribunal stated was based "aux termes de son appréciation des preuves et de son analyse juridique," rested on the fact that Chilean authorities had compensated as the owners of *El Clarín* the

successors of the four registered shareholders of CPP pursuant to an administrative proceeding in which Mr. Pey had knowingly and voluntarily waived his right to participate.

"112. As Chile explained in its Memorial, the Tribunal's "understanding of the evidence" and "legal analysis" was not, as required by the ICSID Convention and Arbitration Rules, based on any claim for discrimination actually asserted by Claimants under the fair and equitable treatment clause of the BIT. Claimants never asserted—either orally or in writing—any Decision 43-related, Article 4-based discrimination claim of the sort that formed the basis for the Award. [Caractères italiques dans l'original] (…)

"211. En bref, le Chili affirme que, chaque fois que les Demanderesses se sont référées à la Décision n° 43 dans des argumentations ultérieures, c'était toujours dans le cadre de demandes au titre de la confiscation." [Soulignement ajouté] (…)

"Analyse du Comité

215. Le Comité observe que le Tribunal fait référence dans sa Sentence aux positions des parties sur la demande fondée sur la discrimination. Pour ce qui est des Demanderesses, le Tribunal se réfère à leurs écritures du 11 septembre 2002 et du 23 février 2003 ainsi qu'à leurs plaidoiries lors de l'audience de janvier 2007. S'agissant de la Défenderesse, en ce qui concerne la Décision n° 43, le Tribunal ne mentionne que quelques remarques faites par le conseil de la République lors des audiences de 2003 et de 2007 ainsi qu'une page en tout dans le Mémoire d'incompétence de la Défenderesse du 20 juillet 1999 et dans le Contre-mémoire de la Défenderesse sur la compétence et le fond du 3 février 2003.

216. Comme expliqué ci-dessus dans le cadre de la demande fondée sur le déni de justice, le Comité considère que les Demanderesses ont présenté une demande fondée sur la discrimination en ce qui concerne la Décision n° 43. (...)"

[End of quote from the Decision of the first *ad hoc* Committee]

37. This contention involves interpreting the basis of the Claimants' claims as being "the confiscation" of 1975, which the OA and the first *ad hoc* Committee categorically rejected, yet Chile restated it to the RT,[83] which, infringing the *res judicata* of the OA and of the Decision of the first *ad hoc* Committee, accepts it in the basis for dispositive points 1 to 6, in particular as follows:

Resubmission Award:

a. "*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*

[83] See in **document C9f**, SR, in §§ 133, 138, 139, 140, 142, 145, 149, 150, 151, 154, 155, 164, 191, 193, 222, 232, 240, a generally inaccurate reference by the Respondent centred on the supposed "confiscation", in its words, in place of the lack of fair and equitable treatment, with denial of justice, asserted by the Claimants.

causalité (...) Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés."[84]

b. *"(..) 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. [Sic, toutes les prétentions et tous les argument des Demanderesses sont fondés sur la violation de l'API survenue le 28 avril 2000 avec la Décision nº 43 et le déni de justice qui lui est lié, voir *infra* les §§38, 39, 43-46, 115-122],

c. *"(...) Au cœur des objections de la Défenderesse figure l'affirmation réitérée que l'ensemble des arguments des Demanderesses, d'une manière ou d'une autre, représentent des tentatives de réintroduire leur demande initiale fondée sur la confiscation d'*El Clarin *(...),*[85]

d. "(*...) 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 ne pouvait pas être justifié ni en fait ni en droit, et était en tout état de cause formellement exclu par l'effet combiné de la Sentence Initiale et de la Décision sur l'annulation"*[86] [Sic, see 29 et seq. and *infra* section 4.1 and §§ 167-178, 189-195]

[End of quote from the RA]

***

4.1 Failure to implement Articles 2(2) and 10(4) of the BIT, Article 42(1) of the Convention, the *res judicata* of the OA and the Decision of the first *ad hoc* Committee relating to the Tribunal's jurisdiction *ratione temporis*

38. The jurisdiction *ratione temporis* of the Arbitral Tribunal is defined in Article 2 of the BIT as follows:

"Article 2. Soutien, admission *1. Chacune des Parties soutiendra, dans la mesure du possible, les investissements effectués dans son territoire par des investisseurs de l'autre Partie et admettra ses investissements conformément à ses dispositions légales.*

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*

[84] **Document C9f,** RA, §§ 232 *in fine* and 233.
[85] **Ibid,** § 222.
[86] **Document C9f,** RA, § 236 and 244.

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****.*

3. Il ne s'appliquera pas, néanmoins, aux controverses ou réclamations surgies ou résolues antérieurement à son entrée en vigueur." [Soulignement ajouté].

39. The OA, *res judicata*, interpreted this Article as is mandatory for the parties, the RT and this *ad hoc* Committee, viz.:

"§423. L'application dans le temps du traité soulève deux questions distinctes : celle de la compétence ratione temporis *du Tribunal arbitral saisi sur le fondement de l'API et celle de l'applicabilité* ratione temporis *des obligations de fond de l'API.*

"§428. *Le Tribunal ne pourra se déclarer compétent* ratione temporis *que si l'investissement des parties demanderesses est couvert par l'API au moment des faits litigieux et si le ou les différends invoqués sont eux-mêmes couverts par l'API.*

"§432. *Le seul objet de l'article 2.2 de l'API Espagne-Chili est de définir les investissements protégés par le traité. En l'occurrence, il ne fait pas de doute que les conditions posées par ce texte sont satisfaites. 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.*

"434. *L'article 2.3 de l'API prévoit que celui-ci* 'ne s'appliquera pas, néanmoins, aux controverses ou réclamations surgies ou résolues antérieurement à son entrée en vigueur'. *Le Tribunal ne pourra donc se déclarer compétent ratione temporis que s'il est en présence de* '*controverses'* ou de '*réclamations' survenues postérieurement à l'entrée en vigueur de l'API.*

"§436. *Il ressort en effet de l'examen des écritures que les parties ont fini par s'entendre sur la signification à donner au terme "réclamations ", équivalent du terme anglais claims, et correspondant ici à une demande formée par l'une des parties pour faire valoir ses droits. Le débat sur la définition du terme "controverses "doit en revanche être tranché: si le terme "controverses" est considéré par les deux parties comme synonyme de "différends ", les parties sont cependant en profond désaccord sur le sens et la portée qui doivent être conférés à ce terme*

"§438. *Pour la défenderesse, le seul différend qui puisse être identifié dans cette affaire est né bien avant l'entrée en vigueur de l'API. La défenderesse prétend en effet déduire des dispositions de l'API, et notamment de son article 10, que '*la controverse est un conflit ou différend juridique qui n'a pas besoin, selon le TBI, d'être présentée à une partie par l'autre partie*' ".*

40. The Chilean State asserted before the RT, for purposes of rebuttal, the same sense of the term "dispute" ("*controverse*") as it asserted, for purposes of affirmation, before the IT and the first *ad hoc* Committee, namely that the **disputes** relating to the claim for compensation for damage caused by the breach of the BIT, on 28 April 2000 and afterwards, are supposed to be a way of covertly introducing the fact of the seizure of

the investment in 1973 and its confiscation in 1975, as the RA approvingly states in the basis for its dispositive points 2 to 8:

§193: *"La Défenderesse, pour sa part, rejette le fondement de chacun des arguments ci-dessus, bien que pour des motifs différents dans chaque cas : en ce qui concerne la* fair market value *des biens saisis, la Défenderesse déclare qu'il ne s'agit ni plus, ni moins que d'un retour aux demandes fondées sur la confiscation qui ont été expressément rejetées par le Tribunal Initial car elles n'entraient pas dans son champ de compétence* ratione temporis *; en ce qui concerne l'argument subsidiaire fondé sur l'enrichissement sans cause, la Défenderesse réitère que celui-ci renvoie encore une fois à la confiscation initiale, bien qu'il soit fondé sur une théorie de 'confiscation continue', qui est également incompatible avec les portions non annulées de la Sentence Initiale ; et quant au préjudice moral, la Défenderesse avance que (…) l'argumentation (…) encore une fois* [a] *invoqué des liens avec la confiscation initiale)…",*

§222 : "(*…) Au cœur des objections de la Défenderesse figure l'affirmation réitérée que l'ensemble des arguments des Demanderesses, d'une manière ou d'une autre, représentent des tentatives de réintroduire leur demande initiale fondée sur la confiscation d'El Clarín."*

By accepting this contention of the State, constituting one of the bases for dispositive points 3 to 5 of the RA, the Award infringes the *res judicata* of the aforementioned conclusions of the OA and of the first *ad hoc* Committee:

Resubmission Award

§195 : constitue "*un obstacle insurmontable*" le "s*ouhait des Demanderesses de faire valoir maintenant un droit à des dommages-intérêts qui, par essence, est fondé sur cette dépossession initiale* [sic], *en recourant, à titre d'élément essentiel de sa demande, à la valeur des biens alors confisqués."*

[We may note that here the RA modifies the Claimants' *causa petendi* and identifies the initial date for estimating the amount of compensation with the date of establishment of jurisdiction.]

§240 : "(...) *la Défenderesse soutient que, quels que soient les mérites et les faiblesses des calculs particuliers de M. Saura* [l'expert des Demanderesses], *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. Une demande fondée sur la confiscation d'El Clarín et des actifs s'y rattachant est exclue, avec l'autorité de chose jugée, par la Sentence Initiale et la Décision sur l'annulation ; la seule compensation pouvant être accordée dans la présente procédure de nouvel examen est au titre des violations particulières établies par le paragraphe 2 du dispositif de la Sentence Initiale qui, comme l'a conclu le Tribunal ci-dessus, ne peut pas être utilisé comme un moyen détourné de réintroduire* [sic] *sous une autre forme la demande fondée sur l'expropriation qui a été rejetée."*

41. Yet the OA rejected, in particular on the basis of Article 2(2) of the BIT, the State's effort to confuse the dates of the facts occurring in 1973 and 1975, namely the seizure followed by the confiscation at the root of the dispute, both with the date on which the dispute arose – which in reality occurred after the BIT's entry into force – and with the date as of which the Tribunal could take information into consideration:

Original award:

*"§438. Pour la défenderesse, le seul différend qui puisse être identifié dans cette affaire est né bien avant l'entrée en vigueur de l'API. La défenderesse prétend en effet déduire des dispositions de l'API, et notamment de son article 10, que "*la controverse est un conflit ou différend juridique qui n'a pas besoin, selon le TBI, d'être présentée à une partie par l'autre partie "*.358[87] Cette interprétation serait confirmée par le procès-verbal des réunions techniques qui ont eu lieu entre les représentants du Chili et de l'Espagne les 29, 30 septembre et le 1er octobre 1998,359[88] à l'initiative du Chili, afin de préciser le sens et la portée de certaines dispositions de l'API.360[89] Selon la défenderesse, l'article 2.3 de l'API doit être compris comme excluant les controverses et les réclamations nées des actes qui se seraient produits avant l'entrée en vigueur de l'API.361[90] Or, en l'espèce, "*le différend juridique, objet du présent arbitrage, [serait] né le 10 février 1975 *", date à laquelle a été adopté le décret de confiscation des biens des sociétés CPP S.A. et EPC Ltda. Selon l'État défendeur, les demanderesses l'auraient elle-même admis en affirmant que "le différend juridique exposé ici découle directement de l'investissement de M. Victor Pey Casado, confisqué par le Décret N°165 du 10 février 1975 […] ".362[91]*

*"§439. (…) Les demanderesses contestent enfin "*la valeur *"du procès-verbal du 1er octobre 1998 invoqué par la défenderesse au motif que celui-ci serait contraire à l'article 10.6 de l'API368[92] et aurait été obtenu frauduleusement par les autorités chiliennes.369[93]*

"(b) Conclusions du Tribunal

---

[87] [358 Note de plaidoirie de l'État du Chili relative aux audiences des 29 et 30 octobre 2001, p. 72]

[88] [359 Le procès-verbal du 1er octobre 1998 contient une interprétation des termes de l'article 2.3 de l'API: "Les parties accordent que les mots ' controverse ' et ' réclamation ' ne sont pas synonymes, mais qu'ils définissent des situations différentes. Le mot 'controverse'" devra être interprété comme discussion ou conflits d'intérêts, ce qui laisse constance indubitable, que ce soit ou non produite l'action en réclamation. S'entend par 'réclamation' l'action ou l'effet de réclamer, ceci est, protester contre une chose, ou s'opposer à celle-ci de mode verbal ou écrit ".]

[89] [360 V. mémoire d'incompétence de la défenderesse du 20 juillet 1999, pp. 58-59 et la transcription de l'audience du 1er octobre 1998 en annexe 15 à ce mémoire. La défenderesse fait valoir notamment que son initiative est compatible avec l'article 10.6 de l'API puisqu'elle a pris contact le 25 août 1998 avec les autorités espagnoles pour solliciter une réunion relative à l'interprétation de l'API, avant la constitution du Tribunal au mois de septembre 1998 (v. mémoire en réplique sur l'incompétence du 27 décembre 1999, p. 77). Par ailleurs, le fait que Me Banderas, représentant du Chili dans la présente procédure, ait pu conduire la délégation chilienne présente aux réunions techniques des 29, 30 septembre et 1er octobre 1998 n'aurait rien de frauduleux puisque la conduite de ce type de négociation relève des fonctions habituelles de Me Banderas (v. mémoire en réplique sur l'incompétence du 27 décembre 1999, p. 78).]

[90] [361 V. contre-mémoire de la défenderesse du 3 février 2003, p. 144.]

[91] [362 Mémoire en réplique sur l'incompétence du 27 décembre 1999, p. 64. V. également note de plaidoirie de l'État du Chili relative aux audiences des 29 et 30 octobre 2001, pp. 74 et ss.]

[92] [368 V. réplique à la réponse soumise par la République du Chili au contre-mémoire réfutant le déclinatoire de compétence, du 7 février 2000, pp. 25-26.]

[93] [369 V. réplique à la réponse soumise par la République du Chili au contre-mémoire réfutant le déclinatoire de compétence, du 7 février 2000, pp. 26-27.]

*"§440. À titre préliminaire, le Tribunal entend se prononcer sur l'interprétation des termes de l'article 2.3 consignée dans le procès-verbal des réunions techniques des 29, 30 septembre et 1er octobre 1998 entre l'Espagne et le Chili, organisées à la demande de ce dernier. L'initiative de l'État défendeur, visant à organiser une rencontre entre les représentants des deux États parties au traité afin de s'entendre sur l'interprétation de certains de ses termes, est intervenue après l'introduction de la requête d'arbitrage (3 novembre 1997) et son enregistrement (20 avril 1998). Comme il a déjà été indiqué, il s'agit là d'un acte incompatible avec les dispositions de l'article 10.6 de l'API qui imposent aux États parties de s'abstenir "*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 *". Il est clair que l'interprétation de l'article 2.3 de l'API entre dans la catégorie des "*arguments concernant l'arbitrage *"échangés postérieurement à l'introduction de la procédure. En conséquence, le Tribunal ne tiendra pas compte de l'interprétation figurant dans le procès-verbal litigieux, sans pour autant préjuger du bien-fondé de cette dernière."*

"Nbp270 (...) 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."*

[End of quote from the OA]

42. The OA consequently concluded:

§446 : "(…) L*es demanderesses ont précisé à plusieurs reprises qu'il fallait distinguer le différend et les faits à l'origine du différend. Le Tribunal partage cette analyse. Comme l'a récemment rappelé le tribunal arbitral constitué dans l'affaire* Duke Energy, 'What is decisive of the Tribunal's jurisdiction *ratione temporis* is the point in time at which the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place'."

43. The First *ad hoc* Committee also rejected the State's effort to stop the Claimants from presenting these facts occurring in 1973, before the BIT's entry into force, for evaluating the amount of damages, though they could not present them for establishing jurisdiction – the latter being linked to facts subsequent to the BIT's entry into force on 29 March 1994:

Decision of the first *ad hoc* Committee: (...)

"§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[201][94]*,* ***les Demanderesses ont***

[94] [201 Voir C-Mém. Dem. Annul., § 613.] Il s'agit de la Duplique des Demanderesse du 28 février 2011 qui figure dans la document C40

soutenu, lors de l'audience de janvier 2007, que l'indemnisation due était équivalente à celle résultant de la confiscation [en 1975]***, 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*** [le 28 avril 2000]***, et il a accordé le montant fixé par la Décision n° 43."***[95]

§271 *in fine : "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."*

[Underlining and other emphasis added]

That is to say that the IT itself could legitimately choose to determine the *quantum* on the basis of objective elements provided that there were no contradictions and account was taken in its reasoning of the parties' positions. As Prof. Zacharias Douglas says:

Can a delay of five years in progressing a domestic adjudication, for instance, amount to a denial of justice? The answer must be that it depends on the substantive rights in play[96]*.* [Underlining added]

In this case the substantive right in play before the first Civil Court of Santiago since 4 October 1995 stemmed from the status as invalid public law, *ab initio*, of Decree 165 of 1975, which the judgment was bound to take note of pursuant to Article 4 of the Constitution of 1925 and Article 7 of the Constitution of 1980, the stalling of which judgment prevented the IT from taking it into account.

44. This interpretation of Article 2(2) of the BIT in the original award and in the Decision of the first *ad hoc* Committee is also applicable to the disputes arising between the parties after 28 April 2000 as to the amount of compensation claimed by the Claimants for the breach of Article 4 of the BIT as a result of Decision 43 being equivalent to the amount that would have resulted from applying the damage assessment methods established for breaches of Article 5 of the BIT on these same dates of 2000 and afterwards, as approved in §§ 266 and 271 of the Decision of the first *ad hoc* Committee, quoted above.

45. The only other interpretation to date by an Arbitral Tribunal of Article 2(2) of the Spain-Chile BIT was in the case brought by the Spanish company *Vieira* against the Chile.[97] Here the *ad hoc* Committee, like the first *ad hoc* Committee in this arbitration in 2012, noted that **facts occurring prior to the BIT could be presented**

[95] **Document C20,** Decision of the 1st *ad hoc* Committee of 18 December 2012, § 266.
[96] **Document C401**, Douglas (Z.), *International Responsibility For Domestic Adjudication: Denial Of Justice Deconstructed*. International and Comparative Law Quarterly, September 2014, page 4.
[97] **Document C217,** Decision of the 1st *ad hoc* Committee of 10 December 2010 in *Vieira v. le Chili*, ICSID No. ARB/04/7, rendered by Mr Christer Sóderlund and Profs. Piero Bernardini and Silva Romero. Mr Bernardini was also part of the *ad hoc* Committee that interpreted and applied the Spain-Chile BIT in the Decision of 18 December 2012 in *Pey Casado and President Allende Foundation v. Chile.*

for evaluating the amount of damages, though not for establishing jurisdiction – the latter being linked to facts subsequent to the BIT's entry into force.

The debate before the *ad hoc* Committee in the *Vieira* case (with the same counsels for Chile as in this proceeding), ran as follows:

"*§326. Ce que la Demanderesse* critique est le fait que le Tribunal ait soutenu que : "…si Vieira réclame le paiement de dommages et intérêts à partir de 1990 [avant l'entrée en vigueur de l'API Espagne-Chili] *il ne saurait qu'être conclu qu'en tout cas le fait illicite attribuable au CHILI a eu lieu à cette même date (…).*"[98]

The Decision of the *ad hoc* Committee in the *Vieira* case established a distinction when identifying the initial date for estimating the amount of compensation and the date for establishing jurisdiction:

"327. Il pourrait parfaitement être considéré que l'utilisation des faits présentés par une partie à une fin déterminée (des faits présentés pour évaluer les dommages et non pour invoquer la compétence) ne peuvent être utilisés par le Tribunal afin d'appuyer ses conclusions quant à la compétence (le fait que, dans la présente instance, la demande s'élèverait à des sommes qui ont été calculées par la Demanderesse sur la base de certaines activités à partir de 1990 ne paraît pas exclure le fait que les dommages aient été causés par des faits différents)."[99]

[Underlining added]

And as we have just seen, in the specific circumstances of our case, the Decision of the first *ad hoc* Committee also considered pursuant to Articles 2(2) and 2(3) of the BIT the Claimants' assertion regarding the equivalence of the amounts of damages for the breach as of 28 April 2000 of Article 4 (Fair and equitable treatment and denial of justice) or of Article 5 of the BIT.

So when in the resubmission proceeding the Claimants' experts, on estimating the fair market value of CPP SA at 8 May 2008,[100] took account of the investment's value on the eve of its seizure, they were not in any way saying that the Tribunal might have jurisdiction over facts occurring in 1973 (the violent seizure by insurgent troops) or in 1975 (the investment's confiscation by Decree 165).

---

[98] "§ 326. *Lo que la Demandante critica es que el Tribunal haya sostenido que: "…si Vieira reclama el pago de daños y perjuicios desde 1990 no puede sino concluirse que en todo caso el hecho ilícito atribuible a CHILE tuvo lugar en esa misma fecha (…).*"

[99] **Ibid,** § 327. *Podría perfectamente considerarse que el uso de hechos presentados por una parte para un efecto determinado (hechos presentados para evaluar los daños y no para invocar la jurisdicción) no pueden ser utilizados por el Tribunal para apoyar sus conclusiones en cuanto a la jurisdicción (el hecho de que, en esta instancia, la demanda se eleve a unas sumas que fueron calculadas por la Demandante sobre la base de ciertas anualidades a partir de 1990 no parecería excluir el hecho de que los daños hayan sido causados por distintos hechos).*

[100] **Document C9f**, SR, § 89: "[Les Demanderesses] *font valoir que, en l'espèce, les violations répétées commises par la Défenderesse jouent en faveur du choix de la date de la Sentence Initiale, soit le 8 mai 2008, comme date critique à laquelle doit être déterminée la fair market value des sociétés*".

46. Conclusion: the RA infringed the *res judicata* of the aforesaid conclusions of the OA and of the first *ad hoc* Committee, as well as Articles 2(2) and 4 of the BIT and 42(1) and 53(1) of the Convention, given that the basis for its dispositive points 3 to 7 is that the conclusion to be drawn from the fact that the *dies a quo* for the evaluation of damages was 10 September 1973 must be that the wrongful act attributable to the State, i.e. the acts in breach of Article 4 of the BIT, could only have taken place on that same date, not on 28 April 2000 and afterwards.

***

4.2 Failure to implement Articles 10(1) and 10(4) of the BIT, Article 42(1) of the Convention and the *res judicata* of the OA and the Decision of the first *ad hoc* Committee relating to the Tribunal's jurisdiction *ratione materiae*

47. Article 10(1) of the Spain-Chile BIT provides:

"*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."*

48. "*Toute controverse…*" "Any dispute" entails no other requirement than a link with the investment, as the Spain-Chile BIT protects both the investment and the investor (see arts. 4, 5, 6 and 7). In our case the notion of "dispute" in the Spain-Chile BIT was established in the OA with binding force for the parties.

For as the Arbitral Tribunal's jurisdiction *ratione materiae* is established in the dispositive part of the OA and in Articles 1(2) and 10(1) of the BIT and 25(1) of the ICSID Convention, the Claimants' wish to submit the determination of the amount of compensation for the harm sustained as of 28 April 2000 to arbitration should obligatorily have been respected by the RT and also by the Respondent State (*pacta sunt servanda*).

In the Resubmission Request of 18 June 2013[101] the Claimants said:

§50. "Ainsi à la question de savoir si les investissements réalisés par M. Pey avaient bénéficié d'un traitement juste et équitable, le Tribunal [initial] *a répondu par la négative aux motifs que (i) M. Pey avait démontré être le propriétaire des biens confisqués par les autorités militaires chiliennes, ce qui était d'ailleurs confirmé par un jugement interne du 29 mai 1995[48][102], (ii) les autorités chiliennes avaient admis à de nombreuses reprises leur intention de rétablir la légalité et de réparer les dommages causés aux victimes du*

[101] **Document C83**

[102] "48 Sentence, §§ 77, 159, 163, 210, 214, 215, 444. Il s'agit de la Décision de la 8ème Chambre Criminelle de Santiago de restituer à M. Victor Pey tous les titres de propriété de CPP S.A. (40.000), ainsi que les preuves de leur achat et du paiement [correspondant] en 1972, et d'autres documents justificatifs [relatifs] à son investissement au Chili (document nº 18 de la Requête d'arbitrage initiale)"

gouvernement militaire49[103], (iii) M. Pey n'a pas bénéficié de ce traitement, celui-ci voyant au contraire rejeter ses revendications50[104], (iv) la République du Chili a indemnisé d'autres personnes pour la confiscation illégale de ces biens alors qu'elles n'en étaient pas les propriétaires51.[105]"

In the Memorial of 27 June 2014:[106]

§225. *"Comme l'a souligné le Tribunal arbitral* [initial]*154[107], l'invalidité des confiscations et le devoir d'indemnisation corrélatif ont été clairement admis par la Défenderesse dans le cadre de la procédure arbitrale."*

In the Rejoinder of 9 January 2015:[108]

> §295. "Malgré la pertinence évidente de la décision, par laquelle le Tribunal initial a contraint l'État 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[109], la Défenderesse tente encore une fois de mettre en question ses obligations ex API."

§296. "Pour l'État du Chili, les investisseurs n'auraient droit à aucune compensation pour la violation de leurs droits. Cette position extrême, si elle était acceptée, aurait pour effet de vider la décision du Tribunal initial de tout sens."

In the hearings of April 2015:

"*Le Tribunal [initial] poursuit avec le paragraphe 667, 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 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 [mis pour préjudices] soufferts par des personnes pendant cette période'.[110]

(…)

---

[103] "49 Sentence, §§ 667 et 668"
[104] "50 Sentence, § 669"
[105] "51 Sentence, § 674"
[106] **Document C8**.
[107] "154. Document ND06, Sentence du 8 mai 2008, § 667."
[108] Document C40.
[109] "329. Comme noté par le Tribunal initial dans sa Sentence du 8 mai 2008, ¶ 668 - 9: '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 demanderesses'".
[110] **Document C43,** page 43, lines 12-20.

Par la suite, que fait le Tribunal initial ? Le Tribunal constate, qu'alors que le Chili s'est engagé dans un processus de réparation, les Demanderesses n'ont pas bénéficié de cette politique d'indemnisation. C'est ce qui ressort du paragraphe 669 de la Sentence.

Et c'est à partir de là que le Tribunal conclut que :

'Les Demanderesses ont subi un traitement discriminatoire et que cela constitue une violation au titre de l'article 4 du Traité de protection des investissements, qui garantit un traitement juste et équitable'.[111]

C'est donc bien le traitement différencié de M. Pey en tant qu'investissement étranger par rapport à d'autres personnes que le Tribunal vient sanctionner. Et c'est ce qui résulte également de la conclusion du Tribunal qui est le paragraphe 674, qui a été souvent cité aujourd'hui, mais qui revêt des informations très importantes et qui dit, je le rappelle encore une fois :

'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 les 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'.

Ce paragraphe 674 fait référence, bien sûr, d'une part à la Décision 43 -accorder des compensations à des personnes qui ne sont pas les propriétaires des biens- et, en même temps, paralyser les revendications de M. Pey -nous sommes là sur le déni de justice qui concerne la presse Goss, paralysie du jugement-, mais également rejet, rejeter les revendications de M. Pey –là on va dire un déni de justice plus large qui touche à l'intégralité de l'investissement de M. Pey.

Quand on lit ce paragraphe on comprend bien que la discrimination ne résulte pas dans le fait d'avoir refusé aux Demanderesses une indemnisation sur le fondement de 6 la loi de 1998, mais simplement d'avoir refusé d'indemniser les Demanderesses.

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 c'est que les biens concernés doivent bien faire l'objet d'une réparation. Les revendications étaient les mêmes, et ils ont été indemnisés.

Et ce que constate ce paragraphe est qu'il y a, encore une fois, un traitement différent réservé à M. Pey et aux Demanderesses."[112]

[End of quote from the hearings of April 2015 before the RT]

Yet it is well known that in international law that:

"*Il est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques.*

[111] **Ibid.**, page 44, lines 25-31.
[112] **Ibid**., page 44, lines 25-49, and page 45, lines 1-13.

Des déclarations de cette nature peuvent avoir et ont souvent un objet très précis. Quand l'État auteur de la déclaration entend être lié conformément à ces termes, cette intention confère à sa prise de position le caractère d'un engagement juridique, l'État intéressé étant désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration. Un engagement de cette nature, exprimé publiquement et dans l'intention de se lier, même hors du cadre de négociations internationales, a un effet obligatoire."[113]

In our case, the statement by the State's representative on 6 May 2003 was before the IT and constitutes one of the bases of the OA, with *res judicata* force, along with the State's assertion to the IT on 21 June 2002 as stressed by the first *ad hoc* Committee:

"Le Comité relève le paragraphe 63 de la Décision du Tribunal relative aux mesures conservatoires[114] :

63. S'agissant d'une décision visant des indemnisations, elle n'est de toute façon, comme indiqué plus haut, pas opposable aux Parties Demanderesses et, par conséquent, ne cause pas (au moins directement) de dommage à ces dernières. En serait-il autrement, ce dommage ne saurait être considéré par le Tribunal Arbitral comme irréparable dès lors que, ainsi que l'a observé avec raison la Partie Défenderesse, dans l'hypothèse 'où le Chili serait condamné' sur le fond (par un Tribunal Arbitral CIRDI s'étant reconnu compétent), la conséquence pratique évidente pour le Chili, principale ou exclusive, ne pourrait être que, soit l'obligation de restituer les actions revendiquées à leurs propriétaires légitimes (c'est-à-dire une restitution en nature), soit, en cas d'impossibilité d'une 'restitutio in integrum', l'obligation d'indemniser."[115]

49. The RT did not reply to these requests/conclusions, within sphere of its jurisdiction *ratione materiae*. It preferred in the RA to alter the *causa petendi* by attributing to the Claimants, radically *contra evidentiam*, the following conclusions:

"*[les Demanderesses] soutiennent à certains endroits que des éléments des parties non annulées de la Sentence Initiale doivent être réexaminées et modifiés par le présent Tribunal*"[116]

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. Chacune d'elles apparaît, sous diverses formes, dans les écritures des Demanderesses au cours de la présente procédure de nouvel examen."[117]

---

[113] **Documents CL140** et **CL141**, International Court of Justice, , *Nuclear Tests (Australia v. France),* judgment of 20 December 1974, ICJ Reports 1974, p. 267, para. 43, and *Nuclear Tests (New Zealand v. France),* judgment of 20 December 1974, ICJ Reports 1974, p. 472, para. 46.
[114] **Document C30f**, IT's Decision of 25 September 2001 on the request for provisional measures, §§ 63.
[115] **Document C20**, Decision of the 1st *ad hoc* Committee of 18 December 2012, § 242.
[116] **Document C9f**, RA, § 196.
[117] **Ibid.,** § 198: "*the First Tribunal was* ***wrong*** *in its finding that…*"; Spanish version: "*el Primer Tribunal* ***se equivocó*** *en su determinación de que…*" (underlining added)

The Claimants invite the Respondent State to substantiate before this present *ad hoc* Committee, in its Reply to the Rejoinder, a) where these "*certains endroits*" in the resubmission proceeding might be, where the Claimants are supposed to have asserted that "*des parties non annulées de la Sentence Initiale doivent être réexaminées et modifiés par le Tribunal*", and 2) where the Claimants are supposed to have stated that the IT wrongly concluded ("*conclu à tort*") anything.

Nowhere does the RA indicate where these places might be.

The Counter-Memorial seems to seek to remedy this with misrepresentations and quotes out of context:

1) in § 232, it addresses § 35 of the Resubmission Memorial of 27 June 2014,[118] which merely sums up the reasons in the Decision of the first *ad hoc* Committee[119] for annulling the OA's dispositive point 4, namely:

   *"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"* (underlining added)*;*

2) in § 230, §§ 17-54 of the Resubmission Memorial of 26 June 2014 substantiating the procedural fraud ("*truffa processuale*") which became apparent when in January 2011, and so after the OA, the Claimants received notice of the domestic judgment of 24 July 2008 and the State's acts *inaudita parte* which ensued, which the Claimants substantiated before the first *ad hoc* Committee and in their Memorial of 26 June 2014.[120]

50. These "conclusions" that the RA attributes to the Claimants are the product of a feat of imagination by the RT so as to base dispositive points 2 to 8 of its award on positions which the Claimants never in any way asserted in the resubmission proceeding, neither in their written submissions nor in the hearings, and which indeed they expressly ruled out:

- in the hearing of 13 April 2015:

"*Les Demanderesses proposent de ne pas modifier un iota, pas un iota, la partie non annulée de la Sentence. C'est res judicata"*[121],

[118] **Document C8**, Resubmission Memorial of 26 June 2014.
[119] **Document C20**, Decision of the 1st *ad hoc* Committee, § 266.
[120] **Document C83**, Resubmission Memorial of 18 June 2014, §§ 17-54.
[121] **Document C43,** page 173, pleading by Juan Garcés, line 22.

- in the Memorial of 18 June 2013:[122]

"32. Cette rétention [du Jugement interne]*, 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 nº 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."*

- In the Rejoinder of 9 January 2015:[123]

"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."* [Underlining added]

How are we to describe the fact that the RA justifies its dispositive part by attributing to the Claimants things that they never said?

51. Moreover, whereas the OA settled the dispute by applying relevant humanitarian law, in particular the American Convention on Human Rights and ECHR case law,[124] the RA fails to apply the law that should have been applied pursuant to Articles 1(2), 10(1) and 10(4) of the BIT, Articles 5 and 7 of the Chilean Constitution, conventional and customary law (including Articles 30, 31, 34, 36 and 38 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts) and Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and in particular:

(1) the American Convention on Human Rights, especially Articles 1(1);[125] 8(1)[126] – right to a fair trial and due process; 13[127] – freedom of expression; 24[128] – equality

[122] **Document C83.**
[123] **Document C40.**
[124] **Document C2**, Original Award, §§ 267, 269, 271, 313-315, 609, 610, 662, 665-674, footnote 580.
[125] Article 1: "1. Les États parties s'engagent à respecter les droits et libertés reconnus dans la présente Convention et à en garantir le libre et plein exercice à toute personne relevant de leur compétence, sans aucune distinction fondée sur la race, la couleur, le sexe, la langue, la religion, les opinions politiques ou autres, l'origine nationale ou sociale, la situation économique, la naissance ou toute autre condition sociale"
[126] Article 8: "1. Toute personne a droit à ce que sa cause soit entendue avec les garanties voulues, dans un délai raisonnable, par un juge ou un tribunal compétent, indépendant et impartial, établi antérieurement par la loi, qui (…) déterminera ses droits et obligations en matière civile ainsi que dans les domaines du travail, de la fiscalité, ou dans tout autre domaine"
[127] Article 13: "1.Toute personne a droit à la liberté (…) d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce,(…) que ce soit (…) par écrit, (…) ou par tout autre moyen de son choix. (…) 3. 3. La liberté d'expression ne peut être restreinte par des voies ou des moyens indirects, (…), ou par toute autre mesure visant à entraver la communication et la circulation des idées et des opinions."
[128] Article 24: "Toutes les personnes sont égales devant la loi. Par conséquent elles ont toutes droit à une protection égale de la loi, sans discrimination d'aucune sorte."

before the law; 25[129] – right to effective recourse; 21[130] - right of ownership; 63(1)[131] – right to full remedy;

(2) the International Covenant on Civil and Political Rights of 16 December 1966, especially Articles 2(3)[132] and 14(1)[133].

These international standards were invoked at the hearings of April 2015,[134] in the Rejoinder of 9 January 2015,[135] in the Memorial of 27 June 2014[136] and in the Resubmission Request of 18 June 2013.[137]

52. We recall that as regards directly and bindingly applicable Chilean law, Article 5 of Chile's Constitution gives human rights primacy over national sovereignty and domestic legislation:

"L'exercice de la souveraineté reconnaît comme limitation le respect des droits essentiels qui émanent de la nature humaine. C'est un devoir des organes de l'État de respecter et de promouvoir ces droits, garantis par la présente Constitution, de même que par les traités internationaux ratifiés par le Chili et qui se trouveraient en vigueur."[138]

---

[129] Article 25: "1.Toute personne a droit à un recours simple et rapide, ou à tout autre recours effectif devant les juges et tribunaux compétents, destiné à la protéger contre tous actes violant ses droits fondamentaux reconnus par la Constitution, par la loi ou par la présente Convention, alors même que ces violations auraient été commises par des personnes agissant dans l'exercice de fonctions officielles. 2. Les États parties s'engagent: a. garantir que l'autorité compétente prévue par le système juridique de l'État statuera sur les droits de toute personne qui introduit un tel recours; b. à accroître les possibilités de recours judiciaire; c. à garantir que les autorités compétentes exécuteront toute décision prononcée sur le recours"

[130] Article 21: "1. Toute personne a droit à l'usage et à la jouissance de ses biens. La loi peut subordonner cet usage et cette jouissance à l'intérêt social. 2. Nul ne peut être privé de ses biens, sauf sur paiement d'une juste indemnité, pour raisons d'intérêt public ou d'intérêt social, et dans les cas et selon les formes prévues par la loi"

[131] Article 63: "1. Lorsqu'elle reconnaît qu'un droit ou une liberté protégés par la présente Convention ont été violés, la Cour ordonnera que soit garantie à la partie lésée la jouissance du droit ou de la liberté enfreints. Elle ordonnera également, le cas échéant, la réparation des conséquences de la mesure ou de la situation à laquelle a donné lieu la violation de ces droits et le paiement d'une juste indemnité à la partie lésée"

[132] Article 2(3): "Les États parties au présent Pacte s'engagent à: a) Garantir que toute personne dont les droits et libertés reconnus dans le présent Pacte auront été violés disposera d'un recours utile, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles; b) Garantir que l'autorité compétente, judiciaire, administrative ou législative, ou toute autre autorité compétente selon la législation de l'État, statuera sur les droits de la personne qui forme le recours et développer les possibilités de recours juridictionnel; c) Garantir la bonne suite donnée par les autorités compétentes à tout recours qui aura été reconnu justifié"

[133] Article 14(1): "1. Tous sont égaux devant les tribunaux et les cours de justice. Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé (…) des contestations sur ses droits et obligations de caractère civil. (…)"

[134] **Document C43**, page 72, lines 12, 18; page 56, lines 1-15; page 177, lines 44-55, page 196, lines 38-42.

[135] **Document C40,** §§ 376, 338, 408-412, 481, 495; 122, 404, 323, 405.

[136] **Document C8,** §§ 142, 169-170, 181-186.

[137] **Document C83,** §§ 125, 128.

[138] **Document CL377**, Chilean Constitution, Article 5: "*El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes*."

53. In short, the RA infringed the *res judicata* of the SA, failed to apply the imperative rules cited by the Claimants, revisited the question of jurisdiction determined in the OA and, moreover:

a) infringed the *ultra petita* rule in § 216 by declining jurisdiction over all the disputes arising between the parties between 3 November 1997 and 8 May 2008, by stripping of practical effect the jurisdiction established in the OA's dispositive point 1 with *res judicata* force;

b) infringed the *infra petita* rule by excluding from the proceeding, and not settling in its dispositive part, one of the key aspects of the resubmission application, namely the dispute as to the amount of consequential damages caused by the Chilean State's continuous breach of its duty to guarantee fair and equitable treatment, since April 28 2000, with no denial of justice:

"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".[139]

54. The material consequences of these infringements are seriously detrimental to the Claimants, given, *inter alia*:

1. The RA's failure to take account of the evidence produced by the Claimants for quantifying the damage caused by the breaches of Article 4 of the BIT committed after 28 April 2000 and which the OA ordered the State to remedy,

2. The **denial of justice** vis-à-vis the Claimants constituted by the RA itself, as we will see below.

4.3 The RT denied justice on not exercising its jurisdiction: manifest excess of powers

55. Denial of justice is invoked here exceptionally as regards the application of the jurisdiction established in Article 10(3) of the BIT, i.e. the RT had the task of settling the Claimants' request of 18 June 2013.

56. In order for it to allow this claim of denial of justice, the *ad hoc* Committee is respectfully asked to consider two aspects. First, the fact that the RA makes it impossible, according to the State, to have recourse to a tribunal tasked with settling the claim and to exercise a right pursuant to an ICSID award that is *res judicata*, to

[139] **Document C9f**, SR, § 244.

the BIT and to international public policy; and second, the link connecting the dispute and this refrerral for annulment of the RA.

57. As the *ad hoc* Committee concluded in the *Vivendi I* case:

> *It is settled and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement of treaty and the ICSID Convention, read together, but also fails to exercise a jurisdiction which it possesses under those instruments. 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).*[140]*,*

Or the *ad hoc* Committee in *Luccheti v. Peru*:

> *Where a tribunal assumes jurisdiction in a matter for which it lacks competence under the relevant BIT, it exceeds its powers. The same is true in the inverse case where a tribunal refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT. The Ad hoc Committee considers that these situations are analogous and should be assessed according to the same legal standards.*[141]

58. The RT's jurisdiction to determine the amount of compensation payable by the State to the Claimants was established in the OA as *res judicata*.

59. The RA **denies justice** vis-à-vis the Claimants in that in § 198 it refers them to "*la sphère domestique*",[142] in which the investors undergo ongoing discrimination and denial of justice, and in § 216 it relinquishes the RT's jurisdiction over the issues arising between the parties between 3 November 1997 and 8 May 2008, whereas the RT knew well:

a) that, according to Article 10(2) of the BIT (the "fork in the road"), the Claimants' choice on 3 November 1997 to submit the parties' existing dispute to arbitration, and then that relating to Decision 43 in May 2000, is irreversible;

---

[140] **Document CL310**, *Compañia de Aguas del Aconquija S.A. et Vivendi Universal S.A. v. Argentina,* CIRDI Case No. ARB/97/3, Decision on the Request for Annulment, 3 July 2002, § 86.

[141] **Document C128**, *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, 5 September 2007, § 99.

[142] **Document C9f**, SR, § 198: "*si la prétendue nullité du Décret 165 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 (…)*."

b) that the Claimants had in November 2002 submitted the denial of justice linked to Decision 43[143] to arbitration – though this submission was not the choice provided in Article 10(2) of the BIT;[144] and

c) that the OA established the Tribunal's jurisdiction over the disputes arising between the parties after Decision 43, with *res judicata* force;

d) that the Claimants are experiencing an objective situation of ongoing discrimination and denial of justice by the State;

e) that on declining to exercise or refraining from exercising its jurisdiction *ratione temporis* and *ratione materiae*, the RT in its Award stripped the OA's dispositive points 1 to 3 and the BIT of all effect, given that the substantive rights provided therein become ineffective without access to international arbitration;

f) that international arbitration is the only mechanism provided in the BIT for the settlement of disputes concerning a failure to give fair and equitable treatment by the State vis-à-vis the Claimants, *res judicata*;

g) that the Respondent has not shown that there are any other competent and neutral forums in which the investors-plaintiffs could seek a determination of the amount of compensation that the OA found the State liable to pay for breaches of the BIT committed as of Decision 43 of 28 April 2000;

h) that the value of arbitration and bar on any recourse to the national courts are undeniably established, in principle;[145]

i) that the Respondent has not shown that the Claimants would be in a position to submit their claim to Chilean courts. Even if this were so, the claim would be time-barred according to the domestic judgment of 24 July 2008, with the case having been closed in 2009 without the Claimants being notified, constituting in itself a denial of justice;

j) that in any event, even if the State asserted a presumption of neutrality of its national courts towards the rights of the President Allende Foundation and Mr Pey Casado over their investment, this presumption would be inapplicable, for it would bind only the State, not the courts;

---

[143] **Document C2,** SI, § 643: "*Il s'agirait donc, selon cette argumentation, d'un déni de justice résultant non seulement de l'attitude des juridictions chiliennes sur le traitement de la question de la rotative Goss mais aussi, plus largement, de l'attitude générale des diverses autorités chiliennes à l'égard du CIRDI et à l'égard du présent Tribunal arbitral.*"

[144] **Document C2,** SI, § 642: "*les demanderesses, qui notent au passage que la "fork-in-the-road "et le déni de justice sont des notions incompatibles, soulignent que la 'répudiation du droit d'accès au Tribunal arbitral […]' est tout-à-fait différente des exceptions d'incompétence prévues dans le Règlement d'arbitrage et la Convention CIRDI".*

[145] **Document CL400**, see Schreuer (C.), "Interaction between International Tribunals and Domestic Courts", in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, edited by A. Rovine (2010), 71.

k) that in any case, as the OA established that the State is liable for discrimination and denial of justice owing to the behaviour of its courts, of its executive and of its body for prior monitoring of legality (the *Contraloría General de la República*), the OA casts doubt with *res judicata* effect on any neutrality or respect for fundamental rights in that country for the Claimants;

l) it is hard to see how a wait of more than 18 years with no prospect of compensation for the harm caused by Decision 43 and what followed, or of more than 10 years after the OA, could constitute anything other than a denial of justice.

60. What is at stake is the Claimants' right to international arbitration under the BIT, the only effective means of securing the compensation ordered by the OA. The Respondent's only declared interest is to prevent this, as shown by its representatives' statements before and after the RA.[146]

The consequences of the RT's failure to exercise its full jurisdiction to determine the amount of this compensation may be drastic, irreparable and equivalent to a consummate denial of justice.

61. Conclusion. These facts constitute, as regards dispositive points 2 to 7,

i. a manifest excess of powers in breach of Article 52(1)(b), consisting:

a) of not applying Articles 2(2), 2(3), (4), 10(1) and 10(3) of the BIT, nor Article 42(1) of the Convention, nor the other national and international legislation cited, to settling the question constituting the substance of the resubmission request, and in particular Chile's absolute infringement of the obligation to remedy the loss caused to the claimant investors for having failed in its duty to give fair and equitable treatment and not to deny justice.

b) of not exercising its full jurisdiction over all the issues arising after 28 April 2000, and over the quantification of the harm caused to the investors by the breaches of the BIT as of that date,

c) of reconsidering the portion of the OA which was *res judicata*. As stated by the *ad hoc* Committee in the *Vivendi I* case:

In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international

[146] See in **document C342** the reply from the Chilean Foreign Minister of 27 November 2017 to the question from the Chamber of Deputies of 20 nv 2017, **document C199**.

law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties[147]*,*

or that of the *Malaysian Historical Salvors* case:

"The Committee fully appreciates that the ground for annulment set forth in Article 52(1)(b) of the ICSID Convention specifies that "the Tribunal has manifestly exceeded its powers." It is its considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it "manifestly" did so (…)."[148]

ii. a <u>failure to state reasons</u> in breach of Article 52(1)(e) of the Convention and Rule 47(1)(i), consisting of not giving the reasons for which the RA did not in any way take into account:

1. the legal and factual difference existing between the date as of which the Tribunal's jurisdiction was established, i.e. 28 April 2000 – after the BIT's entry into force – and the initial date for estimating the amount of the investment's fair market value before the BIT's entry into force,

2. that the facts occurring prior to the BIT were liable to be presented for evaluating damages even though they could not be presented for establishing jurisdiction – for the latter springs from facts subsequent to the BIT's entry force as of 28 April 2000, and

3. that the amount of compensation claimed by the Claimants for the breach of Article 4 of the BIT after 28 April 2000 could be equivalent to the amount that would have resulted from a breach of Article 5 at this date in 2000 and afterwards in the manner approved in §§ 226 and 271 *in fine* of the Decision of the first *ad hoc* Committee, without this stemming at all from a covert reintroduction of the original claim,

iii. a serious departure from fundamental rules of procedure (bias; contradiction with the *res judicata* of the OA).

62. These conclusions are in keeping with the interpretation and application that the first *ad hoc* Committee and the parties made in this proceeding of the ground of "manifest excess of powers", viz.:

<u>Decision of the first *ad hoc* Committee</u>:

"65. (…) Comme l'ont expliqué les commentateurs, ce motif a pour objet de veiller, notamment, à ce que les tribunaux n'excèdent pas leur compétence, ni n'omettent

[147] **Document CL310**, *Compañia de Aguas del Aconquija S.A. et Vivendi Universal S.A. v. République Argentine,* ICSID Case No. ARB/97/3, Decision on the Application for Annulment, 3 juillet 2002, § 102 :
[148] **Document CL399**, *Malaysian Historical Salvors Sdn Bhd v. The Government of Malaysia*, ICSID Case No. Arb/05/10, Decision on the Application for Annulment, 16 avril 2009, §§ 80, 81.

d'appliquer la loi convenue entre les parties19.[149] *Indépendamment de la méthodologie suivie, un comité d'annulation doit examiner si le tribunal a excédé l'étendue de ses pouvoirs et si cet excès est manifeste. Comme l'a relevé le comité dans CDC c. Seychelles20*[150]*:*

A tribunal (1) must act in excess of its powers and (2) that excess must be 'manifest'. It is a dual requirement.

"66. En ce qui concerne l'excès de pouvoir, les deux parties conviennent qu'un tribunal peut excéder ses pouvoirs de deux manières : (i) en exerçant sa compétence de manière inappropriée (ou en n'exerçant pas sa compétence) ; et (ii) en n'appliquant pas le droit approprié21.[151] *S'agissant du défaut d'application du droit approprié, les parties conviennent qu'il existe une distinction importante entre le fait de ne pas appliquer le droit approprié, qui constitue un motif d'annulation, et une application incorrecte ou erronée de ce droit, qui ne constitue pas un motif d'annulation. Le Comité est d'accord. Comme l'a expliqué le comité ad hoc dans Amco I 22*[152] *:*

The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The *ad hoc* Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.

"67. Le Comité note que le Chili soutient également que, dans certaines circonstances, une mauvaise application du droit, même si le droit approprié a bien été identifié, peut être si grave qu'en pratique, elle constitue une inapplication du droit approprié23[153]*. À l'appui de sa prétention, le Chili se réfère aux décisions de plusieurs comités, notamment Soufraki, Amco II, Vivendi II, MTD et Sempra24*[154]

---

[149] 19 Voir Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2009) Art. 52, §§ 132 – 133 (ci-après "Commentaire Schreuer Art. 52 ").

[150] 20 CDC Group PLC c. Seychelles, Affaire CIRDI ARB/02/14, Décision sur l'annulation en date du 29 juin 2005, § 39 (ci-après "Décision CDC ").

[151] 21 Voir Mém. Déf. Annul., §§ 400-402; C-Mém. Dem. Annul., §§ 216 et 389

[152] 22 Amco Asia Corporation, Pan American Development Ltd. et P.T. Amco Indonesia c. la République d'Indonésie, Affaire CIRDI ARB/81/1, Décision sur l'annulation en date du 16 mai 1986, § 23 (ci-après "Décision Amco I ").

[153] 23Voir Tr. Annulation [1] [38:2-16] (Ang.); [16:31-37] (Fr.); [40:22-41:5] (Esp.)

[154] 24 Voir Rép. Déf. Annul., §§ 253-255; Hussein Nuaman Soufraki c. Emirats arabes unis, Affaire CIRDI ARB/02/7, Décision sur la demande en annulation en date du 5 juin 2007 (ci-après "Décision Soufraki "); Amco Asia Corporation, Pan American Development Ltd. et P.T. Amco Indonesia c. République d'Indonésie, Affaire CIRDI ARB/81/1, Seconde décision sur l'annulation en date du 17 décembre 1992 (ci-après "Décision Amco II "); MTD Equity Sdn. Bhd et MTD Chile S.A. c. République du Chili, Affaire CIRDI ARB/01/7, Décision sur l'annulation en date du 21 mars 2007 (ci-après "Décision MTD "); Sempra Energy International c. République argentine, Affaire CIRDI ARB/02/16, Décision sur l'annulation en date du 29 juin 2010; Compañía de Aguas del

"68. La Défenderesse avance également que la bonne application d'un droit national exige du tribunal qu'il interprète ce droit de la manière dont il est interprété par les tribunaux de la nation concernée, ainsi que par la doctrine et les autorités de cette nation25.[155] *À cet égard, le Comité est d'accord avec la nuance introduite par le Comité ad hoc dans Soufraki26*[156] *:*

It is the view of the Committee that the Tribunal had to strive to apply the law as interpreted by the State's highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities. This does not mean that, if an ICSID tribunal commits errors in the interpretation or application of the law, while in the process of striving to apply the relevant law in good faith, those errors would necessarily constitute a ground for annulment.

"70. Le Comité est d'accord avec la Défenderesse sur le fait qu'une argumentation et une analyse approfondies n'excluent pas la possibilité de conclure qu'il existe un excès de pouvoir manifeste, dès lors qu'il est suffisamment clair et grave. En outre, le Comité est de l'avis qu'il doit exercer un contrôle du caractère soutenable de l'approche du tribunal. Il est d'accord avec le comité dans Klöckner I29[157] *:*

It is possible to have different opinions on these delicate questions, or even, as do the Applicant for Annulment or the Dissenting Opinion, to consider the Tribunal's answers to them not very convincing, or inadequate. But since the answers seem tenable and not arbitrary, they do not constitute the manifest excess of powers which alone would justify annulment under Article 52(1)(b). In any case, the doubt or uncertainty that may have persisted in this regard throughout the long preceding analysis should be resolved "*in favorem validitatis sententiae"* and lead to rejection of the alleged complaint*."*

[End of quote from the Decision of the first *ad hoc* Committee]

63. One of the effects of the excess of powers by the RT has had consequences, to use Sir Franklin Berman's words, *mutatis mutandis*, which might be applicable to the treatment of the Claimants' claims in this case, namely conclusions *ex cathedra*, the lack of any reasonable or verifiable fact-finding process, which the RA substituted with finding nonexistent facts and the attribution to the Claimants of inaccurate, imaginary claims or statements:

Instead, more or less all that the reader finds (…), is the ex-cathedra assertion (…) that what the Tribunal has to determine is whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute. No authority is given for this proposition arising out of the BIT itself; (…).

But for me the question does not stop there, the crucial issue being, not whether the parties had adequate opportunity to advance their factual cases, but what steps the Tribunal took to evaluate them, given that (as indicated) they became a 'crucial element' in its decision. To

---

Aconquija S.A. et Vivendi Universal c. République argentine, Affaire CIRDI ARB/97/3, Seconde décision sur l'annulation en date du 10 août 2010.

[155] 25 Voir Mém. Déf. Annul., §§ 415-418

[156] 26 Décision Soufraki, § 97.

[157] 29 Klöckner Industrie-Anlagen GmbH et autres c. la République unie du Cameroun et Société Camerounaise des Engrais S.A., Affaire CIRDI ARB/81/2, Décision sur l'annulation en date du 3 mai 1985, § 52(e) (ci-après "Décision Klöckner I ").

my mind, it is inescapable that every 'crucial element' in an ICSID Tribunal's decision has to be the subject of a finding by the Tribunal; that, if the element is a factual element which is in dispute between the parties, the finding has to be the result of a proper fact-finding procedure; and that the elements and steps in this procedure must be spelled out in the Award. When one looks at the text of the Award, however, all that can be discovered (the key passages are at paragraphs 51-53) is two paragraphs summarizing the recitals whose bona fides the Claimant was challenging, followed without a break by the conclusion (…).

The only conclusion I can draw is that the Tribunal simply failed to put to the proof by any recognized fact-finding process these factual assertions by the Respondent, and the challenge to them by the Claimant, and that this constitutes in the circumstances (i.e. because the facts in issue became a 'critical element' in the Award) a "serious departure from a fundamental rule of procedure" within the meaning of Article 52(1)(d) of the Washington Convention. (…)

But if particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved? [158]

***

5. THE RA DEEMED ALL OF THE CLAIMANTS' CLAIMS TO BE INADMISSIBLE. SERIOUS DEPARTURE FROM FUNDAMENTAL RULES OF PROCEDURE, MANIFEST EXCESS OF POWERS AND CONTRADICTORY REASONS

64. §§ 193 to 196 of the RA analyse:

" [1] ce qui constitue des objections à la recevabilité de l'ensemble des principales demandes présentées par les Demanderesses dans leurs conclusions, ce qu'il convient donc de déterminer en premier lieu, avant de passer à l'examen - qu'il pourrait être nécessaire de faire - de [2] la manière selon laquelle les Demanderesses ont elles-mêmes quantifié ces demandes" (*§194)*

Following the Respondent's objections, the RA concluded that they were inadmissible owing to the:

"*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*" (§195).

What words are there to describe this justification of the RA's dispositive part by saying that the Claimants base their right to compensation on the dispossession of

[158] **Document CL212**, *Industria Nacional de Alimentos, S.A. et al. v. Peru*, ICSID Case No. ARB/03/4, Annulment Proceeding, Decision, 5 September 2005, dissenting opinion of Sir Franklin Berman, §§ 14-17.

1973, whereas they base it, and substantiate it, on the breaches of the BIT committed in 2000 as established in the OA?

65. This basis of the RA's dispositive part:

a. is manifestly arbitrary, and has had serious consequences for the Claimants, who, in the proceeding before the RT, neither asserted nor gave anyone to understand at any time that their right to compensation established in the OA was based on the "initial dispossession", and never ceased to substantiate its basis on the breaches of the BIT occurring as of Decision 43 of 28 April 2000 and the associated denial of justice, which are *res judicata*;

b. infringes the *res judicata* of the OA[159] and the Decision of the first *ad hoc* Committee, which had rejected Chile's wish to identify the event occurring prior to the BIT's entry into force, and at the root of the dispute, with the date on which the dispute arose and/or of the breach of the BIT on 28 April 2000:

Original award: formulation of the Respondent's contention:

§438. "*Pour la défenderesse, le seul différend qui puisse être identifié dans cette affaire est né bien avant l'entrée en vigueur de l'API. La défenderesse prétend en effet déduire des dispositions de l'API, et notamment de son article 10, que* "la controverse est un conflit ou différend juridique qui n'a pas besoin, selon le TBI, d'être présentée à une partie par l'autre partie ".

Yet after the dismissal of this contention in the OA had become *res judicata* with the Decision of the first *ad hoc* Committee (see §§ 38-46 above), the RA took an opposing view, in that it deemed, without stating any reason compatible with Article 2(2) of the BIT,[160] with the OA or with the Decision of the first *ad hoc* Committee, that the Claimants were debarred from basing the amount of *restitutio in integrum* on the investment's fair market value at 8 May 2008, without this implying any assimilation of the date of the harm (Decision 43 of 28 April 2000 and afterwards) with the date of the investment's seizure, on 11 September 1973.

66. The Chilean State made this same claim to the first *ad hoc* Committee in seeking the annulment of the whole OA, and the *ad hoc* Committee dismissed it:

The Respondent State's proposal to the first *ad hoc* Committee:

"(…) Bien que la Demande complémentaire des Demanderesses en date du 4 novembre 2002 fût relative à la rotative Goss, le Chili soutient qu'il s'agissait uniquement d'une

[159] **Document C2**, §§ 464, 623, 674, 679.

[160] Article 2(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*" (underlining added)

demande en restitution de la rotative ou en indemnisation ***au titre de sa confiscation*** [en 1975]. *(...) le conseil du Chili a résumé l'argument dans les termes suivants : 'it [Claimants' Ancillary Request] does refer to the denial of justice, it does refer to the Goss machine, but it does not refer to the basis on which the Tribunal ruled against Chile, which was the delay […]. [T]hey never articulated any denial of justice claim under international law as a free-standing claim.' En résumé, selon le Chili, lorsque les Demanderesses ont fait référence à une demande fondée sur le déni de justice pour la rotative Goss dans leurs écritures ultérieures,* ***c'était toujours dans le cadre de demandes fondées sur une confiscation****."*[161] [Underlining added]

Decision on this point by the first *ad hoc* Committee dismissing the State's contention:

"§186. Dans la Sentence [initiale]*, le Tribunal résume bien les positions des parties. En ce qui concerne les Demanderesses, il renvoie à leurs écritures du 11 septembre 2002*[162]*,* ***du 4 novembre 2002***[163] *et du 23 février 2003*[164] *ainsi qu'à leurs plaidoiries lors de l'audience de janvier 2007*[165]*. (...)."*

"§187. Après avoir examiné les arguments des parties et les paragraphes pertinents de la Sentence, ***le Comité conclut que les Demanderesses ont bien présenté au Tribunal une demande fondée sur le déni de justice en ce qui concerne la rotative Goss****"*[166] [tout autant qu'en ce qui concerne la Décision 43] [Underlining added],

5.1 "One of the core paragraphs in the 2016 Award", § 198 of the RA

67. The Memorial on Annulment of 27 April 2018 substantiated the need for the RA to be annulled in its entirety given that the Tribunal's refusal to exercise its jurisdiction is characterised by a failure to state reasons and an excess of powers in § 198.[167]

The Counter-Memorial (§§ 229-233) countered these reasonings with two "conclusions that the Claimants seek to draw" from the fact that "Decree No. 165 never constituted (for them) a valid legal act".

68. Yet the rejection of the *res judicata* of the OA and of the first *ad hoc* Committee's Decision reappear precisely in § 198 of the RA, which deems all of the main claims inadmissible owing to their "difficulty" and to the "conclusions which the Claimants seek to draw" as set out in § 198, namely:

§ 198 identifies the difficulty as follows:

---

[161] **Document C15**, Decision of the 1st *ad hoc* Committee of 18 December 2012, § 178, citations omitted.
[162] **Document C46.**
[163] **Document C249f.**
[164] **Document C272.**
[165] **Documents C311** and **C312.**
[166] **Document C15**, §§ 180-187, citations omitted.
[167] Memorial on Annulment, §§ 687-696.

That "*le Décret n° 165 n'a jamais (selon elles) constitué un acte juridique valable*",

and the conclusions that the Claimants seek, according to the RA, to draw:

a) "*que le Tribunal Initial a conclu **à tort** que la confiscation était exclue ratione temporis du champ d'application du TBI"* [underlining added],

b) "*ce qui a constitué en fait (si non dans la forme) la confiscation est intervenue avec la Décision n° 43* (…)"[168]

The arbitrary nature and excess of powers involved in this "difficulty" and these two "conclusions" are readily identifiable, as we will see below.

1. "*Le Décret n° 165 n'a jamais (selon elles) constitué un acte juridique valable*"

69. According to § 198, the difficulty in order for the main claims to be admissible is that "Decree No. 165 never (in their view) constituted a valid legal act".

Yet even if the Judgment of 24 July 2008 establishing that decree's invalidity had not been rendered, as substantiated in the Memorial of 27 April 2018,[169] the RT had jurisdiction to set the amount of compensation in line with the OA's conclusions, which are *res judicata*, notably:

i. that on 29 May 1995 a Chilean court recognised Mr Pey's ownership of all the shares of CPP SA;[170]

ii. that this investment – and the inherent right to pursue any remedy attached to it – is covered by Articles 1 and 2(2) of the BIT, according to the OA;[171]

iii. that following Decision 43 of 28 April 2000, the State compensated not the Claimants but rather third parties, who are not the owners of the CPP SA shares;[172]

iv. that in 2001 the Chilean State acknowledged its responsibility to the OA as follows:

*"**dans l'hypothèse 'où le Chili serait condamné' sur le fond** (par un Tribunal Arbitral CIRDI s'étant reconnu compétent), **la conséquence pratique évidente pour***

[168] The RT's decision of 6 October 2017 (**document C39bis**) agreed to rectify § 198 as proposed by chilee), after the Claimants, in their Request for correction of errors of 27-10-2016, **document C126)**, viz. that "*La Défenderesse convient que la référence à la Décision n° 43 est erronée et que la référence exacte aurait dû renvoyer au "Décret n° 165*". Decision of the RT (**document C584**): "*Le Tribunal reconnaît que la référence à la Décision n° 43 qui figure dans la dernière phrase du paragraphe 198 était erronée et qu'il entendait bien faire référence au Décret n° 165. Il s'agit manifestement d'une simple erreur matérielle, qui sera donc corrigée en remplaçant les mots "de la Décision n° 43 "par "du Décret n° 165.*"
[169] Claimants' Memorial on Annulment, §§ 321-322.
[170] **Document C2** RA, § 666.
[171] **Ibid.,** §§ 411, 432.
[172] **Ibid.**, RA, § 674.

le Chili, principale ou exclusive, ne pourrait être que, soit *l'obligation de restituer les actions revendiquées à leurs propriétaires légitimes (c'est-à-dire une restitution en nature), soit, en cas d'impossibilité d'une "**restitutio in integrum** ", **l'obligation d'indemniser**"*[173] [on peut difficilement reconnaître plus clairement par l'État du Chili l'existence en 2001 d'un investissement dans CPP S.A. et EPC Ltée.]*;*

v. that on 8 May 2003 the State recognised before the IT the invalidity of the confiscation of assets under the military dictatorship ordered by the ill-famed Decree-Law 77 of 1973, and the duty to compensate the harm sustained by their owners;[174]

vi. that the State did not fulfil its duty to give fair and equitable treatment and not to deny justice;[175]

vii. that the Claimants' right to compensation was established on incontestable terms in the OA (dispositive points 1 to 3) on this basis, in the absence of any judgment on the merits from the First Civil Court of Santiago;

viii. that the duty to guarantee fair and equitable treatment of the Claimants and their right to be compensated by Chile as of 8 May 2008 (dispositive points 1 to 3 of the OA)[176] were not respected by the State, as no compensation was given for the harm sustained.

70. The RT, whose task was to continue that of the IT following the partial annulment, had precisely the same jurisdiction as the IT to determine the amount of compensation, on the sole basis of the Award of 8 May 2008, even if the domestic Judgment of 24 July 2008 had not existed, given that the OA's dispositive points 1 to 3 are based on the State's categorical recognition in 2003 of the Decree's invalidity.[177]

1.1 In this regard the RT committed a manifest excess of powers by not exercising its jurisdiction to determine the amount of compensation on the basis of the RA.

5.1.1 The RA is grounded on the attribution to the Claimants of nonexistent "conclusions"

71. The RA moreover makes a serious departure from fundamental rules of procedure, as shown in §§ 196 and 198, and as will be substantiated below.

72. Firstly, in § 196 the RA asserts in an arbitrary and biased way:

---

[173] **Document C30**, IT's Decision of 25 September 2001 on Claimants' proposal for provisional measures regarding Decision 43, § 63.
[174] **Ibid.,** §§ 667, 668.
[175] **Ibid.**, footnote 409 and §§ 78, 459, 669-674.
[176] **Ibid.**, ruling that the Claimants are entitled to compensation for breaches of Article 4 since May 2000 (§§ 611-674 and dispositive points 1 to 3).
[177] **Document C2,** OA, §§ 667, 668.

1. that the Claimants "*soutiennent à certains endroits que des éléments des parties non annulées de la Sentence Initiale doivent être réexaminés et modifiés par le présent Tribunal*" – this is untrue, and the RA does not identify (and for good reason) any of these "*endroits*", (and what words could describe this justification of the award's dispositive part by saying that the Claimants assert what they never asserted?),

2. that "*selon les Demanderesses, si elles avaient été en mesure de faire valoir cet argument* [la nullité *ex tun*c du Décret nº 165]*, 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*" [underlining added].

   As to the wholly fabricated reasoning attributed to the Claimants, it is inaccurate, as the Claimants never asserted to the resubmission Tribunal that the confiscation was consummated "several years later" (at the time of Decision 43, see RA § 198), and the RT could naturally not point to any submissions where this had been said (once again, what words may describe this justification of the dispositive part by attributing to Claimants things they never asserted?)

3. "*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 procedure*" – this also is untrue. As the Claimants never asserted to the RT the premise that the confiscation "was consummated only several years later" (with Decision 43), the reasoning which the RA peremptorily attributes to the Claimants is pure fabrication.

Then, in § 198, the two "conclusions" which, according to the RA, the Claimants seeks to draw, and whose inadmissible character led the RT to dismiss the Claimants' main claims, are also wholly invented in the RA, namely:

- "*la première… que le Tribunal Initial a conclu* ***à tort*** *que la confiscation était exclue ratione temporis du champ d'application du TBI*",

- "*la seconde... que* ***ce qui a constitué*** *en fait (si non dans la forme)* ***la confiscation est intervenu avec la Décision n° 43*** (…) *la confiscation effective n'est intervenue qu'avec la Décision n° 43"* [underlining added].

Yet, like the reasoning described above, based on premises attributed by the RA to the Claimants, these "conclusions" are nowhere to be found in the Claimants' written or oral submissions to the RT, for they never claimed to that Tribunal any such

confiscation by Decision 43 (yet again, what words can describe this justification of the dispositive part by attributing to Claimants what they never said?)

What they did say is what the OA affirmed and the first *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".*[178]

Nowhere in the Claimants' submissions filed "*au cours de la présente procédure de nouvel examen*"[179] will we find – whether or not based on a reasoning involving a subsequent consummation of the confiscation, as described in the RA – of either of these "conclusions" mentioned by the RT in its RA. The Claimants here[180] reiterate their invitation to the Chilean State to identify in its rebuttal of 25 January 2018 these "*certains endroits*".

73. This manipulation of the Claimants' submissions, this attribution to them of nonexistent reasonings and claims, thus constitutes the basis of § 198 and of its logical consequence appearing in dispositive points 2 to 6, given that the RA concludes there that the Claimants' main claims were inadmissible despite the fact that the OA's conclusions, *res judicata*, made it mandatory for the RT to determine the amount of compensation **even if the domestic Judgment of 24 July 2008 had not existed**, as indicated above (see §§ 30, 35, 48, 53, 69 *supra*), and concluded by the OA, *res judicata*:

> *"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**".* [Emphasis added]

5.1.2 § 198 openly contradicts the original Award

74. This misapprehension of the Claimants' arguments is so flagrant and the contradictions with the OA in this paragraph are so patent that in October 2016 the Claimants requested the reconstitution of the RT in order to submit to it that § 198 could be a material error and to ask it to delete it:[181]

---

[178] **Document C20**, Decision of the 1st *ad hoc* Committee of 18 December 2012, § 233.
[179] **Document C9**, RA, § 198.
[180] See § 49 *supra.*
[181] **Document C126**, Request of 27 October 2016 on correction of material errors in the OA, §§ 3-11.

"***Erreur nº 1***

"3. *Les Demanderesses signalent une erreur –**la phrase*** **"la prétendue nullité de la Décision n° 43 "**- *figurant dans le paragraphe final du §198 de la Sentence de 2016 :*

"Le Tribunal terminera avec une dernière observation avant de passer à un autre sujet: 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 *"(soulignement ajouté).*

"4. "La Décision nº 43 a été édictée par le Ministère des Biens Nationaux le 28 avril 2000 et a accordé des compensations pécuniaires à des tiers non propriétaires de CPP S.A. et EPC Ltée.

"5. La cause, l'objet, la finalité de la Décision nº 43 dans le §198 de la Sentence arbitrale du 16 septembre 2016 ont un rapport direct avec les points 2, 3, 4, 5 du Dispositif (voir les §§14, 18, 21, 77, 78, 82-85, 93, 94, 153-157,198, 220, 222-240). La non correction de l'erreur dans le §198 peut donc avoir des conséquences pratiques importantes aux effets de l'interprétation ou exécution de cette Sentence.

"6. Or, la Sentence initiale du 8 mai 2008[182] *démontre que, malgré leurs efforts pour amener l'État du Chili au moins à surseoir à la prise de cette Décision nº 43*[183]*, puis à son exécution, l'ensemble a été confirmé par toutes les instances des juridictions chiliennes, comme on peut le lire dans la Sentence arbitrale de 2008 :*

> 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 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,

---

[182] 2 Sentence arbitrale du 8 mai 2008, Document ND06.

[183] See IT's Decision of 25 September 2001 on the request for provisional measures, pages 570, 58 and §§ 28, 61, 67, **document C30f.**

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 2001.3[184]

"7. Ainsi, à l'évidence, le sujet d'une prétendue ***nullité de la Décision n° 43 au regard du droit chilien*** *de la Décision n° 43, ne figure pas dans la partie de la Sentence initiale de 2008 ayant l'autorité de la chose jugée. La propriété de l'investissement par les investisseurs espagnols, que ce soit en 1972 (achat de 100% des actions de CPP S.A. par M. Pey), en 1990 (cession de 90% des actions à la Fondation), en 1995 (décision de la justice chilienne restituant le 100% des titres de propriété de CPP S.A. à M. Pey), en 2000 et 2004 (introduction de la demande complémentaire pour déni de justice), a été statuée par le Tribunal arbitral initial qui, dans sa Sentence, a rejeté la totalité des exceptions présentées par la République du Chili prétendant que les propriétaires de l'investissement ne seraient pas les Demanderesses mais les bénéficiaires de la Décision 43, et a prononcé, avec l'autorité de la chose jugée, les points 1, 2 et 3 du Dispositif, dont les fondements sont, entre autres, les paragraphes*

*"*180. Le Tribunal, dans l'exercice de son pouvoir d'appréciation des preuves, est parvenu à la conclusion que M. Pey Casado a acheté l'intégralité des actions de la société CPP S.A. au cours de l'année 1972*",*

"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 *[le Tribunal]* détenait, reconnaissant par là même que M. Pey Casado était effectivement l'acquéreur et le propriétaire des actions" *(soulignement ajouté)*.

"520. Le Tribunal arbitral ayant constaté que, contrairement à la thèse de la défenderesse, M. Pey Casado avait bien établi son titre de propriété, il est superflu de rouvrir ici cette discussion ",

"525. De l'avis du Tribunal arbitral, la Fondation a démontré qu'elle était en possession de 90% des actions de CPP S.A., qui lui ont été transmises par M. Pey Casado au moyen d'écritures passées entre **le 6 octobre 1989 et le 27 mai 1990**. Cette transmission a été parfaite à la date de l'inscription de cette dernière au Registre des Fondations du Ministère espagnol de la Culture, **le 27 avril 1990**" *(soulignement ajouté)*.

"8. *La Sentence initiale de 2008 a déclaré que la Décision n° 43 du 28 avril 2008 constitue l'une des infractions à l'API pour lesquelles la République du Chili a été condamnée à compenser les investisseurs:*

"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

[184] **Document C2,** Award of 8 May 2008, §§ 455, 456, references omitted.

d'un traité bilatéral), pareils actes sont de nature à susciter inévitablement le scepticisme des arbitres"4[185].

*"*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. *"*

"9. La "nullité "dont traite la Sentence de 2008 porte sur un sujet tout autre : la nullité ab initio, ex officio, imprescriptible, du Décret confiscatoire nº 165 de 1975 édicté par le régime de facto (§§593, 598, 601, 603, entre autres). Il en est de même dans la Décision du 18-11-2009 prononcée dans la procédure en révision (§§27, 43, 48, 50, 51, entre autres).

"10. Bref, la Sentence arbitral de 2008 ayant reconnu et déclaré, avec l'autorité de la chose jugée, que les propriétaires de l'investissement étaient M. Pey Casado et la Fondation espagnole, et que cet investissement était protégé par l'API (points 1 à 3 du Dispositif), faire dépendre -dans la phrase finale du §199 de la Sentence de 2016- "la propriété "des investisseurs espagnols d'une décision des juridictions internes qui, dans un futur indéterminé, pourrait déclarer la "nullité de la Décision 43 ", ne saurait correspondre à la véritable intention du Tribunal dans la Sentence de 2016.

"11. Par ces motifs, le paragraphe final du §199 de la Sentence de 2016 est erroné et les Demanderesses sollicitent respectueusement sa correction par le Tribunal arbitral sans modifier ses intentions, ses analyses, son raisonnement ni ses conclusions, soit en supprimant le paragraphe soit en remplaçant quatre mots - "de la Décision nº 43 "- par trois mots -"du Décret 165 "dans toutes les versions de la Sentence."

[End of quote from the Request of 27 October 2016 for the correction of material errors in the RA]

5.1.3 The Chilean State objected to the deletion of all of § 198 as was requested in the proceeding for the correction of errors in the RA

75. Chile claimed that this particular paragraph was "*one of **the** core paragraphs in the 2016 Award*":

*Chile does not accept Claimants' (…) request that the Tribunal expurgate paragraph 198 in its entirety from the 2016 Award. (…) "supprim[er]"— i.e., "suppress," "delete," or "erase" — Paragraph 198 of the 2016 Award in its entirety is wildly inappropriate. (…) Paragraph 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.*[186] [Citations omitted, emphasis as in the original]

[185] **Ibid**., 2008, page 103, note 270.
[186] **Document C263**, Chile's Observations on Rectification, 9 June 2017, §§ 3-7, in the proceeding for correction of material errors in the Award of 13 September 2016, and along the same lines the Counter-Memorial, § 255.

76. The RT took the same view as Chile and did not delete all of § 198:[187]

A. Reference to Decision 43 in paragraph 198 of the Award after resubmission

*"38. Les Demanderesses soutiennent que la référence à la "nullité de la Décision n° 43 "figurant dans la dernière phrase du paragraphe 198 de la Sentence après Nouvel Examen est erronée, la référence exacte devant renvoyer au Décret chilien n° 165. Elles demandent donc que le paragraphe en question de la Sentence après Nouvel Examen soit corrigé de manière à faire référence au "Décret n° 165 "ou bien intégralement supprimé. Les Demanderesses font valoir, au soutien de leur demande, que la Sentence Initiale avait reconnu qu'elles avaient rapporté la preuve de leur droit de propriété sur les actifs litigieu*x.

"39. ***La Défenderesse (…) n'accepte (…) supprimer le paragraphe 198 dans son intégralité****. La Défenderesse soutient que le Tribunal doit respecter la nature et le champ d'application limité d'une procédure de correction et qu'il ne peut corriger qu'une erreur "matérielle ", sans se lancer dans une interprétation de la Sentence Initiale. Elle fait en outre valoir que* ***le paragraphe 198 est l'un des paragraphes essentiels de la Sentence Initiale*** *(…)."*

"**III. L'ANALYSE DU TRIBUNAL**

A. Référence à la "Décision n° 43 "dans le paragraphe 198 de la Sentence après Nouvel Examen

"52. Le Tribunal reconnaît que la référence à la Décision n° 43 qui figure dans la dernière phrase du paragraphe 198 était erronée et qu'il entendait bien faire référence au Décret n° 165. Il s'agit manifestement d'une simple erreur matérielle, qui sera donc corrigée en remplaçant les mots "de la Décision n° 43 "par "du Décret n° 165 ".

[End of quote from the RA, Decision relating to the correction of material errors]

77. Consequently the Claimants are entitled to respectfully ask the present *ad hoc* Committee to annul the phrases in § 198 which, providing a basis for points 2 to 6 of the RA, attribute to the Claimants arguments not to be found in their submissions or their oral pleadings to the RT and which, moreover, radically contradict the OA, *res judicata*, viz.:

- "le Tribunal Initial a conclu à tort que la confiscation était exclue ratione temporis du champ d'application du TBI ;

- ce qui a constitué en fait (si non dans la forme) la confiscation est intervenue avec la Décision n° 43. Chacune d'elles apparaît, sous diverses formes, dans les écritures des Demanderesses au cours de la présente procédure de nouvel examen",

- "(à savoir que la confiscation effective n'est intervenue qu'avec la Décision n° 43)".

The remainer of § 198 then runs as follows:

[187] **Document C201**, RT's Decision of 6 October 2017 on the correction of material errors in the OA, §§ 39 and 52.

"*Cela étant dit, le Tribunal estime qu'il n'est pas nécessaire d'aller plus avant dans cette question puisqu'il 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 -------- [annulée]*;*

la seconde est que ------[annulée].

Cependant, elles rencontrent toutes deux des difficultés insurmontables. En ce qui concerne la première conséquence, le Tribunal n'a aucun doute que le Tribunal Initial, bien qu'il ait utilisé des termes légèrement différents dans les diverses parties de sa Sentence Initiale, était de l'avis que la confiscation était un fait consommé avec la saisie physique en 1975 et n'entrait donc pas dans le champ d'application du TBI. 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.

En ce qui concerne la seconde conséquence --------[annulée] *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*[363]*. Le Tribunal terminera avec une dernière observation avant de passer à un autre sujet : si la prétendue nullité du Décret 165*[188] *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."*

5.1.4 Point 198 contains irreconcilable internal contradictions

78. In *Togo Electricité et al. v. Togo*, the *ad hoc* Committee applied Article 52(1)(e) as follows:

[188] "si la prétendue nullité de la Décision 43…" was the version prior to the rectification requested by the Claimants; see Decision of 6 October 2017 on the correction of material errors in the RA **(document C201**, §§ 38, 39, 52**).**

"62…. l'article 52(1)(e) n'impose aucun contrôle sur la qualité de la motivation d'un tribunal (qu'elle soit "adéquate ", "suffisante ", "élaborée ", "succincte ", ou "détaillée "), pourvu que le lecteur puisse suivre avec suffisamment de clarté le raisonnement du tribunal dans sa totalité.

63. Néanmoins, le Comité se doit de s'assurer, quand ce grief est soulevé, que des motifs contradictoires ne s'annulent pas mutuellement de sorte que les raisons exposées par le tribunal sont de ce fait privées de leur sens. Ainsi, toute contradiction ne conduit pas à l'annulation de la sentence."[189]

79. The RT finally acknowledged that "*la Décision n° 43 qui figure dans la dernière phrase du paragraphe 198 était erronée et qu'il entendait bien faire référence au Décret n° 165*".

Yet § 198 is located in section "**E. Statut du Décret nº 165**" and is a development of § 197 "sur le statut du Décret n° 165 au regard du droit public chilien", where the OA again fails to state reasons:

"*Ce pourrait donc être le moment opportun pour une brève digression sur le statut du Décret n° 165 au regard du droit public chilien (…).*"

Firstly, the RA's reasoning concerning the implementation of applicable law to the most essential exchanges in the framework of the resubmission proceeding is thus confined to a "brief digression" – almost a remark in passing, which in itself is contradictory.

Then, once it has been acknowledged in the first and second sentences of § 198 that the premise of the inadmissibility of the Claimants' assertions is supposed to be the Claimants' proposition, based on the domestic Judgment of 24 July 2008 (RA § 197), that:

"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)",

the conclusion drawn by the RA in the last sentence of § 198 is that:

"*si la prétendue nullité du Décret 165 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*."

Such a proposition by the Claimants and the associated conclusion in the RA are radically incompatible with the supposed conclusions that sentences 3 and 4 of § 198

[189] **Document C13,** Togo Electricité et altri v. Togo, Annulment, § 62, 63.

attribute to the Claimants [and how is this to be described, given that they did not make these conclusions?], namely:

"*les conclusions que les Demanderesses cherchent à en tirer …*[sont] *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."*

Firstly it is wholly illogical to attribute to the Claimants the chronological absurdity that, in its Award rendered on 8 May 2008, the IT could have been presented by the Claimants as having been led to conclude "***à tort** que la confiscation était exclue* ratione temporis *du champ d'application du TBI*" given that this "conclusion", in its context in section "E", following § 197 and the first and last sentences of § 198, stems from the questioning in the domestic Judgment of 24 July 2008 of the validity of Decree 165. There could be no "***tort***", no wrongness, and indeed there never was, in the OA, given that the IT took care to indicate that when its Award was rendered, "*à la connaissance du Tribunal, la validité du décret n° 165 n'a pas été remise en cause par les juridictions internes …*"[190]

Then, it is both inconsistent and wholly arbitrary, in view of the Claimants' submissions, to attribute to them the nonsensical reasoning consisting:

1) On one hand, in the 4th sentence of § 198, of having concluded before the RT that "*la confiscation est intervenue avec la Décision n° 43*" of 28 April 2000 – a view it never took before the RT, as the RA itself states:

   "du fait que la nullité du Décret n° 165 aurait entraîné son inexistence ex tunc *ainsi que la nullité de la confiscation* de jure*, les Demanderesses soutiennent que la confiscation de facto qui était intervenue dès 1973 aurait perduré après l'entrée en vigueur du TBI Chili-Espagne, et que la mesure appropriée pour supprimer les effets du déni de justice ne consiste pas à **faire des suppositions** sur ce que le Tribunal Initial aurait conclu, mais que le Tribunal décide en lieu et place du Tribunal Initial*"[191] [c'est-à-dire, selon sa mission consistant à opérer en continuité de la mission du TI et non à "*corriger la Sentence*"], (underlining added);

   "*Les Demanderesses… rappellent leur argument selon lequel la dissimulation du jugement du Tribunal de Santiago a eu pour conséquence d'**empêcher** le Tribunal Initial de prendre en compte la réalité de la nullité du Décret n° 165 (….)"*[192] (underlining added)

2) Whereas, on the other hand, in the 2nd sentence of § 198 it attributes to the Claimants having asserted "*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*

[190] **Document C2**, OA, § 603.
[191] **Document C9f**, RO, § 62.
[192] **Ibid**., § 71.

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",

which they did indeed assert to the RT, as witnessed by the RA in points Nos. 53, 56-58 or 62, which contradict the two "conclusions" that § 198 arbitrarily attribute to the Claimants:

"*§58. Les Demanderesses soutiennent que, lorsque le Tribunal de Santiago a décidé explicitement que seules CPP et EPC avaient la qualité requise pour agir dans cette affaire, il doit nécessairement avoir conclu que le Décret n°165 était entaché d'une nullité de droit public, car il ne pouvait y avoir d'autre raison expliquant que le Tribunal de Santiago conclue qu'EPC continuait à exister ; selon elles, une telle conclusion entraînait la continuité de la personnalité juridique de CPP et EPC."* [Citations omisses]

80. But even if these two "conclusions" attributed in § 198 to the Claimants appeared in some way or another (though as we have noted, they do not), the two "conclusions" and their consequences in § 198 and the RA contradict the conclusion of the RA itself also in § 198, namely:

"si la prétendue nullité du Décret 165 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…".

For as is to be inferred from the "reasoning" here in the RA, this circumstance, i.e. that *in law the investment remained the property of Mr Pey Casado and/or the Foundation since 1972*, refers to the conclusions that the Claimants submitted to the RT after the Santiago court notified them in January 2011 of the 9th Recital of the domestic Judgment of 24 July 2008 – "*un sujet qui a absorbé une grande partie des débats entre les Parties*" (§ 197), but **wholly unknown, by definition, to the IT** – taking note of the legal standing of EPC Ltda, 33 years after being "wound up" by Decree No. 165, and consequently:

1. the IT could not have concluded anything "**wrongly**", given that it had to render its Award without knowing of this judgment, owing to the judgment being stalled until after the notification of the OA – an effect of the denial of justice for which the OA found Chile liable:

2. Decision 43 could not have confiscated EPC Ltda either in fact or in form given that the First Civil Court of Santiago, fully aware of Decision 43 of 28 April 2000,[193] nonetheless deemed in its Judgment of 24 July 2008 that EPC Ltda had legal standing.

[193] **Document C2**, OA, § 455: "… *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*405…"

81. Conclusion: as § 198 of the RA contradicts the OA's *res judicata*, confirmed by the Decision of the first *ad hoc* Committee, with a tangle of unresolvable contradictions in respect of the RA and of § 198 itself, and attributes "conclusions" to the Claimants which had not been submitted to the RT, the Claimants respectfully ask that the present *ad hoc* Committee annul § 198 in its entirety, along with all other organically consequent and dependent parts of the RA.

5.1.5 § 198 is the basis of other key reasonings of the RA and its dispositive part

82. § 198 – which attributes to the Claimants two "conclusions" that they did not assert in the resubmission proceeding – underlies the following points of the RA, in particular §§ 220, 221, 227-229, which in turn are the basis of §§ 232-234, and the latter of §§ 235-236, which in turn underlie § 244, and all these form the basis of the dispositive part.

As we will see, the first "conclusion" arbitrarily attributed to the Claimants by the RT ("*le Tribunal Initial a conclu à tort que la confiscation était exclue* ratione temporis *du champ d'application du TBI*"), and the 2nd ("*ce qui a constitué en fait (si non dans la forme) la confiscation est intervenue avec la Décision n° 43*"), form the necessary premise, whether explicit or implicit, of the following points:

- in section "H. **L'interprétation de la Sentence Initiale**", in points:

§215 : "*Le Tribunal concentrera donc son attention sur (...) [à] 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*" ;

§216 : (…) *l'ensemble de cet argument n'entre 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 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****.* *Ces termes ne peuvent être interprétés que comme une référence au "différend" qui avait été initialement soumis à l'arbitrage* [portant sur **la confiscation]**, *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
[See the 2nd "conclusion" of § 198]

, § 463: "*Le 3 août 2002, M. Pey Casado a formé devant la Cour d'appel de Santiago un recours en protection constitutionnelle relatif à son droit de propriété sur la rotative Goss, droit qui aurait été violé par les décisions du Contralor des 22 et 23 juillet 2002 entérinant les décrets de paiement des indemnités accordées* ***dans la Décision n°43****"* [underlining added]

- *et a fortiori les questions découlant d'une conduite postérieure à la Sentence*
  [See the first "conclusion"]

- *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."*

*

§219 : "*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)* (...)"
[See the first "conclusion" of § 198];

*

§220 : "*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 ; 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*** (…)"
[See the 2nd "conclusion" of § 198. And the RA's attributing to the Claimants of assertions not in their submissions appears again. They did not contend in the resubmission proceeding, and the State will not be able to prove otherwise, what is attributed to them in § 220. Quite the reverse: the Claimants' conclusions were strictly in the framework of Article 10(3) of the BIT – the fork in the road – and Article 26 of the ICSID Convention, as the choice provided for in Article 10(3) was taken when the original arbitration request was filed on 2 November 1997 and then registered on 20 April 1998,[194] whereas Decision 43 was adopted over two years later, on 28 April 2000][195]

*

§221 : "*le préjudice causé aux Demanderesses et son évaluation monétaire sont simplement établis en calculant l'enrichissement qui en résulte pour la Défenderesse (c'est-à-dire découlant de* ***la confiscation continue et non indemnisée****"*

[194] **Document C2**, SI, § 8
[195] These facts and dates speak for themselves against the anachronistic picture in the Counter-Memorial (§ 19, footnote 2) in which "*Claimants had voluntarily (and in writing) declined to participate in this reparations program, due to the arbitration that at that time they had already commenced at ICSID*", while omitting to mention the Claimants's requests to the executive, the comptroller, the domestic courts and the Arbitral Tribunal to suspend Decision 43 until the Tribunal's decision was known (OA, §§ 21, 455, 460-463, OA's Decision of 26 September 2001 on the requirement for provisional measures concerning Decision 43, **document C30**).

[See the premise in the 2nd "conclusion" of § 198. Moreover, how are we to describe the fact that the RA attributes to the Claimants a statement that they never made?];

*

§224 :" (…) *au paragraphe 608* [la SI] *estime que l'expropriation "'était consommée'" à la date du Décret n° 165*
[See the premise in the first "conclusion" of § 198]

(…) la Décision n° 43, qui devait s'analyser en une application discriminatoire d'une loi postérieure au TBI et des droits que celle-ci avait créés, était "une question distincte et non pas… un fait identique à l'expropriation susceptible de former l'un des ingrédients du fait composite allégué'"
[See the premise in the 2nd "conclusion" of § 198, contradicting §§ 622-623 of the OA];

*

§227 : "(…) *Le Tribunal note également, bien que sur un niveau quelque peu différent et non factuel, la déclaration du Tribunal Initial, au paragraphe 680, selon laquelle l'existence de* ***dommages 'résultant de la confiscation'*** *[soulignement ajouté](…)* découle automatiquement de la nature des choses, ainsi que de la décision (à savoir la Décision n° 43) d'octroyer une indemnisation à d'autres personnes*"*
[See the premise in the 2nd "conclusion" of § 198, denying the OA's conclusion based on the State's acknowledgment to the IT of the invalidity of the investment's confiscation in 1975 and the lack of fair and equitable treatment since 28 April 2000 of which the investors are victims];

*

§228 : "(*...) tous l****es arguments fondés sur la confiscation ou en découlant*** *ne peuvent pas être pris en compte (...) la théorie des Demanderesses fondée sur un "acte continu "qui rattache la conduite postérieure au TBI* [la Décision 43] *à la conduite antérieure à celui-ci doit être rejetée"*
[See the premise in the first "conclusion" of § 198, contradicting the conclusions of the OA];

*

§229 : "*les conclusions du Comité* ad hoc *dans sa Décision sur l'annulation, notamment son paragraphe 261, dans lequel le Comité* ad hoc *tire de la Sentence Initiale les décisions du Tribunal Initial selon lesquelles les arguments des Demanderesses concernant les dommages-intérêts étaient strictement limités à ceux fondés* ***sur l'expropriation*** *; que ceux-ci n'étaient pas pertinents pour les demandes fondées sur le déni de justice et la discrimination ; et que les Demanderesses n'avaient pas produit de preuves convaincantes du dommage en ce qui concerne ces demandes."*
[See the premise in the 2nd "conclusion" of § 198, contradicting the OA's conclusions];

*

- in section "**I. Les Demanderesses ont-elles satisfait à la charge de prouver le préjudice ?"**

§232 : "(…) *La Défenderesse soutient que (…) les Demanderesses 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 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*
[See the premise in the first "conclusion" of § 198];

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)"
[See the premise in the 2nd "conclusion" of § 198. We should recall here that the choice of international arbitration was made in October-November 1997 and that Decision 43 is dated 28 April 2000, so the dispositive part is based on an anachronism];

§233 : *"Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés."*

§234. "*Le Tribunal n'a donc d'autre choix que de conclure que 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.*
[See the premise in the 1st and 2nd "conclusions" of § 198, contradicting the OA's conclusions, and which the RT fabricated as a basis for the RA].

*

- In section "**J. Les Demanderesses ont-elles rempli la charge de prouver un dommage quantifiable ?**"

§235 :" *Compte tenu de sa conclusion au paragraphe 234 ci-dessus, le Tribunal peut trancher cette question brièvement en disant que, en l'absence de toute preuve suffisante d'un préjudice ou d'un dommage causé aux Demanderesses par la violation du TBI établie dans la Sentence Initiale, la question de l'évaluation ou de la quantification de ce dommage ne se pose pas ."*
[See the premise in the 1st and 2nd "conclusions" of § 198, contradicting the OA];

§236. *"le Tribunal ajoute – (...)- 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 (...)."*
[See the premise in the 1st and 2nd "conclusions" of § 198];

*

- in section "***M. Les options qui s'offrent au Tribunal***", sustaining dispositive points 2 to 6 relating to damages:

§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".*
[It is hard to say any more clearly that the "confiscation" is supposed to have been resubmitted under cover of the breach of Article 4 of the BIT constituted by Decision 43 of 28 April 2000... See the premise in the 1st and 2nd "conclusions" of § 198]

83. In short, as Chile asserted to the RT and as the latter agreed, on refusing to delete it in its entirety, § 198 "*is one of* ***the*** *core paragraphs in the 2016 Award"* (see *supra* §75).

For indeed, no other traceable paths are to be found in the RA, outside these supposed "conclusions" which in reality are no such thing, on which the RT could have based its award's dispositive points 2 to 7.

84. As § 198 of the RA infringes Article 52(1) letters (b), (d) and (e) of the Convention, the Claimants respectfully ask the present *ad hoc* Committee also to annul points 216, 219, 220, 221, 224, 227-229, 232-236 and 244 of the RA, which derive directly or indirectly from the "conclusions" established in § 198 and are organically dependent thereon, and consequently also dispositive points 2 to 4, of which they form the basis, as well as the RA as a whole.

***

5.2 THE RA BREACHES THE *RATIO DECIDENDI* OF THE ORIGINAL AWARD

85. The RT was made up of a majority of common-law jurists.[196] The binding *ratio decidendi* relating to the Tribunal's *ratione temporis* was established in the OA

[196] **Document CL378**, see Stone (Julius), "The ratio of the ratio decidendi", 22 the Modern Law Rev., 22 (1959), pages 600-601, noting with regard to *ratio decidendi,* in this system, that the "*distinction between that use of the term* ratio decidendi *which describes the process of reasoning by which decision was reached (the 'descriptive'* ratio decidendi*), and that which identifies and delimits the reasoning which a later court is bound to follow (the 'prescriptive' or 'binding'* ratio decidendi*). Descriptively the phrase imports merely an explanation of the court's*

pursuant to Articles 10(1) and 2(3) of the BIT, i.e. *any dispute relating to the investment, within the meaning of the BIT*, arising between the parties after the latter's entry into force and submitted to the Tribunal after the filing of the original request on 3 November 1997 and before the winding up of proceedings on 31 January 2008.[197] Consequently the OA established the jurisdiction of the IT *ratione temporis* over the facts and issues arising between the parties in 2000[198] and in 2002,[199] as well as in 2007,[200] and account thereof was taken in the basis for its dispositive points 1 to 4.

86. This *ratio* of the OA's *ratio decidendi* relating to jurisdiction *ratione temporis* was declared *res judicata* by the first *ad hoc* Committee.[201]

87. The RT in its Award committed an excess of powers and seriously departed from a fundamental rule of procedure in that it breached this mandatory *ratio* and also *res judicata* in § 216

88. The RA also suffers from a failure to state reasons in view of the serious contradiction within the selfsame § 216, of which, on one hand, the first sentence asserts the Claimants' argument relates to **actions subsequent to 8 May 2008**:

> *"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* [l**e 8 mai 2008**]*, 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"* [soulignement ajouté]*,*

and, on the other hand, the 3rd sentence also excludes from the RT's jurisdiction the issues arising between the parties **between November 1997 and 8 May 2008**:

> "*l'ensemble de cet* ***argument*** *n'entre 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 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. 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*** *– et a fortiori les questions découlant d'une conduite postérieure à*

---

reasoning to its conclusion (…) Prescriptively used, on the other hand, the phrase ratio decidendi *refers to a normative judgment requiring us to choose a particular* ratio decidendi *as legally required to be drawn from the prior case, that is, as the binding* ratio decidendi."

[197] **Document C2**, OA, § 54.

[198] **Ibid.,** section IV(b)(ii) and § 453.

[199] **Ibid.,** section IV(b)(iii) and § 464.

[200] **Ibid.**, §§ 699, 702, 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*.")

[201] **Document C20**, Decision of the 1st *ad hoc* Committee of 28 December 2012, VII, Decision, § 359(4) and §§ 167, 168.

*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" ;*

A manifest contradiction as to the RT's jurisdiction, on which § 216 concludes simply:

"*le Tribunal estime qu'il n'est pas nécessaire d'en dire plus sur cette question dans la présente Sentence."*

89. Yet § 216 constitutes, in turn, a key basis for dispositive points 2 to 6, for the reasons we will see below.

90. For as § 216 of the RA also rules out of its jurisdiction the disputes arising between the parties between 3 November 1997 and 8 May 2008, this conclusion is part of the prescriptive *ratio decidendi* of the RA's dispositive points 2 to 6, given that "*la manière selon laquelle les Demanderesses ont elles-mêmes quantifié ces demandes*" (OA, §194) is wholly based on the issues arising between the parties after 28 April 2000 and which led to the State being found liable for lack of fair and equitable treatment, discrimination and denial of justice.

91. Yet while the IT established its jurisdiction in time over the issues arising between 3 November 1997 and 8 May 2008, § 216 of the RA arbitrarily ruled them of its jurisdiction, and on this basis the RA constructs the descriptive *ratio decidendi* for §§ 232-233, 235, 238, 239, 243. In other words, the basis that determines points 2 to 6 of the RA's dispositive part is § 216.

92. It follows from the *ratio decidendi* underlying § 216 of the RA that the considerations in other points on the issues arising between 3 November 1997 and 8 May 2008 themselves represent a manifest excess of powers in that § 216 casts these issues outside the RT's jurisdiction. Such is the case, in particular:

1) Of **§§ 232-233, 235** of the RA, according to which the Claimants are supposed not to have suffered:

"*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* (…) 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 (...) 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 (...) Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés*" ,

for it is *res judicata*:

a) that the issue relating to Decision 43 arose between the parties after 3 November 1997, namely 28 April 2000;

b) that the IT's Decision of 25 September 2001, contested by Chile before the first *ad hoc* Committee and then confirmed by that Committee,[202] on the request for provisional measures regarding Decision 43, ruled that:

"la Décision Ministérielle n° 43 et son exécution au Chili n'ont pas des conséquences telles qu'elles puissent affecter ou la compétence du Tribunal Arbitral CIRDI" ou les droits allégués par les Parties demanderesses dans leur requête en mesures conservatoires d'une manière qui, de l'avis du Tribunal Arbitral, rende "nécessaire "un prononcé des mesures conservatoires sollicitées à propos de la Décision Ministérielle n° 43 et de son exécution,

"la Décision Ministérielle n° 43 (...), abstraction faite de son caractère administratif plutôt que judiciaire, ne tranche pas, dans son dispositif, le même litige que celui que les Demanderesses ont voulu soumettre à la compétence du Tribunal Arbitral CIRDI,

"elle n'est de toute façon, comme indiqué plus haut, pas opposable aux Parties demanderesses et, par conséquent, ne cause pas (au moins directement) de dommage à ces dernières. En serait-il autrement, ce dommage ne saurait être considéré par le Tribunal Arbitral comme irréparable dès lors que, ainsi que l'a observé avec raison la Partie défenderesse, dans l'hypothèse "où le Chili serait condamné "sur le fond (par un Tribunal Arbitral CIRDI s'étant reconnu compétent), la conséquence pratique évidente pour le Chili, principale ou exclusive, ne pourrait être que, soit l'obligation de restituer les actions revendiquées à leurs propriétaires légitimes (c'est-à-dire une restitution en nature), soit, en cas d'impossibilité d'une 'restitutio in integrum', l'obligation d'indemniser.

*"compte tenu du "principe de la primauté des procédures internationales par rapport aux procédures internes "rappelé par les précédents cités plus haut, 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 f*aire.

[au cas où] *"le Tribunal Arbitral (...) rende une sentence sur le fond, dont l'exécution pourrait être rendue plus difficile, voire impossible, par les mesures unilatérales prises entretemps* [la Décision nº 43] *par l'Etat défendeur – une situation de nature à engager la responsabilité internationale de cet Etat, ainsi qu'il a été relevé plus haut, par exemple dans l'affaire Holiday Inns c. Gouvernement du Maroc."*[203]

c) that the OA found Chile liable to remedy the harm caused precisely by this Decision of 28 April 2000 and the associated denial of justice;

2) of **§ 233** of the RA, while none of the evidence produced by the Claimants of the

[202] **Document C20** §§ 42; 234-245.
[203] **Document C30f**, IT's Decision on the Claimants's request for provisional measures regarding Decision 43, §§ 54, 59, 60, 63, 65, 76.

harm caused by the Decision of 28 April 2000 and the associated denial of justice[204] was considered, concluded, with no explanation of this exclusion, that:

"*il n'y a pas de commencement de preuve que la Défenderesse, en sa qualité de partie adverse, devrait réfuter*" ;

3) of **§§ 238-239,** which also rule out any consideration of the claim based on unjust enrichment, because this:

"*se traduirait par l'octroi d'une compensation sans la constatation préalable d'une violation d'où résulterait le préjudice devant être indemnisé. De l'avis du Tribunal, la Défenderesse a raison sur ce point",*

as the breach of the BIT of 28 April 2000 was by definition subsequent to the date of 3 November 1997 established in § 216;

4) of **§ 243**, according to which

"*la demande au titre du dommage causé par la conduite de la Défenderesse dans la procédure arbitrale doit également être rejetée* in limine litis*, pour les raisons énoncées au paragraphe 216 ci-dessus"* [soulignement ajouté],

which assertion shows that the conclusion regarding jurisdiction *ratione temporis* appearing in § 216 is the prescriptive *ratio decidendi* of the other points of the OA and determines their conclusions, as well as its dispositive points 2 to 6.

93. Consequently, pursuant to Article 52(1) letters b) and d) of the Convention, the 2nd *ad hoc* Committee is respectfully asked to annul §§ 216, 232-233, 235, 238, 239 and 243.

5.3 Contradictions and failure to state reasons between the prescriptive *ratio decidendi* of § 216 and the dispositive part

94. Moreover, pursuant to Article 48(3) of the ICSID Convention, points 2, 3, 4, 5 and 6 of the dispositive part should be annulled given that the RA states no basis, beyond the inadmissibility *ratione temporis* of claims as stated in § 216, liable to come within the RT's sphere of substantive jurisdiction, viz.:

"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;

[204] See in **document C9f**, RA, §§ 232 and 240.

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 ;

6) qu'il n'existe dans les circonstances de l'espèce aucun motif justifiant d'octroyer des dommages-intérêts au titre d'un préjudice moral, ni à M. Pey Casado, ni à la Fondation".

Having decided in § 216 that the Tribunal had no jurisdiction over the issues arising between 3 November 1997 and the date of the OA, i.e. 8 May 2008, the RA nonetheless analyses the merits of the request for quantification of damages in connection with issues arising as of 28 April 2000, including "*une demande* [qui] *ne figurait pas dans la requête de nouvel examen* [du 18 juin 2013]*, mais elle est apparue dans la suite de la procedure*",[205] and settles the issue in its dispositive part. The Tribunal thereby incomprehensibly wielded a power which it categorically denied itself in § 216, given that these claims were based on breaches of the BIT subsequent to 28 April 2000. The Tribunal thus committed a manifest excess of powers making its Award annullable.

95. Moreover, **in none of the said points 2 to 6 of the dispositive part** does the RA link these positions to the fact that the RT purportedly had no jurisdiction to consider requests for quantification of damages caused by the State's acts between 3 November 1997 and 8 May 2008 or afterwards, and nor do the dispositive points dismiss the Claimants' claims for lack of jurisdiction.

96. There are thus manifest contradictions between:

a. § 216, which declines jurisdiction over the disputes and issues arising between the parties between 3 November 1997 and the date of the OA's notification or afterwards,

b. and the RA's dispositive part which, taking no account of this lack of jurisdiction for settling disputes arising between the parties between 3 November 1997 and 8 May 2008, takes decisions in their regard on a quite elusive legal basis.

97. These manifest contradictions concerning the vital point of the RT's jurisdiction meet the two conditions required by Article 52(1)(e) of the Convention according to the first *ad hoc* Committee, namely:

[205] **Document C9f**, RA, § 241.

the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision.[206]

98. In short, not only does the RA lack any rational explanation of the position taken regarding the RT's *ratione temporis* jurisdiction over the issues arising between the parties after 28 April 2000, but, moreover, such jurisdiction, necessary to the decision taken by RT in the dispositive part concerning the issues submitted by the Claimants, is denied in § 216 and then implicitly, but essentially, reasserted in points 2 to 6 of the dispositive part.

This steered the RT's reasoning and created bias throughout the Award.

99. If the RT had taken a different line in § 216 and asserted, as was incumbent on it, its jurisdiction *ratione temporis* over the issues arising between the parties after 3 November 1997 and the date of the OA's notification, there would have been a chance that the RA could have reached a substantially different end point – "*une possibilité distincte (une 'chance') que cela ait pu faire une différence quant à une question cruciale"* [see § 111 below] – among other reasons because the RT itself acknowledged that:

"si la prétendue nullité du Décret 165 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"[207].

100. If the *ratio* of the *ratio decidendi* of § 216 had been lifted, the logical consequence could have been admissibility, and account being taken of the evidence produced by the Claimants, which might reasonably have affected, in a decisive manner, the Award's contents and dispositive part.

101. In the absence of any reasons to substantiate this crucial point determining the dispositive part, the Award is annullable pursuant to Article 52(1) letters b) and e) of the ICSID Convention and their application by the first *ad hoc* Committee:

"Le Comité estime que, dès lors qu'il n'existe aucun fondement exprès pour étayer les conclusions sur un point crucial ou déterminant pour le résultat, l'annulation doit être prononcée, que le défaut de fondement soit dû à une absence totale de motivation ou soit le résultat d'explications futiles ou contradictoires."[208]

*

[206] **Document C20**, Decision of the 1st *ad hoc* Committee of 18 December 2012, § 83.
[207] Document **C9f,** RA, § 198.
[208] **Document C20**, Decision of the 1st *ad hoc* Committee, § 86.

5.4 The serious departure from a fundamental rule of procedure and the failure to state reasons for the decision regarding the RT's jurisdiction *ratione temporis* constitute the basis of points 2 to 7 of the RA

102. In this arbitration proceeding Chile stated to the first *ad hoc* Committee that *An Ad Hoc Committee May Not Fill in Significant Gaps in Reasoning or Provide Supplementary Reasons*,[209] a point of view that the Claimants heartily applaud:

> *627. (...) the key principle is that it is not within the purview of a Committee to correct deficiencies in the award, to attempt to fill in lacunae, or to provide missing reasons not found in the Award.*
>
> *628. While it may be the case that not every single reason must be explicit and that Committees in some instances have filled in certain gaps in the Award's reasoning, such gap filling is only permissible where the reasons that were provided in the Award are themselves sufficient to understand how the tribunal reached a given determination or conclusion, or where the implicit reasons can logically be inferred. Professor Schreuer explains:*
>
> *The jurisprudence on Art. 52(1)(e) confirms that ad hoc committees are inclined to reconstruct missing reasons where the result reached by the tribunal appears capable of explanation in the light of the reasons actually supplied. . . . If the ad hoc committee can explain an award by clarifying reasons that may have been only implicit, it may do so and need not annul.* ***If the decision appears incorrect or inexplicable, the ad hoc committee will be more inclined to view the absence of reasons as a ground for annulment.****748*[210]
>
> *In other words, it is not within the province of a Committee that is faced with incorrect reasons or inexplicable conclusions in an award to attempt to rectify, justify, or embellish the reasoning to a point where it can meet the requirements of Article 52(1)(e).*
>
> *629. In CMS, for example, a lacuna in part of the tribunal's reasoning was so great that the Committee had no choice but to annul the relevant part of the Award:*
>
> *In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by the above interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation referred to above. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognize it.*
>
> *In these circumstances* ***there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point.*** *It is not the case that*

[209] **Document C294,** Chile's Memorial on annulment (corrected), 10 June 2010.
[210] 748 RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 362 (emphasis added).

answers to the question raised 'can be reasonably inferred from the terms used in the decision': they cannot.749[211]

630. Thus, the CMS Committee noted instances where the tribunal could have expanded its analysis and offered reasons for its conclusions, but failed to do so. However, the Committee did not seek to fill the gaps; instead, it annulled the relevant part of the Award.

631. The Committee in Rumeli had a similar approach:

[I]f reasons are not stated but are evident and a logical consequence of what is stated in an award, an ad hoc committee should be able to so hold. Conversely, ***if such reasons do not necessarily follow or flow from the award's reasoning, an ad hoc committee should not construct reasons in order to justify the decision of the tribunal****.750*[212]

[End of quote from the Chilean State]

103. Yet the decisions in the RA regarding jurisdiction *ratione temporis*, especially in § 216 and the points directly or indirectly deriving therefrom, were adopted by the RT by surprise, *sua sponte*, without even hearing the Claimants' view on such a radical departure from the *res judicata* of the OA, and when all the parties had pleaded on the basis that in all events the issue arising on 28 April 2000 (Decision 43) came within the RT's sphere of jurisdiction.[213]

104. The RA provides no explanation compatible with the OA, the Convention or the BIT as to the reasons for which the Tribunal considered *ex cathedra* that the issues arising between the parties between 3 November 1997 and the date of the OA's notification should exceed its jurisdiction (§ 216).

Now this lack of reasons affects a question directly linked to the purport of the *causa petendi* of the claim of 18 June 2013 and to the *res judicata* on jurisdiction *ratione temporis* in the OA, and has vital consequences in the RA's dispositive points 2 to 7.

105. This constitutes a serious departure from fundamental rules of procedure – the right of all parties to be heard, absence of partiality on the arbitrators' part – and a failure to state reasons affecting, in both cases, a key question of the arbitral proceeding, namely jurisdiction. This is sanctioned in Article 52(1), letters d) and e) of the ICSID Convention.

106. The Claimants contended in the resubmission proceeding that:

---

[211] 749 RALA-15, CMS (Annulment) at ¶¶ 96–97 (emphasis added) (internal citations omitted) [**document C130**]

[212] 750 RALA-34, Rumeli Telekom (Annulment) at ¶ 83 (emphasis added) [**Document CL379**]

[213] **Document C9**, RA: "148. Selon la Défenderesse, les actes et omissions dont se plaignent maintenant les Demanderesses tombent en dehors du champ d'application temporel et matériel du déni de justice constaté par le Tribunal Initial, qui s'étend de 1995 à 2002"

Resubmission Memorial of 27 June 2014:[214]

"284. On rappellera à cet égard qu'indépendamment de ces circonstances particulières, l'introduction, devant un second tribunal arbitral, d'informations apparues après la Sentence, dès lors qu'il ne s'agit pas de demandes nouvelles, est parfaitement admissible :

On le voit, la compétence du second tribunal n'est pas identique à celle du premier. Elle est largement conditionnée par l'effet de la chose jugée qui restreindra inévitablement le champ du différend à arbitrer. Accessoirement, sans doute le second tribunal pourra connaître de questions nouvelles, telles des données apparues postérieurement à la première sentence (…), mais pour l'essentiel l'étendu de sa juridiction sera réduite puisqu'elle ne pourra plus porter sur l'examen de demandes nouvelles[198][215] (underlining added).

285. Dans l'affaire Amco II199[216], le tribunal arbitral a ainsi considéré qu'il était compétent pour connaître de faits nouveaux, 'intervening effects', résultant d'une décision de la Cour Suprême d'Indonésie rendue postérieurement à la première sentence :

The present tribunal cannot accept Indonesia's view (observations on Jurisdiction of the New Tribunal, p.35, §5 (ii)) that the issue of the intervening effect of the Indonesian court judgments can be relitigated. Lack of intervening effect of the interlocutory decree as upheld by the Supreme Court judgment of August 4, 1980 cannot be relitigated and is res judicata.

However, the present Tribunal believes that it may be helpful to indicate to the parties at this juncture that it finds it has jurisdiction to deal with any intervening effect of the Supreme Court decision rendered on April 30, 1985 such matter being admissible as a new fact available only after the Award was rendered. (Underlining added)

Le présent Tribunal arbitral devra dès lors constater que l'un des actes de déni de justice commis par la République du Chili à l'égard de M. Pey et de la Fondation a eu pour effet d'empêcher les Demanderesses d'informer le Tribunal arbitral du jugement de la juridiction civile chilienne reconnaissant la "nullité de droit public" du Décret n°165, et, en conséquence, l'absence de titre de l'Etat défendeur sur l'investissement en 1995, compte tenu de la nullité de droit public du Décret nº 165. Ce qui a conduit le Tribunal arbitral à considérer que, "à sa connaissance", ce Décret n'avait pas été remis en cause par les juridictions internes et faisait toujours partie de l'ordre juridique interne

[214] **Document C8,** Resubmission Memorial of 27 June 2014.
[215] [198] C-L04, Rambaud (P.), *La compétence du tribunal C.I.R.D.I. saisi après une décision d'annulation*, Annuaire français de droit international, Vol. 34, 1988, page 213 [**document CL380**]
[216] 199 C-L03, *Amco v. Indonesie,* Resubmitted Case, Decision on Jurisdiction, 10 May 1988, 3 ICSID Review – Foreign Investment Law Journal (ICSID-Rev. FILJ), page 176, §§ 53-54 **[document CL294**].

chilien200[217], et, par voie de conséquence, que les dispositions de l'article 5 de l'API étaient inapplicables aux faits de confiscation."

Hearing of April 2015[218]

"Juan Garcés : (…) 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 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."

[End of quote from the Claimants]

108. The "summary of the parties' positions" appearing in the RA does not mention any of the Respondent's objections to the RT's jurisdiction over the issues arising between the parties between 3 November 1997 and the date of the OA, i.e. 8 May 2008 (or afterwards). It is thus without having heard the Claimants on the subject of a change in the jurisdiction *ratione temporis* established in the OA and confirmed by the first *ad hoc* Committee that the RA changed this aspect of the Tribunal's jurisdiction *ex cathedra* in the continuation of the same arbitral proceeding, while declaring that this was a further stage (in the sense of a

[217] **Document C2,** OA, § 603.
[218] **Document C43**, page 160.

continuation intended to deal with what was annulled) of the original proceeding.[219]

109. The Chilean State said to the first annulment Committee regarding the right to be heard:

"*One does not respond to a Bilateral Investment Treaty claim that attaches serious potential responsibility to a sovereign state orally by thinking about it for one minute in the context of a hypothetical question* "[220],

"*Le Chili conclut ensuite que la privation par le Tribunal de son droit d'être entendu a, en fin de compte, eu un impact sur l'issue de l'affaire et qu'elle doit donc être qualifiée d'inobservation grave d'une règle fondamentale de procédure"*[221],

and the first *ad hoc* Committee determined :

"*Le Comité considère que le non-respect du droit d'être entendu qu'il a constaté est grave car la question sur laquelle le Chili a été privé du droit de présenter ses arguments était substantielle et déterminante pour le résultat. (...) Compte tenu des conclusions du Tribunal, qui font partie du dispositif, il est évident que cette question était un élément crucial de la Sentence et que cela a causé un dommage substantiel au Chili. Le Comité conclut donc qu'il n'a pas d'autre choix que celui d'annuler le paragraphe 4 du dispositif de la Sentence. En outre, si le Chile avait eu l'opportunité de présenter ses arguments sur (...), la Sentence aurait pu être substantiellement différente. Bien que, comme l'a décidé le Comité ci-dessus205, la partie requérante ne soit pas tenue de démontrer que le résultat final aurait été différent si la règle avait été observée, le Comité est d'accord avec le Chili sur le fait que le Tribunal est allé au-delà du critère qu'il avait fixé (...) Sans procéder à une analyse du critère applicable et du calcul des dommages-intérêts, il n'y a aucun doute que le Chili a démontré l'impact que cette violation substantielle a pu avoir sur la Sentence.*

En résumé, le Comité conclut que seul le paragraphe 4 du dispositif de la Sentence doit être annulé."[222]

110. This conclusion by the first *ad hoc* Committee is all the more appropriate here in that the RT did not hear the Claimants even for "a minute", and failed to respect their right to be heard as to the questioning of the jurisdiction *ratione temporis* established in the OA.

This is serious, for the issue is substantive and was vital to the outcome expressed in dispositive points 2 to 7 and to the basis thereof.

The extent of the harm is also plain to see, for it is enough to collate these dispositive points with the claims and bases of the Claimants' requests on the

[219] **Document C9**, RA, §§ 171, 188: "*Pour le Tribunal, il est clair que la présente instance est le prolongement de l'arbitrage initial…*"
[220] **Document C20**, Decision of the 1st *ad hoc* Committee, § 252.
[221] **Ibid,** § 254.
[222] **Document C20**, Decision of the 1st *ad hoc* Committee, §§ 252, 254, 269, 270.

fixing of the *quantum* of compensation for acts by the State after 3 November 1997 in breach of their rights guaranteed by the BIT.

Consequently the Claimants ask respectfully that the second *ad hoc* Committee annuls points 2 to 7 of the RA pursuant to what is provided in Article 52(1), letters d) and e) of the ICSID Convention

111. This conclusion is also in accordance with the interpretation and application that the first *ad hoc* Committee made of Article 52(1)(d), namely:

72. Le Comité est d'accord avec le Chili sur le fait que ce motif d'annulation comporte trois éléments : (i) la règle de procédure doit être fondamentale ; (ii) le Tribunal doit y avoir contrevenu ; et (iii) cette inobservation doit être grave.[30][223]

"73. Les règles fondamentales de procédure sont les règles de procédure qui sont essentielles à l'intégrité du processus arbitral et qui doivent être observées par l'ensemble des tribunaux CIRDI. Les parties sont d'accord sur le fait que ces règles comprennent le principe du contradictoire, le traitement juste et équitable des parties, une répartition appropriée de la charge de la preuve et l'absence de partialité.

"74. Le second critère exige que le Comité examine l'intégralité du dossier, notamment les transcriptions et la Sentence, afin de déterminer si le Tribunal a violé ou non la règle en question.

"75. Le troisième critère est lié à la gravité de l'inobservation. Ici, le Comité note qu'il existe un désaccord significatif entre les parties quant à la manière dont la gravité de la violation doit être déterminée.

"76. Le Comité observe qu'il existe deux séries de précédents relatifs à cette condition importante. Ils ont été bien résumés par la Défenderesse lors de l'audience sur l'Annulation[31][224] *:*

*- Certains comités ont regardé l'importance du droit en jeu. Si le droit est fondamental ou important, le fait d'en être privé est susceptible de porter atteinte à la légitimité ou l'intégrité du processus arbitral. Par conséquent, selon ces comités, la violation d'un tel droit mérite réparation. Ainsi que l'ont relevé certains commentateurs et comités, '*the departure must be more than minimal'[32][225] *ou '*must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide'[33].*[226]

*- D'autres comités ont relevé que la règle fondamentale doit être relative à une question déterminante pour le résultat. Dans l'affaire Wena, le comité a estimé que '*the violation of

[223] 30 Voir Tr. Annulation [1] [pp. 22-23] (Ang.); [pp. 10-11] (Fr.); [pp. 25 – 26] (Esp.).
[224] 31 Voir Tr. Annulation [1] [35:1-19] (Ang.); [15:26-37] (Fr.); [38:1-18] (Esp.).
[225] 32 Voir Commentaire Schreuer Art. 52, § 287.
[226] 33 Voir Maritime International Nominees Establishment v. République de Guinée, Affaire CIRDI ARB/84/4, Décision sur l'annulation en date du 2 décembre 1989, § 5.05 (ci-après "Décision MINE "); Décision Amco II, §§ 9.09 - 9.10; Décision CDC, § 49.

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'*34.*[227]

"77.(...) La Défenderesse est d'un avis différent et avance que prouver d'une manière qui ne laisse la place à aucun doute que le Tribunal aurait modifié sa sentence impose un obstacle insurmontable qui ignore la valeur inhérente de la règle elle-même35.[228] *Elle conclut qu'il appartient au Comité de rechercher si, dans le cas où la règle aurait été observée, il existe une possibilité distincte (une "chance ") que cela ait pu faire une différence quant à une question cruciale.*

"78. Le Comité souscrit à l'opinion de la Défenderesse. La partie requérante n'est pas tenue de démontrer que le résultat aurait été différent, ni qu'elle aurait gagné l'affaire, si la règle avait été respectée. Le Comité note en fait que, dans Wena, le comité a déclaré que la partie requérante doit démontrer 'the impact that the issue may have had on the award'*36.*[229] *Le Comité est d'accord sur le fait que c'est précisément de cette manière que la gravité de l'inobservation doit être analysée.*

"79. Les parties ont également évoqué la question de savoir si un comité peut, à sa discrétion, refuser d'annuler une sentence même dans le cas où il estime que le tribunal a commis une inobservation grave d'une règle fondamentale de procédure37[230]*. Un examen par le Comité de décisions récentes rendues par d'autres comités ad hoc révèle que beaucoup d'entre eux ont conclu qu'ils disposaient d'une certaine liberté d'appréciation pour refuser d'annuler une sentence même dans le cas où un motif d'annulation est établi, à condition qu'un tel motif n'ait aucune conséquence pratique38*[231]*. Cependant, certains comités ont exprimé l'avis selon lequel un tel raisonnement ne s'applique pas à l'article 52(1)(d) dans la mesure où la condition d'une inobservation "grave "renferme déjà en elle-même le caractère substantiel de l'impact. Par conséquent, si un tel motif est démontré, il entraîne une annulation ipso facto39*[232]

"80. De l'avis du Comité, il ne dispose d'aucune liberté d'appréciation pour refuser d'annuler une sentence si une inobservation grave d'une règle fondamentale est démontrée. Le Comité exerce son pouvoir de libre appréciation lorsqu'il détermine si l'inobservation était grave ou non. L'examen de la gravité de l'inobservation implique un examen de la gravité de l'acte concerné, c'est-à-dire la privation du droit légal protégé par la règle, ainsi qu'un examen de la gravité de la conséquence ou de l'impact de l'inobservation. La libre appréciation du Comité réside dans l'évaluation de l'impact. L'impact sera très probablement significatif et requerra une annulation si l'inobservation affecte le droit légal

---

[227] 34 Voir Wena Hotels Ltd. v. République arabe d'Égypte, Affaire CIRDI ARB/98/4, Décision sur l'annulation en date du 5 février 2002, § 58 (ci-après "Décision Wena "); Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador, Affaire CIRDI ARB/01/10, Décision sur l'annulation en date du 8 janvier 2007, § 81; Décision CDC, § 49.

[228] 35 Voir Tr. Annulation [1] [30:11-31:7] (Ang.); [14:9-19] (Fr.); [33:11-34:4] (Esp.).

[229] 36 Voir Décision Wena, § 61.

[230] 37 Voir Mém. Déf. Annul., para 86; Rép. Déf. Annul., §§ 41-42; Répl. Dem. Annul., § 33.

[231] 38 Voir Décision Wena; Décision CDC; Décision Soufraki; Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. la République argentine, Affaire CIRDI ARB/97/3, Décision sur l'annulation en date du 3 juillet 2002 (ci-après "Décision Vivendi I "); Patrick Mitchell v. la République démocratique du Congo, Affaire CIRDI ARB/99/7, Décision sur l'annulation en date du 1er novembre 2006 (ci-après "Décision Mitchell ").

[232] 39 Voir Décision CDC; Rumeli Telekom A.S. et Telsim Mobil Telekomunikasyon Hizmetleri v. la République du Kazakhstan, Affaire CIRDI ARB/05/16, Décision sur l'annulation en date du 25 mars 2010 (ci-après "Décision Rumeli").

des parties en ce qui concerne une question déterminante pour le résultat. En d'autres termes, une constatation selon laquelle, si la règle avait été observée, le tribunal aurait pu parvenir à une conclusion différente. Cependant, comme indiqué ci-dessus, le Comité ne considère pas qu'une requérante est tenue de prouver que le tribunal aurait nécessairement modifié sa conclusion si la règle avait été observée. Cela impliquerait qu'un comité entre dans le domaine de la spéculation, ce qu'il ne doit pas faire. Le Comité commencera donc par chercher à déterminer s'il y a eu une inobservation d'une règle fondamentale de procédure et, dans l'affirmative, il examinera ensuite l'impact de la violation pour déterminer si elle est grave ou non."

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

***

5.5 The OA determined and the first *ad hoc* Committee confirmed that the Claimants demonstrated the harm caused by the breach of Article 4 of the BIT. The RA infringes *res judicata*

112. The OA stated that "*la défenderesse n'a pas jugé nécessaire ou utile de discuter ou de réfuter les thèses des demanderesses quant à l'évaluation d'un préjudice (à son avis inexistant). Elle a cependant contesté fermement les méthodes d'évaluation des dommages et intérêts employées par ses parties adverses*",[233] and the Decision of the first *ad hoc* Committee dismissed the State's claim that the Claimants had not met the burden of proof as regards the harm caused by the breach of Article 4 of this BIT, and accordingly that the OA should be annulled.

113. What follows shows that the RT seriously departed from a fundamental rule of procedure, failed to state reasons[234] and also manifestly exceeded its powers on deciding that the Claimants had purportedly not met the burden of proof, given that this question was settled in the OA with *res judicata* effect.[235]

114. Chile asked the first *ad hoc* Committee to annul the OA given that Claimants had supposedly not proven the harm that they asserted as a result of the breach of Article 4 of the BIT by Decision 43 of 28 April 2000 and the associated denial of justice:

Memorial on Annulment

[233] **Document C2**, SI, § 684
[234] See Memorial on Annulment of the RA, section 2.4.
[235] See in **document C40,** Claimants's Rejoinder of 9 January 2015, §§ 304-307, 308, 315 showing that the OA and the 1st *ad hoc* Committee established that the Claimants had met the burden of proof on them with regard to Chile's contention to the RT that "*Claimants never explained what the discrimination consisted of, exactly; how they were purportedly harmed by Decision 43; or what an appropriate measure of damages for the alleged discrimination might be"* [Chile's Resubmission Counter-Memorial (27 October 2014, **document RA-0134**, ¶ 276]; or "*Claimants rely primarily on repetition of their own assertion that the '*[First] 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,' *instead of actually quoting any relevant passage of the First Award"* (Counter-Memorial, § 376).

"on the issue of damages, the Tribunal proceeded to award Claimants damages for those violations with respect to which the ***Claimants had not really asserted any damages at all.*** *(…)*

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*** [i.e. la Décision 43 et le déni de justice qui lui est lié]***,*** *it is evident that* ***the Tribunal*** *disregarded even its own standards on the issue, and improperly* ***reversed the burden of proof***[236]

Reply on Annulment

"§*206 (…) Claimants do not articulate a clear (or viable) standard regarding the allocation of the burden of proof, to justify the Tribunal's actions. Because t****he Tribunal improperly allocated the burden of proof on the critical issues of (…) denial of justice, discrimination and damages****, the Award must be annulled pursuant to Article 52(1)(d).*

"§234. (…) ***Claimants never presented—and therefore now cannot identify—any documentary evidence, legal support, witness testimony, or damages evaluation associated with the purported denial of justice and discrimination "claims.****" The Committee should not ignore this important corollary of Claimants' failure to assert the claims that were the basis of the Award.*[237]

§237. ***Claimants are unable to demonstrate that they satisfied their burden of proof on damages*** *concerning the discrimination and denial of justice claims (…)*

§239. (…) it is evident that ***Claimants failed to carry their burden of proof on damages on the alleged denial of justice and discrimination claims,*** *and that the Tribunal erred in allowing any damages at all for those alleged claims.*

[Emphasis added]

Let us say at once that this is false. When in § 689 the OA deems that

"*les demanderesses n'ont pas apporté (…) de preuve convaincante (…) des importants* [3] *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 - la simple vraisemblance d'un dommage dans les circonstances concrètes de l'espèce ne suffisant évidemment pas*" [underlining added],

[236] **Document C294,** Memorial on Annulment, 10 June 2010, §§ 367-368.
[237] **Document C269,** Reply on Annulment, 22 December 2010, §§ 234.

the OA is manifestly referring not to the existence of harm (points 2 and 3 of the OA's Decision 43) but to the financial amount equivalent to the *restitutio in integrum* that the Claimants were claiming.[238]

The existence of harm is not in any way questioned, for the IT itself decided to determine the amount of financial compensation – a decision that the first *ad hoc* Committee does not question, and says so expressly – but it did so with contradictions in *the reasoning* and *the process* relating to the assessment of financial damage in dispositive point 4.

115. For the OA distinguishes between [1] the infringements of the BIT occurring as of Decision 43, resulting in [2] the harm, and [3] the evaluation of the pecuniary amount to be derived from a substantiated investigation of [1] and [2].

Chapter VII of the OA -" *RESPONSABILITÉ DE L'ÉTAT POUR LES VIOLATIONS DE L'API"* - establishes [1] in section A – "*Application dans le temps des dispositions de fond de l'API*", and [2] in section B – "*Le bien-fondé des violations alléguées*" – and then sets out to establish [3] in chapter VII "DOMMAGES" an evaluation of the pecuniary amount of [2], insufficiently substantiated by the Claimants according to the OA.

116. In 2016 however the RT recycled the Respondent State's claim of 2010 to the first *ad hoc* Committee and asserted that that Committee had based its annulment of the OA's dispositive point 4 precisely on the fault asserted by Chile to the first *ad hoc* Committee, namely:

Resubmission Award[239]

"§212. (...) the process followed by the First Tribunal consisted of the following steps:

- ***the existence of injury resulting from the original expropriation of the investment required no demonstration****.*

[This is untrue: the present *ad hoc* Committee will find no such assertion in the OA or in the Decision of the first *ad hoc* Committee. The OA states categorically that the Claimants proved that [2] the harm was caused by [1] Decision 43 of 28 April 2000 and the associated denial of justice (§§ 627-674) and that the State recognised to the IT on 6 May 2003 "*l'invalidité des confiscations*" of CPP SA's assets, "*le devoir de compensation", "l'illégalité des confiscations opérées par l'autorité militaire chilienne sur les biens litigieux"* (§§ 667, 668, footnote 617; reiterated in §§ 677, 678 and footnote 623).]

---

[238] **Document C2**, OA, § 683: "*elles ont chiffré leur préjudice à USD 52'842'081.-- pour ce qui concerne le damnum emergens et à USD 344'505'593.-- pour le lucrum cessans, sommes à parfaire et à augmenter, en particulier, de la réparation des dommages moraux infligés à M. Pey Casado"*

[239] **Document C9en**, Resubmission Award, English version.

- *the **Claimants had not produced any proof**, or at least any convincing proof, of any kind **for the existence of damage caused by the facts falling within the competence of the First Tribunal ratione temporis.***

[This is untrue: the present *ad hoc* Committee will find not a single assertion in the OA or in the Decision of the first *ad hoc* Committee questioning "***the existence***" of the harm caused by Decision 43 of 28 April 2000 and the associated denial of justice, while the State acknowledged to the IT the invalidity of the confiscation of the assets of CPP SA. This is expressly stated in §§ 627-674 and the OA's dispositive points 2 and 3, as confirmed by the first *ad hoc* Committee. Contrary to what is asserted in this basis of the RA's dispositive part, the OA distinguishes in §685 between, on one hand, [2] "**the harm**" **caused by** [1] these acts of the State as of 28 April 2000 – determined and sanctioned in §§ 627-674 and dispositive points 1 and 3, *res judicata*, and on the other hand, [3] the pecuniary "**evaluation**" asserted for the harm in §§ 685, 686, 689, 690, 691, 692, 693 and dispositive point 4, annulled by the first *ad hoc* Committee.]

- *in the absence of proof, and the unavailability in the circumstances of alternative expert evidence, the First Tribunal was empowered to make its own evaluation by reference to "objective elements"…".*

- *this evaluation could not be of the damage suffered by reason of the original expropriation, but had instead to be of the damage resulting from the breach of the guarantee of fair and equitable treatment under the BIT.*

[This wholly omits the crucial importance in the OA of the State's acknowledgment to the Tribunal on 6 May 2003 of "*l'invalidité des confiscations*" of CPP SA's assets and of the resulting "*devoir de compensation*" (§§ 667, 668, footnote 617 and dispositive point 3, confirmed by the first *ad hoc* Committee with *res judicata* force.]

These premises and conclusions go against *res judicata* and have direct consequences on the RA's reasoning.

"*§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 Demanderesses ont satisfait à **la charge de prouver** quel* [2] *préjudice a été causé à l'une ou/et l'autre du fait de la violation par la Défenderesse de* [1] *la norme de traitement juste et équitable du TBI, puis d'établir en* [3] *termes financiers le dommage quantifiable correspondant."*

[End of quote from the RA]

The present *ad hoc* Committee may see that the RT announces here, for the first time in the resubmission proceeding, that the OA purportedly did not determine, or the first *ad hoc* Committee confirm as *res judicata*, that the Claimants had proven [2] the harm caused by [1] the acts in breach of the BIT as of 28 April 2000, while the State

acknowledged to the IT in 2003 the illegality of the confiscation of CPP SA's assets and the duty to compensate their owners.

117. Yet contrary to what is asserted in this basis of the RA's dispositive part, the Decision of the first *ad hoc* Committee stated that the OA properly decided that the Claimants had produced evidence of the facts and of the legal basis of Chile's liability for its breach of the treaty, and that this breach was the source of [2] the harm caused by [1] Decision 43 and the associated denial of justice.

Original award

"§674. Dans le cas d'espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – [Décision 43] *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* [1] *commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable.*

*"**X. Dispositif. Par ces motifs*** Le Tribunal arbitral, à l'unanimité, (…)

2. constate que la défenderesse a [1] *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 [2] *compensation ;*

4. ordonne à la République du Chili de [3] *payer aux demanderesses le montant de USD 10.132.690,18, portant intérêt au taux de 5%, composé annuellement, à compter du 11 avril 2002 jusqu'à la date d'envoi de la présente sentence ."* [Ce point [3] a été annulé par le 1er Comité *ad hoc*]

Indeed the first *ad hoc* Committee dismissed Chile's attempt to have the OA annulled for failing to meet this requirement, as follows:

Decision of the first *ad hoc* Committee:

"G. Dommages-intérêts (...)

*"(ii) **Charge de la preuve***[240]

*"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* [2] ***préjudice** qui pesait sur elles."* [Soulignement ajouté] [241]

[240] **Document CL376**, Decision of the 1st *ad hoc* Committee: "**(ii) Burden of Proof"; document CL373**, id., Spanish version: "**(ii) Carga de la prueba**".

[The basis of the RA's dispositive part regarding the supposed lack of proof by the Claimants of the harm had evidently already been pleaded by Chile to the first *ad hoc* Committee and dismissed by it as follows:]

Analysis and decision of the first *ad hoc* Committee:

"Positions des parties

Position du Chili

273. Le Chili souligne le fait que le Tribunal [initial] *a reconnu que les Demanderesses avaient* ***la charge de prouver leur*** [2] ***préjudice*** *et qu'elles n'avaient pas apporté de preuves relatives à* [3] *l'évaluation du préjudice dans le cadre des demandes fondées sur le* [1] *déni de justice et la discrimination.* ***Nonobstant ce postulat,*** *le Tribunal a octroyé aux Demanderesses des* [3] *dommages-intérêts au titre de la* [1] *violation du principe de traitement juste et équitable.*[242]

274. Le Chili soutient que:

> *Because the Tribunal rendered such determination on* [3] *damages against the Respondent* ***despite the fact that*** *it admitted both that the* ***Claimants bore the burden of proof regarding*** [3] ***damages,*** *and that the* ***Claimants had in fact provided no arguments or evidence at all*** *in that regard with respect to the* [1] *two claims that constituted the ultimate* [2] *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.***[243]

---

[241] **Ibid.**, Decision of the 1st *ad hoc* Committee: "272. The ground raised by Chile in connection with this aspect of Article 52(1)(d) is whether the Claimants satisfied their burden of proving their [2] damages." **Document CL373**, id., Spanish version: "*272. La causal invocada por Chile en relación con este aspecto del Artículo 52(1)(d) se refiere a si las Demandantes cumplieron con la carga de la prueba sobre la cuestión de [2] los daños*."

[242] **Document CL376**, Decision of the 1st *ad hoc* Committee: "*273. Chile lays emphasis on the Tribunal's acknowledgment that the Claimants had the burden of proving their [2] damages and they had not presented any evidence concerning the [3] valuation of damages for the denial of justice and discrimination claims. Notwithstanding this premise, the Tribunal awarded Claimants damages [3] for [1] violation of the fair and equitable treatment*." **Document CL373,** id., Spanish version:"[273.] *Chile destaca que el Tribunal reconoció que las Demandantes soportaban* ***la carga de la prueba*** *sobre la cuestión de [2] los daños, pero que no habían presentado prueba alguna sobre la [3] evaluación de los daños respecto de las demandas [1] por denegación de justicia y discriminación. A pesar de esto, el Tribunal procedió a otorgar a las Demandantes una [3] indemnización por la [1] violación del tratamiento justo y equitativo*."

[243] **Document CL376**, Decision of the 1st *ad hoc* Committee: "*275. The Respondent adds that if* ***the burden of proof****, had in fact, been placed upon the Claimants, the Award might have been very different. Therefore, concludes Chile, the Tribunal departed from a fundamental rule of procedur*e." **Document CL373**, id., Spanish version: "*275. La Demandada agrega que si* ***la carga de la prueba*** *se hubiera asignado a las Demandantes el Laudo final podría haber sido sustancialmente distinto. Por lo antedicho, Chile concluye que el Tribunal incurrió en un quebrantamiento grave de una norma fundamental de procedimiento*."

[Underlining added]

Analyse du Comité

277. Compte tenu de la conclusion du Comité dans la section précédente de sa Décision, selon laquelle le Tribunal a privé le Chili du droit d'être entendu sur la question du [3] *calcul des dommages-intérêts, ce qui constituait une inobservation grave d'une règle fondamentale de procédure au sens de l'article 52(1)(d) de la Convention CIRDI, le Comité estime que ce motif d'annulation est en fait englobé dans la violation du droit d'être entendu ou qu'il est devenu sans objet. Cependant,* ***afin de dissiper tout doute en ce qui concerne la Demande du Chili*** **[la charge de la preuve]**, ***le Comité décide de la rejeter."***[244]

[End of quote from the Decision of the first *ad hoc* Committee. underlining added]

118. The fact that before the IT the Claimants met **the burden of identifying and proving the damage**, in the sense [2] of the reality of harm, caused by [1] the breach of the BIT, is consequently *res judicata* in the OA. The contrary was then expressly asserted by Chile and expressly dismissed by the first *ad hoc* Committee.

119. The RA lacks any reasoning in connection with this conclusion of the first *ad hoc* Committee, which neither the State nor the RA even mention.

120. Contrary to what is said in § 212 of the RA, what the first *ad hoc* Committee annulled[245] is the *reasoning* – the *process* merely for establishing the [3] **evaluation** of the damage referred to in §§ 686, 688, 689, 691, 692 of the OA:

"686. *Il y a lieu de relever d'abord que l'argumentation des demanderesses concernant l'évaluation* [[3], quantum] *du dommage (ainsi du reste, par voie de conséquence, que la*

[244] **Document CL376**, Decision of the 1st *ad hoc* Committee: "277. In light of the Committee's finding in the previous section of its Decision that the Tribunal denied Chile the right to be heard on the question of [3] the calculation of damages which amounted to a serious departure from a fundamental rule of procedure in breach of Article 52(1)(d) of the ICSID Convention, the Committee considers that this ground for annulment is in fact subsumed in the denial of the right to be heard or has become moot. **However, in order to dispel any doubt regarding Chile's Application the Committee decides to deny it.**" **Document CL373**, id., Spanish version: "*277. En virtud de la conclusión del Comité en la sección anterior acerca de la Decisión llegada sobre la denegación del Tribunal del derecho a ser oído de Chile en materia de la evaluación de los daños, que equivalía a un quebrantamiento grave de una norma fundamental de procedimiento en violación del Artículo 52(1)(d) del Convenio del CIADI, el Comité considera que esta causal de anulación se encuentra de hecho subsumida en la denegación del derecho a ser oído o se ha tornado innecesaria. Sin embargo,* ***para despejar toda duda acerca de la Solicitud de Chile, el Comité decide rechazarla.***"

[245] **Document C20**, Decision of the 1st *ad hoc* Committee, see in particular § 271 :" (…) contestaient le raisonnement des tribunaux quant à la quantification des dommages-intérêts. 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". **Document CL376,** Decision of the 1st *ad hoc* Committee: "271 . (…) were challenging the reasoning in the tribunals' quantification of damages. The Committee in the present section of its Decision has found an annullable error in the process which the Tribunal followed in reaching its conclusion not in the way it calculated the amount of damages" (underlining added).

réfutation esquissée par la défenderesse par exemple avec le rapport de l'expert Kaczmarek) se réfère à l'expropriation intervenue au Chili dans la période 1973-1977, notamment en 1975, et confirmée par la suite.

688. L'expropriation survenue avant l'entrée en vigueur du traité ayant été écartée de l'examen du Tribunal arbitral, il en résulte que, pour cette raison déjà, les allégations, discussions et preuves relatives au dommage [[3], quantum] *subi par les demanderesses du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir* ***un*** [2] ***préjudice, résultant lui d'une <u>autre cause</u>****, de fait et de droit, celle du* [1] *déni de justice et du refus d'un" traitement juste et équitable ".* ["Autre" souligné dans l'original de la SI, caractères appuyés ajoutés]

689. Dans l'exercice de son droit et pouvoir d'appréciation des preuves, le Tribunal arbitral ne peut que constater que les demanderesses n'ont pas apporté de preuve, ou de preuve convaincante, ni par pièces, ni par témoignage, ni par expertise, des importants [[3], quantum] *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* [[3], quantum]*, du lucrum cessans* [[3], quantum]*, ou encore d'un dommage moral* [[3], quantum] - *la simple vraisemblance d'un dommage dans les circonstances concrètes de l'espèce ne suffisant évidemment pas.*

691. Il est clair aussi, quoi qu'il en soit, que tout recours à une expertise [[3], quantum]*, 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.*

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 [[3], quantum] *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* [1] *la Décision n° 43, ont fixé le montant [*[3], quantum*] de la réparation due aux personnes ayant, selon elles, droit à* [2] *une indemnisation."*

121. Yet the RA revisited what is *res judicata*, allowing Chile to reopen and replead a question dismissed by the OA and again by the first *ad hoc* Committee, as we see in § 231 of the RA:

*"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, <u>les Demanderesses ont satisfait à l</u>**<u>a charge de prouver</u>** <u>quel</u>* [2] *<u>préjudice a été causé</u> à l'une ou/et l'autre du fait de la violation par la Défenderesse de la norme de* [1] *traitement juste et*

équitable du TBI, puis d'établir en termes [3] *financiers le dommage quantifiable correspondant."*[246]

122. There is no question here on the Claimants' part of a "*disagreement with the analysis of the Tribunal as to causation, or with respect to the assessment of the evidence or the interpretation of the law*" as asserted in § 387 of the Counter-Memorial, quoting the *ad hoc* Committee in the *Suez* case. The point is that in going against *res judicata*, revisiting the matter of the purported lack of **proof of damage**, in the sense of the reality of the **harm**, not of [3] the **evaluation**, which was all that remained to be determined (as the RT's sole task), caused by the breach of Article 4 of the BIT with [1] Decision 43 and the associated denial of justice (which evaluation was annulled by the first *ad hoc* Committee, as we have seen), the RT, in its Award's dispositive points 2 to 6 and the basis thereof, committed a manifest excess of powers, a serious departure from a fundamental rule of procedure (bias) and a failure to state reasons – its reasoning being wholly contrary to the *res judicata* of the IT and the first *ad hoc* Committee.

The RA says:

"§232. Une fois la question 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* [3] *l'****évaluation*** *du dommage, sans démontrer au préalable la nature précise du* **[2]** ***préjudice,*** *le lien de* ***causalité*** *et* ***le dommage*** *lui-même".*[247] [Underlining added]

And with reason, as these questions [1] and [2] had been settled in the OA, as expressly confirmed by the first *ad hoc* Committee, and all that remained was [3] the evaluation of damages or *quantum* resulting from Decision 43 and the associated denial of justice, according to what the OA had determined[248] and the first *ad hoc* Committee ratified.[249] Such was the task entrusted to by the Claimants to the RT on 18 June 2013, and which the RA refuses.

---

[246] **Document CL376**: "The question remaining for the Tribunal, and it is the central question in these resubmission proceedings, is whether, and to what extent, the Claimants have met that **burden of proving** what [2] injury was caused to either or both of them by the Respondent's breach of [1] the standard of fair and equitable treatment in the BIT, and then of establishing the corresponding assessable damage in [3] financial terms."

[247] **Document C9en**: "232. Once the question is reduced to the terms in the preceding paragraph, it becomes plain that the Claimants have not met this burden; indeed, it could be said that in some senses they have not even set out to do so, in as much as they have focussed their submissions on the [3] **evaluation** of damage, without undertaking the prior step of showing the precise nature of the [2] **injury**, causation and damage itself ". **Document C9e**, id., version en espagnol: "232. [emphasis added]

[248] **Document C2,** SI, § 679: "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" [underlining added].

[249] **Document C20**, Decision of the 1st *ad hoc* Committee, § 271 *in fine*.

123. Without these premises and conclusions in the RA, contrary to the Decision of the first *ad hoc* Committee to dismiss Chile's claims regarding the burden of proof, with *res judicata* effect, the rest of the reasoning and the process leading to dispositive points 2 to 6 would probably have been different, viz.:

> *"215. (...) la Sentence Initiale [a] fait abstraction* [sic] *de la distinction entre* [2] *le préjudice (et la question connexe du lien de causalité) et* [3] *l'évaluation de la compensation due au titre de ce préjudice. Comme indiqué ci-dessus (voir paragraphe 204 ci-dessus), cette distinction est fondamentale pour la mise en œuvre de l'article 31 des Articles de la CDI. Nul doute que ce point n'était pas pertinent dans le contexte de la procédure d'annulation, une fois que 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* [sic, bien au contraire, l'État l'ayant allégué, "***afin de dissiper tout doute en ce qui concerne la Demande du Chili, le Comité décide de la rejeter***"]. *Mais il s'agit d'un point qui doit demeurer au premier plan dans l'examen de ce Tribunal (...)" ;*
>
> *"§217. (...) Étant donné que la première étape, c'est-à-dire [1] 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* [2] *préjudice causé par la violation"*, [sic, comme on l'a vu, le 1er Comité *ad hoc* a rejeté la prétention du Chili selon laquelle la SI devait être annulée des lors que, selon lui, les Demanderesse n'auraient "*satisfait à* ***la charge de la preuve de*** *leur* [2] ***préjudice*** *qui pesait sur elles"*]

Infringing *res judicata* on the matter, the RA:

i. reopens this issue in §§ 219-222 (see *supra* § 82),

ii. in § 230 it takes up Chile's request of 2010 which the first *ad hoc* Committee had expressly dismissed, so as to remove any doubt ("*pour dissiper tout doute*"), thus:

Chile to the first *ad hoc* Committee in 2010	Decision of the first *ad hoc* Committee in 2012	The RA in 2016
"the [initial] *Tribunal ...admitted ... that the* ***Claimants had in fact provided no arguments or evidence at all in that regard with respect to the [1] two claims that constituted the ultimate [2] bases of responsibility****, it is evident that the Tribunal disregarded even its own standards on the issue, and improperly* ***reversed the burden of proof****"*	*"afin de dissiper tout doute en ce qui concerne la Demande du Chili,* ***le Comité décide de la rejeter."***	a) "*le Tribunal Initial n'a pas déterminé quel* [2] *préjudice a été causé aux Demanderesses par* [1] *la violation"* de la garantie d'un traitement juste et équitable ou ses éléments constitutifs. *"b) il reste donc à déterminer [2] 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"*

iii. in § 231:

"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 [2] *préjudice a été causé à l'une ou/et l'autre du fait de la violation par la Défenderesse de la norme de* [1] *traitement juste et équitable du TBI (...)" ;*

iv. in § 232:

"Une fois la question 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 [3] *l'évaluation du dommage, sans démontrer au préalable la nature précise du* [2] *préjudice,* [1] *le lien de causalité et le dommage lui-même" ;*

v. in § 233:

"(*...) étant donné que les Demanderesses n'ont pas satisfait à la charge de la preuve qui leur incombait, il n'y a pas de commencement de preuve que la Défenderesse, en sa qualité de partie adverse, devrait réfuter" ;*

vi. in § 234:

"Le Tribunal n'a donc d'autre choix que de conclure que les Demanderesses n'ont pas démontré de [2] *dommage matériel causé à l'une ou l'autre d'entre elles et qui est le résultat suffisamment direct de* [1] *la violation par la Défenderesse de l'article 4 du TBI. Le Tribunal ne peut donc pas, par principe, octroyer de dommages-intérêts" ;*

vii. in § 235:

"Compte tenu de sa conclusion au paragraphe 234 ci-dessus, le Tribunal peut trancher cette question brièvement en disant que, en l'absence de toute preuve suffisante d'un [1] *préjudice ou d'un dommage causé aux Demanderesses par* [2] *la violation du TBI établie dans la Sentence Initiale, la question de* [3] *l'évaluation ou de la quantification de ce dommage ne*

se pose pas. Le Tribunal n'a donc pas besoin d'analyser de manière plus détaillée les rapports d'expertise de M. Saura pour les Demanderesses (…)" ;

viii. in §§238-239 – the claim based on unjust enrichment:

"La Défenderesse répond que cette analyse reviendrait à décorélller complétement la demande du TBI, car elle se traduirait par l'octroi d'une [3] *compensation sans la constatation préalable d'une* [1] *violation d'où résulterait le* [2] *préjudice devant être indemnisé. La Défenderesse ajoute que cette interprétation de l'argument des Demanderesses est attestée par la manière selon laquelle le paragraphe 380*[250] *est expressément lié à l' "hypothèse "(bien que rejetée par les Demanderesses) de l'absence de l'une quelconque des circonstances qui génèrent la* [2] *responsabilité au titre* [1] *d'une violation du TBI.* [Sic, le droit à compensation pour [2] le préjudice subi a été établi dans la SI et confirmé par le 1er Comité *ad hoc, res iudicata*]

De l'avis du Tribunal, la Défenderesse a raison sur ce point" ;

ix. in §243 – the claim based on moral damage:

"la demande au titre du dommage causé par la conduite de la Défenderesse dans la procédure arbitrale doit également être rejetée (...) le facteur le plus décisif de tous est qu'une demande de [3] *dommages intérêts pour préjudice moral n'échappe pas au fardeau de la preuve* [1 et 2] *qui pèse sur le demandeur, comme cela a été exposé dans les paragraphes 205-206 ci-dessus. Le Tribunal relève, à ce propos, que le Tribunal Initial a exprimé clairement à deux reprises, aux paragraphes 689 et 704 de la Sentence Initiale, son avis selon lequel les Demanderesses avaient tout simplement manqué à leur obligation de satisfaire à la charge de cette preuve et que la simple probabilité qu'un préjudice ait été susceptible d'être subi ne suffit pas."*

The RA asserts in § 205:

"*l'obligation de réparer concerne* [2] *'le préjudice **causé** par' le fait internationalement illicite ; et le 'préjudice' à cette fin est* [2] *le dommage 'résultant' du* [1] *fait internationalement illicite",*

and in § 206:

"*Il est donc évident que ce Tribunal (comme le Tribunal Initial avant lui) n'est compétent que pour octroyer une réparation sous la forme d'une compensation financière, dans la mesure où il a été dûment démontré devant lui que la compensation représente une* [3] *évaluation équitable du* [2] *dommage prétendument subi par les Demanderesses qui a été*

[250] **Document C40**, Claimants; Rejoinder of 9 January 2015 in the resubmission proceeding: "§ 380. Même dans l'hypothèse -quod non- où [1] les agissements de l'État Défendeur [postérieurs à la SI] à l'encontre des investisseurs ne seraient pas dolosifs, ni constitutifs d'escroquerie à la procédure et à la Sentence arbitrale, ou le Décret nº 165 ne serait pas entaché ex tunc de la nullité de droit public, l'obligation de [2] dédommagement perdure et l'État du Chili s'est enrichie 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 [3] 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."

*effectivement **causé** par la violation par la Défenderesse de son obligation internationale* [1] *à leur égard en vertu du TBI."*

Yet § 689 of the OA, as we saw in § 114 above, deemed that the only proof not supplied by the Claimants was that corresponding to the "*importants* [3] *dommages* [pécuniaires] *allégués*", not in any way the [2] harm "***causés** par* [1] *les faits relevant de la compétence ratione temporis du Tribunal arbitral (...)"*, like § 704, "*la demande relative au dommage moral",* viz.: *"les demanderesses n'ont pas apporté de preuves permettant* [3] *l'évaluation d'un tel* [2] *préjudice".* [Underlining added]

x. in § 244:

"Le Tribunal regrette que les Demanderesses ne se soient pas elles-mêmes fixées pour tâche spécifique de démontrer quel [2] *préjudice et dommage particulier pouvait leur avoir été causé par la violation de* [1] *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",*

whereas, as we saw above (§ 117), the Decision of the first *ad hoc* Committee of 18 December 2012 (§§ 272-277) dismissed Chile's contention of 2010, on which same contention the RA is nonetheless based:

xi. in the IT's ruling on costs:

"§249. (…) *la réticence des Demanderesses (...) à porter plutôt leur attention à l'identification, la preuve et la* [3] *quantification d'une demande alléguant un [2] préjudice spécifiquement centrée sur [1] la violation du TBI qui avait été reconnue par le Tribunal Initial",*

en dépit que cette même prétention relative à la charge de la preuve le Chili l'avait explicitement plaidée devant le 1er Comité ad hoc et que celui-ci la rejetée non moins explicitement (v. *supra* (§§117-118) ;

xii. in the OA's dispositive part:

"§256. Par ces motifs, le Tribunal décide, à l'unanimité : (...)

2) que (...) 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;

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 ;

6) qu'il n'existe dans les circonstances de l'espèce aucun motif justifiant d'octroyer des dommages-intérêts au titre d'un préjudice moral, ni à M. Pey Casado, ni à la Fondation;

7) que les frais d'arbitrage de la présente procédure de nouvel examen seront partagés dans la proportion de trois quarts à la charge des Demanderesses et d'un quart à la charge de la Défenderesse, dont il résulte que les Demanderesses devront rembourser à la Défenderesse la somme de 159,509.43 USD."

124. Conclusion: for these reasons, the RA infringed Article 52(1) letters (a), (d) and (e) of the ICSID Convention.

***

5.6 In the event of discrepancy, the *res judicata* of the original Award of 2008 would prevail over any opposing conclusions in the Award of 2016

125. The *res judicata* force of the OA and of the Decision of the first *ad hoc* Committee, like the force of Articles 10(4) and 10(5) of the BIT and Articles 53(1) and 48(3) of the ICSID Convention, require that all substantive discrepancies in the reasoning and the dispositive part of the RA be annulled, given that such disrepencies in the RA a) are contrary to the positions regarding facts, reasonings or decisions of the OA, *res judicata* (in particular that award's §§ 665-674 and dispositive points 2 and 3), and b) are moreover contary to international legality.

126. The ICSID Convention does not allow the present *ad hoc* Committee to delete or amend discrepancies in the RA relative to the OA, as it is not an appeal court.

127. A recognition of the basis and decisions which in the RA are irreconcilable with the *ratio decidendi* and purport of the OA, *res judicata*, would contravene the ICSID Convention and the BIT, for the chief framework here is that of the OA, as *res judicata*. It would also be contrary to international legality.

According to the ICSID Convention (Article 53(1)) and the BIT (Articles 10(4) and 10(5)), the present *ad hoc* Committee must recognise the OA and the Decision of the first *ad hoc* Committee as binding. According to that Committee's Decision, the body and dispositive part of the OA are *res judicata.*

128. Any discrepancy between the OA and the RA should be settled in favour of the former. This is what results from applying a chronological criterion pursuant to the *res judicata* system provided in the Convention and in the BIT.

129. The RA asserts in § 241 that a claim which "*ne figurait pas dans la requête de nouvel examen"* of 18 June 2013 could appear "*dans la suite de la procédure*."

130. But the first and main basis of dispositive points 2 to 7 is precisely the RT's refusal to accept claims regarding disputes arising from the investment, within the meaning of the BIT and of Article 25 of the ICSID Convention, which did not figure in the claim of 3 November 1997 but which did appear in the original proceeding after 28 April 2000 and/or in its continuation as of 18 June 2013.

131. This refusal goes against the *res judicata* of the OA, which admitted claims about diputes involving facts ocurring between 28 April 2000 and the closing date of the proceeding (see § 85 above), along with jurisdiction *ratione temporis* over these points. In keeping with the OA, then, when the same case was continued on 18 June 2013, the Tribunal should have taken note of its jurisdiction over the issues arising between the parties after between 28 April 2000 and 8 May 2008.

132. But the RT refused to do so (RA § 216), asserting other principles, whereas all that was annulled by the first *ad hoc* Committee was the evaluation of damages, and this was to be resumed on the basis of strict reasoning and the parties' rights.

133. The RA's dispositive points 3-4 and 6 are based on the conclusion adopted in §§ 231-233 that no loss (in the sense of the existence of <u>harmful</u> effects) could be demonstrated by the Claimants:

A) "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",

B) 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, 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. Le Tribunal estime que les arguments avancés par la Défenderesse sont parfaitement fondés.

134. As regards the basis of the RA's dispositive part, i.e. that no material damage could be demonstrated "*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*" (§ 232), **the RA wholly revisits a substantive point of the OA**, i.e. the latter Award's taking into account of what was at issue in the case of the Goss press for the whole investment: the status of Decree No. 165 as invalid public law, *ab initio*, liable to be acknowledged *ex officio*, as submitted by Mr Pey to the first Civil Court of Santiago as the key basis of his suit, and which:

"*fut contestée **<u>le 17 avril 1996</u>** par le Conseil national de Défense en tant que représentant du Chili devant le tribunal civil, pour défaut de qualité pour agir (locus standi). Cela au motif que M. Pey Casado n'était pas propriétaire et donc pas légitimé à agir : premièrement, du fait que* 'le Demandeur a confondu sa qualité de propriétaire de 99% du capital social de l'Entreprise périodique Clarín Ltda avec la qualité du titulaire du droit de pleine propriété sur

les biens de cette dernière'" ; *deuxièmement et subsidiairement, du fait* 'de la validité du Décret suprême n°165, de 1975, du Ministère de l'Intérieur*' portant confiscation de CPP S.A. et d'EPC Ltda."*[251] [Underlining added]

We may note here that § 61 of the RA had opened the way for this distortion of the OA's approach by putting the following into the Claimants' mouths (diametrically opposed to what they have always contended):

"Les Demanderesses (...) font valoir que, tout au contraire, 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*." [Underlining added, citation omitted]

Only once the Claimants had demonstrated the enormity of such assertions being attributed to them did the Chilean State and in its wake the RT agree to correct § 61; the RT then penalised the Claimants by ordering them to pay the costs of the proceeding for the rectification of this crucial point, also following the State's request.[252]

135. It is on the basis of this, i.e. that on the critical date of **17 April 1996** the question of the validity of Decree No. 165 was *sub lite*, and then stalled for the next **eleven years** in a Santiago court – for which the OA found there had been a denial of justice – that the IT was forced by the State to make its ruling despite the uncertainty, to its knowledge, as to the Decree's status: "***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*."[253] [Emphasis added]

Up to 8 May 2008 the IT waited to learn of the decision of the first Civil Court of Santiago concerning the Decree, thereby confirming as clearly as could possibly be its jurisdiction *ratione temporis* over the issues arising between the parties beyond 3 November 1997, Decision 43 and the associated denial of justice.

This incomplete legal/factual framework in which the IT had to make a determination was never contested by the Claimants.

Yet in § 66 the RA also opens the way for misrepresenting the OA as regards Decree No. 165 by asserting that the Claimants had contended, once again, the opposite of what they actually contended, and of what the OA concluded as *res judicata*, viz.:

"Les Demanderesses soutiennent que le prétendu abandon par M. Pey Casado, ou la prétendue élimination par la Défenderesse du jugement du 24 juillet 2008 et de son dossier judiciaire des archives du Tribunal de Santiago, sont sans incidence sur le déni de justice

---

[251] **Document C2**, OA, § 78.
[252] See Request of 27 October 2016 on correction of errors in the OA, **document C126**, §§ 12-17 et 27, and RT's Decision on correction of errors of 6 October 2017, **document C201**, § 18, 40-41, 53, 54, 58-62.
[253] **Document C2**, OA, § 603.

*résultant de l'absence de décision dans l'affaire de la rotative Goss, qui a été consommé **par** la Sentence Initiale du 8 mai 2008."*[254] [Underlining added, citation omitted]

Though it is true that Chile's attempts to make the domestic Judgment of 24 July 2008 disappear did not remotely mitigate the denial of justice involved in that unconscionable delay in the rendering of the decision, any supposed assertion by the Claimants that the OA somehow rounded off that denial of justice is mere fantasy. But chiefly it obscures the full awareness that the IT had of the significance of this decision to intervene on the point of the status of Decree No. 165 as regards invalidity of public law.[255]

Here again, once the Claimants pointed out the absurdity of such an assertion being attributed to them, the State and in its wake the RT agreed to rectify § 66. The RT then penalised the Claimants by ordering them to pay the costs of the rectification procedure.[256]

136. The validity or otherwise of Decree No. 165 was thus the key issue in the case of the Goss press throughout the original proceeding, of which the IT was well aware given that it took note of it in the Reply from the State Defence Council of **17 April 1996**[257] before the Santiago judge, produced by the State in the arbitration proceeding[258] and which the OA studies.[259] In its defence to the Santiago judge, the State Defence Council notably made the following objections to Mr Pey's claim of 4 October 1995[260] based on the Decree's invalidity *ex tunc*, viz.:

1. The State's first objection, *in fine*:

"1. (….) *il y a lieu de porter à l'attention de V.S. que même la Société* [EPC Ltée.*] mentionnée ne pourrait pas être la demanderesse, car il lui manque l'habilitation pour agir dans cette affaire puisque, comme il sera démontré plus loin, le Fisc est le propriétaire* (…)"[261].

---

[254] *107 CR, §§ 158- 60*

[255] § 123 of the Counter-Memorial omits to say that when on 18-11-2009 the IT rejected (**document C261**) the request for partial review of the OA filed on 2-06-2008 by the Claimants (**document C250**), the State had concealed from them and from the IT the rendering of the domestic judgment of 24 July 2008.

[256] See Request of 27 October 2016 for correction of errors in the OA, **document C126**, §§ 18-22 and 27 and RT's Decision on correction of errors of 6 October 2017, **document C201**, §§ 37, 42-43, 54, 58-62.

[257] **Document C17,** page 2 et seq.

[258] Voir dans la **document C2**, OA, footnote 409.

[259] **Document C2**, OA, § 78.

[260] **Document C266.**

[261] "*cabe hacer presente a US. que ni siguiera la Sociedad aludida podría ser la demandante ya que carecería de legitimación activa para obrar en autos pues, como o se demostrará más adelante, es el Fisco el dueño*", **document C297,** page 3.

The Judgment of 24 July 2008, two months **after** the notification of the OA, did not accept this objection by the State and recognised the standing of EPC[262] (but not Mr Pey) in its 9th Recital:

"NEUVIÈMEMENT: Que, dans le cas de ce dossier, si le demandeur déclare expressément que la chose spécifique, objet du présent litige est la propriété d'un tiers, à savoir la société Entreprise de Presse Clarín Ltée, qu'en conséquence il incombe à cette dernière d'avoir entrepris l'action et non au demandeur qui a comparu au présent procès, car le titulaire des droits est la personne morale et non la personne physique.

Qu'en l'espèce le demandeur devait comparaître en qualité de représentant de la société et non en son nom, vu qu'il est seulement propriétaire, selon ce qu'il indique, de 99% de la société. (...)". [263]

2. The State's second objection:

"2.- Subsidiairement à l'exception opposée au N° 1 ci-dessus, j'oppose la validité du Décret Suprême N° 165, de 1975, du Ministère de l'Intérieur. Je sollicite de V.S., dans l'éventualité improbable où [vous] n'accepteriez pas l'exception opposée au numéro précédent, qu'il vous plaise rejeter la demande [formulée] dans le dossier en toutes ses parties; dans la mesure où il n'existe pas de dépôt par nécessité comme l'indique le demandeur, puisque pour se trouver face à cette institution -dans le cas de la présente affaire- il serait préalablement nécessaire que soit déclarée la nullité du décret Suprême N° 165 de l'année 1975, du Ministère de l'Intérieure. [underlined in the original]

Au fond le demandeur est en train de mettre en cause ce Décret Suprême. (…)

Par conséquent, j'oppose comme exception á la demande [introduite] *dans cette affaire la validité du Décret Suprême N° 165 du Ministère de l'Intérieur, publié au Journal Officiel du 17 mars 1975. Le Décret Suprême N° 165, en question, ne s'oppose pas à l'ordonnancement constitutionnel en vigueur à la date où il a été pris, pas plus qu'il ne viole le principe de légalité qui régit les actes des organes publics*".[264] [Underlining added].

The Judgment of 24 July 2008 did not accept this objection either.

3. Nor the State's third objection, viz.:

---

[262] The Counter-Memorial (and the RA) omit to address the crucial fact that on 24 January 2008 the Santiago judge rejected the Treasury's objection to the legal standing of EPC Ltda 20 years after Decree No. 165 ordered its winding-up and the confiscation of its assets.

[263] **Document C282.**

[264] **Ibid.:** "*2. - En subsidio de la excepción opuesta en el Nro. 1 precedente, opongo la de validez del Decreto Supremo Nro.165, de 1975, del Ministerio del Interior. Solicito a US., en el improbable evento que no acogiera la excepción opuesta en el número anterior, se sirva rechazar la demanda de autos en todas sus partes, en tanto no existe depósito necesario como lo señala el demandante, pues para estar frente a esa institución -en el caso de autos-, sería previamente necesario se declárese la nulidad del decreto Supremo Nro. 165, del año 1975, del Ministerio del Interior.* ***En el fondo el actor está impugnando este Decreto Supremo.*** *(...) Por consiguiente, opongo como excepción a la demanda de autos la validez del Decreto Supremo N° 165 del Ministerio del Interior, publicado en el Diario Oficial de 17 de marzo de 1975. El Decreto Supremo Nro. 165, ya referido, no se opone al ordenamiento constitucional vigente a la fecha en que se dictó, ni vulnera el principio de la legalidad que rige el actuar de los órganos públicos*" [underlining added].

"*j'oppose l'exception de non existence d'un dépôt par nécessité en l'espèce*"[265] [underlining in original],

"il n'existe pas de dépôt nécessaire parce que le Fisc du Chili en est venu à avoir la possession matérielle de la chose en qualité de propriétaire et non de simple détenteur. Il [en] a été possesseur avec animus domini *et l'on n'est pas en présence de la catégorie [juridique] de dépôt mais de possession".*[266]

In his Rejoinder of 26 April 1996,[267] Mr Pey countered these objections by the State's representative (the "Fisc"):

- Section "***2) LA NULLITÉ DU DÉCRET SUPRÊME Nº 165 DE 1975 [ÉMANANT] DU MINISTÈRE DE LA JUSTICE".*** *Avant d'exposer tous les antécédents qui obligent par impératif constitutionnel et légal* ***à constater***[268] *l'invalidité totale du Décret Suprême derrière lequel s'abrite la défense du Fisc pour justifier le refus de restituer…"* ;

- Section "3. ***VICE DE FORME OU INCOMPÉTENCE DE L'AUTORITÉ QUI A ÉDICTÉ LE DÉCRET SUPRÊME Nº 165.*** *Ce que nous avons effectivement soutenu est que la nullité de droit public opère* ipso iure*, c'est-à-dire par le seul truchement de la loi ou de la Constitution, et par suite* ***ce qui incombe aux tribunaux, plutôt que de déclarer la nullité est simplement de constater la nullité****. Cela signifie que dans le débat en cours, du fait que se trouve opposée, comme une défense, la validité présumée du Décret Suprême nº 165, V. S., satisfaisant à l'article 170 nº 6 du Code de Procédure civile, va nécessairement devoir se prononcer à son propos ; cependant, en constatant les vices de l'acte, ce qui va être fait est seulement reconnaître -par une décision judiciaire, -déclarative d'un simple fait constant - l'absence de validité et d'effets de l'acte ab initio, parce que la Constitution l'a disposé ainsi"* ;

- Section "4. "***LES ACTIONS SONT EN VIGUEUR..*** (…) *l'opinion des auteurs de traités* [de droit] *converge uniformément sur ce que la nullité de droit public, et également les actions qui requièrent sa* ***constatation****, participent d'un statut juridique particulier, qui diffère jusqu'à la moelle de celui [qui est] consacré par le droit civil*."

---

[265] "*opongo la [excepción] de no existencia de depósito necesario en la especie (…) no [es] efectiva la existencia de un depósito necesario porque el Fisco pasó a tenor la posesión material de la máquina rotativa en calidad de dueño y no de mero tenedor. Así, el Fisco ha sido poseedor con ánimo de señor y dueño y no se da la figura del depósito sino de la posesión*".

[266] **Ibid.**, pages 8 and 9**:** "*opongo la excepción de un depósito necesario (…) no [es] efectiva la existencia de un depósito necesario porque el Fisco pasó a tenor la posesión material de la máquina rotativa en calidad de dueño y no de mero tenedor. Así, el Fisco ha sido poseedor con ánimo de señor y dueño y no se da la figura del depósito sino de la posesión*"

[267] **Document C298f**, whose original in Spanish appears in document **C298e**.

[268] Note that according to various decisions of the Chilean Supreme Court regarding the confiscatory decrees issued pursuant to Decree-Law 77 of 1983, the role falling to the judge in such cases is simply to take note of the reality of the invalid public law status of the act in question pursuant to Article 7 of the Constitution, which provides: "(…) 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 que expresamente se les hayan conferido en virtud de la Constitución o las leyes. Todo acto en contravención a este artículo* ***es nulo****"*), emphasis added. See in the Memorial of 27 April 2018 §§ 316, 324, 326, 344 (iv).

(Underlining added)

In short, this domestic judgment took note in its 9th Recital of the status of Decree No. 165 as invalid public law in that it recognises the standing of the firm EPC Ltda (and not of Mr Pey), which is mutually incompatible with any processing of the State's other claims with a view to a decision – in which case Article 170[269] of the Chilean Procedural Code releases the judge of the duty to refer thereto. Thus:

- la Société mentionnée ne pourrait pas être la demanderesse, car il lui manque l'habilitation pour agir dans cette affaire puisque le Fisc est le propriétaire (…),

- la validité du Décret Suprême N° 165, de 1975, du Ministère de l'Intérieur (...) il n'existe pas de dépôt par nécessité puisque pour se trouver face à cette institution -dans le cas de la présente affaire- il serait préalablement nécessaire que soit déclarée la nullité du décret Suprême N° 165 de l'année 1975, du Ministère de l'Intérieure. Au fond le demandeur est en train de mettre en cause ce Décret Suprême (…),

la validité du Décret Suprême N° 165 du Ministère de l'Intérieur ne s'oppose pas à l'ordonnancement constitutionnel en vigueur à la date où il a été pris, pas plus qu'il ne viole le principe de légalité qui régit les actes des organes publics".

il n'existe pas de dépôt nécessaire parce que le Fisc du Chili en est venu à avoir la possession matérielle de la chose en qualité de propriétaire et non de simple détenteur. Il [en] a été possesseur avec animus domini *et l'on n'est pas en présence de la catégorie [juridique] de dépôt mais de possession".*

For the Judgment's 19th Recital expressly confirms that the refusal of Mr Pey's standing and the attribution of standing to EPC Ltda (and the time limit on the action brought) are incompatible with the examination of the State's other claims:

"*DIX-NEUVIÈMEMENT : Qu'ayant accepté les exceptions de défaut d'habilitation à agir et de prescription, par économie procédurale et selon ce que dispose le numéro 6 de l'article 170 du Code de Procédure Civil[270], il est omis de se prononcer quant aux autres actions et*

[269] Article 170 of the Code of Civil Procedure provides: "Les décisions définitives de première instance, d'instance unique et celles de second [degré] qui modifieraient ou infirmeraient dans leur dispositif celles d'autres tribunaux, contiendront: (…) 6º La décision relative à l'affaire en litige. Cette décision devra comprendre toutes les actions et exceptions qu'il a été fait valoir dans le procès; mais il pourra être omis de trancher celles qui seraient incompatibles avec celles [qui ont été] acceptées" (Las sentencias definitivas de primera o de única instancia y las de segunda que modifiquen o revoquen en su parte dispositiva las de otros tribunales, contendrán: (…) 6° La decisión del asunto controvertido. Esta decisión deberá comprender todas las acciones y excepciones que se hayan hecho valer en el juicio; pero podrá omitirse la resolución de aquellas que sean incompatibles con las aceptadas.)"

[270] Article 170 of the Code of Civil Procedure provides: "*Les décisions définitives de première instance, d'instance unique et celles de second [degré] qui modifieraient ou infirmeraient dans leur dispositif celles d'autres tribunaux, contiendront: (...) 6° La décision relative à l'affaire en litige. Cette décision devra comprendre toutes les actions et exceptions qu'il a été fait valoir dans le procès; mais il pourra être omis de trancher celles qui seraient incompatibles avec celles [qui ont été] acceptées" (Las sentencias definitivas de primera o de única instancia y las de segunda que modifiquen o revoquen en su parte dispositiva las de otros tribunales, contendrán: (...) 6° La decisión del asunto controvertido. Esta decisión deberá comprender todas las acciones y excepciones que se hayan hecho valer en el juicio; pero podrá omitirse la resolución de aquellas que sean incompatibles con las aceptadas*.)"

exceptions du fait qu'une décision les concernant est ***incompatible*** *avec les exceptions acceptées*"[271] [underlining added]

As we see, the State's claims whose processing with a view to a decision was deemed **incompatible** with the approach taken by the Santiago court are very precisely those stating or implying the validity of Decree No. 165.

Conclusion: the documents in the proceeding before the first Civil Court of Santiago and their effects in the Judgment confirm that, in the basis for the RA's dispositive points 3 and 4, §§ 232-233 revisit the OA's conclusion as to the scope and significance of the case of the Goss press in determining the status of Decree No. 165 in domestic law and, consequently, the exact compensable harm arising from the denial of justice, the only possible source of the damages payable to the Claimants.

137. The OA was also revised in the RA's conditions in §§ 232-233 by accepting Respondent's claim that *the Claimants supposedly could not have benefited from a compensation process [Decision 43] in which they had deliberately and expressly opted not to take part (by reason of the BIT's fork-in-the-road clause), and if the Claimants could be presumed to have suffered any damage, the immediate cause of this was their own acts, thereby breaking the link of causality.*

Quite the reverse: the Award of 8 May 2008 expressly confirmed with *res judicata* effect that the Claimants asserted that the supplementary claim of 4 November 2002[272] – relating to **Decision 43** and the **denial of justice** – did not constitute a fork in the road:[273]

"§480. Selon les demanderesses, la clause d'option irrévocable ne s'applique pas davantage à leur demande complémentaire relative au ***déni de justice*** *qu'elles prétendent avoir subi dans la procédure introduite devant les tribunaux chiliens pour obtenir la restitution de la rotative Goss. L'exercice de l'option irrévocable serait en effet impossible dans le cas d'un* ***déni de justice*** *car lorsqu'une partie porte un différend devant une juridiction interne et que cette procédure interne débouche sur un* ***déni de justice****, par définition imprévisible, alors que par ailleurs la même partie a introduit une procédure d'arbitrage, la demande portée par la suite devant le Tribunal arbitral est nécessairement différente. Le* ***déni de justice*** *dans la procédure introduite en 1995 pour obtenir la restitution de la rotative Goss pourrait donc être porté à la connaissance du Tribunal* ***sans que soit exercée l'option irrévocable****."* (Soulignement ajouté)

"§ 641. (...) 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

---

[271] **Document C282,** Judgment of 24 July 2008: *"DECIMONOVENO: Que, habiéndose acogido las excepciones de falta de legitimación activa y de prescripción, por economía procesal y según dispone el número 6 del artículo 170 del Código de Procedimiento Civil, se omite el pronunciamiento de las demás acciones y excepciones por ser incompatible su resolución con las excepciones acogidas*."

[272] **Document C249**.

[273] **Document C2,** OA, chap. "*VII. RESPONSABILITE DE L'ÉTAT POUR LES VIOLATIONS DE L'API. B. Le bien-fondé des violation alléguées"*

l'indemnisation de sa valeur de remplacement et l'absence de décision depuis plus de dix ans constituaient ***un déni de justice*** *de la part du Chili.599*[274]

642. En outre, ***les demanderesses, qui notent au passage que la "fork-in-the-road "et le déni de justice sont des notions incompatibles***..." [Soulignement ajouté]

For the OA expressly asserted that the supplementary claim filed on 4 November did not affect the jurisdiction of the first Civil Court of Santiago to decide the merits of the issue submitted to it, i.e. taking note of the invalidity of Decree 165:

Footnote 409 : "*Selon les parties demanderesses, cette procédure interne, qui vise à obtenir la restitution de la rotative Goss, n'a donné lieu à aucune "sentence "(...) Les décisions invoquées par la défenderesse ne peuvent de fait être qualifiées de jugement sur le fond de l'affaire (...) le Conseil national de Défense a répondu à la requête du 4 octobre 1995 en invoquant* ***le défaut de qualité pour agir de la partie demanderesse*** *(...). L'appel formé par M. Pey Casado contre la décision du 20 décembre 1996 a pu être rejeté le 4 octobre 2002 par la Cour d'appel de Santiago (v. contre-mémoire de la défenderesse du 3 février 2003, pp. 117-118 et annexe 109 au contre-mémoire) mais il ne s'agit pas d'une décision sur le fond*."

§457 : "*(...) La défenderesse avance également que* ***la Première Chambre civile de Santiago aurait rejeté la demande de suspension formulée par M. Pey Casado*** *au moment où les parties demanderesses ont déposé leur demande complémentaire.*"

§603 ." (…) *A la connaissance du Tribunal, la validité du Décret n°165 n'a pas été remise en cause par les juridictions internes* (…)." [Emphasis added]

This incompatibility between the denial of justice and the fork in the road asserted by the Claimants and the OA is also corroborated by the following undeniable facts:

a) The fact that §§ 666-673 of the OA take account of the *recognition* by Chile to the Arbitral Tribunal in 2003 of the invalidity of the confiscations under the *de facto* regime and the duty to confiscate the owners;

b) The fact that § 674 and dispositive points 2 and 3 of the OA hold the State liable to compensate the Claimants for its breach of the duty to give the latter fair and equitable treatment, with no denial of justice.

---

[274] **Document C2**, OA, "Footnote 599: "*Les parties demanderesses ont résumé leur position lors de l'audience du 15 janvier comme suit*: 'En l'espèce, **le Chili a commis un acte de déni de justice**, d'un côté, par le délai extraordinaire à établir une vraie solution. A l'heure où nous parlons, nous nous situons plus de dix ans après la requête originale et, à ce jour, il n'y a pas eu de résolution en première instance. Le délai de résolution d'un différend porté à la connaissance des cours est en soit un motif de **déni de justice** si ce délai est irraisonnable'.599 Transcription de l'audience du 15 janvier 2007, p. 93, § 10-16 (Me Garcés). V. aussi réplique des demanderesses au contre-mémoire de la défenderesse, du 23 février 2003, p. 107; 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'État 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*'" [underlining added]

c) The fact that the State, in giving the Judgment of 24 July 2008, implicitly acknowledged that Mr Pey had not taken the fork in the road when in May 2002 he notified the 28th Civil Court of Santiago[275] of the supplementary claim submitted the same day to the ICSID Tribunal, and asked it to provisionally suspend the domestic proceeding;[276]

d) The fact that in the proceeding for annulment of the OA as a whole initiated by the State on 5 August 2008, the latter objected on 21 March 2011 to that domestic judgment being incorporated into the proceeding on 30 March 2011[277] without claiming that the judgment had been rendered in breach of the supposed fork in the road in Article 10(2) of the BIT.

138. Accordingly the Claimants respectfully request the annulment of §§ 232 and 233 of the RA and their consequences in dispositive points 2 to 6, for being contrary to the *res judicata* of the OA (Article 52 letters b) and e) of the ICSID Convention).

**

139. § 2 to §6 of the RA's dispositive part are based on the conclusion, accepted in § 244, that "*le Tribunal n'aurait pas pu non plus élaborer sa propre théorie sur les dommages-intérêts, distincte des arguments des Parties ; c'est ce que le Tribunal Initial avait fait, et c'est pour cela qu'il a été critiqué à juste titre par le Comité ad hoc dans la procédure en annulation*".

140. Yet the RT in its Award came up with its own theory on damages, which it took as a basis for dispositive points 2 to 4, regardless, in this case, of something whose binding force for the RT far exceeded the parties' arguments, viz. the *res judicata* of the OA. Thus it:

a) revisited the principle of financial compensation established in the OA[278] and replaced it with that of "satisfaction" (RA § 201 and its dispositive point 2).

---

[275] **Document C282**, sheets 383-384.

[276] **Document C2,** OA, "La défenderesse avance également que la Première Chambre civile de Santiago aurait rejeté la demande de suspension formulée par M. Pey Casado au moment où les parties demanderesses ont déposé leur demande complémentaire"; **Document C299**, the first Civil Court of Santiago rejects on 14 November 2002 the request for provisional suspension of the proceedings filed by Mr Pey following the decision of the original Tribunal asserting substantive jurisdiction for denial of justice at ICSID; **document C300**, appeal of 20 November 2002 for reconsideration and subsidiarily to a higher court by Mr Pey Casado against the decision of 14 November 2002 of the first Civil Court of Santiago rejecting the provisional suspension of the domestic proceeding.

[277] **Documents C301** to **309.**

[278] See Memorial of 27 April 2018, § 300(ii) :"*Jamais dans le courant de la procédure initiale ni l'État Défendeur, ni le Tribunal initial ni le Comité ad hoc, n'ont manifesté le moindre doute quant à ce que la seule nature du dédommagement à avoir été plaidée était pécuniaire. Ce fait est attesté dans la rédaction, le contexte, l'intention et la finalité de tous les paragraphes de la Sentence initiale qui portant, directement ou indirectement, sur la compensation constituent le fondement du § nº 2 du Dispositif -par exemple, les §§ 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,*

b) went against the BIT, the OA (*res judicata*) and the Decision of the first *ad hoc* Committee by ruling that it was necessarily and inevitably "*un moyen détourné de réintroduire sous une autre forme la demande fondée sur l'expropriation qui a été rejetée*" – dealing with a breach of the BIT committed by definition after that treaty's entry into force – that the *dies a quo* of the proposed estimate of the amount of damage caused by this breach could be prior to the BIT's entry into force (RA §§216, 240 and its dispositive points 3 to 6).

141. Accordingly the Claimants respectfully request the annulment of §§ 201, 216 and 240 of the RA and their consequences in its dispositive points 2 to 6, on the grounds provided in Article 52 letters b) and e) of the ICSID Convention.

**

6. MANIFEST INTERNAL CONTRADICTIONS IN THE RA MAKE IT VOID. FAILURE TO STATE REASONS

142. Chile asserted to the first *ad hoc* Committee on the subject of contradictions in an arbitral award:

Reply on Annulment (22 December 2010)[279]

§442. Concerning the first point, unlike Article 52(1)(b) (which renders annullable a "manifest" excess of powers), and Article 52(1)(d) (which refers to "serious" departures of a "fundamental" rule of procedure), Article 52(1)(e) does not include any qualifying adjectives, and there is no basis at all to import them tacitly. This point was made by Professor Schreuer in his COMMENTARY:

[A]d hoc Committees have pointed out that the wording of Art. 52(1) itself placed limits on their power of scrutiny. The Klöckner I ad hoc Committee said: "The very language of the provision demands a cautious approach: sub-paragraph (b) requires that the Tribunal's excess of powers be 'manifest.' Likewise, under subparagraph (d), only a 'serious departure' from a fundamental rule of procedure can justify challenging an award. Finally, the Convention envisages in sub-paragraph (e) a 'failure to state' reasons and not, for example, a mistake in stating reasons. . . ."[733][280]

2010-06-10 Memorial on the Annulment (corrected)

(3) Inconsistent or Contradictory Reasons

661, 662, 667, 668, 674, 728, ou les notes en bas de page 191, 589, 599, 617" -la seule exception est le § 704, circonscrit à "*la demande relative au dommage moral*". § 115 of the Counter-Memorial manipulates § 704 of the OA, whose sole object is the request for moral damages which the State, and in its wake, dispositive point 2 of the RA, construe *contra rem iudicatam* for all of the harm sustained by the Claimants.

[279] **Document 310**.

[280] 733 [See RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 21]

618. There is also broad acceptance in the jurisprudence and doctrine that inconsistent or contradictory reasons in an award can amount to a "failure to state reasons" within the meaning of Article 52(1)(e). As Professor Schreuer has noted, "There is agreement among the ad hoc committees that contradictory reasons amount to a failure to state reasons".734[281] This is so because "[c]ontradictory reasons will not enable the reader to understand the tribunal's motives…," and therefore "are as useful as no reasons at all."735[282]

619. As President of the Klöckner I Committee, Professor Lalive articulated this principle in the Committee's decision as follows: "As for 'contradiction of reasons', it is in principle appropriate to bring this notion under the category 'failure to state reasons' for the very simple reasons [sic] that two genuinely contradictory reasons cancel each other out."736[283]

620. Subsequently, the Committees in Amco I and MINE annulled awards for "failure to state reasons" precisely because of the existence of inconsistent or contradictory reasons. In Amco I, the tribunal had presented contradictory reasons with respect to the calculation of the amount of the investment, and the Committee found that this amounted to a "failure to state reasons."737[284] In MINE, the Committee stated that "to the extent that the Tribunal purported to state the reasons for its decisions" at all with respect to damages, these were "inconsistent and in contradiction with its analysis" of other damages theories presented by the parties in that case.738[285] For this reason, it too annulled the relevant portion of the Award.

621. More recently, the Committees in Vivendi I, Mitchell, and CDC have reaffirmed the principle that inconsistent or contradictory reasons amount to a "failure to state reasons." In Vivendi I, the Committee held that "it is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might."739[286] Mitchell phrased the concern as follows: "Indeed, it is evident that a seriously contradictory reasoning would be equivalent to a failure to state reasons under Article 52(1)(e), provided that the contradiction is at the same time apparent, to a point such that the ad hoc Committee cannot be reproached for engaging in analysis of the merits."740[287] And the Committee in CDC stressed that "Article 52(1)(e) requires that the Tribunal have stated reasons, and that such reasons be coherent, i.e., neither 'contradictory' nor 'frivolous . . . .'"741[288]

(4) Failure to Address Questions Presented

622. Finally, it is also well established both in the case law and the doctrine that a tribunal has an obligation to address the questions that are presented to it, and that a failure to do so amounts to a "failure to state reasons" under Article 52(1)(e).742[289] Since the task of affirmatively addressing in the award every single point raised by the parties could impose an

---

[281] 734 RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 390
[282] 735 RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 389.
[283] 736 RALA-23, Klöckner I (Annulment) at ¶ 116.
[284] 737 RALA-2, Amco I (Annulment) at ¶ 97.
[285] 738 RALA-26, MINE (Annulment) at ¶¶ 6.105.
[286] 739 RALA-16, Vivendi I (Annulment) at ¶ 65.
[287] 740 RALA-29, Mitchell (Annulment) at ¶ 21.
[288] 741 RALA-8, CDC (Annulment) at ¶ 70
[289] 742 See, e.g., RALA-23, Klöckner I (Annulment) at ¶ 115; RALA-2, Amco I (Annulment) at ¶¶ 31–35; RALA-26, MINE (Annulment) at ¶¶ 5.12–5.13; RALA-40, Wena Hotels (Annulment) at ¶ 101; RALA-27, M.C.I. (Annulment) at ¶ 67; RALA-8, CDC (Annulment) at ¶ 71; RALA-34, Rumeli Telekom (Annulment) at ¶ 81; RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 409.

intolerably onerous burden on the tribunal, the key issue for purposes of an annulment proceeding is determining what kind of "question" is subject to this obligation.

623. Professor Schreuer has stated that a "question" for purposes of Article 52(1)(e) "is to be understood objectively in the sense of a crucial or decisive argument. An argument is crucial or decisive if its acceptance would have altered the tribunal's conclusions."[743][290] *Along the same lines, the Committee in MINE found that in the case before it, there had been a "failure to state reasons" because the tribunal had not addressed certain outcome-determinative questions presented to it by the Respondent State. The Committee determined that, if the tribunal had in fact addressed and ultimately accepted such arguments, this would have resulted in a "radical reduction of the damages claim. . . ."*[744][291] *This conclusion in turn meant that the tribunal was obligated not only to consider those arguments, but also to explain in the award why it disregarded or rejected them:*

The Tribunal either failed to consider them, or it did consider them but thought that Guinea's arguments should be rejected. But that did not free the Tribunal from its duty to give reasons for its rejection as an indispensable component of the statement of reasons on which its conclusion was based.[745][292]

624. Similarly, the Committee in M.C.I. stated that "[t]he obligation in Article 48(3) of the Washington Convention to deal with every question applies to every argument which is Relevant and in particular to arguments which might affect the outcome of the case. . . . This explains why the tribunal must address all the parties' 'questions' ('pretensiones') but is not required to comment on all arguments when they are of no relevance to the award."[746][293]

625. Thus, a Tribunal cannot simply brush aside an issue or argument of importance to its decision (especially one that can materially affect the outcome of the case), simply because it may be inconvenient to address it.

626. On the basis of the foregoing, the standard appears clear: an ICSID tribunal does not have the authority to ignore questions or arguments presented by a party where such questions or arguments could change an important aspect of the tribunal's conclusions or rulings. Doing

---

[290] 743 See also RALA-2, Amco I at ¶ 35 ("If the Tribunal had accepted as valid any of the arguments invoked in the Application for annulment, their insertion in the Award would have contradicted what had hitherto been the main lines of reasoning of the Award. Thus, the Tribunal would have been obliged to modify the rationale"); RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 426; see also RALA-23, Klöckner I (Annulment) at ¶ 148 ("It is clear that the argument Klöckner bases on the contractual clauses limiting liability can and should be considered a 'question submitted to the Tribunal' and that this an **essential question** for both parties. The Claimant has a major interest in seeing these contractual clauses deemed applicable and applied. The Respondent has a major interest in seeing them judged inapplicable or irrelevant to the present case.") (emphasis added); RALA-26, MINE (Annulment) at ¶¶ 5.13, 6.50, 6.84, 6.91.

[291] 744 RALA-26, MINE (Annulment) at ¶ 6.101.

[292] 745 RALA-26, MINE (Annulment) at ¶ 6.101. Nor does Article 49(2) of the ICSID Convention, which allows "supplementation" of an award, prevent the use of Article 52(1)(e) in cases where a Tribunal fails to address important arguments of the parties. As Professor Schreuer explains, "Article 49(2) will be useful only in cases of inadvertent omissions of a technical error" but "will not be useful in cases of a failure to address major facts and arguments which go to the core of the tribunal's decision." RALA-67, Schreuer, COMMENTARY, at Art. 52 ¶ 402. This proposition was accepted by the Committees in Klöckner I, Amco I, Wena Hotels, and MINE, among others. See RALA-23, Klöckner I (Annulment) at ¶ 115; RALA-2, Amco I (Annulment) at ¶¶ 31–35; RALA-26, MINE (Annulment) at ¶¶ 5.12–5.13; RALA-40, Wena Hotels (Annulment) at ¶ 101.

[293] 746 RALA-27, M.C.I. (Annulment) at ¶ 67

so amounts to a "failure to state reasons" that represents grounds for annulment under Article 52(1)(e).[747][294]

[End of quote from Chile's proposal to the first *ad hoc* Committee]

143. These grounds for annulment of an arbitral award are also applicable to the contradictions whose existence in the RA of 13 September 2016 has been demonstrated.

144. For as we saw in §§ 94-100 above, the RA contradicts itself when it says in § 241 that a request which "*ne figurait pas dans la requête de nouvel examen*" of 18 June 2013 could nonetheless appear "*dans la suite de la procédure*", given that the primary basis for dispositive points 2 to 7 was precisely a refusal to accept any claims not appearing in the request of 3 November 1997, whereas they did appear later in the proceeding – the claim regarding Decision 43 in 2000,[295] the supplementary claim of 4 November 2002,[296] the claim made in the hearings of 2007[297] – duly submitted to the original Tribunal, accepted by it and ratified by the first *ad hoc* Committee.

145. The RA also contradicts itself when:

1) after establishing in § 188 that:

"*La compensation qui pourrait être accordée à la suite de l'annulation partielle sera donc octroyée à ces Demanderesses désignées, et elle le sera au titre du préjudice subi par ces Demanderesses en raison des violations identifiées dans la Sentence Initiale et ayant autorité de chose jugée*",

these breaches identified in the OA being those arising after Decision 43 of 28 April 2000,

2) and the RT refused to take account in its award of the issues arising between the parties between 3 November 1997 and 8 May 2008 and the evidence of the damage involved therein for the Claimants, due to lack of jurisdiction according

---

[294] 747 Other Committees that have reached this conclusion include: RALA-8, CDC (Annulment) at ¶ 71 (agreeing with the Committee in MINE that a failure to address questions posed would amount to a ground for annulment if "the failure to deal with a particular question rendered the award unintelligible") (quoting RALA-67, Schreuer, COMMENTARY, at Art. 52, ¶¶ 308–09); RALA-34, Rumeli Telekom (Annulment) at ¶ 81 (noting with approval that both parties agreed "that a failure to deal with a question which would have altered an important finding of the tribunal or would have rendered the award unintelligible amounts to a failure to state reasons").

[295] **Document C2**, OA, "Conclusions du Tribunal", §§ 613-623: "ii. Les dispositions de fond de l'API sont applicables à la Décision n°43 du 28 avril 2000".

[296] **Document C2**, OA, §§ 464, 494-497, 653-674, and **document C249f**.

[297] **Document C2**, OA, § 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 […]'" (citation omitted, serious departure from a fundamental rule of procedure). The transcription of the hearings of 15 and 16 January 2007 appear in **documents C311 and C312.**

to the RA,[298]

3) yet the RA reaches conclusions that presuppose the existence of jurisdiction:

- 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*"

- in § 235,

that "*en l'absence de toute preuve suffisante d'un préjudice ou d'un dommage causé aux Demanderesses par la violation du TBI établie dans la Sentence Initiale, la question de l'évaluation ou de la quantification de ce dommage ne se pose pas. Le Tribunal n'a donc pas besoin d'analyser de manière plus détaillée les rapports d'expertise de M. Saura pour les Demanderesses (…)" ;*

- in §§ 238-239, on the State's actions subsequent to the date of the OA, 8 May 2008 (see above §92(3), 123(viii));

- in § 243,

that "*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.*"

[Underlining added]

4) The RA also contradicts itself in §§216, 232, 233, 238-239, 243 when, after casting off jurisdiction to settle disputes about the amount of compensation for issues arising between the parties between 3 November 1997 and 8 May 2008, it concludes nonetheless in § 244 that

"la conclusion dans la Sentence Initiale selon laquelle la Défenderesse avait commis une violation de l'article 4 du TBI [après le 28 avril 2000] *en ne garantissant pas un traitement juste et équitable aux investissements des Demanderesses, en ce compris un déni de justice (…) a autorité de chose jugée*".

Given that the breaches for which the OA ordered Chile to compensate the Claimants all took place as of Decision 43 of 28 April 2000, and the question of jurisdiction over the merits and the State's responsibility were decided in the OA,

[298] **Ibid**., see *supra* our remarks on §§ of the RA nos. 216 (sections 5.2 to 5.4), 232 (§§ 82, 92(1), 122), 234 (§ 82), 238-239 (§ 92(3), 243 (§ 92(4), 123(ix)).

the Tribunal tasked with continuing the same arbitration had jurisdiction to determine the amount of damages caused by those breaches.

5) Now in the basis for the RA's dispositive points 2 to 8 there is a contradiction between, on one hand, what is stated in §§ 216, 232, 233, 238-239, 243 (RT's lack of jurisdiction *ratione temporis* over the issues arising between the parties between 3 November 1997 and 8 May 2008 [see sections 5.2 to 5.4 above]) and, on the other, the conclusions of §§ 234, 235, 238-239, 243, 244 (assuming jurisdiction over the question concerning the quantification of damages caused as of Decision 43 of 28 April 2000).

6) These contradictions come on top of those existing between, on one hand, the OA and the Decision 43, and on the other, the RA.[299]

7) All of these contradictions relate to one very important and inescapable question: the RT's jurisdiction to carry out its task in continuance of the original arbitral proceeding.

8) The result is that dispositive points 2 to 8 and the basis thereof must all be annulled on the ground provided in Article 52(e) of the Convention, and the same basis of principle that led the first *ad hoc* Committee to annul the OA's dispositive point 4 and its basis, namely, in short:

> *"281. Comme cela est bien établi par les décisions de nombreux comités ad hoc CIRDI, des motifs contradictoires peuvent constituer un '*défaut de motifs'*[217][300]. L'objet de ce motif d'annulation – en d'autres termes, l'objet de l'exigence d'une motivation – est de permettre aux parties de comprendre les décisions des tribunaux CIRDI.*
>
> *"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 dommagesintérêts[219][301], 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 (...) qui, comme cela a été démontré ci-dessus, est manifestement contradictoire.*
>
> *"287. Compte tenu de ces éléments, le Comité estime que le Tribunal n'a pas motivé sa décision relative aux dommages, ce qui constitue un motif d'annulation sur le fondement de l'article 52(1)(e) de la Convention CIRDI. Le Comité fait donc droit à la demande de la Défenderesse à cet égard et annule le paragraphe 4 du dispositif de la Sentence".*[302]

---

[299] See *supra* §§ 32, 35, 74-77, 81, 82, 116.
[300] 217 Voir supra, § 85 [voir supra § 22]
[301] 219 Voir Décision Wena, § 91; Décision Rumeli, § 146; Décision Azurix, § 35
[302] **Document C20**

***

7. THE TREATMENT OF EVIDENCE BY THE RESUBMISSION TRIBUNAL MAKES ITS AWARD ANNULLABLE

146. The Claimants contended in their Request for Annulment[303] and their Memorial[304] that the treatment by the RA of the evidence submitted by the Claimants justifies the award's annulment for two reasons.

147. On one hand, the rejection of the arguments and evidence submitted by the Claimants to demonstrate the harm sustained as a result of the breaches identified by the original award constitutes a manifest excess of powers.[305]

148. On the other hand, the Tribunal's decision that the Claimants purportedly did not provide evidence of the harm sustained involves a failure to state reasons and a serious departure from a fundamental rule of procedure.[306]

149. The Respondent's reply to the grounds for annulment, often terse and peremptory, does not bear analysis.

150. We will again show that the Tribunal's rejection of arguments and evidence submitted by the Claimants about the harm sustained by them as a result of the Respondent's breach of Article 4 of the BIT justifies the annulment of the RA (**7.1**), as does the Tribunal's decision that the Claimants supposedly provided no proof of the harm sustained (**7.2**).

7.1 The Tribunal's rejection of arguments and documents concerning the evaluation of the harm sustained by the Claimants constitutes a manifest excess of powers

151. In their previous written submissions[307] and in the above sections, the Claimants showed that the Tribunal questioned, contrary to the OA's considerations that are *res judicata*, the existence of harm sustained by the Claimants as a result of the Respondent's breach of Article 4 of the BIT.

152. Further to this infringement of the OA's *res judicata*, the Tribunal also took a view on the arguments and evidence submitted by the Claimants.

153. As the Claimants showed in previous submissions, after using its power to interpret the OA beyond what the OA allowed, the Tribunal opted to dismiss the arguments put forward and the documents produced by the Claimants for the

[303] Application for Annulment, §§ 238 et seq.
[304] **Memorial on Annulment** §§ 584 et seq.
[305] Application for Annulment, §§ 238 et s.; Memorial on Annulment, §§ 586 et seq.
[306] Application for Annulment, §§ 243 et seq.; Memorial on Annulment, §§ 623 et seq.
[307] Application for Annulment, §§ 207 et seq.; Memorial on Annulment, §§ 494 et seq.

evaluation of the loss that they sustained as a result of the breach of Article 4 of the BIT, on the grounds that all this would refer back to the initial confiscation.[308]

154. This decision constitutes a manifest excess of powers given that the OA, *res judicata*, expressly states that, though the IT lacked jurisdiction to hear a claim based on the expropriation of the investment on the basis of Article 5 of the BIT, this event could be taken into account by the Tribunal in its analysis of other breaches of the BIT.

155. Accordingly the OA states 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 contexte dans lequel sont intervenus les actes que les demanderesses estiment devoir être qualifiés de violations postérieures à l'entrée en vigueur du traité. C'est ce qu'a rappelé le Tribunal arbitral constitué dans l'affaire MCI c. Ecuador qui estimait n'être compétent qu'à l'égard des actes postérieurs à l'entrée en vigueur de l'API lorsque ces actes sont présentés comme des violations de l'API :
>
> "Prior 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"
>
> 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. Il convient dès lors de déterminer si les autres violations invoquées par les demanderesses peuvent effectivement se voir appliquer les dispositions de fond de l'API ratione temporis" (Underlining added)[309].

156. Moreover it is worth noting that the partial annulment made by the first *ad hoc* Committee was based on two grounds: serious departure from a fundamental rule of procedure,[310] and failure to state reasons.[311]

157. In the particular case of failure to state reasons, the first *ad hoc* Committee's decision to annul the OA's dispositive point 4 was based on the fact that the original Tribunal "[n'avait] *pas indiqué les raisons*":

> "*le Tribunal a procédé au calcul des dommages-intérêts des Demanderesses en fonction de l'évaluation réalisée par le Ministère chilien des Biens nationaux, conformément à la*

[308] **Memorial on Annulment**, §§ 586 et s.
[309] **Document C2**, OA, §§ 611-612; see also Memorial on Annulment, §§ 609 et s.
[310] **Document C20**, Decision of the 1st *ad hoc* Committee of 18 December 2012, §§ 246 et seq.
[311] **Ibid.,** Decision of the 1st *ad hoc* Committee of 18 December 2012, §§ 278 et seq.

> *Décision n° 43, aux fins de l'indemnisation des personnes qu'il considérait être les propriétaires d'El Clarín, au titre de l'expropriation du journal. (...)*
>
> *Le recours par le Tribunal au calcul des dommages-intérêts au titre de l'expropriation est manifestement contraire à sa décision, quelques paragraphes auparavant, selon laquelle un tel calcul des dommages-intérêts au titre de l'expropriation manque de pertinence et les éléments de preuve et des arguments relatifs à un tel calcul ne pouvaient pas être retenus*." [312]

We may note here that the first *ad hoc* Committee criticises the OA for accepting "***le calcul***", "*l'évaluation*" et les "*éléments de preuve et des arguments relatifs à un tel* ***calcul***". Yet the calculation annulled by the first *ad hoc* Committee was precisely that established by the Chilean Ministry of National Assets in one of the acts constituting the discrimination and denial of justice for which the Award found the State liable, i.e. in Decision 43, which compensated persons[313] who were not the owners of the investment.[314] This contradiction in the OA was touched on in the hearings and struck the first *ad hoc* Committee.[315]

158. In short, the annulment pronounced by the first *ad hoc* Committee on this point was based on the fact that the OA **had not explained** why or how it was appropriate to adopt compensation calculated on the basis of the expropriation value of "El Clarin" group. Given the view taken a few lines earlier, the first *ad hoc* Committee saw conflicting reasons in this lack of justification:

> "Le recours par le Tribunal au calcul des dommages-intérêts au titre de l'expropriation est manifestement contraire à sa décision, quelques paragraphes auparavant, selon laquelle un tel calcul des dommages-intérêts au titre de l'expropriation manque de pertinence et les éléments de preuve et des arguments relatifs à un tel calcul ne pouvaient être retenus".[316]

159. The First *ad hoc* Committee nonetheless took care to stress that what was at issue here was not the method of calculation used by the original Tribunal to determine the *quantum* of remedy payable to the Claimants but the fact that the use of this method **had not been justified** by the IT in keeping with its earlier conclusions:

> "Bien que le Comité reconnaisse que les tribunaux 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 pas le Tribunal. Le problème ne réside pas non plus en soi dans la méthode retenue par le Tribunal pour évaluer

[312] **Ibid.,** § 284.
[313] **Document C2**, OA, §§ 692-702.
[314] **Ibid., § 674.**
[315] **Documents C349** (pages 86-90) et **C350** (pages 157-161, 164, 167-171 transcription of the hearings of 7 and 8 June 2011 before the first *ad hoc* Committee
[316] **Ibid.,** para. 285.

> 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."[317]

160. Hence the Decision of the first *ad hoc* Committee did not prevent the resubmission Tribunal from having recourse to aspects relating to the fair market value of the "El Clarin" group to determine the amount of compensation to which the investors were entitled[318] as a result of the Respondent's breach committed on 28 April 2000 and afterwards of "*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*".[319]

161. In its Counter-Memorial, the Respondent makes two sets of criticisms of the reasoning followed by the Claimants in their previous submissions.

162. Firstly it insists at length on the use by the Claimants in their submissions of the term "*in limine litis*". In what appears to be a matter of pure form, the Respondent charges the Claimants with distorting the meaning of these words.[320]

163. The Respondent's critique is artificial and inconsequential, as we saw in §§ 7, 17(x), 92(4) above, and as was substantiated in the request for annulment.[321]

164. It is also baseless, for the term "*in limine litis*" is in the award itself,[322] and implicitly underlies some of the award's reasons, as the Claimants detailed above.[323]

165. Secondly, the Respondent charges the Claimants with filing an appeal against the determinations of the RA.[324] It alleges in particular that the Claimants mistake the meaning and scope of the OA, which is supposed to have ruled out any claims concerning the expropriation.[325]

166. This assertion is worth remarking on.

167. As was recalled above,[326] though the original Tribunal held that the expropriation effected by Decree No. 165 on 10 February 1975 could not constitute a breach of the BIT, *ratione temporis*,[327] it also allowed that points of fact prior to the BIT's entry

---

[317] **Ibid.,** para. 286.
[318] **Document C2**, OA, dispositive point 3: "*Le Tribunal arbitral, à l'unanimité,* (…) *constate que les demanderesses ont droit à compensation*".
[319] **Document C2**, OA, dispositive point 3.
[320] Counter-Memorial on Annulment, §§ 343 et seq.
[321] V. **document C8**, Memorial on Annulment, paras 586 et seq.
[322] **Document C9**, resubmission Award, para. 243.
[323] *Supra*, § 7.
[324] Counter-Memorial on Annulment, para. 383.
[325] **Ibid**., §§ 384-386.
[326] *Supra*, §§ 154-155.
[327] **Document C2**, OA, §§ 601 et seq.

into force be taken into account in its analysis of the breaches of thie BIT for which it had asserted its jurisdiction.[328]

168. This determination not only had not been annulled by the first *ad hoc* Committee, and so had *res judicata* force for the RT,[329] but moreover the *ad hoc* Committee distinctly agreed about the flaw in the OA that the Claimants mentioned to it, viz.:

> "***De l'avis du Comité**, ces échanges postérieurs à l'audience ne constituent pas une possibilité équitable de débattre de la réparation au titre de la violation de l'article 4 de* l'API. *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'annulation201, 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*."[330] [Underlining added]

169. The RT failed to take account of this determination, which was binding for it.

170. For in its work of interpreting the OA, the RT distorted that award's *res judicata* considerations.

171. Thus, in § 217 the RA states that: *"[t]ous 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"* (underlining added)[331].

172. This assertion is doubly contrary to the *res judicata* of the OA.

173. First, as shown above,[332] the IT's determination was not confined to the "*éléments de preuve et les arguments relatifs à cette confiscation*" established in Decision 43, which the first *ad hoc* Committee did not accept (underlining added),[333] but related more widely to "des *faits antérieurs à la date d'entrée en vigueur du traité*"[334] and

---

[328] V. **document C8**, Memorial on Annulment, §§ 609 et s; **Document C2**, OA, §§ 611-612.
[329] *Supra*, §§ 154-155.
[330] **Document C20**, Decision of the 1st *ad hoc* Committee, § 266.
[331] **Document C9**, Resubmission Award, para. 217: *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 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*" (underlining added).
[332] *Supra*, §§ 154-155.
[333] **Document C9**, RA, para. 217.
[334] **Document C2**, OA, §§ 611.

"*des événements qui ont eu lieu avant cette date* [l'entrée en vigueur de l'API]",[335] which the first *ad hoc* Committee did accept and which are part of the body of the OA that has *res judicata* force.

174. The RA thus distorts the scope of the OA's *res judicata* force by restricting it.

175. The RA then goes beyond the OA's conclusions and those of the Decision of the first *ad hoc* Committee. As indicated above,[336] the first *ad hoc* Committee explained that "*la question qui se pose en l'espèce n'est pas en soi celle du quantum des dommages-intérêts déterminés pas le Tribunal*"[337] and that "*le problème ne réside pas non plus en soi dans la méthode retenue par le Tribunal pour évaluer les dommages subis par les Demanderesses.*"[338]

176. There again the RA distorts the scope of the OA's *res judicata*, confirmed by the Decision of the first *ad hoc* Committee.

177. Beyond the above criticisms, though §§ 217 and 228 of the RA hint that certain aspects prior to the BIT's entry into force may be taken into account "*à titre de contexte factuel*",[339] in line with the OA[340], this option disappears in § 230.

178. The Claimants showed in their previous submissions that the interpretation made by the RT as reproduced above was manifestly untenable, in that it resulted in overriding a *res judicata* conclusion of the OA.[341]

179. They have also shown that this breach of the OA's *res judicata* constitutes a manifiest excess of powers, justifying the annulment of the latter Award.[342]

180. For this reason the Claimants ask the present *ad hoc* Committee to annul the RA on the basis of Article 52(1)(b).

7.2 The Tribunal's decision that the Claimants purportedly did not meet the burden of proof borne by them justifies the annulment of the Award

181. We recalled above that in § 232 of the RA the Tribunal decided that the Claimants had not met the burden of proof.

> "Une fois la question posée dans les termes du paragraphe précédent, il devient clair que les Demanderesses n'ont pas satisfait à cette charge de la preuve ; en

[335] **Document C2**, OA, §§ 612.
[336] *Supra*, §§ 156-160.
[337] **Document C20**, Decision of the 1st *ad hoc* Committee of 18 December 2012, para. 286.
[338] *Ibid*.
[339] **Document C9**, RA, §§ 217 et 228.
[340] **Document C2**, OA, §§ 611-612.
[341] **Memorial on Annulment**, §§ 589 et seq.
[342] **Ibid.,** §§ 617 et seq.

effet, on pourrait même 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" (underlining added).[343]

182. Contrary to what the Respondent contends in its Counter-Memorial,[344] and as the Claimants already showed in their previous submissions,[345] this decision of the RT involves a failure to state reasons (**7.2.1**) and a serious departure from a fundamental rule of procedure (**7.2.2**)

7.2.1 The Tribunal's decision that the Claimants did not meet the burden of proof borne by them involves a failure to state reasons

183. In their previous submissions, the Claimants showed that the Tribunal's decision that the Claimants had not met the burden of proof lying with them involved a failure to state reasons.[346]

184. As its sole reply the Respondent asserts that the RT explained repeatedly why the Claimants' claims should be rejected.[347] Then, in footnote No. 1078, the Respondent refers the present *ad hoc* Committee to §§ 198, 217 and 232 of the RA, which state:

- Para. 198 : "*Le Tribunal n'a aucun doute que le tribunal initial, bien qu'il ait utilisé des termes légèrement différents dans les diverses parties de sa Sentence Initiale, était de l'avis que la confiscation était un fait consommé avec la saisie physique en 1975 et n'entrait donc pas dans le champ d'application du TBI. 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* "[348].

- Para. 217 : "*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*"[349].

---

[343] **Document C9**, RA, para. 232.
[344] Counter-Memorial on Annulment, §§ 378 et seq.
[345] Application for Annulment, §§ 238 et seq.; Memorial on Annulment, §§ 623 et s.
[346] Memorial on Annulment, §§ 631 et seq.
[347] Counter-Memorial on Annulment, para. 382.
[348] **Document C9**, RA, para. 198.
[349] **Document C9**, RA, para. 217.

- Para. 232 : "[I]*l 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*"[350].

185. Contrary to what the Respondent asserts, the above passages do not show how *"les Demanderesses n'ont pas satisfait à cette charge de la preuve*"[351] or why "*dans un sens, elles n'ont même pas cherché à le faire*".[352]

186. This last statement is especially hard to understand in that, whatever the Respondent may say,[353] in the resubmission proceeding the Claimants ceaselessly substantiated the loss that they sustained as a result of the breach of the BIT determined by the OA.[354]

187. Yet the RA contains only a brief summary of the Claimants' position.[355]

188. The RA contains no analysis or discussion, however brief, of the arguments and supporting documents presented by the Claimants in their submissions during the resubmission proceeding.

189. In particular, the Tribunal did not refer – not even to dismiss them – to any of the rulings highlighted by the Claimants so as to show that, on the principle of full reparation of harm, as sustained on 28 April 2000 and afterwards, it is acknowledged in such cases by many arbitral tribunals that investors may be compensated for a lack of fair and equitable treatment[356] using the standard of fair market value.[357]

190. Likewise, the RA is silent about the exchanges during the hearings between the Claimants and Mr Kaczmarek, the Respondent's financial expert, in which he recognised that the calculation of reparation for lack of fair and equitable treatment may lead a tribunal to remedy a loss in a way equivalent to the calculation resulting

---

[350] **Document C9**, RA, para. 232.
[351] *Ibid.*
[352] *Ibid.* see *supra* §§ 112-122.
[353] Counter-Memorial on Annulment, para. 382.
[354] Application for Annulment §§ 231 et seq.; Memorial on Annulment, §§ 632 et seq.
[355] **Document C9**, RA, §§ 219-221.
[356] **Document C40**, Rejoinder in the resubmission proceeding of 9 January 2015, para. 341-343; **Document CL408**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, §§ 793-794: [T]*he loss which Claimants maintain that they have suffered is in fact the expropriation of their shares in Kar-Tel, whether or not this is characterized as an expropriation calling for compensation under the BIT, or* ***merely as the consequence of some other internationally wrongful act, such as a breach of the obligation of fair and equitable treatmen****t. In either case, the Tribunal considers that the correct approach is to award such compensation as will give back to Claimants the value to them of their shares at the time the expropriation took place. This requires the Tribunal to take into account only of the value which the shares would probably have had in the hands of Claimants if the shares had not been expropriated, and therefore to leave out of account any increase (or decrease) in the value of their shares which Claimants would probably not have enjoyed (or suffered) if the shares had remained in their hands. As the Tribunal has just stated, it considers that, regardless of the nature of the breach which has been established, the correct approach in this case is to award such compensation as will give back Claimants the value to them of their shares at the time when the expropriation took place.* (Underlining added).
[357] **Document C40**, Rejoinder in the resubmission proceeding of 9 January 2015, para. 344-349; and legal documents produced in support thereof, **documents C47 à C65**.

from an expropriation, using the same calculation methods.[358] This is moreover what the first *ad hoc* Committee expressly recognised, as we saw in § 168 above.

191. In particular, questioned by the Claimants' counsels, Mr Kaczmarek acknowledged that, as a matter of principle, nothing prevented the Tribunal from applying a calculation of the *quantum* according to the fair market value standard to a a situation involving a form of treatment other than expropriation:

> "Q[uestion]. Is it your position then that, as a general matter, the fair market value of an asset can never be the appropriate measure of damages for a non-expropriation breach?
>
> A[nswer]. When you have an expropriation, obviously you lose the value of what was taken, and fair market value is a standard routinely applied to measure the property taken. I do agree in other cases -- where you have, say, a diminution in value due to a measure that's passed that doesn't result in complete destruction of the business but just diminishes the value of the business -- that you could also use fair market value. But again, in such an instance, you are not valuing the whole property as a measure of loss."[359]

192. Then, asked more specifically about *Kardassopoulos and Fuchs v. Georgia,*[360] in which he acted as an expert, Mr Kaczmarek acknowledged that in some situations, the evaluation of a loss caused by a lack of fair and equitable treatment is identical to the evaluation of a loss caused by expropriation.

> "*Q. Okay. But the end result was that the tribunal found that he* [Mr. Fuchs] *was entitled to compensation for a lack of fair and equitable treatment regarding his investment?*
>
> *A. That's correct.*
> *Q. And his investment in that case was essentially the same as that of Mr Kardassopoulos?*
>
> *A. That's correct.*
>
> *Q. And you would agree as well that for Mr Kardassopoulos, the tribunal found that for expropriation the appropriate standard of compensation was the fair market value of the asset?*
>
> *A. They did indeed. That is precisely the standard that I put forward.*
>
> *Q. And for Mr Fuchs the tribunal found that for fair and equitable treatment the standard of compensation would be exactly the same?*

---

[358] **Document C271**, Transcript of the hearing of 15 April 2015, pp. 102 et seq.
[359] **Ibid.**, [102:22 - 103:8].
[360] **Document CL407**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on jurisdiction of 6 July 2007.

A. That's correct. And I think there's an important distinction, I would say, in that case versus this case. Mr Fuchs was invited to participate in a compensation commission in Georgia that had been established by the government. So he did it on behalf of the company, a Panamanian company; Tramex, if I recall. And that process pretty much languished and ended up resulting in nothing. In fact, I think Mr Fuchs was kicked off of the compensation commission at some point in time. I think that's a little bit different from this case, where Mr Pey did not participate in domestic proceedings for compensation.

[Quite the reverse: on one hand Mr Pey had as of 1995 asked a Santiago court to take note of a vital issue for determining the *quantum* of compensation, i.e. the invalidity of Decree No. 165,[361] and moreover the State rejected its request for a stay of enforcement of Decision 43 until the IT rendered its award.[362]

Q. So would it be fair to say that your position is that the type of breach was different; but once the tribunal had found that there was a breach of the fair and equitable treatment standard, the compensation was the same, or the principle for calculating the compensation was the same?

A. Yes "[363].

193. Likewise, asked about *Gold Reserve v. Venezuela,*[364] in which he also acted as an expert, Mr Kaczmarek recognised that, in this case, the Tribunal, having dismissed a claim based on expropriation, allowed a claim based on a breach of the fair and equitable treatment principle, and deemed that this breach had resulted in the loss of the investor's investment:

> "Q. And once again, is it true to say that in that case tribunal rejected the claimant's claim for expropriation, but held that Venezuela had breached the fair and equitable treatment standard, and that this had resulted in the deprivation of the claimant's mining rights?
>
> A. Yes, if I recall. I have to profess, I have not read in detail the legal findings of the tribunal in that case; I tend to skip to the end, which is more relevant for my purposes. But the tribunal, if I recall correctly, did find that even though there was no legal expropriation, the violation committed by Venezuela had the same quantitative effect as a violation, because they still relied on the entire value of the investment in that case"[365].

---

[361] See *supra* §§ 129-136.
[362] See *supra* §§ 28, 48 92(1).
[363] **Document C271**, Transcript of the hearing of 15 April 2015, [104:12 - 105:22].
[364] **Document C65**, *Gold Reserve Inc v. Venezuela,* ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014.
[365] **Document C271**, Transcript of the hearing of 15 April 2015, [106:2-16].

194. Mr Kaczmarek finally explained that the key question was the effect of the disputed measure, regardless of what heading it came under, and recommended the Tribunal to proceed as follows:

> "Q. Yes. So as a result, the test to be applied is then: what are the consequences of the breach?
>
> A. Right. As a damages expert, I'm really never concerned with the heading under which a measure falls, whether it's expropriation or fair and equitable treatment. What I do and what I concern myself with is: what is the measure that took place, when did it take place, and what effect did it have on the investment?"[366]
>
> (…)
>
> "Q. So, by analogy, in this case what the Tribunal will need to do is see what losses flow from the breaches that have been found to have occurred?
>
> A. Right. I think they should, just as I articulated, think of the breach itself, the actual act that the original tribunal said was a breach, and not necessarily get hung up on the label as to whether it's fair and equitable, discrimination or what-have-you, but just measure what loss flows from the particular act that was in violation of the BIT."[367]

195. These remarks, vital for the Claimants' case, seem to have been simply ignored by the Tribunal. The Tribunal also seems to have overlooked the parties' expert reports.[368]

196. As the Claimants set out in their Memorial,[369] the lack of discussion of evidence may constitute a failure to give reasons. As the *ad hoc* Committee in *TECO v. Guatemala*[370] judged:

> "*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*

[366] **Ibid.**, [106:7-13].
[367] **Ibid.**, Transcript of the hearing of 15 April 2015, [108:2-11].
[368] **Document C9**, RA, para. 235: "*Le Tribunal n'a donc pas besoin d'analyser de manière plus détaillée les rapports d'expertise de M. Saura pour les Demanderesses et de M. Kaczmarek pour la Défenderesse, bien qu'il souhaite exprimer sa reconnaissance pour les rapports et le témoignage oral des deux experts, qui ont constitué une aide précieuse dans la clarification des questions posées au Tribunal dans la présente instance*".
[369] Memorial on Annulment, §§ 640 et seq.
[370] **Document CL316**, *TECO Guatemala Holdings LLC v. République du Guatemala*, ICSID Case No. ARB/10/23, Decision of the *ad hoc* Committee of 5 April 2016.

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" (underlining added).[371]

(…)

"*The Committee is not persuaded by Guatemala's argument that it was sufficient that the Tribunal summarized the contents of the expert reports and purportedly analyzed them in 72 paragraphs of the Award. What matters for present purposes is that the Tribunal failed to address in any way the expert testimonies within its analysis on the loss of value claim, despite the fact that those testimonies directly pertained to this issue and that the Parties considered them to be highly relevant*" (underlining added).[372]

(…)

"*The Committee wishes to point out that it cannot determine whether the evidence that was ignored by the Tribunal would have had an impact on the Award or not. What can be ascertained at the annulment stage is that the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case*" (underlining added).[373]

(…)

"*The Committee therefore finds that the Tribunal failed to address in any way the Parties' expert reports on the loss of value claim despite the Parties' strong emphasis on expert evidence, and ignored the existence in the record of evidence which at least appeared to be relevant to its analysis. This resulted in the Tribunal's reasoning on the loss of value claim being difficult to understand. Based on these cumulative grounds, the Committee finds that the Tribunal's decision on the loss of value claim does not satisfy the reasoning requirements of Article 52(1)(e) of the ICSID Convention and should therefore be annulled*" (underlining added).[374]

197. Thus the lack of analysis and discussion by the Tribunal of the Claimants' case,[375] of the evidence produced by them[376] and of the exchanges in the hearing with Mr Kaczmarek[377] entail that the statement that "*les Demanderesses n'ont pas satisfait à cette charge* [de la preuve], [et qu'] *elles n'ont même pas cherché à le faire*"[378] cannot be seen as a reason and or as free of excess of powers.

[371] **Ibid.**, para. 131.
[372] **Ibid**, para. 132.
[373] **Ibid.**, para. 135.
[374] **Ibid.**, para. 138.
[375] *Supra*, §§ 186-188
[376] *Supra*., para. 189
[377] *Supra*., §§ 190 et seq.
[378] **Document C9**, RA, para. 232.

198. Hence the Tribunal's explanations do not allow us to follow its reasoning from a point A to a point B,[379] and are grossly insufficient and inadequate.[380] The consequence is a failure to state reasons justifying annulment on the ground of article 52(1)(e).

199. The result is a failure to state reasons justifying the annulment of the Award on the grounds of Article 52(1)(e).

7.2.2 The Tribunal's decision that the Claimants did not meet the burden of proof borne by them constitutes a serious departure from a fundamental rule of procedure

200. The Claimants showed in their previous submissions that the Tribunal's decision that they had not met the burden of proof lying with them was also a manifestation of a serious departure from a fundamental rule of procedure making the RA annullable.[381]

201. In its Counter-Memorial, the Respondent distorts the Respondent's assertions and contends that ""*[t]he third, and final claim - that there was a* ***"serious departure from a fundamental rule of procedure"*** *- consists of the assertion that the resubmission Tribunal declared Claimants' evidence and arguments on damages inadmissible in limine litis*."[382]

202. This presentation of the Claimants' case is misleading and reductive. For as the Claimants have contended, the Tribunal's decision as to the Claimants' supposed failure to meet the burden of proof is the result of a wider, systematic approach that is just the latest manifestation of the bias that runs through the RA.[383]

203. For we may recall that during the resubmission proceeding the RT:

- Took sides as to the nature of its task, consisting of: "*mettre définitivement un terme à cette procédure arbitrale*";[384]

- Declared that the first *ad hoc* Committee could have gone further in its annulment of the OA;[385]

---

[379] **Document CL313**, *MINE v. Guinean Republic*, ICSID Case No. ARB/84/4, Decision of the *ad hoc* Committee of 22 December 1989, §§ 5.08-5.09: "*In the Commitee'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 is in particular not satisfied by either contradictory or frivolous reasons*".
[380] Memorial on Annulment, §§ 78 et seq.
[381] Application for Annulment, §§ 243 et seq.; Memorial on Annulment, §§ 647 et seq.
[382] Counter-Memorial on Annulment, para. 387.
[383] Memorial on Annulment, §§ 647 et s.
[384] **Document C9**, RA, para. 172; Application for Annulment, §§ 3 et seq.; Memorial on Annulment, §§ 652 et seq.
[385] Application for Annulment, §§ 243 et seq.; Memorial on Annulment, §§ 655 et seq.

- Allowed and upheld Chile's arguments that had been rejected by the first *ad hoc* Committee, with the substantive outcome of allowing the Respondent a right of appeal against determinations that were *res judicata*;[386]

- Reopened, on the last day of hearings, questions that were also *res judicata*[387] and whose significance and scope were unveiled for the first time in the actual RA.

204. The RT's decision to dismiss the arguments made and the evidence produced by the Claimants, then to deem that the Claimants had not met the burden of proof borne by them, is the consequence of other expressions of the Tribunal's partiality.

205. Thus this decision constitutes one aspect of the Tribunal's partiality.[388]

206. Yet as the ad hoc Committee stressed in Klöckner v. Cameroon, "[a]ny 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".[389]

207. If only for this reason, the RA should be annulled.[390]

208. In its Counter-Memorial the Respondent also contends that there could be no breach of the right to be heard in our case, for the Claimants have been able to produce the documents that they wished and that in such conditions the right to be heard had been respected.[391]

209. The treatment of evidence by an Arbitral Tribunal is an important aspect of a party's right to be heard.[392]

210. Contrary to the Respondent's assertion, a party's right to be heard is not confined just to the opportunity for it to make an argument and to produce the relevant documents, but also includes account being taken by the Tribunal of these arguments and documents.

211. As noted by Fellmeth and Horwitz, the maxim *audiatur et altera pars* from which a party's right to be heard is drawn, represents "*a principle of due process according*

---

[386] Application for Annulment, §§ 246 et s; Memorial on Annulment, para. 657.
[387] Application for Annulment, §§ 251 et s; Memorial on Annulment, para. 658 et s..
[388] v. Application for Annulment, §§ 3 et seq.; et §§ 243 et seq.
[389] **Document C7**, *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985-05-03, para. 95.
[390] v. Application for Annulment, §§ 3 et seq.; et §§ 243 et seq.
[391] Counter-Memorial on Annulment, §§ 346-347.
[392] **Document CL314**, *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4, Decision of the 1st *ad hoc* Committee, 5 February 2002, para. 56-57: "*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*".

to which parties before an authoritative tribunal must have an equal opportunity to be heard and their arguments considered under the law"[393] (underlining added).

212. The same authors refer to Bin Cheng, and his explanation that: "*All these [pleadings] rules [of the Hague Conventions and World Court] are merely different methods designed to ensure that the judge should hear and consider what each party may have to say on the dispute as fully as possible - not only on the question at issue, but also on the statements of its opponent. They constitute a more or less elaborate implementation of the fundamental principle: audiatur et altera pars*" (underlining added).[394]

213. Tribunals sitting under the aegis of ICSID have also deemed that, though a Tribunal does not have to respond expressly to all the evidence submitted by the parties, it must consider it.

214. As explained by the *ad hoc* Committee in *Helnan v. Egypt*, the fact that the claimant's arguments had been considered and mentioned in the award allowed it to deem that in that case there had been no breach of the right to be heard:

> "Helnan was afforded an opportunity to advance its arguments on the point, both at the Hearing and in its written Post-Hearing Memorial. Its arguments were plainly considered by the Tribunal. They are summarised in the Award at paragraphs 87-88." (Underlining added)[395]

215. As was also stressed by the *ad hoc* Committee in *MTD v. Chile*, the mere fact of a Tribunal reciting the parties' positions does not suffice for these to be held to have been taken into account, if the Tribunal recites them erroneously:

> "Conceivably an award might recite the arguments of the parties in such a defective or inaccurate way as to evidence a failure to hear the arguments in the first place".[396]

216. Yet in our case the total lack of references to the Claimants' submissions or their evidence showing that an appraisal for harm due to a lack of fair and equitable treatment could be equivalent to an appraisal in a case of expropriation,[397] along with the Tribunal's conclusion that the Claimants had not even sought to meet the burden

---

[393] **Document CL405**, Aaron X. Fellmeth & Maurice Horwitz, *Guide to Latin in International law*, Oxford University Press, p. 41.
[394] **Ibid.**, referring to Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1953, p. 293.
[395] **Document CL406**, *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee of 14 June 2010, para. 38.
[396] **Document CL349**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case ARB/01/7, Decision on Annulment of 21 March 2007, para. 56-57.
[397] *Supra*, §§ 44, 60, 61 (ii), 168, 190-197.

of proof borne by them,[398] shows that the RT manifestly failed to hear, even in the most rudimentary way, the Claimants's arguments and evidence.

217. We should note that the RT acted in a similar way in its treatment of the application of Chilean law to the question of the status of Decree No. 165.[399]

218. Firstly this question, though key to the Claimants' case, as remarked by the Tribunal,[400] was dealt with only with a "*brève digression*" in the Tribunal's Award.[401]

219. In this brief digression the RT dismissed the Claimants' position peremptorily, criticising them for not producing an expert report, by contrast with the Respondent, and simply interpreting Chilean law themselves:

> "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 et dénigrant la fiabilité et la bonne foi du Dr Libedinsky";[402]

220. Whereas the Claimants points of law literally reproduced the articles of the Chilean Constitution directly and bindingly applicable for the courts, and the Chilean Surpreme Court's doctrine on invalid public law in respect of all the confiscatory decrees issued under Decree-Law No. 77 of 1973.[403]

221. In short, after referring very briefly to the testimony of the expert put forward by the Respondent,[404] the RT agrees with the Respondent on the basis of "*[le] bon sens*", "*la logique*" and "*la bonne administration*".[405]

222. The reasoning thus applied by the RT, if it may be referred to as such, is insufficient to deem that the Claimants' right to be heard has been respected.

---

[398] **Document C9**, Resubmission Award, para. 232.
[399] **Document C9**, Resubmission Award, §§ 197-198.
[400] **Document C9**, Resubmission Award, para. 197: "*Ce pourrait donc être le moment opportun pour une brève disgression sur le statut du Décret n° 165 au regard du droit public chilien, un sujet qui a absorbé une grande partie des débats entre les Parties, tant au cours de la phase écrite que lors des audiences. Le poids de l'argument des Demanderesses a déjà été indiqué au paragraphe 196 ci-dessus*" (Underlining added).
[401] *Ibid*.
[402] **Document C9**, Resubmission Award, para. 197.
[403] See *supra* § 28 (page 24)
[404] **Document C9**, Resubmission Award, para. 197: "*La Défenderesse a contré cet argument grâce au rapport d'un expert en droit chilien, en la personne du Dr Marcos Libedinsky Tschorne, ancien Président de la Cour suprême du Chili et Membre de la Cour constitutionnelle du Chili. Celui-ci a déclaré, en substance, qu'il est plus exact de dire que la nullité absolue d'un décret-loi exige une décision judiciaire à cet effet, que, en tout état de cause, le demandeur n'a pas demandé de déclaration de nullité dans l'affaire de la rotative Goss et enfin qu'une telle déclaration de nullité ne peut pas être déduite des termes du jugement du Tribunal de Santiago de 2008 dans cette affaire*".
[405] **Document C9**, Resubmission Award, para. 197.

223. Firstly we should stress that, though some legal systems require that local law be proved by testimony in national jurisdictions, this rule has no reason to be in international arbitration, especially under the aegis of ICSID.

224. For neither the Convention nor the Rules provide for recourse to any particular form of evidence. Consequently evidence is free and may be given by all means.[406]

225. Hence the Claimants were not bound to resort to a legal expert, and the mere fact of not submitting a legal opinion on Chilean law paid for by the Claimants, and of preferring to cite the Constitution, the Supreme Court's relevant case law and doctrine from qualified authors cannot constitute in itself a lack of evidence. And even if no Chilean lawyer was actually there in the hearing, the Claimants' lead counsel is well acquainted with Chilean law and the changes in it over the years and was assisted by Chilean legal experts throughout the proceeding, as attested in the arbitral file and as the RT must have been aware.

226. For without going so far as to pay an expert for an opinion, the Claimants produced dozens of rulings from Chilean case law and specialist commentaries published on applicable law in support of their case.[407] The RT did not mention this, and *a fortiori* did not refer to any of them or to the Claimants' presentations in their submissions.[408]

227. The Claimants were also able to show that the Respondent's expert testified at the hearings on the vital point for determining the *quantum* along the same lines asserted by the Claimants, pursuant to applicable law, which the RA does not remotely apply. As set out in previous submissions,[409] in cross-examination by the Claimants the expert called on by the Respondent admitted that, though the first Civil Court of Santiago did not rule directly on the status of Decree No. 165 as invalid public law, it was bound to take note of it in the 9th Recital of its Judgment of 24 July 2008 in order to settle the State's objections:[410]

> "Q. Thank you, Mr Libedinsky. All the same, the decision continues; it doesn't stop there. We agree? There are three more pages in the decision.
>
> A. Yes, because the judge then went on to refer to the statute of limitations objection which had been submitted by the Respondent, and to sanction or to consider that it was appropriate to sanction by way of nullity under public law that situation, which would be contrary to the Constitution and to the laws of the Republic.

[406] ICSID Arbitration Rule 34: " The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."
[407] See Application for Annulment, §§ 254 et seq. and documents cited in the footnotes; Memorial on Annulment, paras 681 et seq.
[408] **Memorial on Annulment**, §§ 246 et seq.; **Document C40**, Claimants' Rejonder of 9 January 2015, §§ 75 et seq.
[409] Application for Annulment, §§ 259 et seq.; Memorial on Annulment, pp. 191-192, et §§ 681 et seq.
[410] See § 136 *supra*

> Q. Mr Libedinsky, what you have just said is that after that, the judge will look at the question of time bar, i.e. the fourth objection that was raised by Chile in its reply, right?
>
> A. Yes, I agree.
>
> Q. So this statute of limitation concerns the deposit by necessity; is that what you indicated earlier, a few moments ago? Is that right?
>
> A. Yes.
>
> Q. Do you agree with the statement that I am going to make: that in order to rule over the statute of limitation and the deposit by necessity, you have to acknowledge that there is such a thing?
>
> A. Yes, that's what Mr Pey invoked. And Mr Pey said, "The machine was taken from me". He didn't quite say it in so many words, but he said that the military arrived and he voluntarily handed the machine over. That's more what he was saying. And then he started asking for it to be returned.
>
> *(...)*
>
> MS MUÑOZ: You say this is Mr Pey's position, but it is also the position of the Chilean court, since the rule on the time bar of the deposit by necessity. So obviously the Chilean court had to deal with it.
>
> A. Yes.
>
> Q. All the same, we heard a moment ago that in order to have this deposit by necessity, Decree 165 should be null and void.
>
> A. **Yes, yes**" (underlining added).[411]

228. There again, the Tribunal passed over the expert's testimony in this part of the hearing and highlighted only Dr Libedinsky's apparent good faith, independence and objectivity.

229. Again, the total absence of any reference by the Tribunal to applicable law, to the Claimants' submissions and evidence or to the examinations in the hearings on the Chilean Constitution and the status of Decree No. 165 as invalid public law, *ab initio*, shows that the RT failed to hear the Claimants' case, for unexplained reasons.

230. Thus the RT breached the Claimants' right to be heard.

---

[411] **Documents C43**, Frensh transcript of the hearing of 14 April 2015, page 84; **C66**, id. in Spanish, pages 443 (lines 20-22), 444 (lines 1-22), 445 (lines 1-2; 17-22), 446 (lines 1-5); **C358**, id. in English, pages 150 (lines 21-25), 151 (lines 1-20), 152 (lines 9-17), and **C68** with the corrected translation of pages 150 and 151, approved by the RT.

231. As explained by the first *ad hoc* Committee in this case, once a departure from fundamental rule of procedure has been established, it is up to that Committee to determine if the departure is a serious one. This requires the present Committee to determine whether, in the event that the rule in question had been respected, there is a possibility that the Tribunal's decision might have been different.[412]

232. The Claimants contend that in our case this possibility exists.

233. For if the RT had taken the trouble to listen to the Claimants objectively and impartially, without preconceptions, especially as regards the lack of jurisdiction to rule on acts by Chile subsequent to 3 November 1997, it would not have concluded, as it did, that: *"n'ont pas satisfait à cette charge* [de la preuve] ; [ni] *même (...) cherché à le faire*."[413]

234. Accordingly the Claimants ask the present *ad hoc* Committee to annul the Award for a serious departure from a fundamental rule of procedure.

***

8. THE RA IMPOSED THE ROLE OF MR PEY'S REPRESENTATIVE ON MRS PEY AGAINST THE WILL OF THOSE CONCERNED, AND REFUSED WITHOUT REASON THE LEGAL STANDING INHERENT IN THE OWNERSHIP OF 10% OF THE SHARES OF CPP SA, DEPARTING FROM A FUNDAMENTAL RULE OF PROCEDURE

> *"La CESSIONNAIRE se subroge également en lieu et place du CÉDANT (...) pour ce qui concerne la poursuite dudit arbitrage auprès du CIRDI (Cas ARB/quatre-vingt- dix-huit/deux) conformément à ce que dispose l'article cinquante-deux (six) de la Convention CIRDI et la Règle d'arbitrage numéro cinquante- cinq (un).*"[414]

---

[412] **Document C20**, Decision of the *ad hoc* Committee of 18 December 2012, §§ 77-78; **Document CL314**, *Wena Hotels Ltd v. Egypt*, ICSID Case ARB/98/4, Decision of the *ad hoc* Committee of 5 February 2002, para. 61.

[413] **Document C9**, Resubmission Award, para. 232.

[414] **Document C264,** Credit transfer contract signed before a notary on 15 March 2013 between Mr and Mrs Pey, clause 7.

234. The points of fact and of law in this section were submitted in a timely manner to the RT in the Rejoinder of 9 January 2015[415] and are also mentioned in the proceeding on annulment of the RA.

235. M.A. Broches, whose role in the genesis of the ICSID Convention is well known, wrote:

> *"Nous avons laissé ouvertes toutes les questions de détermination de la nationalité ; on a aussi laissé ouverte la question d'une cession ou plutôt des effets juridiques d'une cession volontaire, par exemple la question de savoir si la clause compromissoire bénéficierait à une tierce personne ou plutôt au successeur où à une personne à qui a été cédé le contrat. La question de savoir si le consentement doit être censé avoir été donné intuitu personae est une question d'interprétation du consentement (...) Je crois qu'il s'agira toujours d'une interprétation du consentement".*[416]

236. The RT committed a manifest excess of powers on imposing the role of Victor Pey Casado's representative on Coral Pey Grebe,[417] on the unilateral request of the Chilean State, passing over Mr Pey's wish to the contrary,[418] as well as that of Mrs Pey,[419] without even asking their opinion.

237. Mr Pey and Mrs Pey and the legal representative read the following, to their astonishment, in the RA:

i. that "*il n'est pas contesté que (...) Mme. Pey Grebe, la fille*, *agit en pratique en qualité de représentant légal de son père âgée* (…)",[420] which is untrue. The RA indicates no basis for this conclusion, and with reason, for the Claimants expressly objected to the State dictating who should be their representative:

> "*Comme cela a été clairement indiqué, M. Pey a réalisé cette cession au profit de sa fille en raison de son âge avancé, bientôt cent ans aujourd'hui, afin de préserver ses droits. Les Demanderesses considèrent que cette raison est parfaitement compréhensible, la position du Chili sur la question sous une apparente bienveillance* [que Mme. Pey soit admise dans la procédure en qualité

---

[415] **Document C40**, section "*1. **SUR LE TRANSFERT DES DROITS DE M. PEY A SA FILLE CORAL PEY GREBE",*** §§ 16-52, and reaffirmed at the hearings of 2015 (**document C43**)

[416] **Document CL404**, Investissements étrangers et arbitrage entre États et personnes privées. La Convention BIRD du 18 mars 1965, Paris, Padone, pages 51-52.

[417] **Document C9f**, RA, § 188, "*le Tribunal a noté avec satisfaction, dans les écritures de la Défenderesse, une indication selon laquelle celle-ci également n'aurait, pour sa part, aucune objection à un accord pratique de cette nature dans les circonstances particulières de l'espèce. Le Tribunal poursuivra donc comme indiqué dans le paragraphe suivant*."

[418] The power of attorney granted by Mr Pey to Juan E. Garcés on 2 June 1997 appears in annex 1 of the initial request. On 24 March 2018 a copy was attached to this phase of the proceeding.

[419] The power granted by Mrs Pey before a notary on 15 March 2013 to Juan E. Garcés appear in document ND03 attached to the resubmission request of 18 June 2013.

[420] **Document C9f**, RA, § 187

de "représentante" de son père] *tend à avoir pour effet de priver M. Pey et ses ayant-droits du bénéfice de la Sentence du 8 mai 2008*"[421],

ii. "*que les termes utilisés* [dans certaines écritures] *aient pu avoir pour but d'indiquer au Tribunal que les conseils des Demandeurs recevaient en pratique des instructions détaillées de Mme Pey Grebe pour le compte de son père, et non de M. Pey Casado en personne",*

which is untrue, and the RA identifies no written submission to this effect. A Tribunal that bases its conclusions on attributing nonexistent statements or acts to the Claimants when, what is more, proof to the contrary appears in the casefile, could not "even with a large effort of imagination" be considered impartial.

iii. that, "*si tel est le cas, le Tribunal ne voit pas la moindre irrégularité dans cette situation*" – a conclusion whose conditional "*si tel est le cas* – if that is the case" shows that what precedes is the fruit of the RT's imagination, and results from the inaccurate and purely fictional statements quoted above;

iv. that "*Mme Pey Grebe sera considérée comme la représentante de M. Pey Casado à tous égards en ce qui concerne l'octroi de cette compensation."*[422] This decision of the RA:

a) wholly exceeds the powers that Mr and Mrs Pey bestowed on the RT;

b) infringes ICSID Arbitration Rule 18, which provides that it up to "each party" to appoint those who represent or assist them, "*whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Commission 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*";

c) Mr Pey Casado did not notify to the ICSID Secretary-General that Mrs Grebe would be his representative, nor, naturally, to the corresponding authority;

v. That "*dans le cas où le Tribunal déciderait que la compensation doit prendre la forme d'une compensation pécuniaire, le versement des sommes dues à chacune des deux Demanderesses bénéficiaires devra faire l'objet d'un accord interne entre elles, dans lequel leurs conseils désignés joueront également le rôle de conseil de Mme Pey Grebe*"[423] This decision of the RA wholly and manifestly exceeds the RT's power. Its reasoning is moreover hard to follow

[421] **Document C40**, Claimants' Rejoinder of 9 January 2015, § 40
[422] **Document C9f**, RA, § 187
[423] **Ibid.**, § 188

and contractory given that the RA denies the Claimants any pecuniary compensation.

238. The excess of powers and the contradiction in §§ 187-188 of the RA also constitute a failure to give reasons:

a. It bestows the representation of Mr Pey Casado, aged 101 when the RA was rendered, onto someone to whom Mr Pey had not intended;

b. It thereby seeks to replace the legal representative appointed by Mr Pey;

c. It alters the legal consequences of the transfer of the CPP SA's assets from Mr Pey to his daughter, accepted before a notary on 15 March 2013,[424] namely that the latter acquired the status of foreign investor within the meaning of the BIT, as was amply substantiated in the resubmission proceeding.[425] Yet the RA says: *"Les seules Demanderesses sont donc M. Victor Pey Casado et la Fondation*";

d. A way for the RT to avoid accounting for the basis on which it deemed that Mrs Pey was not since 15 March 2013 "the investor", according to Article 1 of the BIT, to Article 25 of the Convention and to the OA's conclusions[426] in the case of the first transfer of Mr Pey's shares to the Foundation, which are equally applicable to the transfer to his daughter;

e. or not to account for why Mrs Pey, who appeared in the resubmission proceeding in her capacity as owner of 10% of the shares, as co-claimant/transferee (together with the "original investor", Mr Pey and the Foundation), should not be a co-claimant;

f. or for why "*si la cession de droits doit être comprise comme transférant à Mme Pey Grebe les droits substantiels de son père, il en résulterait que M. Pey Casado ait perdu sa capacité à agir et ne pourrait plus apparaître comme demandeur*";[427]

g. or for why "*dans ce cas de figure, le transfert ne serait pas de nature à satisfaire l'exigence classique d'identité de parties."*[428]

239. Can such an exceeding of powers by the RT be seen as innocuous? For given that Mr Pey Casado was on 13 September 2016 aged 101 it was foreseeable that he would not have enough life before him to manage the consequences of this abuse of power

[424] **Document C246**
[425] **Document C40**, Rejoinder of 9 January 2015, §§
[426] See document C2, OA, §§ 539, 540, 542- 544, 556-558, and also §§ 238, 322, 323, 414- 416, 551, 553, 544 regarding the investor/transferee status and nationality of Mrs Pey respectively.
[427] **Document C9f**, RA, § 187. See reply to this conclusion in the Memorial on Annulment, §§ 710- 711
[428] **Ibid**.

in the RA, removing Mrs Pey and her shares from the jurisdiction of the Tribunal tasked with setting the amount of damages.

Mr Pey did indeed pass away on 5 October 2018, well before the Decision of this *ad hoc* Committee on the request for annulment of the RA that he submitted four days before being notified, on 6 October 2017, of the RT's decision on correction of errors in the RA.

240. With Mrs Pey having thereby been stripped of legal standing in the RA, the denial of justice in the RA would also be consummated as regards Mr Pey… if the RA is not annulled.

241. This excess of powers also constitutes a flagrant breach by the RA of binding international standards, referred by Article 10(4) of the BIT, guaranteeing access to justice and due process.[429]

242. Moreover the OA's conclusions (§§ 537-544) concerning Mr Pey's transfer of 90% CPP SA's shares to the Foundation may be invoked vis-à-vis the Respondent's[430] pleadings against Mrs Pey's legal standing as claimant/transferee of 10% of the CPP SA shares (Mr Pey being claimant in his capacity as original investor), namely:

Respondent's pleadings	Original Award
(1) that, in order to establish jurisdiction *ratione materiae*, Ms. Pey Grebe would need to demonstrate not only that she held some type of protected asset, but also that she had obtained such asset as a result of personal contribution	SI, §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."*
(2) that Ms. Pey Grebe could not establish either prong, because (a) half of the "investment" that she supposedly had acquired (*viz.*, a 10% stake in *El Clarín*) was the same "investment" that had been expropriated definitively in the 1970s	SI, §542 SI, 537 :" *De l'avis du Tribunal arbitral, la Fondation Presidente Allende a obtenu la qualité d''investisseur' en vertu de la cession des actions en sa faveur de la part de la première partie demanderesse, M. Pey Casado"*
(2) that Ms. Pey Grebe could not establish either prong, because (…) (b) the other half (an alleged right to any	§543 : "L*a cession d'actions de la part de M. Pey Casado ne constituait pas une cession du 'droit de réclamation ou 'droit de demande' (termes*

[429] Memorial on Annulment, § 121; Application for Annulment, § 16
[430] See Counter-Memorial footnote 376

amount awarded in the ICSID proceeding) could not be considered an "investment" as such	*utilisés par la défenderesse),mais de la qualité d''investisseur''*.
(3) in any event, Ms. Pey Grebe had not made any contribution (the "rights" had been "ceded" to her for free)	SI, §542 ; §532 : *"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"*
(4) that Ms. Pey Grebe could not assert damages claims based on alleged injury to another person	L'API protège l'investissement qui lui a été transmis, et, également, l'investisseur cessionnaire
(5) that Ms. Pey Grebe could not assert claims based on alleged events or injury predating her alleged investment	Mme. Pey a reçu 10% de l'investissement de son père dans CPP S., protégé par l'API, dont la violation a eu lieu à partir du 28 avril 2000
(6) that new claims could not be asserted in the Resubmission Proceeding	Les demandes portent sur l'évaluation du dommage causé pour les violations à l'article 4 de l'API établies à la SI

243. The pleadings in the Counter-Memorial do not rebut the conclusions of the Memorial on Annulment.

1. §§365-366: As Arbitration Rule 50(1) provides, such application must "*state in detail . . . the grounds on which it is based*".

Reply: See § 8 above

2. § 367: in their Annulment Memorial, Claimants fail to articulate a fully-formed claim for a manifest excess of powers.

Reply: See in the Memorial on Annulment:

- § 669 (§ 187): the RA's assertion that Mrs Pey had no legal standing contradicts "*l'article 25 de la Convention tel qu'appliqué dans les fondements res iudicata de la S.I. (§§144, 415, 237 ; 542 ; 556, 557, 558; 551, 553, 554)."* The RA provides no reason, or no tenable reason, for its conclusion in § 669;

- §§ 698-699;

- §§ 712-753 and the conclusion of § 753 : "*Le paragraphe 1 de la Décision (§256) et ses fondements dans les paragraphes cités ci-dessus enfreignent ou contredisent manifestement la res iudicata de la SI et devraient être annulés.*"

244. The Counter-Memorial continues in § 368:

the Resubmission Tribunal's conclusions plainly meet the "tenable" standard. Article 52(6) of the ICSID Convention states that "[i]f 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." Because the phrase "either party" is a reference to the parties to the annulment proceeding — and the parties in the annulment proceeding must be the same as in the original arbitration — it was clearly appropriate for the Resubmission Tribunal to find that "[t]he only Claimants [in the Resubmission Proceeding] are therefore Mr. Victor Pey Casado and the Foundation."

Yet this conclusion by the Respondent infringes the *res judicata* conclusions of the SA regarding the transfer of the shares of CPP SA by Mr Pey, the "questions at issue" and their consequences on jurisdiction.

It is also contrary to the conclusions made on the subject by other ICSID Tribunals, such as in *Vivendi*:

The Argentine Republic argues that these identity requirements are not met, while the Claimants submit that they are satisfied. The identity of the parties depends on whether Vivendi Universal is the successor-in-interest of CGE. As will be seen below, ***the Tribunal has come to the conclusion that Vivendi Universal is indeed the successor of CGE and shareholder of CAA. Hence, the requirement of identical parties is met.***

The same conclusion holds true with respect to the identity of the "questions at issue". Depending on the definition given to this second requirement, the requirements for the identity which it implies may be more or less stringent. In the present case, there is no need to further define the applicable requirements, as ***the dispute before this Tribunal meets the identity requirement by any standard. A review of the pleadings before this and the First Tribunal demonstrates that the claims are based on the same facts,*** *ie,* ***on certain conduct of the authorities*** *of Tucumán* ***and on the same legal grounds****, ie, on breaches of Articles 3 and 5 of the Treaty. It further demonstrates that* ***in both cases Claimants seek reparation in the form of an award of damages. It is true that in the resubmitted case, Claimants have made allegations about certain conduct which occurred later than the acts submitted to the First Tribunal, and produced related evidence. This fact does not change the conclusion on the identity of the "questions at issue" as the later occurrences are merely the continuation in time of the breaches initially complained of****.*[62] [431]

245. The identity of the parties in the original proceeding and the resubmission proceeding is therefore in keeping with the *res judicata* of the OA concerning Article 25 of the Convention and Articles 1 and 2 of the BIT in the case of the Foundation, transferee of 90% of Mr Pey's shares in CPP SA, and of Mrs Pey Grebe, transferee of the remaining 10%, as is the identity of the cause of action, arising from continuous

[431] [62] This is in line with "continuing character" of breaches referred to in Article 14 of the International Law Commission Draft on the Responsibility of States for internationally wrongful acts, which provides as follows: "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation".

infringements of Article 4 of the BIT committed as from Decision 43 of 28 April 2000.

246. The conclusion in § 187 of the RA that:

> *"le transfert [*des actions de M. Pey à sa fille] *ne serait pas de nature à satisfaire l'exigence classique d'identité de parties",*

is an assertion *ex cathedra*, with no reasoning or backing anywhere, without the slightest analysis or consideration of the Claimants' conclusions in this regard. It is untenable, lacks any statement of reasons and constitutes a manifest excess of powers.

247. This conclusion is untenable because it clashes with the conclusions of the SA and of the first *ad hoc* Committee regarding the legal consequences of the transfer of Mr Pey's shares in CPP SA in relation to legal standing and the Tribunal's jurisdiction under the ICSID Convention and the BIT.

Chile had lodged a first appeal against the SA to the first *ad hoc* Committee, which appeal it makes again to the RT on the pretext of Mrs Pey's legal standing (see §§ 127, 129, 130(b), (c), of the RA). The first appeal was as follows:

> *411. The Republic could not have anticipated during the arbitral proceeding that in its Award, the Tribunal would confuse a transfer of shares for ownership purposes with the mere transfer of litigation rights, and that in doing so, it would fail to analyze the real nature of the Foundation's alleged investment as a matter of Chilean law..[…]*
>
> *413. Chile's analysis in the Memorial of whether the claim rights received by the Foundation from Mr. Pey could qualify as an investment was based on the Tribunal's reasoning in the Award regarding Mr. Pey's alleged investment. (...) the Tribunal failed to assess whether the claim rights received by Foundation could in and of themselves qualify as an investment. In its Memorial, the Republic applied to the Foundation the same standard that the Tribunal used to determine whether Mr. Pey's alleged acquisition qualified as an investment, and demonstrated that the Tribunal had not applied to the Foundation its own standard to determine whether the Foundation held an "investment" covered by the BIT. (...)*
>
> *414. Had the Tribunal performed with respect to the Foundation's alleged investment the same analysis that it had applied to Mr. Pey's alleged investment, it necessarily would have concluded that the litigation rights transferred by Mr. Pey to the Foundation did not qualify as an investment, either under the provisions of the Chile-Spain BIT—Article 1(2)—or under Article 25 of the ICSID Convention. Accordingly, the Tribunal manifestly exceeded its powers by asserting jurisdiction over an alleged "investment" by the Foundation that clearly did not arise out of any activity that could be considered an "investment" under either the ICSID Convention or the BIT. The Award must therefore be annulled under*

Article 52(1)(b) of the ICSID Convention for this reason. [Caractères italiques dans l'original][432]

The First *ad hoc* Committee rejected Chile's appeal, whereas the RA accepts it in substance in § 187. The First *ad hoc* Committee said:

"*Selon le Comité, il s'agit là encore d'une tentative de la part de la Défenderesse d'interjeter appel de la décision du Tribunal devant le Comité en vue d'obtenir de celui-ci qu'il l'infirme et décide, au lieu de cela, que les droits reçus par la Fondation de M. Pey Casado ne peuvent pas être qualifiés d'investissement. Cela, le Comité ne le fera pas. La Défenderesse tente de contester la conclusion du Tribunal selon laquelle il y a eu un transfert d'actions de M. Pey Casado à la Fondation, qui a conféré à cette dernière la qualité d'investisseur. La Défenderesse soutient que les actions avaient cessé d'exister et que, par conséquent, elles ne pouvaient pas avoir été transférées. Elle en conclut que M. Pey Casado aurait pu seulement transférer des droits relatifs à des litiges ou des réclamations qui ne peuvent pas être qualifiés d'investissement. Après examen des arguments des parties, le Tribunal est parvenu à une conclusion différente : la Fondation avait acquis la qualité d'investisseur*[111]*. Ceci signifiait que l'investissement restait le même et que, par conséquent, il n'était pas besoin pour le Tribunal d'examiner de nouveau si les droits transférés à la Fondation pouvaient être qualifiés d'investissement au sens des dispositions de l'API et de la Convention CIRDI. Le Tribunal résume ainsi sa position au paragraphe 558 de la Sentence :*

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 investissement (et la qualité d'investisseur) puisse résulter d'une cession de la part de l'investisseur initial.

173. Le Tribunal n'a pas commis d'excès de pouvoir et la Sentence ne sera pas annulée sur le fondement de ce motif. La demande de la Défenderesse est par conséquent rejetée."

[End of quote from the Decision of the first *ad hoc* Committee]

248. The RA's conclusion also lacks a statement of reasons given that the parties' assertions, summarised in §§ 185, 186 of the RA,

- either are not dealt with in § 187 – "*Le Tribunal comprend parfaitement les points mis en avant par les deux Parties sur cette question, mais il estime, après mûre réflexion, que celle-ci a donné lieu à des débats entre les Parties qui sont allés bien au-delà de l'importance intrinsèque réelle qu'elle revêt*" –

[432] **Document C20**, Decision of the 1st *ad hoc* Committee

- or the reasons appearing in § 187 of the RA are untenable as we saw in § 246 above.

Moreover,

- Far from "*profiter des arguments en matière de compétence avancés par les autres demandeurs*" as this paragraph seems to be saying, Mrs Pey established jurisdiction in her regard by virtue of the *res judicata* of the RA and of the first *ad hoc* Committee rejecting the objections to the legal standing resulting from the transfer of CPP SA's shares by Mr Pey;[433]

- It is untenable that "*si la cession de droits doit être comprise comme transférant à Mme Pey Grebe les droits substantiels de son père, il en résulterait que M. Pey Casado ait perdu sa capacité à agir et ne pourrait plus apparaître comme demandeur",* given that Mr Pey appeared in another capacity, namely that of "original", "initial" investor.[434]

- Also untenable is the consequence drawn from these premises, which are untenable themselves, by § 187 of the RA, viz.: "*même dans ce cas de figure, le transfert ne serait pas de nature à satisfaire l'exigence classique d'identité de parties*", for the identity of the parties flows from the fact that Mrs Pey is the legitimate successor to Mr Pey's interest in CPP SA pursuant to the contract of transfer signed before a notary on 15 March 2014 by Mr and Mrs Pey, as follows:

*"**QUATRIÈMEMENT**.- La CESSIONNAIRE accepte et, en conséquence, acquiert la qualité de titulaire du crédit cédé, avec tous les droits, accessoires, obligations et charges qui y sont attachées. Pour être de son intérêt, la cessionnaire déclare connaître toutes les circonstances relatives au crédit transmis de même qu'à l'opération commerciale à l'origine dudit crédit.*

***"CINQUIÈMEMENT.** La CESSIONNAIRE accepte et ratifie le consentement à l'arbitrage entre le CÉDANT et la République du Chili auprès du Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI), dont le siège est à la Banque Mondiale, Washington D.C., arbitrage auquel a été consenti en date du deux octobre mil neuf cent quatre-vingt- dix-sept et dont la Requête fut enregistrée le vingt-quatre avril mil neuf-cent quatre-vingt- dix-huit par le Secrétariat du CIRDI comme Cas ARB/quatre-vingt-dix-huit/deux, et dans lequel ont été prononcées la Sentence du huit mai deux mil huit et la Décision du dix-huit novembre deux-mil neuf du Tribunal arbitral, et la Décision du Comité ad hoc du dix-huit décembre deux mil douze.*

***"SIXIÈMEMENT**. La CESSIONNAIRE se subroge en lieu et place du CÉDANT dans le contrat primitif, de même que dans la procédure d`arbitrage en cours.*

***"SEPTIÈMEMENT**. La CESSIONNAIRE se subroge également en lieu et place du CÉDANT (…) dans toute autre procédure et/ou action découlant, connexe ou ayant un*

[433] See in the Claimants' Rejoinder of 9 January 2015, §§ 16-52, **document C40**
[434] See §§ 238(e), 242 *supra*, and Claimants' Rejoinder of 9 January 2015, **document C40**, §§ 52

rapport avec cet arbitrage et ses développements, et/ou avec la défense du patrimoine, des droits et crédits du CÉDANT sur ledit investissement auprès de tout Tribunal, organisme, autorité, institution ou instance ayant compétence dans n'importe quel pays du Monde. En particulier, ***elle se subroge en lieu et place du CÉDANT pour ce qui concerne la poursuite dudit arbitrage auprès du CIRDI (Cas ARB/quatre-vingt- dix-huit/deux) conformément à ce que dispose l'article cinquante-deux (six) de la Convention CIRDI et la Règle d'arbitrage numéro cinquante- cinq (un).*** (…)

NEUVIÈMEMENT*. La CESSIONNAIRE assume tous les droits du CÉDANT afin de les faire valoir auprès de toute personne physique ou morale, auprès de toute Autorité, organisme et institution, publique ou privé, dans n'importe quel État, et tout spécialement aux fins de revendiquer le patrimoine, les titres, crédits, droits, indemnisations, de quelque nature que ce soit, qui seraient consécutifs au Décret Suprême numéro cent soixante-cinq, aux Décrets Lois numéros quatre-vingt- treize et mil quatre cent cinquante-cinq , publiés respectivement au Journal Officiel de la République du Chili le dix-sept mars mil neuf-cent soixante-quinze, le dix novembre dix-neuf cent soixante-treize et le vingt-deux janvier dix-neuf cent soixante-seize, et de toute autre disposition ou tout autre agissement de fait qui auraient touché les intérêts et droits cédés dans le présent contrat. (…)*

ONZIÈMEMENT*. En conséquence la CESSIONNAIRE, en qualité de propriétaire du patrimoine, des titres, droits et crédits, pourra réaliser les démarches nécessaires à leur revendication et à leur possession paisible, sans nécessité d'aucune intervention du CÉDANT, auprès de toute personne physique ou morale, toute Autorité, organisme ou institution, cela dans n'importe quel État."*[435]

249. This conclusion in § 187 of the RA concerning the requirement of identity of the parties where the transfer of rights occurs *lite pendente* is also contrary to the prevailing conclusions of Arbitral Tribunals on the subject. Such is the case of the Tribunals in *El Paso v. Argentina,*[436] or *African Holding v. Democratic Republic of the Congo,*[437] or *Wintershall Aktiengesellschaft v. Argentina.*[438]

---

[435] **Documents C264f et C264e**, Credit transfer contract signed before a notary on 15 March 2013 between Mr and Mrs Pey

[436] **Document CL368**, *El Paso Energy v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 Apr. 2006, § 135 :" *the issue to be discussed here is the alleged lack of ICSID jurisdiction because the investments in question no longer are the Claimant's or, to put it differently, because the latter must retain its investor status during the examination of its international claims. An examination of the relevant texts - the BIT and the ICSID Convention - and of the case-law cited by the Claimant reveal, however, that there is no such rule (above, §§ 125-129). In other words, there is no rule of continuous ownership of the investment. The reason for there not being such a rule in the ICSID/BIT context is that the issues addressed by those instruments are precisely those of confiscation, expropriation and nationalisation of foreign investments. Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism. That purpose would be defeated if continuous ownership were required. Thus the claim continues to exist, i.e. the right to demand compensation for the injury suffered at the hands of the State remains -- unless, of course, it can be shown that it was sold with the investment.*"

[437] **Document CL369**, *African Holding v. République Démocratique du Congo,* CIRDI Affaire No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 Jul. 2008, § 63: *"Le Tribunal conclut de ce fait sur ce point que tous les droits que détenait SAFRICAS ont été cédés à African Holding, en ce compris les créances et le consentement à l'arbitrage étant donné que l'État dont les ressortissants bénéficient du consentement exprimé sous le traité bilatéral d'investissement n'a pas changé. La situation, dans le cas*

Conclusion

250. Accordingly §§ 187 and 188 and the first point in § 256 of the RA's dispositive part should be annulled on the grounds provided in Article 52(1) letters (b), (d) and (e) of the Convention.

251. This also entails the annulment of the RA as a whole for manifest lack of impartiality by the RT in the treatment of the rights of Mr Pey and Mrs Pey as guaranteed by the BIT and the *res judicata* of the OA regarding the transfer of foreign investor capacity attached to the transfer of the CPP SA shares.

252. As the *ad hoc* Committee said in the *AMCO I* case:

> *[T]he obligation set out in Article 48(3) of the Convention to 'deal with every question submitted to the Tribunal and [to] state the reasons upon which [the award] is based', can find its sanction in Article 52(1)(e) of the Convention. Failure to deal with one or more questions raised by the parties would entail annulment of the award where such omission amounts to 'failure to state reasons upon which [the award] is based' (Article 52[1][e], Convention). Such an omission could, moreover, amount in particular situations to 'a serious departure from a fundamental rule of procedure' (Article 52[1][d]) and to a manifest excess of power (Article 51[1][b]);*[439]

or the *ad hoc* Committee in the *MINE* case:

> *The Tribunal either failed to consider them* [questions posed by the parties]*, or it did consider them but thought that Guinea's arguments should be rejected. But that did not free the Tribunal from its duty to give reasons for its rejection as an indispensable component of the statement of reasons on which its conclusion was based*[440],

or the *ad hoc* Committee in the *Soufraki* case:

> *[T]he requirement of stating reasons may, as a practical matter, frequently be the only way by which compliance with the fundamental prohibition of manifest excess of powers and with the critical duty to apply the proper law may be observed. The more lucid and explicit the*

---

d'espèce, est clairement différente de celle des affaires Mihaly et Banro, dans lesquelles une société canadienne tentait de céder des droits qu'elle n'avait pas."

[438] **Document CL370**, *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 Dec. 2008, § 56: "*Bilateral Investment Treaties between Contracting States offer rights and remedies to individuals which they can pursue regardless of the State of which they are nationals. Hence, the Request for Arbitration has been rightly made by the Claimant (Wintershall) – a national of the Federal Republic of Germany – in its own name. It is that claim which has been referred to ICSID Arbitration. If the applicable law so permits – there is nothing to prevent the Claimant (who is a beneficiary under the Argentine – Germany BIT) from voluntarily assigning his/its ICSID Claim to a third party; whether or not that third party be only a partial successor-in-interest of the Claimant. If a claim like the present had been brought before national courts, the latter would have ordinarily permitted a substitution or addition of parties to the proceedings in view of the assignment pendente lite of the claim."*

[439] **Document C196,** Amco I, § 32

[440] **Document CL313**,MINE, § 6.101

reasons set out by a tribunal, the easier it should be to observe what a tribunal is in fact doing by way of compliance[441],

or in Prof. Hanotiau's qualified doctrine:

Persons other than the formal signatories may be parties to the arbitration agreement by application of the theory of apparent mandate or ostensible authority or because they are third-party beneficiaries, or assignees of the contract containing the clause, or members with the signatories of a general partnership or a community of rights and duties. (…)

Finally, concerns of equity and good administration of justice are not foreign to the decisions of judges and arbitrators. One is occasionally tempted to wonder whether equity is not in some cases the paramount consideration and all the legal theories advanced to justify the final decision, ex post facto creations[442] [underlining added]

***

9. GROUNDS FOR ANNULMENT RELATING TO THE RT'S COMPOSITION

253. Given the facts and considerations about the RA substantiated above, the present *ad hoc* Committee has evidence which may help it to assess the process by which the Tribunal that rendered the RA was constituted, and its consequences on that Award.

254. In this arbitration the original Tribunal ruled "*qu'il appartient au Tribunal arbitral de veiller (...), ou au besoin de trancher, les questions de procédure (cf. les articles 43 et 44 de la Convention de Washington et le Règlement d'arbitrage CIRDI, à l'article 34 et passim).*"[443] Pursuant to these precepts and to this decision of the IT, the Claimants submitted to the RT the procedural question that gave rise to these grounds for annulment of the RA.

255. As set out in their Application for Annulment and then their Memorial on Annulment, the Claimants have identified two sets of facts regarding the composition of the resubmission Tribunal that make its Award annullable.

256. First there is the Respondent's appointment of Mr Mourre as co-arbitrator, contrary to what is provided in the Convention and the Rules (**9.1**), and second is a set of facts not disclosed by arbitrators Berman and Veeder giving rise to reasonable doubts as to their independence and impartiality (**9.2**).

---

[441] **Document CL131,** Soufraki, § 127

[442] **Document CL371,** Hanotiau (B): *Who are the Parties to the Contract(s) or to the Arbitration Clause(s) Contained Therein? The Theories Applied by Courts and Arbitral Tribunals,* § 12 and 15, in Complex arbitration, 2005

[443] Document CL402, original Tribunal's decision asserting substantive jurisdiction, 8 May 2002

9.1 On the Respondent's appointment of Mr Mourre

257. In its Counter-Memorial on Annulment, the Respondent asserts that the grounds for annulment of the resubmission Award cited by the Claimants regarding the Respondent's appointment of Mr Mourre are unfounded.[444]

258. In particular, according to the Respondent, the resubmission Tribunal was properly constituted, [445] and the treatment by the resubmission Tribunal of the Claimants' objections to the appointment of Mr Mourre do not justify an annulment of the resubmission Award.[446] Moreover the Respondent claims that the Claimants did not suitably develop some of their grounds for annulment.[447]

259. Contrary to the Respondent's assertions, the Claimants will show below that its appointment of Mr Mourre does justify the annulment of the resubmission Award for improper constitution of the Tribunal (**9.1.1**), manifest excess of powers (**9.1.2**), and serious departure from a fundamental role of procedure (**9.1.3**).

260. The Claimants withdraw their request for annulment on this last basis for failure to state reasons.

9.1.1 The Respondent's appointment of Mr Mourre means that the resubmission Tribunal was not properly constituted

261. As the Claimants explained in their Memorial, improper constitution of the Tribunal, a ground for annulment provided in Article 52(1)(a) of the Convention, means either a breach of the rules applicable to the Tribunal constitution process, or a lack of certain qualities that arbitrators should have (requirements relating to their nationality, impartiality and independence vis-à-vis the parties, etc.).[448]

262. As set out in their Application for Annulment[449] and the Memorial on Annulment,[450] the Claimants assert that the Respondent was not entitled, at the stage of the resubmission proceeding, to appoint an arbitrator given (i) that it lost this right after the resignation of the arbitrator Leoro Franco on learning of the final draft award by the Chair of the Tribunal, Prof. Pierre Lalive, without the consent of the other members of the original Tribunal, thereby increasing the case duration and costs, (ii) that the resubmission proceeding should be regarded as a continuation of the original proceeding.

263. The arguments given by the Respondent in its Counter-Memorial on Annulment greatly restrict the terms of the Convention concerning the constitution of the

---

[444] Counter-Memorial on Annulment, pp. 151-171.
[445] **Ibid.,**, §§ 282 et seq.
[446] **Ibid.,**, §§ 297 et seq.
[447] **Ibid.,**, §§ 279-280.
[448] **Memorial on Annulment**, §§ 31 et seq.
[449] Application for Annulment, §§ 43 et seq.
[450] Memorial on Annulment, §§ 89 et s.

resubmission Tribunal (**9.1.1.1**). The Respondent thus draws a veil over the sanction attached to the resignation of an arbitrator without the consent of the other members of the Tribunal (**9.1.1.2**), and denies the true nature of the resubmission proceeding (**9.1.1.3**). After these clarifications, as regards the Respondent, the fact of having appointed an arbitrator in the resubmission Tribunal evidently resulted in the improper constitution of that Tribunal, justifying the annulment of its Award (**9.1.1.4**).

9.1.1.1 The Respondent's arguments greatly restrict the terms of the Convention concerning the constitution of a resubmission Tribunal

264. As a reminder, the constitution of a resubmission Tribunal following the annulment of an award is covered by Article 52(6) of the Convention and Rule 55(2)(d).

265. Article 52(6) of the Convention states 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."[451]

266. Moreover Article 55(2)(d) states that:

> "Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
>
> (d) 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."[452]

267. The Respondent's arguments aim to rule out any application of Article 56(3) of the Convention on the consequences of an arbitrator's resignation without the consent of the other Tribunal members:

268. For 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.[453]

269. To do this, the Respondent misrepresents Article 52(6) of the Convention (**a**) and Rule 55(2)(d) (**b**).

---

[451] Article 52(6) of the Convention.
[452] Rule 55(2)(d).
[453] Article 56(3) of the Convention.

(a) The Respondent distorts the meaning and scope of Article 52(6) of the Convention

270. In its Counter-Memorial on Annulment, the Respondent construes article 52(6) of the Convention so as to restrict its meaning and scope.

271. Firstly the Respondent claims that Article 52(6) of the Convention draws a sharp dividing line between the Tribunal for the original proceeding, on one hand, and the Tribunal for the resubmission proceeding, on the other, purportedly represented by the use of the expression "*new Tribunal*" in Article 52(6).[454]

272. The Claimants cannot agree with such an interpretation.

273. They believe that Article 52 of the Convention, providing for the means of requesting the annulment of an award, must be put back in its context, i.e. Section 5 of the Convention entitled "*Interpretation, Revision and Annulment of the Award*".

274. This section details the appeals which may be brought once an award has been rendered: an appeal for interpretation (Article 50), an appeal for revision (Article 51), or an appeal for annulment (Article 52). These three remedies are subject to different procedures. Whereas appeals for interpretation or revision are in principle made before the "*Tribunal which rendered the award*",[455] appeals for annulment are made before an *ad hoc* Committee.[456]

275. In this context, the reference to a "*new Tribunal*" in Article 52(6) should be taken to express the drafters' intention to specify the body to which the dispute may be resubmitted in the event of an award's annulment. The "*new Tribunal*" referred to by Article 52(6) is thus contrasted, in organisational terms, with the "*Tribunal which rendered the award*" of Articles 50 and 51.

276. The use of the term "*new Tribunal*" in Article 52(6) does not however suggest that the consequences of an incident such as the one at issue, where the arbitrator appointed by Chile breached the confidentiality of deliberations, thwarting the proceeding and impairing the Tribunal's constitution in the original proceeding, should not continue to have effects in the continuation of the same case – with the sole purpose of setting the amount of compensation that the Chilean State was to pay the claimant investors according to the *res judicata* part of the OA.

277. Secondly the Respondent suggests that, as Article 52(6) refers only to section 2 of chapter IV of the Convention, it is not appropriate to take account of Article 56(3) and the consequences of an arbitrator's resignation without the consent of the other members of the original Tribunal.

---

[454] Counter-Memorial on Annulment, § 299.
[455] Articles 50 and 51 of the Convention.
[456] Article 52 of the Convention.

278. Such a conclusion cannot be drawn from the text of Article 52(6), which does not rule out the application of other provisions of the Convention or of the Rules in the constitution of a resubmission Tribunal.

279. As will be shown below, the provisions of Rule 55(2)(d), providing for the constitution of a Tribunal "*including the same number of arbitrators, and appointed by the same method, as the original one*", allow us to take account, in our case, of the consequences of the application of Article 56(3) during the original proceeding.

280. The Respondent's interpretation of article 52(6) of the Convention is thus unfounded. The same goes for its interpretation of Arbitration Rule 55(2)(d).

(b) The Respondent distorts the meaning and scope of Arbitration Rule 55(2)(d)

281. The Respondent then objects to the interpretation proposed by the Claimants of the term "original Tribunal" in Rule 55(2)(d), based on a comparison of that term with similar or identical terms used elsewhere in the Convention, particularly in Articles 50 and 51 and Rule 51.[457]

282. According to the Respondent, the comparison with the provisions on appeals for interpretation and appeals for revision are unjustified given that "*resubmission is a different remedy from interpretation or revision*".[458]

283. The Claimants contend that their proposed interpretation is well founded, is in line with the customary rules for the interpretation of treaties provided in Articles 31 et seq. of the Vienna Convention on the Law of Treaties of 23 May 1969, ratified by the Kingdom of Spain and the Republic of Chile.[459]

284. In particular article 31(1) of the Vienna Convention stipulates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". [460]

285. Yet as one author says regarding the consideration of the context of interpretable terms, "[t]he terms of a treaty should not be interpreted in the abstract or as if they were contained in a vacuum. They draw meaning from other provisions in the treaty and other sources or materials outside the treaty".[461]

286. Along these lines, the author notes that many arbitral tribunals rendering awards on investment law have had recourse, in determining the relevant context, to other articles of the same treaty, or to the use of similar or identical terms in other articles

[457] Memorial on Annulment, §§ 93 et seq.
[458] Counter-Memorial on Annulment, § 294.
[459] Chile ratified the Vienna Convention on 9 April 1981, and Spain on 16 May 1972, v. https://bit.ly/2JJg71l
[460] Article 31 of the Vienna Convention on the Law of Treaties.
[461] **Document CL386**, Weeramantry (R.), *Treaty Interpretation in Investment Arbitration*, OUP, First Ed., 2012, § 3.52.

of the same treaty.[462]

287. As referred to above, Articles 50 (appeal for interpretation) and 51 (appeal for revision) are in the same section of the Convention as Article 52 (appeal for annulment). Hence the comparison and consideration as context of terms similar or identical to those being interpreted, as used in each of these Articles as well as in the Rules detailing their implementation, is justified.

288. The Claimants therefore maintain that, in their proper context, the term "original Tribunal" as used in Rule 55(2)(d) should be understood as referring to the Tribunal having rendered the award examined in the annulment proceeding, in our case the original award.[463]

289. Thus the wording of Rule 55(2)(d) suggests that at the stage of appointing the resubmission Tribunal we may take into account the consequences of any incidents affecting the constitution of the Tribunal during the original proceeding, so as to constitute a new Tribunal "*including the same number of arbitrators, and appointed by the same method, as the original one*" (underlining added)

290. In short, the wording of Article 52(6) of the Convention and Arbitration Rule 55(2)(d) does not rule out a consideration, at the stage of constituting the resubmission Tribunal, of the consequences of the resignation of an arbitrator without the consent of the other members of the Tribunal during the original proceeding.

291. What is more, the sanction attached to such events, and also the nature of the resubmission proceeding, should have led the Centre and the Tribunal to take account of those consequences.

9.1.1.2 The Respondent's arguments ignore the sanction attached to the resignation of the arbitrator appointed by Chile without the agreement of the other members of the Tribunal

292. The circumstances of arbitrator Leoro Franco's resignation during the original proceeding were detailed by the Claimants in their previous submissions, to which the *ad hoc* Committee is asked to refer.[464]

293. Moreover the Claimants have already noted that in the event of the resignation of an arbitrator without the consent of the remaining arbitrators, the party that originally appointed the resigning arbitrator loses the right to designate a replacement.[465]

---

[462] **Ibid.**, § 3.54: "*Interpretations of treaty terms by FIATs* [Foreign Investment Arbitral Tribunal] *have been influenced by the context provided by:* (…) *(c) other articles in the treaty; (d) the use of an identical or similar term in other articles of the treaty* (…)".

[463] This ad hoc Committee is asked to refer to §§ 93 et seq. of the Memorial on Annulment (**document C8**) for a full description of Claimants' position on this point.

[464] Application for Annulment, §§ 48-53.

[465] Memorial on Annulment, §§ 103 et seq.

Indeed, in this event, the Chairman of the Administrative Council is responsible for filling the vacancy on the Tribunal.

294. Article 56(3) of the Convention thus 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."[466]

295. This article is supplemented by Rule 11, according to which:

> "(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.
>
> (2) 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; or
>
> (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General" (our underlining).[467]

296. As Prof. Schreuer, quoting Aaron Broches, explains, a lack of consent from the Tribunal's other members allows us to suppose that the party that originally appointed the resigning arbitrator is no stranger to the resignation:

> "*Art. 56(3) is an exception to the principle that vacancies should be filled by the same method that was used for the original appointment (...). In the words of* A. Broches *"[t]his provision reflects the suspicion that the party [that made the original appointment] may not be a stranger to the resignation"*"[468].

297. A resignation in these circumstances is sanctioned by the loss, for the party that originally appointed the resigning arbitrator, of the right to appoint a new arbitrator:

> "In other words, the party who made the original appointment loses the right to appoint a replacement"[469].

---

[466] Article 56(3) of the Convention.
[467] Rule 11
[468] **Document CL387**, v. Schreuer, "Article 56", § 35, p. 1194, in *The ICSID Convention, a commentary*, Cambridge University Press, 2009.
[469] **Ibid,**, C. Schreuer, "Article 56", § 41, p. 1195, in *The ICSID Convention, a commentary*, Cambridge University Press, 2009.

298. This particular procedure, and the sanction attached to it, is intended to discourage any kind of collusion between a party and the arbitrator appointed by it:

> "*By attaching a sanction to an unjustified resignation, it* [Art. 56(3)] *discourages any attempts, made for whatever reason, to withdraw a member of a commission or tribunal. In doing so, it serves not only the principle of non-frustration and expediency but also the principle of the immutability of the commission or tribunal* (…)"[470]

299. In our case, Mr Franco's resignation without the agreement of Messrs Lalive and Bedjaoui during the original proceeding resulted in the Respondent losing the right to appoint a new arbitrator to replace him.

300. We shall see below that this should have been taken into account when the resubmission Tribunal was appointed, given the fact that the resubmission proceeding is a continuation of the original proceeding,[471] and that the appointment of the arbitrators making it up must be made "*by the same method, as the original one*" according to special Rule 55(2)(d).[472]

301. Contrary to what the Respondent claims, taking this sanction into account during the resubmission Tribunal's constitution would not have impaired its right to appoint an arbitrator, in that it is a simply matter of continuing a sanction arising from the circumstances of the resignation of an arbitrator in which the Respondent was personally involved.[473]

302. Thus the application of article 52(6) and Rule 55(2)(d) should have led the Tribunal to refuse Chile the right to appoint a new arbitrator, and to have the Chairman of the Administrative Council make the appointment.

9.1.1.3 The Respondent errs as to the nature of the resubmission proceeding

303. In its Counter-Memorial on Annulment, the Respondent suggests that the resubmission proceeding is a new proceeding with a new Tribunal,[474] for which reason there is purportedly no reason for the above sanction to be applied.

304. This argument evincies a misunderstanding of the nature of the resubmission proceeding.

305. As the resubmission Tribunal noted in the *Amco* case in its decision on jurisdiction:

---

[470] **Ibid.**, § 37, p. 1195
[471] *Supra* § 33, et *infra* § 307, 311, 330
[472] *Supra*, §§ 281 et seq.
[473] Application for Annulment, §§ 48 et seq.
[474] Counter-Memorial on Annulment, § 289.

> "Article 52 is not a provision for starting a totally new arbitration, restricted only by the requirements of Article 25. Rather, it is a procedure for resubmission of an existing dispute in respect of which Article 25 jurisdiction exists" (underlining added).[475]

306. This is particularly so where, as in our case, the resubmission proceeding follows the partial annulment of an award, the dispute submitted to the appeal Tribunal is by nature limited, and the Tribunal has to accommodate the *res judicata* effect attached to the unannulled portions of the original award.[476]

307. This is why the resubmission Tribunal unambiguously noted that "[p]our le Tribunal, il est clair que la présente instance est le prolongement de l'arbitrage initial (…)"[477]

308. The specific nature of this resubmission proceeding, "*prolongement de l'arbitrage initial*",[478] thus justified the continuation of the consequences of the unconsented resignation of the arbitrator appointed by Chile, and the Respondent being regarded as having lost its right to appoint an arbitrator.

309. It follows from this interpretation, along with the specific nature of the resubmission proceeding and the consequences of Mr Franco's resignation in the circumstances recalled above, that the Respondent was not entitled to appoint an arbitrator when the resubmission Tribunal was constituted.

9.1.1.4 The Respondent's appointment of an arbitrator means that the Tribunal was improperly constituted

310. As a result of the above points:

> (i) Pursuant to Rule 55(2)(d), the resubmission Tribunal should have been constituted by arbitrators appointed "by the same method as the original one".
>
> (ii) The "original Tribunal" in question here is the Tribunal that rendered the original award, made up of Messrs Lalive (Chair), Bedjaoui and Gaillard;
>
> (iii) Chile forfeited the right to appoint an arbitrator following Mr Franco's resignation during the original proceeding;
>
> (iv) This sanction still applied in the resubmission proceeding given that this is "le prolongement de la procédure initiale".

311. Thus the Centre, and by extension the Tribunal, should, when the resubmission Tribunal was constituted, have taken into account that the Respondent had lost the

---

[475] **Document CL294**, *Amco v. Indonésie (Resubmission proceeding)*, ICSID Case No. No. ARB/81/1, Decision on jurisdiction, 10 May 1988, para 133.
[476] Rule 55(3)
[477] Resubmission Award, § 188.
[478] *Ibid.*

right to appoint an arbitrator following Mr Franco's resignation during the original proceeding without the original Tribunal's consent.

312. The fact of having authorised the Respondent to appoint an arbitrator in the person of Mr Mourre means that the resubmission Tribunal was improperly constituted within the meaning of Article 52(1)(a) of the Convention.

313. Accordingly the annulment of the award is justified.

9.1.2 The Tribunal's refusal to react to the Respondent's appointment of Mr Mourre constitutes a manifest excess of powers

314. As the Claimants recalled in their Memorial on Annulment, once the Tribunal had been constituted, they asked it to settle the procedural question arising with the Respondent's appointment of an arbitrator when it no longer had the right to do so.[479]

315. Each time they was advised to propose a disqualification pursuant to Article 57 of the Convention. The ground for annulment corresponding to this suggestion will be considered below.

316. The Tribunal's refusal to settle the question of the appointment of this arbitrator constitutes a manifest excess of powers.

317. Excess of powers pursuant to Article 52(1)(b) of the Convention involves a Tribunal using a power that it does not have, or unduly refusing to use a power that it does have.[480]

318. To result in annulment, the excess of powers in question must be manifest, which *ad hoc* Committees that have previously ruled under the ICSID aegis have interpreted as meaning at once obvious, self-evident and serious or substantive.[481]

319. To quote the summary made by the ad hoc Committee in the Soufraki case, "[i]t 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."[482]

320. The Claimants assert that the RT's decision not to settle, pursuant to article 44 of the Convention, the question concerning the irregular appointment of one of the arbitrators, and to require the Claimants to have recourse to the procedure in Article 57 of the Convention, not applicable here,[483] constitute a manifest excess of powers.

321. For given the non-applicability of Article 57, the Tribunal had the opportunity to

---

[479] **Memorial on Annulment**, §§ 116 et s.
[480] **Ibid.,** §§ 37 et seq.
[481] **Ibid.,** §§ 52 et s.
[482] **Document C131**, *Hussein Nuaman Soufraki v. UAE* (ICSID Case No. ARB/02/7), Decision of the *ad hoc* Committee on Mr Soufraki's Request for Annulment, 5 June 2007, § 40.
[483] *Infra*, §§ 334 et s.

set its own rules for suitably dealing with the question pursuant to article 44.

322. Moreover the Tribunal's decision not to agree to deal with the question posed to it pursuant to article 44 constitutes, in this case, a breach of the *res judicata* of the original award.

323. As set out in the Application for Annulment,[484] the original Tribunal noted, in paragraphs 34 to 37 of its award, the manifestly murky circumstances and the *tempus suspectus* of arbitrator Franco's resignation:

> "34. Au cours de l'été 2005, le Président rédigea un projet partiel de décision sur la compétence, dont il soumit le 3 juin le texte, confidentiel, aux autres membres du Tribunal pour une délibération prévue à New York le 19 septembre 2005.
>
> 35. Par lettre du 23 août 2005, la République du Chili a demandé la récusation des trois membres du Tribunal arbitral, dont l'un (l'Ambassadeur Galo Leoro Franco, de nationalité équatorienne) donna sa démission par lettre du 26 août 2005, au motif qu'il aurait perdu la confiance de la partie l'ayant désigné. A la suite de cette démission, le Chili a retiré par écrit sa requête de récusation concernant ce dernier. La démission de Monsieur Leoro Franco, à la veille de la délibération du Tribunal fixée avec son accord, n'étant justifiée au regard d'aucun des motifs prévus aux articles 56 (3) de la Convention CIRDI et 8 (2) du Règlement d'arbitrage, elle n'a pas été acceptée par les deux autres membres du Tribunal arbitral, et le Président du Conseil administratif a été appelé à pourvoir à la vacance ainsi créée. C'est ce qu'il a fait en désignant M. Emmanuel Gaillard, professeur de droit et avocat à Paris.
>
> 36. Il est apparu par la suite, notamment après un entretien accordé par M. Robert Dañino, alors Secrétaire général du CIRDI, à une importante délégation chilienne sur la demande de cette dernière, que la récusation demandée par le défendeur à la veille de la délibération prévue par le Tribunal arbitral était motivée en réalité par la connaissance du projet de décision partielle proposé par le Président, projet interne que l'Arbitre Leoro Franco avait cru pouvoir communiquer à la partie qui l'avait désigné, au mépris de l'obligation, incontestée, de la confidentialité des documents de travail du Tribunal et du secret des délibérations.
>
> 37. L'existence de cette violation n'est pas contestée, mais au contraire reconnue par la défenderesse. Le doute subsiste seulement sur la question de savoir qui en a pris l'initiative mais il n'incombe pas au présent Tribunal

[484] Application for Annulment, § 52.

> arbitral de se prononcer à ce sujet, malgré les protestations et demandes présentées au CIRDI par les demanderesses"[485].

324. To justify its decision in points 5 to 7 of the dispositive part to require the Respondent to bear a large share of the Claimants' legal costs and of the procedural costs, the original Tribunal explained in paragraph 729 of the original award that:

> "En outre, le Tribunal arbitral estime approprié de prendre en considération l'attitude des parties et leur degré de coopération à la procédure et à la mission confiée au Tribunal. De ce point de vue, 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" (underlining added)[486].

325. As the Claimants noted in their Memorial on Annulment, the *res judicata* force of an arbitral award covers not only the terms of its dispositive part but also the aspects in the grounds for the award constituting their necessary basis.[487]

326. In its Counter-Memorial, albeit without disagreeing with this position of principle,[488] the Respondent distorts the Claimants' arguments so as to assert that "*Claimants have not adduced any support for the notion that every single word of an un-annulled ICSID award has the force of res judicata.*"[489]

327. This is not what the Claimants said. They merely set out the basis of the rule recalled above, and stressed the fact that the *ad hoc* Committee itself had decided in point 4 of the dispositive part of its Decision that "[le Comité] *estime que les paragraphes 1 à 3 et 5 à 8 du dispositif ainsi que le corps de la Sentence, à l'exception de la Section VIII, ont autorité de chose jugée.*"[490]

328. So contrary to what the Respondent claims,[491] the Claimants contend that paragraphs 34 to 37 of the original award have *res judicata* force in so far as they constitute the necessary basis, along with point 729, of the decisions adopted in points 5 to 7 of the original award's dispositive part and, moreover, of the first *ad hoc* Committee's express rejection of the State's claims with a view to "covering" its

---

[485] **Document C2**, SI, §§ 35-37.
[486] **Ibid.**, § 729.
[487] Memorial on Annulment, paras. 271 et seq.
[488] Counter-Memorial on Annulment, § 308: "[a]*ccordingly, the force of res judicata only attaches to final decisions (and the supporting reasoning thereof), on questions that the parties had put in issue*".
[489] Counter-Memorial on Annulment, para. 308.
[490] Decision of the *ad hoc* Committee , para. 359, point 4.
[491] Counter-Memorial on Annulment, §§ 307-309.

coup of 2005 and 2006.[492]

329. Moreover, the Respondent's attempt to get round this obstacle by breaking up the *res judicata* of the original award, and by limiting the scope of that attached to paragraphs 34 to 37 of the original award merely to a question of costs, is doomed to failure.[493] Mr Franco's resignation was an integral part of the coup that brought down the regularly constituted Tribunal on the eve of a crucial decision in which the Tribunal and the parties had invested more than seven years of their respective lives – limited for Mr Victor Pey, unlimited for the Respondent State.

330. In so far as it is the same dispute that is submitted to the resubmission Tribunal, there can be no doubt as to the fact that all the questions of law and of fact settled in the original Award and not annulled by the *ad hoc* Committee are applicable for the resubmission Tribunal. Indeed, as the resubmission proceeding is a continuation of the original proceeding, the conditions for the application of *res judicata*– identical parties, subject and cause of dispute – are evidently met.

331. By refusing to carry out the conclusions of the original award with *res judicata* effect, and refusing to use the powers that it has under the Convention for the conduct of procedure, the resubmission Tribunal committed an excess of powers within the meaning of article 52(1)(b).

332. The simple demonstration made by the Claimants in their submissions, summarised above,[494] shows that this excess of powers is manifest, in that it is obvious and self-evident.

333. It is also serious, in that the denial of the original award's *res judicata* by the resubmission Tribunal, and its refusal to use its own powers, resulted in the Respondent's irregular appointment of an arbitrator.

334. Thus the annulment of the resubmission award is justified.

9.1.3 The fact of requiring the Claimants to resort to article 57 of the Convention constitutes a serious departure from a fundamental rule of procedure

335. As the Claimants explained in their previous submissions,[495] the Tribunal refused the Claimants' request for the Tribunal to settle the question of procedure raised pursuant to article 44 of the Convention as soon as the appointment of an arbitrator was notified by Chile to the other parties, and it encouraged them to have recourse to the procedure provided for in article 57 of the Convention.

336. The Claimants see this decision by the Centre and the Tribunal as a serious

[492] Décision du 1er Comité *ad hoc*, paras 24, 334-337, et **document C346** (lettre des Demanderesses à Mr. Paul Wolfowitz, Président du Conseil administratif du CIRDI).
[493] Counter-Memorial on Annulment, § 309.
[494] Memorial on Annulment , paras. 120-122.
[495] Application for Annulment, paras. 75 et seq.; Memorial on Annulment, paras. 116 et seq.

departure from a fundamental rule of procedure as defined in article 52(1)(d) of the Convention.

337. As the Claimants discussed in their Memorial on Annulment, the ground for annulment provided in article 52(1)(d) of the Convention requires, to be admissible, (i) a departure from a fundamental rule of procedure, and (ii) that this departure be a serious one.[496]

338. In our case it is worth noting that the procedure provided in Article 57 of the Convention was not applicable, as the Claimants indicated to the Tribunal.[497]

339. For article 57 of the Convention states that:

> "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."[498]

340. Here the Claimants' wish to have the Tribunal settle this procedural question did not concern the qualities required by article 14(1) of the Convention (moral character, specialist competence, independence), nor the conditions provided in Section 2 of Chapter IV (involving essentially the nationality condition provided in article 39), but rather the fact that an arbitrator had been appointed by a party not entitled to do so.

341. Accordingly, by requiring the Claimants to have recourse to a inapplicable procedure to settle the procedural question relating to this third arbitrator, the Tribunal departed from the rules of due process.

342. This departure is serious, in that, as shown above, it ultimately allowed a party to appoint an arbitrator in an irregular fashion.

343. Thus the annulment of the resubmission award is justified.

9.2 Regarding the undisclosed ties between members of Essex Court Chambers and the Respondent

344. In its Counter-Memorial the Respondent contends chiefly that the Claimants waived their right to object about the apparent objective conflict of interest between the Chilean State and arbitrators Veeder and Berman,[499] and that in reality they were

---

[496] Memorial on Annulment, §§ 58 et seq.
[497] Application for Annulment, §§ 75 et seq.; Memorial on Annulment, §§ 116 et s.
[498] Article 57 of the Convention.
[499] Counter-Memorial on Annulment, §§ 314 et seq.

seeking to appeal the first Decision on the proposal for disqualification of arbitrators Berman and Veeder of 21 February 2017.[500]

345. This is not so, as will be shown below.

346. Firstly, it is worth recalling that, as the Claimants already showed in their previous submissions,[501] the present *ad hoc* Committee has jurisdiction to hear, at this stage of the proceeding, doubts as to the independence and impartiality of Messrs Berman and Veeder, notwithstanding the decision of the Chairman of the ICSID Administrative Council of 21 February 2017 (**9.2.1**).

347. Secondly, the decision of the Chairman of the ICSID Administrative Council of 21 February 2017 is manifestly untenable and unreasonable, and the Claimants have not waived or lost their right to state an objection regarding the apparent objective conflict of interest between the Chilean State and Messrs Berman and Veeder (**9.2.2**).

348. Thirdly, significant factual aspects arising after the decision of the Chairman of the ICSID Administrative Council given on 21 February 2017 have substantially changed the factual context in which the decision was taken, which justifies disregarding its conclusions on the admissibility of the Claimants' request for disqualification (**9.2.3**).

349. Fourthly, in this case there is reasonable doubt as to the independence and impartiality of arbitrators Berman and Veeder, which, given its impact on the Award, justifies its annulment on the grounds of Articles 52(1)(a) and 52(1)(d) of the Convention (**9.2.4**).

9.2.1 The present *ad hoc* Committee's jurisdiction to consider the apparent objective conflict of interest between the Chile and Messrs Berman and Veeder

350. As the Claimants explained in previous submissions, the *ad hoc* Committee has jurisdiction to examine *de novo* the question of the independence and impartiality of Messrs Berman and Veeder.[502]

351. In objecting to the present Committee carrying out its task, the Respondent contends first that "*the ICSID Convention does not offer any avenue for appealing the Challenge Decision*".[503] The Claimants agree in principle that decisions rendered pursuant to Article 58 of the Convention by, as the case may be, the remaining members of the Arbitral Tribunal or the Chairman of the Centre's Administrative Council, are not liable to appeal.

352. However, this is not the recourse that the Claimants are seeking. For the

[500] Ibid., §§ 326 et s.
[501] Memorial on Annulment, §§ 130 et s.
[502] Memorial on Annulment, §§ 130 et s.
[503] Counter-Memorial on Annulment, § 328.

Claimants ask the present Committee only to fully exercise its powers under the Convention in order to fulfil its role as guarantor of procedural integrity.[504]

353. In this regard it is worth noting that the reference cited by the Respondent to the decision of the *ad hoc* Committee in the *Azurix* case "*a committee cannot decide for itself whether or not* [a challenge] *decision under Article 58 was correct, as this would be tantamount to an appeal against such a decision*" has been criticised by other Committees as being unduly restrictive and preventing them from properly fulfilling their task.

354. Such is the case, firstly, of the *ad hoc* committee in *EDF International et al. v. Argentina.*[505]

355. Thus, having noted that "*the ICSID Convention also establishes the ad hoc committee as the guardian of the integrity of the arbitral procedure*"[506] and that "*the independence and impartiality of the members of the tribunal is a matter which goes to the very heart of the integrity of the arbitral procedure*",[507] the ad hoc Committee in *EDF International et al. v. Argentina* rejected the approach taken by the Committee in the *Azurix* case, pointing out that:

> "The Committee considers that the second consideration must lead it to reject the approach taken by the Azurix Committee, namely that an ad hoc committee has no role in respect of a challenge to an arbitrator which had been considered by the remaining members of the tribunal under Articles 57 and 58 of the Convention beyond examining whether there had been a serious departure from a fundamental rule of procedure in the manner in which the remaining members had dealt with the proposal for disqualification. The Committee considers that such an approach is incompatible with the duty of an ad hoc committee to safeguard the integrity of the arbitral procedure"[508].

356. Such is also the case of the *ad hoc* Committee in *Suez et al. v. Argentina* which, for similar reasons, deemed that:

> "If the Committee were to follow the approach taken by the Azurix committee, its analysis would be a fairly short exercise given that neither Party in the present case has claimed that the Decision on Disqualification was made in violation of the procedure prescribed in Articles 57 and 58 of the ICSID Convention. In the Committee's view, however, this approach would not be consistent with the conclusion drawn in the interpretative exercise above and in

[504] Memorial on Annulment, §§ 26 et s.
[505] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016.
[506] **Ibid.**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016. § 140.
[507] **Ibid.**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016 § 140.
[508] **Ibid.**, § 141.

> particular with the purpose of annulment proceedings and thus the duty of an ad hoc committee to safeguard the integrity of the arbitration proceedings. The Committee rather agrees with the committee in EDF v. Argentina and rejects the Azurix approach as too narrow and formalistic because it prevents an ad hoc committee from playing any role in ensuring the independence and impartiality of the arbitrators – a matter "which goes to the very heart of the integrity of the arbitral procedure."[509]

357. The approach taken by the *ad hoc* Committee in the *Azurix* case and invoked by the Respondent is thus inappropriate, and the Claimants invite the present *ad hoc* Committee to build on the approaches taken by the Committees in *EDF International et al. v. Argentine* and *Suez et al. v. Argentina*.

358. These approaches, detailed by the Claimants in previous submissions,[510] may be summarised in three points, as follows:

359. First, where the parties have made no challenge during the proceeding and the *ad hoc* Committee is the first to rule on the matter of an arbitrator's lack of independence and impartiality, the Committee should approach the issue *de novo*:

> "*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*
>
> *(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".[511]

360. Second, where there is a previous decision by the remaining members of a Tribunal or the Chairman of the ICSID Administrative Council on a challenge to an

---

[509] **Document C109**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Argentina's Request for Annulment, 5 May 2017, § 90.
[510] Memorial on Annulment, §§ 130 et seq.
[511] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016, § 136.

arbitrator under Article 58 of the Convention, the role of the *ad hoc* Committee is to ascertain whether it is untenable or 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"[512].

361. Third, the Committee can also conduct a review *de novo* of the objection as to the arbitrator's independence and impartiality where there is a previous decision taken by the remaining members of the Tribunal or the Chairman of the ICSID Administrative Council under Article 58 of the Convention, if the factual context in which that decision was taken has significantly changed.[513]

362. Here it is worth recalling that the procedural context of this case of different to that dealt with by the Committees in the *EDF* and *Suez* cases. In these two cases, the respective *ad hoc* Committees were asked to annul the awards involved on the grounds of Articles 52(1)(a) and (d) of the Convention, based on doubts expressed about an arbitrator's independence and impartiality, whereas a decision pursuant to Article 58 of the Convention had already been given during the original arbitration and had dismissed the substance of the challenge to the arbitrator in question.[514]

363. Yet in our case:

- The decision of the Chairman of the ICSID Administrative Council of 21 February 2017 was rendered not during the resubmission proceeding resulting in

[512] **Ibid.**, § 145; **Document C109**, *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 Request for Annulment, 5 May 2017, § 70.

[513] **Document C109**, *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 Request for Annulment, 5 May 2017, § 194.

[514] In *EDF* and *Suez*, a challenge was filed and rejected against the arbitrator Gabrielle Kaufmann-Kohler.

the Award of 13 September 2016 but during a proceeding for correction of material errors started after the Award had been issued, pursuant to Article 49 of the Convention,[515] and:

- In his decision of 21 February 2017, the Chairman of the Administrative Council did not decide on the merits of the proposed disqualification of arbitrators Veeder and Berman, but rather just declared it inadmissible, due to its supposedly being filed late.[516]

364. These procedural peculiarities mean that, if the *ad hoc* Committee were to deem that the decision of 21 February 2017 by the Chairman of the Administrative Council holding the Claimants' proposal for disqualification inadmissible were untenable or plainly unreasonable, it would be led to appraise for the first time, *de novo*, the merits of the Claimants' arguments concerning the apparent objective conflict of interest between the Chilean State and arbitrators Veeder and Berman.

365. The same *de novo* appraisal could be undertaken by the Committee if it deems that there have been significant changes in the factual context in which the Chairman of the Administrative Council made his decision of 21 February 2017 on the admissibility of the Claimants' proposal for disqualification.

366. Thus the Claimants will show below:

- That the decision of the Chairman of the Administrative Council of 21 February 2017 holding inadmissible the Claimants' proposal for disqualification of arbitrators Veeder and Berman is manifestly untenable and unreasonable (*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*);[517]

- That, moreover, the factual context in which the Administrative Council Chairman's decision was given has changed so much that the *ad hoc* Committee may justifiably disregard its conclusions on the admissibility of the Claimants' proposal for disqualification of arbitrators Berman and Veeder;

- That, finally, there are legitimate doubts as to the independence of arbitrators Berman and Veeder justifying the annulment of the Award.

9.2.2 The decision of the Chairman of the Administrative Council of 21 February 2017 is manifestly untenable and unreasonable

367. This decision by the Council Chairman declared the proposed disqualification of arbitrators Berman and Veeder inadmissible on the basis that the Claimants should

[515] **Document C126**, Request for correction of material errors of 26 October 2016.
[516] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017.
[517] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016, § 145.

have known of the fact that certain members of Essex Court Chambers were acting or had acted for the Chilean State when the resubmission proceeding took place.[518]

368. The conclusions reached by the Administrative Council Chairman were broadly recycled by the Respondent in its Counter-Memorial on Annulment so as to assert that the Claimants had waived their right to make objections as to the independence and impartlity of arbitrators Berman and Veeder.[519]

369. As the Claimants showed in previous submissions,[520] and as they will show again below, the decision of the Chairman of the Administrative Council of 21 February 2017 is manifestly untenable and unreasonable. In fact the Claimants have acted with all the required diligence and so cannot be assumed to have waived their right to make an objection regarding the independence and impartiality of arbitrators Veeder and Berman.

370. It is worth first realling the relevant provions of the Convention and the Rules constituing the basis of the decision of the Chairman of the Administrative Council of 21 February 2017, and to which the Respondent refers in its Counter-Memorial on Annulment.

371. Thus Article 57 of the Convention allows the parties to propose to a Tribunal the disqualification of any of its members claimed not to possess the qualities required by paragraph (1) of Article 14, or the conditions established in Section 2 of Chapter IV for the appointment to a Tribunal.[521]

372. Arbitration Rule 9 states that that proposal for disqualification shall be filed " *promptly, and in any event before the proceeding is declared closed*".[522]

373. Finally Rule 27 provides that a party which knows or should have known that a provision of the has not been complied with and which fails to state promptly its objections thereto, shall be deemed to have waived its right to object

> "A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object."[523]

374. The decision of the Chairman of the Administrative Council of 21 February 2017 holding inadmissible the Claimants' proposal for disqualification of artbitrators

[518] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, §§ 82 et seq.
[519] Counter-Memorial on Annulment, §§ 314 et s.
[520] Application for Annulment, §§ 95 et s; Memorial on Annulment, §§ 139-142.
[521] Article 57 of the Convention.
[522] Rule 9.
[523] Rule 27.

Berman and Veeder on the basis of the provisions quoted above has no justification, and so it is plainly untenable and unreasonable. The same goes for the arguments advanced by the Respondent Counter-Memorial on Annulment, which are merely the other side of the same coin.

375. In his decision of of 21 February 2017, the Chairman of the Administrative Council declared the proposed disqualification of Messrs Berman and Veeder inadmissible on the basis that the Claimants should have known of the fact that certain members of Essex Court Chambers were acting or had acted for the Chilean State when the resubmission proceeding took place.[524]

376. In particular the Council Chairmen stressed the point that:

- Articles appearing in the press as of the year 2012 supposedly mentioned the representation of Chile by certain members of Essex Court Chambers.[525]

- The secret nature of the relationship between Essex Court Chambers and the Chilean State was supposedly not stated in the press article of 18 September 2016 supplied by the Claimants;[526]

- The Claimants followed the Chilean press regularly at the time;[527]

- The Claimants should have investigated any conflict of interest concerning arbitrators Veeder and Berman when they were appointed.[528]

377. In short, the inadmissibility declared by the Chairman of the Administrative Council was based on the following reasons:

> "Lorsque les Demanderesses ont nommé M. V. V. Veeder QC et accepté la nomination de Sir Franklin Berman QC, elles savaient que les Arbitres mis en cause étaient tous les deux membres des Essex Court Chambers. Au même moment, les médias ont régulièrement rapporté que M. Wordsworth QC représentait le Chili dans une affaire distincte, et les Demanderesses se sont régulièrement appuyées au cours des instance sur des preuves provenant des mêmes médias. Au vu des circonstances spécifiques de cette affaire, il apparaît que des informations suffisantes étaient publiques et à la dispositions des Demanderesses au cours de l'instance de nouvel examen et que, par

[524] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, §§ 82 et s.
[525] **Ibid.**, § 88: "*Les éléments de preuve présents au dossier de la procédure montrent que les informations concernant la représentation du Chili par des barristers des Essex Court Chambers dans les procédures CIJ étaient dans le domaine public et disponibles depuis décembre 2012*".
[526] **Ibid.**, § 89: "*L'article du 18 septembre 2016 sur lequel les Demanderesses s'appuient comme preuve d'une relation jusque-là secrète entre les Essex Court Chambers et le Chili n'étaye pas cette allégation*".
[527] **Ibid.**, § 90: "*Le dossier de la procédure montre de plus que, durant les instances d'arbitrage et de nouvel examen, les Demanderesses ont fait référence à, et cité, un certain nombre d'articles de presse*".
[528] **Ibid.**, § 92: "*C'est une pratique courante pour une partie que de rechercher les conflits que des arbitres pourraient avoir au moment de leurs nominations, et, en particulier, concernant la désignation de leur propre candidat*".

conséquent, elles savaient ou auraient dû savoir que d'autres barristers des Essex Court Chambers représentaient la République du Chili dans des procédures CIJ".[529]

378. Yet, if we look closely, the reasons cited by the Chairman of the Administrative Council as set out above are untenable, and betray the plainly unreasonable nature of the decision.

379. First, as the Claimants explained in previous submissions,[530] the press articles to which the Chairman of the Administrative Council is referring do not allow the public nature of the Chile's representation by members of Essex Court Chambers to be clearly established.

380. For in footnote No. 69 the Chairman of the Administrative Council notes that "*à titre d'exemple, la Défenderesse a annexé plusieurs articles de presse publiés entre décembre 2012 et mai 2015 qui font expressément référence à la participation de barristers des Essex Court Chambers comme conseils du Chili dans des affaires CIJ*".[531]

381. Yet though the eight articles cited do indeed mention Mr Samuel Wordsworth in the International Court of Justice cases *Maritime Dispute (Peru v. Chile)* and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Peru)*, none record his capacity as member of Essex Court Chambers.[532]

382. These press articles, which were not known about, are not detailed enough to have aroused the Claimants' suspicions when the resubmission Tribunal was constituted or during the proceeding, so as to justify checks. In these circumstances it would have been manifestly unreasonable and excessive to require the Claimants to inquire systematically into what form of practice all the counsels for Chile mentioned in one way or another in press articles belonged to. Such a systematic investigation would have been excessive.

383. The other arguments cited by the Respondent in its Counter-Memorial on Annulment to assert the supposedly belated nature of the proposal for disqualification are irrelevant.

384. Thus the fact that Mr Berman's CV mentioning his membership of Essex Court

---

[529] **Ibid.**, Decision the Chairman of the Administrative Council of 21 February, § 94.
[530] Memorial on Annulment, § 141.
[531] **Ibid.,** Decision the Chairman of the Administrative Council of 21 February, footnote 69
[532] These articles, listed in footnote 69 of the Decision the Chairman of the Administrative Council of 21 February, are: **document C316e**, article in LA TERCERA, 6 December 2012; **document C317e**, article in LA NACION on 14 December 2012; **document C318e**, article in LA TERCERA on 12 April 2014; **document C319e**, article in LA RAZON on 24 May 2014; **document C320e**, article in LA TERCERA on 5 December 2014; **document C321e**, article in LA NACION on 4 May 2015; **document C322e**, article in EMOL on 4 May 2015; and **document C323e**, article in PANAM POST on 11 may 2016.

Chambers was circulated to the parties in November 2013[533] is not relevant in so far as (i) neither this CV nor any other documents that might have been communicated by Mr Berman at the time of his appointment indicate that other members of Essex Court Chambers represented Chile at the time, and (ii) as shown above,[534] the press articles available at the time were not detailed enough to link Chile to Essex Court Chambers or to justify any in-depth research on the point.

385. The same arguments apply to the Respondent's appointment of Mr Veeder in January 2014.[535]

386. Moreover the fact that one of the members of Essex Court Chambers – Mr Vaughan Lowe – represented Bolivia against Chile in the International Court of Justice case *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Peru)*[536] is likewise irrelevant in the proceeding in hand. Bolivia being represented by Vaughan Lowe does not excuse or explain the lack of disclosure by Messrs Veeder and Berman, or by the Respondent, of the links between certain members of Essex Court Chambers and the Chilean State.

387. The foregoing shows that nothing in the public documents extant when the resubmission Tribunal was constituted could give the Claimants cause to suspect the links between Essex Court Chambers and the Respondent.

388. Second, the Chairman of the Administrative Council's reading of the article appearing in the newspaper *El Mercurio* of 18 September 2016, from which the Claimants learnt of the existence of covert relations between the Chilean State and certain members of Essex Court Chambers, is likewise untenable.[537]

389. The article in question states that :

"*Le ministre ne cache pas son enthousiasme quand il parle de l'affaire Silala, et de la stratégie suivie à cet égard, qui inclut une recherche "avancée" et secrète des conseils internationaux, qui travaillent depuis des mois - jusqu'à présent dans la plus grande discrétion - avec l'équipe dirigée par l'agent Ximena Fuentes et les co-agents Juan Ignacio Piña et María Teresa Infante.*

(...)

Quant au britannique Alan Boyle, il est professeur à l'Université d'Edimburg en Écosse et spécialiste en droit maritime et en droit de l'environnement. De même que

[533] Counter-Memorial on Annulment, § 315.
[534] *Supra*, § 381.
[535] Counter-Memorial on Annulment, § 314.
[536] Ibid., § 317.
[537] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, § 89.

Samuel Wordsworth -avocat du Chili dans l'affaire de la demande maritime- il est membre du prestigieux cabinet Essex Courts Chambers." (underlining added)[538]

390. Contrary to the view taken by the Chairman of the Administrative Council, the press article quoted above (i) reports a secret and well-advanced investigation by lawyers acting for Chile with utmost discretion, and (ii) reports, in this case expressly and unequivocally, the membership of Messrs Boyle and Wordsworth of Essex Court Chambers.

391. So it was as of this date, soon after the rendering of the resubmission Award, and with this evidence, that the Claimants started to research more thoroughly the links between certain members of Essex Court Chambers and the Chilean State.

392. This is moreover what was explaned by Hernan Garcés during the procedural hearing of 16 February 2018, contrary to the impression given by the distortion of his words by the Respondent in its Counter-Memorial on Annulment.[539] Hernan Garcés actually said that once he heard from Chile of the article published on 18 September 2016 (document C291), he made inquiries allowing him to uncover the string of Essex Court Chambers members who were representing or had represented the Chilean State.[540]

393. Third and finally, counting from when the Claimants learned through the article of 18 September 2016 of the concealed ties between members of Essex Court Chambers and Chile, it is worth noting that their reaction was immediate.

394. As of 20 September 2016, the Claimants asked the ICSID Secretary-General to have arbitrators Veeder and Berman to disclose the links of other members of Essex Court Chambers with the Chilean State.[541]

395. As detailed in the decision of the Chairman of the Administrative Council of 21 February 2017, from this date there were several exchanges between the Centre, the parties and arbitrators Veeder and Berman allowing them to offer explanations.[542]

396. On 27 October 2016, the Claimants submitted their request for rectification of the resubmission Award, also restating their request for enquiries and disclosures regarding Messrs Berman and Veeder.[543]

397. On 22 November 2016, i.e. just two months after notifying the Secretary-General of their concerns and the day after the email of 21 November 2016 by which the Tribunal told the parties that Messrs Berman and Veeder had nothing to add to their

[538] **Document C291**, Article in EL MERCURIO on 18 September 2016.
[539] Counter-Memorial on Annulment, § 323.
[540] **C324**, Transcript of the hearing of 16 February 2018, pages 190:4-191:02.
[541] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, § 8.
[542] **Ibid.**, §§ 8-25.
[543] **Document C126**, Request for correction of material errors of 26 October2016.

previous statements,[544] the Claimants formally filed a proposal for disqualification of arbitrators Berman and Veeder pursuant to Article 57 of the Convention.[545]

398. Thus the prompt nature of the Claimants' reaction is manifest.

399. Let us also remark that if, as claimed by the Respondent[546] and accepted by the Administrative Council Chairman,[547] certain decisions have deemed that a proposal for disqualification was belated when filed 53 days, 147 days or 6 months after the requesting party learnt of the facts underlying the request, it is generally accepted that a request filed within a month of the facts being discovered is admissible.[548]

400. Many Tribunals have also admitted proposals for disqualification filed within two months of the facts being discovered,[549] especially where exchanges have taken place on the subject between parties and arbitrators[550] over that period, as is the case here.[551] Other Tribunals have also admitted requests filed after much longer periods, such as 6 months after the Tribunal's constitution.[552]

401. The foregoing shows that the decision of the Chairman of the Administrative Council of 21 February 2017 to deem inadmissible the proposal for disqualification filed by the Claimants regarding arbitrators Berman and Veeder is manifestly unreasonable and untenable. In fact is it manifest that the objection filed by the Claimants was timely.

402. To use the terms used by the *ad hoc* Committees in the EDF and Suez cases, the

---

[544] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, §§ 25.
[545] **Document C118**, Proposal for disqualification of arbitrators Berman and Veeder of 22 November 2016.
[546] Counter-Memorial on Annulment, para 319.
[547] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, § 85.
[548] **Document CL389**, K. Daele, "Chapter 3: The Timing of a Challenge", § 3-006, in *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012: "*In general, a challenging party will be considered to have made the challenge 'promptly' if it has made the challenge within one month of acquiring knowledge of the circumstances on account of which the challenge is made. This rule is formulated on the basis of a number of cases in which the challenge was made within one month and in which the timing of the challenge was not raised at all*".
[549] **Ibid.,** § 3-008: "*For anything in between one and five months, the ICSID case law does not offer a clear picture. In some cases, a liberal approach was taken. In Amco v. Indonesia, in which the challenge was made forty-one days from the arbitrator's disclosure, and in Asset Recovery v. Argentina, in which the challenge was made fifty-eight days from the constitution of the Tribunal, the timing of the challenge was not questioned. In World Duty Free v. Kenya, the challenged arbitrator resigned following a challenge made forty-seven days from the constitution of the Tribunal*".
[550] **Document CL390**, K. Daele, "Chapter 3: The Timing of a Challenge", § 3-009, in *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012: "*In Lemire v. Ukraine, the deciding co-arbitrators determined that a challenge made six weeks after the disclosure by the challenged arbitrator of a conflicting relationship was timely only because the challenging party had been in communication during this period with the non-challenging party and the challenged arbitrator over the challenge*".
[551] *Supra*, §§ 394-397
[552] **Document CL390**, K. Daele, "Chapter 3: The Timing of a Challenge", § 3-007, in *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012: "*A notable exception is Carnegie v. Gambia in which the State made a challenge six months after the constitution of the Tribunal and seven months after acquiring knowledge of the ground for challenge. Nevertheless, as will be analysed further below, its proposal was considered timely*".

decision of the Chairman of the Administrative Council of 21 February 2017 is truly "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*".[553]

403. This conclusion means the Committee has good reason, for the first time and necessarily deciding *de novo*, to examine the merits of the Claimants' objections as to the independence and impartiality of arbitrators Veeder and Berman.

404. This conclusion is reinforced by the fact that new evidence, of which the Chairman of the Administrative Council was unaware when he issued his decision on 21 February 2017, has added certainty to the existence of a covert relationship between some members of Essex Court Chambers and the Chilean State.

9.2.3 The existence of new evidence justifies an appraisal *de novo* by the *ad hoc* Committee of the concerns as to the independence and impartiality of Messrs Berman and Veeder

405. As the Claimants said in previous submissions,[554] in all events, in a procedure instituted in Chile, the Chilean State opposed the disclosure of documents concerning the relationship that it had with members of Essex Court Chambers by invoking their secret nature, linked to national interest.[555]

406. This evidence, not known to the Chairman of the Administrative Council when he took his decision, clearly shows that the close relationship concerning strategic questions between Chile and some members of Essex Court Chambers was not in the public domain and so could not have been known to the Claimants.

407. The Committee will notice here the Respondent's total silence on this issue in its Counter-Memorial.

408. Thus with these crucial new facts substantially altering the factual context in which the Administrative Council Chairman's decision was given on 21 February 2017, the Committee may justifiably disregard its conclusions as to the admissibility of the Claimants' challenge to arbitrators Berman and Veeder.

409. It is then up to the Committee to take a view, this time in its role as "primary decision-maker",[556] and so necessarily deciding "*de novo*",[557] on the merits of the Claimants' objection regarding the apparent conflict of interest between the Chilean

---

[553] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Décision sur l'annulation, 5 février 2016, § 145; **Document C109**, *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 Request for Annulment, 5 May 2017, § 94.
[554] Application for Annulment, §§ 99 et seq.; Memorial on Annulment, §§ 142-147.
[555] **Document C138**, Reply of the Chilean authorities to a PAF counsel of 12 April 2017.
[556] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, § 144.
[557] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, § 132.

State and arbitrators Veeder and Berman.

9.2.4 Reasonable doubt as to the independence and impartiality of Messrs Berman and Veeder

410. As noted by the *ad hoc* Committee in *EDF International et al. v. Argentina*, when deciding for the first time on an objection relating to the arbitrators' independence and impartiality, it falls to an *ad hoc* Committee to determine 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

(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?"[558].

411. The first question about the waiving of the right to file an objection was really settled above,[559] as we saw that the decision of the Chairman of the Administrative Council of 21 February 2017 that the Claimants' proposal for disqualification was inadmissible was "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*".[560]

412. So it remains for the Committee to appraise (i) whether the evidence advanced by the Claimants would cause a reasonable person to consider that there were reasonable grounds for supposing there may be an apparent conflict of interest between the Chilean State and arbitrators Veeder and Berman and, (ii) if the reasonable and objective risk of lack of independence and impartiality of those arbitrators, if established, could have had an impact on the Award.

413. The Claimants will show below that this is indeed the case.

414. For there are reasonable grounds for doubting the independence and impartiality of arbitrators Veeder and Berman (**9.2.4.1**), which justifies annulling the Award (**9.2.4.2**).

---

[558] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February, § 136.
[559] *Supra*, §§ 367 et seq.; see also Memorial on Annulment, §§ 148 et seq.
[560] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February, § 145; **Document C109**, *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 Request for Annulment, 5 May 2017, § 94.

415. As a preliminary, it is worth highlighting the Respondent's crude attempt to impose on the *ad hoc* Committee of a dated and deprecated standard of proof.

416. The Respondent thus contends that "*in order to justify an arbitrator challenge, the moving party must "establish facts that make it obvious and highly probable, not just possible [,] that [the challenged arbitrators] may not be relied upon to exercise independent and impartial judgment"*."[561]

417. This does not take account of the latest developments in proposals for disqualification of arbitrators in ICSID case law.

418. Thus many decisions have considered that the legal standard applicable to a proposed disqualification of an arbitrator is an objective criterion based on a reasonable appraisal of the evidence by a third party,[562] and that the term "manifest" used in Article 57 of the ICSID Convention means "evident" or "obvious" and that it relates to the ease with which the alleged lack of the qualities can be perceived.[563]

---

[561] Counter-Memorial on Annulment, § 333.

[562] "*The applicable legal standard is an objective standard based on a reasonable evaluation of the evidence by a third party*"; see **Document C154**, *Suez, Sociedad General de Aguas de Barcelona SA. v. République argentine* (ICSID Case Nos ARB/03/17 and ARB/03/19), Décision sur la proposition de récusation d'un membre du Tribunal arbitral (22 octobre 2007), §§ 39-40; **Document CL282**, *Blue Bank International & Trust (Barbados) Ltd. v. République bolivarienne du Venezuela* (Affaire CIRDI ARB/12/20), Décision sur les propositions des parties de récuser une majorité des membres du Tribunal (12 novembre 2013), § 60; **Document CL390**, *Burlington Resources Inc. v. République d'Équateur* (Affaire CIRDI ARB/08/5), Décision sur la proposition de récusation du Professeur Francisco Orrego Vicuña (13 décembre 2013), § 67; **Document CL391**, *Abaclat et autres v. République argentine* (Affaire CIRDI ARB/07/5), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (4 février 2014), § 77; **Document CL392**, *Caratube International Oil Company LLP et Devincci Salah Hourani v. la République du Kazakhstan* (ICSID Case No. ARB/13/13), Décision sur la proposition de récuser M. Bruno Boesch (20 mars 2014), § 91; **Document CL393**, *ConocoPhillips Hamaca B.V. et ConocoPhillips Gulf of Paria B.V. v. République bolivarienne du Venezuela* (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (5 mai 2014), § 53; **Document CL394**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. et ConocoPhillips Gulf of Paria B.V. v. République bolivarienne du Venezuela* (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (1 juillet 2015), § 84; **Document CL395**, *BSG Resources Limited, BSG Resources (Guinea) Limited et BSG Resources (Guinea) SARL v. République de Guinée* (Aff. CIRDI ARB/14/22), Décision sur la proposition de récusation de tous les membres du tribunal arbitral (28 décembre 2016), § 58.

[563] "*Regarding the meaning of the word "manifest" in Article 57 of the Convention, it means "evident" or "obvious," and that it relates to the ease with which the alleged lack of the qualities can be perceived*"; v. **Document C154**, *Suez, Sociedad General de Aguas de Barcelona SA. v. République argentine* (Affaires CIRDI ARB/03/17 et ARB/03/19), Décision sur la proposition de récusation d'un membre du Tribunal arbitral (22 octobre 2007), § 34; **Document CL396**, *Saint-Gobain Performance Plastics Europe v. République bolivarienne du Venezuela* (Affaire CIRDI ARB/12/13), Décision sur la proposition de la Demanderesse de récuser M. Gabriel Bottini du Tribunal sur le fondement de l'article 57 of the Convention CIRDI (27 février 2013), § 59; **Document CL282**, *Blue Bank International & Trust (Barbados) Ltd. v. République bolivarienne du Venezuela* (Affaire CIRDI ARB/12/20), Décision sur les propositions des parties de récuser une majorité des membres du Tribunal (12 novembre 2013), § 47; **Document CL390**, *Burlington Resources Inc. v. République d'Équateur* (Affaire CIRDI ARB/08/5), Décision sur la proposition de récusation du Professeur Francisco Orrego Vicuña (13 décembre 2013), § 68; **Document CL391**, *Abaclat et autres v. République argentine* (Affaire CIRDI ARB/07/5), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (4 février 2014), § 71; **Document CL271**, *Repsol, S.A. et Repsol Butano, S.A. v. République argentine (Affaire CIRDI ARB/12/38), Décision sur la proposition de récusation des Arbitres Francisco Orrego Vicuña et Claus von Wobeser* (13 décembre 2013), para. 73; **Document CL393**, *ConocoPhillips Hamaca B.V. et ConocoPhillips*

419. It is also established that Articles 57 and 14(1) of the ICSID Convention do not require proof of actual partiality, but rather it suffices to establish the appearance of partiality.[564]

420. This is moreover the criterion used by the Chairman of the Administrative Council in his second decision on the proposal for disqualification of Messrs Berman and Veeder of 13 April 2017.[565]

421. Thus, contrary to what the Respondent contends, the standard applicable here is to ascertain whether "*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"*.[566]

9.2.4.1 The existence of reasonable grounds to doubt the independence and impartiality of arbitrators Veeder and Berman

422. In their previous submissions the Claimants already described in detail how there are reasonable grounds for doubting the independence and impartiality of arbitrators Berman and Veeder.[567]

423. Substantially this arises from two aspects.

Gulf of Paria B.V. v. République bolivarienne du Venezuela (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (5 mai 2014), para. 47; **Document CL394**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. et ConocoPhillips Gulf of Paria B.V. v. République bolivarienne du Venezuela* (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (1 juillet 2015), para. 82; **Document CL395**, *BSG Resources Limited, BSG Resources (Guinea) Limited et BSG Resources (Guinea) SARL v. République de Guinée* (Aff. CIRDI ARB/14/22), Décision sur la proposition de récusation de tous les membres du tribunal arbitral (28 décembre 2016), para. 54.

[564] "*Article 57 of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias*" ; v. **document CL397,** *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina,* ICSID Case ARB/07/26, Decision On Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010, para. 43 ; **document CL282**, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela* (ICSID Case ARB/12/20), Decision on the parties' proposal to disqualify a majority of the Tribunal (12 November 2013), para. 59 ; **document CL390**, *Burlington Resources Inc. v. Ecuador* (ICSID Case ARB/08/5), Decision on the proposal to disqualify Professor Francisco Orrego Vicuña (13 December 2013), para. 66 ; **document CL391**, *Abaclat et altri v. Argentina* (ICSID Case ARB/07/5), Decision on the proposal to disqualify a majority of the Tribunal (4 February 2014), para. 76 ; **document CL393**, *ConocoPhillips Hamaca B.V.and ConocoPhillips Gulf of Paria B.V. v. Venezuela* (ICSID Case ARB/07/30), Decision on the proposal to disqualify a majority of the Tribunal (5 May 2014), para. 52; **document CL394**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V.and ConocoPhillips Gulf of Paria B.V. v. Venezuela* (ICSID Case ARB/07/30), Decision on the proposal to disqualify all members of the Arbitral Tribunal (1 July 2015), para. 83 ; **document CL395**, *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea* (ICSID Case ARB/14/22), Decision on the proposal to disqualify a majority of the Tribunal (28 December 2016), para. 57.

[565] **Document C165**, Decision the Chairman of the ICSID Administrative Council of 13 April 2017, §§ 41-45.

[566] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision s136.

[566] Application for Annulment, 10 October 2017, para. 93 (136).

[567] Application for Annulment, §§ 86 et seq.; Memorial on Annulment, §§ 165 et s.

424. One one hand, the fact that several members of Essex Court Chambers, to which arbitrators Berman and Veeder belong, have represented the Chilean State or entities controlled by it in several international and domestic proceedings taking place before and during the resubmission proceeding, and in some cases which took place afterwards.

425. This is especially the case of:

- Mr Wordsworth, who represented Chile before the International Court of Justice in the following cases:

  - *Maritime Dispute (Peru v. Chile)*, a case brought on 16 January 2008 and completed with a judgment on 27 January 2014.[568] The case was thus still pending when the resubmission proceeding was brought on 18 June 2013, and when Mr Berman was appointed arbitrator on 24 December 2013. The judgment of 27 January 2014 was handed down just a few days before the confirmation of Mr Veeder's appointment, on 31 January 2014;

  - *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Peru)*, brought on 24 April 2013 and recently finished with a judgment on 10 October 2018.[569] This case was thus pending throughout the resubmission proceeding;

  - The *Dispute over the status and use of the waters of the Silala (Chile v. Bolivia)*, brought on 6 June 2016 and still pending today.[570] This case was therefore brought during the resubmission proceeding, nearly three months before the Award was rendered, and continues at present.

- Mr Boyle, who also represents Chile in the *Dispute over the status and use of the waters of the Silala (Chile v. Bolivia)*, described above; [571]

- Messrs Simon Bryan and Stephen Houseman, who defended Coromine Ltd. – an associate of CODELCO, the biggest copper-producing and exporting firm in the world, wholly owned by the Chilean State in 2007[572] – in a case relating to Compañia Minera Doña Inés de Collahuasi, headquartered in Chile;[573]

- Mr Lawrence Collins, who represented the Chilean State in the proceedings for the extradition of General Pinochet in the UK in 1998-1999 brought by the

[568] **Document C328**, see information on the ICJ site: https://www.icj-cij.org/fr/affaire/137.
[569] **Document C329**, see information on the ICJ site: https://www.icj-cij.org/fr/affaire/153.
[570] **Document C330**, *Différend concernant le statut et l'utilisation des eaux du Silala (Chili v. Bolivie)* see information on the ICJ site: https://www.icj-cij.org/fr/affaire/162.
[571] **Ibid**., see information published by the Chilean Foreign Ministry: https://bit.ly/2RG5f7m
[572] **Document C128**, §§ 23-24
[573] See http://www.collahuasi.cl/es/

President Allende Foundation,[574] and member of Essex Court Chambers since 2012;[575]

426. Only at the International Court of Justice, then, the Respondent has been represented by at least one member of Essex Court Chambers continuously over the past decade. Though to the Claimants' knowledge there are no official statistics on the average cost of a proceeding brought before the International Court of Justice, at the Respondent's own admission, the cost is tens of millions of dollars by proceeding.[576]

427. The information available, uncontested by the Respondent, suggests then that Chile has had a continuous business relationship with Essex Court Chambers for at least ten years,[577] for a total sum that may reasonably be estimated at several million and or tens of millions of dollars.

428. In any international law firm, such a regular client in cases of such moment would be regarded as strategically important. Thus it cannot be seriously asserted that the links between Essex Court Chambers and Chile are insignificant.

429. Moreover, these ties between the Respondent and Essex Court Chambers were not disclosed by arbitrators Veeder and Berman on their appointment, or even during the proceeding.

430. It is uncontested that neither Mr Berman nor Mr Veeder nor the Respondent have at any time disclosed the substance of the ties between the Chilean State and the members of Essex Court Chambers recounted above.

431. And if we consider, as set out above,[578] that the relationship between the Respondent and certain members of Essex Court Chambers (not identified as such) had been reported by the Chilean press, the fact remains that the information was not common knowledge, and consequently it was incumbent on the arbitrators to disclose it.

432. In order to apprehend these ties as precisely as possible, the Claimants have sought to get the Respondent to disclose information about the sums paid to members of Essex Court Chambers.[579]

---

[574] See les documents 1 et 3 attached to **document C127**, *Observations des Demanderesses aux commentaires des arbitres MM. Berman et Veeder et de l'État du Chili* (on digital media given its volume), accessible at http://bit.ly/2lKWQCc (fr) et http://bit.ly/2lLlliT (es)

[575] **Document C128**, §§ 26, 100 et seq.

[576] **Document C-142**, Article "*Defensa en La Haya costó 16 US$ millones*", La Tercera (Santiago), 22 June 2013, mentioning that between 2009 and 2012, Chile's defence just in the *Maritime Dispute* cost the Respondent 16m dollars.

[577] See Memorial on Annulment, para. 167: as Claimants have mentioned earlier, members of Essex Court Chambers have also represented semi-public Chilean bodies in this period.

[578] *Supra*, §§ 379 et s.

[579] Memorial on Annulment, §§ 158-162.

433. The proceeding brought by the Claimants for this purpose before the Chilean courts was torpedoed by the State[580] after the first Civil Court of Santiago enjoined the Foreign Ministry in August 2017,[581] and the State Defence Council on 29 November 2017,[582] to produce the information requested by the Foundation in this proceeding on preliminary measures for non-contractual liability.[583]

434. Moreover the request for production of documents filed by the Claimants to this *ad hoc* Committee was rejected on 30 August 2018.[584]

435. In its Procedural Order No. 2 of 30 August 2018, the Committee stressed the fact that the Claimants' request for production of documents was not relevant in so far as the Respondent did not contest that it had made use of Essex Court Chambers in the past, and has contributed indirectly to its revenue.[585]

436. The Committee also said that the production of the requested documents would not allow us to demonstrate how the rules provided in the IBA Guidelines on the assessment of conflicts of interest in a law firm would be applicable to Essex Court Chambers,[586] and that they were not relevant to establishing a lack of independence and impartiality on the part of arbitrators Berman and Veeder. On this second point the Committee said: "*the question is rather whether the arbitrators could and should have revealed them, and what the consequences of non-compliance are*".[587]

437. As the Claimants said in previous submissions,[588] in our case it is justifiable to apply the rules in the IBA Guidelines on the assessment of conflicts of interest in a law firm to Essex Court Chambers (**a**). Moreover arbitrators Berman and Veeder have not complied with their duties of disclosure (**b**).

(a) <u>There is no reason for a differentiated application of the IBA Guidelines in this case</u>

438. The Claimants have showed at length in previous submissions how in this case it is justifiable to apply the IBA Guidelines on the disclosure of conflicts of interest in law firms by analogy to Essex Court Chambers. [589]

439. The Respondent's sole reply has been to peremptorily criticise the application by analogy of the IBA Guidelines to the current situation, referring to the literality of

---

[580] **Documents C110, C208, C220, C221, C283, C315.**
[581] **Documents C181, C182, C191, C208.**
[582] **Documents C242, C242bis, C243, C244, C208, C245, C283f, C212, C220.**
[583] ***Ibid.***
[584] Procedural Order No. 2 of 30 August 2018.
[585] Procedural Order No. 2 of 30 August 2018, §§ 17-19.
[586] Procedural Order No. 2 of 30 August 2018, § 17.
[587] Procedural Order No. 2 of 30 August 2018, § 19.
[588] Memorial on Annulment, §§ 183 et s.
[589] *Ibid.*

the Guidelines.[590]

440. The Claimants have discussed in previous submissions how, despite the letter of the IBA Guidelines (which are, all in all, just guidelines), it is legitimate in some situations to treat barristers' chambers in the same way as law firms.

441. Two reasons in particular justify this analogy: first, the growing promotional work performed directly by barristers' chambers, akin to that performed by law firms (**i**) and, second, their internal operation, which is also akin to that of law firms (**ii**).

(i) On the promotional work of Essex Court Chambers

442. As noted in doctrine,[591] the division between chambers and law firms is tending to be blurred given that the promotional and marketing techniques used today by chambers are no different from those used by law firms. Both the former and the latter present themselves as integrated outfits offering the public a range of services and legal skills.

443. Essex Court Chambers, one of the most active chambers in the field of international disputes and arbitration, is a case in point, as shown by its elaborate public relations.

444. As was pointed out by the Tribunal in *Hrvatska Elektroprivreda v. Slovenia*:

> "*(...) 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..."[592]

445. A visit to the Essex Court Chambers website confirms this promotional approach.

446. First, the Essex Court Chambers website describes the Chambers as being part of the "magic circle" of chambers[593] – a term traditionally used to designate a small group of highly profitable English law firms.[594]

---

[590] Counter-Memorial on Annulment, § 335.
[591] See many references to doctrine cited by Claimants in their Memorial on Annulment, **document C8**, §§ 183 et seq.
[592] **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 s.
[593] *The set's profile and reputation as a "magic circle" commercial chambers was confirmed in the late 1960s and 1970s, during which time Mark Saville (later Lord Saville), Johan Steyn (later Lord Steyn), Anthony Colman (later Mr Justice Colman) and John Thomas (later Lord Thomas, the Lord Chief Justice of England and Wales) joined. Since then, Essex Court Chambers has gone from strength to strength, growing in size and international presence whilst maintaining its tradition of excellence.*
[594] **Document C330**, according to Wikipedia, "[t]*he Magic Circle is an informal term for the five London-headquartered law firms with the largest revenues, the most international work and which consistently*

447. Second, the fields of competence in which Essex Court Chambers operates are presented generically, as for a law firm:[595]

448. Third, the homepage of the Essex Court Chambers site contains a scrolling banner in the centre-right of the screen quoting appreciative past comments about the Chambers.[596] Thus we read:

- "*The go-to set for High Court employment work and complex disputes*", Legal 500 2016
- "*The first port of call for commercial litigation and arbitration"*, Legal 500 2016
- "T*he excellent Essex Court Chambers is full of highly competent counsel at all levels with vast experience and a commercial approach*", Legal 500 2016
- "*A heavy-hitting set across the commercial litigation space with an excellent and well-deserved reputation*", Legal 500 2016
- "*They have excellent commercial acumen and the ability to understand every business's needs. They always advise constructively*.", Chambers UK Bar 2016
- "*A strong and reputable set recognized for its members' regular involvement in complex, high-value and legally important disputes*.", Chambers UK Bar 2018

---

outperform most of the rest of the London market on profitability", v. https://en.wikipedia.org/wiki/Magic_Circle_(law_firms).

[595] **Document C331**, screenshot of the website of Essex Court Chambers: https://essexcourt.com/expertise/.

[596] **Document C332**, see website of Essex Court Chambers: https://essexcourt.com/.

- "*A heavy-hitting set across the commercial litigation space with an excellent and well-deserved reputation.*", Legal 500 2016

- "*A fantastic set overall and a preferred choice in many arbitration and commercial litigation cases*.", Legal 500 2016

- "*The crème de la crème of the Commercial Bar congregates at Essex Court Chambers, where the work is wide-ranging and the members friendly*." Chambers Student Guide 2015

- "*A leading London set for international arbitration*.", Chambers UK Bar 2016

- "*Extremely bright and able*.", Chambers UK Bar 2016

- "*Essex Court has a superb reputation for its work both at home and abroad, and is noted for its deft handling of highly complex and significant commercial arbitration and litigation across diverse geographical spread.*'", Chambers UK Bar 2018

449. Fourth and last, the Essex Court Chambers site also highlights the various awards given directly to the Chambers, thus:

- Who's Who Legal Awards 2018, May 2018[597]
- Who's Who Legal UK Bar: Leading Sets 2018, April 2018[598]
- The Legal 500 UK Awards 2018, December 2017[599]
- Chambers Bar Awards 2017 – Essex Court Chambers Named International Arbitration Set of the Year, October 2017[600]

---

[597] **Document C333,** see website of Essex Court Chambers: https://essexcourt.com/whos-who-legal-awards-2018: "*Essex Court Chambers has been awarded the Who's Who Legal Set of the Year Award for 2018, in a ceremony held on 8 May 2018 at Plaisterers' Hall. This award is in recognition of the exceptional calibre of work undertaken by members of Chambers over the past year. Last month, Essex Court featured at top of the list of 100 Leading Sets for 2018 in Who's Who Legal's annual analysis. Head of Chambers David Foxton QC and Joint Senior Clerk Joe Ferrigno collected the award last night on behalf of the Members of Essex Court Chambers*".

[598] **Document C334,** see website of Essex Court Chambers: https://essexcourt.com/whos-who-legal-uk-bar-leading-sets-2018: "*Essex Court Chambers has come top of the list of Leading Sets for 2018 in Who's Who Legal's latest analysis.Following thousands of interviews conducted and out of over 100 featured sets, members of Essex Court Chambers featured in the most listings in the country this year, with 72 in total*".

[599] See website of Essex Court Chambers: https://essexcourt.com/legal-500-uk-awards-2018: "*Essex Court Chambers has won International Arbitration Set of the Year in The Legal 500 Awards 2018. James Willan has been named Commercial Litigation Junior of the Year*".

[600] **Document C335,** See website of Essex Court Chambers: https://essexcourt.com/chambers-bar-awards-2017-essex-court-chambers-named-international-arbitration-set-year: "*Essex Court Chambers picked up the award for International Arbitration Set of the Year at last night's Chambers Bar Awards, for the 13th consecutive year. The awards are based on research for the 2018 edition of Chambers UK Bar and reflect pre-eminence in key practice areas within sets of Chambers. They also reflect notable achievements over the past 12 months including outstanding work, impressive strategic growth and excellence in client service*".

- Essex Court Chambers recognised at Law Digest Awards Africa 2016, November 2016[601]

- Chambers & Partners UK Bar Directory 2017 – Rankings Revealed, 3 November, 2016[602]

- Essex Court Success at Chambers Bar Awards 2016, 28 October, 2016[603]

- Essex Court wins Chambers of the Year at the Lawyer Awards 2016, 30 June, 2016[604]

- Essex Court wins Chambers of the Year at the Lawyer Awards 2016, 30 June, 2016[605]

450. In short, the public relations conducted by Essex Court Chambers is appreciably of the same sort as that conducted by international law firms. This is evident from a short visit to the websites of the parties' counsels in this proceeding.[606]

---

[601] **Document C336,** See website of Essex Court Chambers: https://essexcourt.com/essex-court-chambers-recognised-law-digest-awards-africa-2016: "*The 2nd Annual Law Digest Awards took place in Lagos, Nigeria on Friday 4 November. The awards recognise and honour excellence in the African legal services market by assessing the contributions of individual lawyers, law firms and in-house teams. Following several years of implementing training placements for young African lawyers, alongside other initiatives including overseas development trips to Kenya, Uganda and Nigeria, Essex Court Chambers and law firm Stephenson Harwood have been recognised as pioneers in this field and named as 'Strategic Partners of the Year 2016'*".

[602] **Document C337,** See website of Essex Court Chambers: https://essexcourt.com/chambers-partners-uk-bar-directory-2017-rankings-revealed: "*Published on 1 November, the 2017 edition of the Chambers & Partners UK Bar directory describes Essex Court Chambers as a "gold standard commercial set. Essex Court is one of the most highly ranked sets in the UK with listings in the following 10 practice areas, including 4 in the Top Tier: Banking & Finance, Commercial Dispute Resolution, Employment, Energy & Natural Resources, Fraud: Civil, Insurance, International Arbitration: General Commercial & Insurance, Public International Law, Shipping & Commodities, Tax: Indirect Tax. Ranked as a Top Tier set in Commercial Dispute Resolution, International Arbitration: General Commercial & Insurance, Fraud: Civil, and Public International Law, Essex Court is noted for having "tremendous commercial and legal experience right across their ranks and together represent a real powerhouse of a team*".

[603] **Document C338,** See website of Essex Court Chambers: https://essexcourt.com/essex-court-success-chambers-bar-awards-2016: "*Essex Court Chambers collected the award for International Arbitration Set of the Year at last night's Chambers Bar Awards, for the 12th consecutive year. (…) James Willan won International Arbitration Junior of the Year, following a busy year*".

[604] **Document C339,** See website of Essex Court Chambers: https://essexcourt.com/legal-500-uk-bar-2016-essex-court-chambers-increases-number-top-tier-rankings: "*Launched today, The Legal 500 UK Bar 2016 reveals that Essex Court Chambers is 'the first port of call for commercial litigation and arbitration', and has further strength in employment, shipping, tax, public international law and insurance matters. Named in the top five UK sets with the most set rankings, most Top-tier rankings and most Silks rankings, with 36 QCs and 22 juniors are listed overall. Essex Court has been recommended as a TOP-TIER set in the following 7 practice areas: Commercial Litigation, Employment, Fraud: Civil, International Arbitration: Arbitrators, International Arbitration: Counsel, Public International Law, Tax – corporate and VAT*".

[605] **Document C340,** see https://essexcourt.com/essex-court-wins-chambers-year-lawyer-awards-2016: "*Essex Court Chambers has been named Chambers of the Year 2016 at The Lawyer Awards, which took place on 29th June. Chambers' commitment to social mobility issues was noted, as well as the quality of work undertaken, including multiple high profile cases in the past 12 months. Essex Court were also commended for their creativity and sensitivity on fee issues and intelligent business development initiatives*".

[606] See par exemple, for the Claimants: https://www.gide.com; and for the Respondent: https://www.arnoldporter.com.

451. This promotional work by the Chambers itself has a direct impact on its member barristers.

452. As one author says:

> "*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*" (underlining added).[607]

453. Moreover a not insignificant part of the remuneration received in a case, in principle profiting just one or a few barristers, is paid to the Chambers to cover the outfit's costs.[608] Though as a general rule this is to pay clerks and other common employees, as the Chambers' marketing develops, these costs also involve funding the Chambers' PR and promotional work.

454. Consequently, given the PR and promotional work performed by the Chambers, its reputation reflects on each of its members, and vice versa – the personal reputation of a barrister benefits the chambers in which he or she practises.

(ii) On the working of Essex Court Chambers

455. Notwithstanding the lack of reply from Essex Court Chambers to the emails sent by the Claimants, information in the public domain allows us to see that the Chambers' internal organisation does not substantially differ from that of a law firm, despite the fact that, in practice, barristers are freelance practioners.

456. Thus, as is typically the case in law firms, teams are formed in house among barristers to handle cases. Much as in a law firm, one or more partners are often assited by junior partners and associates, i.e. the younger barristers will assist the more experienced ones:

> "*From a very early stage, tenants of Essex Court Chambers are typically given a great degree of responsibility for the cases they work on. Some cases will involve a tenant being solely instructed, and others will involve the tenant working as part of a team of*

---

[607] **Document CL154** - A. H. Merjian, "Caveat arbitor: 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.

[608] **Document CL343**, Green (M.)- Robertson (E.A.), *associate at BDO Stoy Hayward* et *director at Falcon Chambers*, respectivement, "Running a profitable set of chambers", article of 14 February 2003 in *Reporter* 153 NLJ 209: "*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*"; also Document **CL346**, Smith (C.), "Mansfield team move chambers", article of 9 November 2015 in *Reporter* LS Gaz, 9 Nov, 6 (2), which notes that the Chambers benefit from barristers' contributions from their fees, with an average of 25%.

barristers, the latter often with other members of Chambers. There are regular opportunities for oral advocacy."[609]

457. Moreover, just as interns or trainees in law firms normally work for several lawyers, "pupils", after being mentored by a barrister for three to four months, enter a rota allowing them to work with six other barristers:

"*Pupils sit with their main supervisor for the first three to four months and have the chance to 'learn the ropes and ease into pupillage, which gradually builds in intensity'.*

(...)

After Christmas pupils enter the 'rota'. "It's called the rota because you rotate around six supervisors." Pupils spend around three weeks with each"[610].

458. So there again, the *modus operandi* of the barristers at Essex Court Chambers is not substantially different from that to be found in law firms.

459. For the above reasons, there is no reason to treat Essex Court Chambers differently from a law firm as regards conflicts of interest and the duty of disclosure of its members appointed arbitrators.

460. As the Claimants showed in previous submissions, without this being objected to by the Respondent, the situation in which Messrs Berman and Veeder would have been if they had been practising in a law firm would have constituted a conflict of interest as appears in the Non-Waivable Red List, the Red List, or the Orange List.[611]

461. Thus, and as will be expanded on below, arbitrators Berman and Veeder did not comply with their duties of disclosure.

(b) Arbitrators Berman and Veeder did not comply with their duties of disclosure

462. We recalled above that, in its Procedural Order No. 2 of 30 August 2018, the Committee noted the fact that "*the question is rather whether the arbitrators could and should have revealed them, and what the consequences of non-compliance are*".[612]

463. These questions have already been addressed in detail in the Memorial on

[609] **C341**, See website of Essex Court Chambers: https://essexcourt.com/pupillage/life-as-a-tenant/.
[610] **Document C325**, See website of Essex Court Chambers Student: https://www.chambersstudent.co.uk/essex-court-chambers/true-picture/10389/2##true-picture.
[611] Memorial on Annulment, §§ 174 et seq.
[612] Procedural Order No. 2 of 30 August 2018, § 19.

Annulment.[613]

464. The reply to the first of the Committee's questions ("could the arbitrators disclose the financial ties between the Respondent and other members of Essex Court Chambers?") requires two commentaries.

465. The first concerns the matter of actual or presumed knowledge of the ties between the Respondent and members of Essex Court Chambers by arbitrators Berman and Veeder.

466. The Committee will recall that, in their reply to the Claimants' questions, Messrs Berman and Veeder said that, as each barrister practises independently, and the profession is governed by confidentiality rules, they did not know or could not have known of the financial ties in question.

467. Thus in his email of 17 October 2016, Mr Berman explained to the Claimants' counsel that:

"*You are, I am sure, aware that an English barristers' chambers is not a law firm, and that all barristers in chambers operate in strict independence of one another, with the sole exception of the circumstance in which more than one of them is retained by the same client to act in the same matter. I would not therefore in any case be able to answer your questions, as the governing rules impose on each barrister the strictest confidence over the affairs of his clients, so that it would be prohibited for me to make enquiries of fellow members of chambers about the work undertaken by them.*"[614]

468. In his email of 17 October 2016, Mr Veeder for his part explained that:

"*Étant donné que tous les barristers de Essex Court Chambers (comme d'autres chambers en Angleterre et au Pays de Galles) exercent à titre individuel et ne constituent donc pas une "law firm ", un "partnership" ou une "company", je regrette de ne pas être en mesure de vous répondre. D'après le Code of Conduct du Bar Standards Board, chaque barrister est indépendant et "must keep the affairs of each client confidential "(Core Duty 6). En bref, ces informations confidentielles, quelles qu'elles soient, ne peuvent être ni ne sont connues de moi.*"[615]

469. That the arbitrators did not know of the exact amounts involved is understandable. That they pretend not to know of their colleagues' work for the Chilean State is ludicrous.

---

[613] Memorial on Annulment, §§ 203 et seq. See also statement with testimonial and legal consultative value of Mr. Toby Cadman, member of Guernica 37 International Justice Chambers, London, and Claimants' counsel (**document C313**)

[614] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, § 13; **Document RA-21**, email from Mr Berman to the Claimants of 17 October 2016.

[615] **Document C119**, Decision the Chairman of the Administrative Council of 21 February 2017, § 14; **Document RA-22**, email from M. Veeder to Claimants of 17 October 2016.

470. As was shown by the Claimants in previous submissions[616] and as will be recalled below, an arbitrator's duty of disclosure includes facts in the public domain, and an arbitrator is considered to be in a better position than the parties to have access to such information.[617]

471. We showed above that,[618] given the information available in the Chilean press at the time, the task of linking each of the Respondent's counsels to a particular law firm or chambers would have been arduous, unreasonable and disproportionate for the Claimants.

472. Such limits are not applicable to arbitrators who may be assumed to know the other members of their chambers personally.

473. Moreover we saw that it is common for barristers to form working teams in house and to have a rota for pupils.[619] Given such staffing arrangements, it is also reasonable to suppose that information circulates, and the Messrs Berman and Veeder were therefore informed that some of the colleagues were representing the Chilean State in other cases.[620]

474. Hence that Messrs Berman and Veeder knew, if only superficially, of the ties between the Chilean State and other members of Essex Court Chambers, is beyond doubt, and they could have enquired further into the matter.

475. The second concerns any possible prohibition that might have been issued to Messrs Berman and Veeder on disclosing whatever they knew about the links between the Respondent and certain members of Essex Court Chambers.

476. On this point we should note that neither the Convention nor the Arbitration Rules contain any provisions restricting the information disclosable by arbitrators.

477. Hence nothing prevented arbitrators Berman and Veeder from disclosing, albeit shortly, the involvement of certain members of Essex Court Chambers in Chile's defence in other proceedings so as to comply with the rules regulating the practice of their profession.

478. Thus we have established that arbitrators Berman and Veeder could have disclosed the legal relations between certain members of Essex Court Chambers and Chile.

---

[616] Application for Annulment, §§ 88 et seq.; Memorial on Annulment, §§ 211 et seq.
[617] **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, §§ 17 et 51.
[618] *Supra*, §§ 379 et seq.
[619] *Supra*, §§ 455 et s.
[620] The doctrinal articles provided by the Claimants also show that the daily life of a barrister involves exchanges with colleagues about their casefiles: see **Document CL342**, Aamodt (A.), *A life in the day,* Reporter, 166 NLJ 7692, p. 22: "*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*".

479. The reply to the Committee's second question ("*should the arbitrators have disclosed the financial ties between the Respondent other members of Essex Court Chambers?*") has already been dealt with the Claimants in previous submissions.[621]

480. Thus we have shown that the duty of disclosure applicable to arbitrators acting in the framework of the ICSID Convention is especially broad, and that it concerns in particular "*any other circumstance that might cause* [an arbitrator's] *reliability for independent judgment to be questioned by a party*",[622] as well as facts that are in the public domain.[623]

481. We have also shown that the ties between certain members of Essex Court Chambers and Chile do indeed constitute a circumstance that might cause a party to question an arbitrator's independence and impartiality.[624]

482. So we have established that arbitrators Berman and Veeder should have disclosed the relationships between certain members of Essex Court Chambers and the Chilean State, and that in not doing so they breached the duties of disclosure incumbent on them pursuant to the Convention and the Rules.

483. The Respondent's only reply in its Counter-Memorial on Annulment is that there is supposedly no conflict of interest for the arbitrators.[625] According to the Respondent, as it is possible in practice for two barristers from the same chambers to appear as arbitrator and counsel in the same case without this undermining their independence and impartiality, the same would apply *a fortiori* where members of the same chambers as an arbitrator have represented one of the parties to the arbitration in another proceeding.[626]

484. The shortcut that the Respondent takes here is unjustified.

485. For the hypothesis in which two barristers from the same chambers represent opposing parties in the same arbitration, or act respectively as counsel and arbitrator during the same arbitration, is quite different from our case.

486. Whereas in the former situation, the ties between the barristers involved in the proceeding are perfectly transparent and visible, in our case, it is precisely the opaque and concealed nature of the ties between one party to the arbitration and members of the chambers to which two of the arbitrators belong that is at issue.

487. Moreover the practices described by the Respondent, much as they may be acceptable in the UK, require some adaptation in order to be applied smoothly in international arbitration proceedings involving parties not familiar with them.

---

[621] Application for Annulment, §§ 88 et seq.; Memorial on Annulment, §§ 204 et seq.
[622] Rule 6(2)
[623] Application for Annulment, §§ 88 et seq.; Memorial on Annulment, §§ 211 et s.
[624] Memorial on Annulment, §§ 174 et seq.
[625] Counter-Memorial on Annulment, § 334.
[626] Counter-Memorial on Annulment, § 334.

488. As the Bar Standards Board, the body that administers and regulates the bar in the UK, acknowledged in an information note regarding barristers in international arbitration of 6 July 2015:

> "*It is also the case that different types of dispute require different approaches, and barristers should remain alive to the varying expectations, backgrounds and cultures of those who utilise arbitration. Many arbitrations involving English and Welsh barristers may have little or no connection with England and Wales or English and Welsh law. By way of example, international investment arbitrations, or public international law disputes, may involve barristers as arbitrators or Counsel but may be located outside England and Wales and may involve consideration of other national legal systems or indeed international or supra-national legal regimes. Such arbitrations may require a different approach from that which would be involved in a purely domestic setting*" (underlining added).[627]

489. Hence the local practice of barristers in the UK is irrelevant to appraising whether, in international arbitration stemming from the application of a bilateral investment treaty involving parties with a civil-law tradition, the existence of financial ties between one party to the arbitration and barristers belonging to the same chambers as one of the arbitrators is liable to constitute for the latter a conflict of interest.

490. It follows from the above that arbitrators Berman and Veeder could and should have disclosed the existence of financial ties between Chile and some members of Essex Court Chambers before and during the resubmission proceeding.

491. The non-disclosure of this information gives rise to reasonable doubt as to the independence and impartiality of the arbitrators, justifying the Award's annulment.

9.2.4.2 The reasonable doubts as to the independence and impartiality of arbitrators Berman and Veeder justify the annulment of the Award

492. The existence of ties between the Respondent and some members of Essex Court Chambers constitute for Messrs Berman and Veeder an apparent objective conflict of interest.

493. For we showed above that:

- Over a period of more than ten years, covering the whole resubmission proceeding, the Respondent made use of barristers belonging to Essex Court Chambers for its defence in three proceedings before the International Court of Justice and in proceedings[628] before domestic courts;

---

[627] **Document C326**, *Bar Standards Board* information note regarding barristers in international arbitration of 6 July 2015, viewable at https://www.barcouncil.org.uk/media/376302/bc_information_note_-_perceived_conflicts_in_international_arbitration_-_060715.pdf

[628] *Supra*, §§ 422 et s.

- The resulting financial ties, though not precisely known, may be put at millions or more likely tends of millions of dollars;[629]

- Arbitrators Berman and Veeder could not be unaware of these ties;[630]

- Financial ties between one party to arbitration and one of the arbitrators or the practice for which he/she works constitute, in some cases, one of the most serious signs of a conflict of interest;[631]

- Through the organisation of Essex Court Chambers and its promotional work, all of its member barristers have a personal interest in the greatest possible success of all the other members of the chambers, which builds up the reputation of the chambers and by extension their own.[632]

494. Consequently, the cases dealt with by members of Essex Court Chambers on the Respondent's behalf before and during the resubmission proceeding had a direct impact on Messrs Berman and Veeder.

495. Arbitrators Berman and Veeder thus had a direct interest in Chile, a client that may be regarded as strategic,[633] being represented in other proceedings by members of Essex Court Chambers.

496. Hence the Respondent's representation by members of Essex Court Chambers, when Messrs Berman and Veeder were sitting as arbitrators in the resubmission proceeding, constituted an apparent conflict of interest.

497. This apparent conflict of interest should have been disclosed,[634] and was not.

498. The various circumstances recalled above constitute, in the words used by the Committee in *EDF International et al. v. Argentina*, "*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*".[635]

499. Given that there are doubts as to the independence and impartiality of a majority of members of the resubmission Tribunal, this has serious consequences for its Award, which cannot be regarded as having been rendered by an independent and impartial Tribunal.

500. Thus, in line with what was recalled by the Committee in *EDF International et*

---

[629] *Supra*, §§ 426-427
[630] *Supra*, §§ 465 et s.
[631] Supra, § 460; Memorial on Annulment, §§ 174 et seq.
[632] *Supra*, §§ 451 et s.
[633] *Supra*, § 428.
[634] *Supra*, §§ 479 et s.
[635] **Document C103**, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016, § 136

al. v. Argentina, the Award is annullable on the grounds of Article 52(1)(a) and (d) of the Convention.

501. For the Committee in *EDF International et al. v. Argentina*, first determined the applicable standard – recalled above – pursuant to Article 14(1) of Convention :

"*In the opinion of the Committee, the standard applied under Article 14(1) is whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality*."[636]

502. It then determined that a breach of this standard could lead to the annulment of an award on the grounds of Article 52(1)(a) and (d) of the Convention, deeming that:

"*Article 52(1)(d) gives a committee power to annul an award where there has been a serious departure from a fundamental rule of procedure. It is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal. The Committee accordingly considers that, in principle, an ad hoc committee can examine under Article 52(1)(d) not only allegations that the procedure by which a challenge to an arbitrator was determined was flawed but, more importantly, allegations that the lack of independence and impartiality of an arbitrator meant that there was a serious departure from a fundamental rule of procedure in the arbitration as a whole*[637].

(...)

If an award may be tainted by the fact that a decision whether or not to disqualify an arbitrator was taken in a manner which was procedurally deficient, a fortiori an award may be tainted by the fact that the award itself was adopted by a tribunal one or more of whose members did not meet the requisite standard of impartiality and independence.[638]

The Committee therefore considers that the fact that there is reasonable doubt about whether an arbitrator possessed the qualities of independence and impartiality required by Article 14(1) is a ground on which an award might be annulled under Article 52(1)(d)".[639]

503. It also determined that a breach of this standard could lead to the annulment of an award on the grounds of Article 52(1)(a) and (d) of the Convention, deeming that:

---

[636] **Ibid.**, § 111
[637]**Ibid.**,, *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on annulment, 5 February 2016, § 123
[638] **Ibid.**, § 124
[639] **Ibid.**, § 125

"*The Committee therefore concludes that the fact that an arbitrator does not meet the standard required under Article 14(1), as set out in para. 111, above, is also a ground on which an award might be annulled under Article 52(1)(a).*

Moreover, the Committee does not consider that the question whether or not a tribunal has been properly constituted is one which can be answered only at the outset of proceedings. While it is obviously necessary to establish that a tribunal is properly constituted at the time that it begins work, once it is accepted that the proper constitution of the tribunal requires that each of its members fulfil the requirements of Article 14(1), it becomes clear that changes in the circumstances of an arbitrator may mean that a tribunal which was properly constituted at the outset may cease to be so during the course of the proceedings".[640]

504. What we have seen above means that the Award was rendered by a Tribunal whose independence and impartiality were not assured.

505. The Claimants respectfully ask the *ad hoc* Committee accordingly to annul the Award as a whole pursuant to Articles 52(1)(a) and 52(1)(d) of the Convention.

***

10. THE CLAIMANTS' CONCLUSIONS IN DEFENCE OF THE INTEGRITY AND EQUITY OF THE PROCEEDING IN THE INCIDENT OF 12, 15 AND 16 FEBRUARY 2018 HAVE BEEN CONFIRMED

506. The Claimants confirm their conclusions regarding the incident on 12, 15 and 16 February 2018, reitereated in their Memorial of 27 April 2018,[641] for the following reasons.

507. As was indicated in the Memorial on Annulment of 27 April 2018,[642] the order of the 28th Civil Court of Santiago of 24 July 2017[643] directed the Foreign Ministry to produce details of the payments made to members of Essex Court Chambers.

508. Notice of this order was served to the Foreign Ministry[644] in August 2017 and then, on 29 November 2017,[645] to the State Defence Council (the State's representative in the

[640] **Ibid.**,,§ 127
[641] See §§ 5 and 759(2)
[642] See § 144
[643] See Application for Annulment, § 180, Claimants' letter to this ad hoc Committee of 21 Dec 2017 (§§ 16-1926) and 2 Feb 2018 (§§ 3, 15) and **documents C110, C284f, C290f and C292f**
[644] **Documents C181, C182, C191, C208**
[645] **Documents C242, C242bis, C243, C244, C208, C245, C283f, C212, C220**

proceeding on preliminary measures for non-contractual liability), without the judge deeming that the documents were "confidential".[646]

509. The Chilean State said to the present *ad hoc* Committee on 12 February 2018:[647]

> *Claimants' **sixth** argument appears to be that the Committee's intervention is necessary to give effect to a Chilean court order that (according to Claimants) requires production of the requested documents. However, the court order in question was **vacated** on procedural grounds more than **two months** before Claimants submitted their Document Request to the Committee[648], and the Chilean courts currently are reviewing Claimants' assertion that "d'après la loi chilienne l'investisseur a droit aux documents qui font l'objet de la demande . . . ." Because, as Claimants note, "le Comité ad hoc n'a pas le pouvoir de contrainte sur les autorités chiliennes dont disposent les juridictions internes," Claimants' discussion of this issue amounts to a misleading red herring.* [Underlining in original]

510. The Claimants filed their request for production of documents on 21 December 2017 and the State based its "misleading" charge on the assertion that the judge had supposedly **vacated** (or annulled) the order two months previously.

511. The Chilean State repeated on 15[649] and 16 February 2018[650], at the present *ad hoc* Committee's first meeting with the parties, that the Santiago judge's order had been **vacated** since October 2017, and presented the contrary assertion in the Claimants' submissions as a sham, seeking to make the *ad hoc* Committee believe that the Claimants' representatives had infringed professional ethics by directly questioning the accuracy of the Respondent's communication of 12 February 2018, and, building on this fabrication, it claimed that such infringements had been numerous, and moreover proven, since the start of the arbitration – which is wholly untrue.

512. On the following 27 April the Claimants produced judicially established proof of the fact that the order had not been **vacated** in October 2017[651] and the legal basis[652] of their respectful request to the present *ad hoc* Committee.

513. In its Counter-Memorial of 20 July 2018 the State did not remotely prove that this order of 24 July 2017 had been **vacated** in in October 2017 (and section IV(A) no longer refers to this verb or that date).

514. What is more, the State's pressure on the Santiago judge was sustained to the point that the judge agreed, on 20 April 2018,[653] that the documents which the order

---

[646] **Documents C184, C110, C242, C191, C220, C221, C242, C242bis, C243, C244, C245**
[647] See communication *2018-02-12 Chile's Second Submission on Preliminary Issues*, § 13
[648] Claimants filed their request for the production of documents on 21 Dec 2017
[649] See communication from the Chilean State of 15 February 2018
[650] See transcription of the hearing of 16 Feb 2018, pages 70, 83-90, 94, 97, 99, 100-102, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149 and *verbatim* extract of Chile's statements in the Claimants' Request in defence of the integrity and equity of the proceeding of 27 April 2018, § 15
[651] See **documents C283, C284, C291**,
[652] See documents **CL246** to **CL251**
[653] **Documents C110, C208, C220, C221, C283**

required it to produced might be confidential, while applying in its Decision Article 277[654] of the Code of Civil Procedure on "contempt".[655]

515. Yet the Counter-Memorial persists in basing the arguments in support of the Respondent's claims on attributing facts to the Claimants of which the proof to the contrary is manifest and appears in the casefile, for example:

Claimants' communications 27 April and 16 may 2018	**Chilean State's Counter-Memorial of 20 July 2018**, §418
The *Memorial of* ***27 April 2018*** (§144)[656] mentions: - the decision of **20 April 2018** of the 28th Civil Court of Santiago (**document C284**) - the appeal of 25 april 2018 (document **C290**),[657] and - the Tribunal's decision of **2 May 2018** upholding the appeal of 25 April (**document C292**)[658]	*§418 (d): The letter [of* ***27 April 2018****] … fails to disclose to the Committee a key recent development on that issue: that the Chilean court on* ***20 April 2018*** *issued a resolution accepting Chile's invocation of confidentiality privilege.* *Not only that, but on* ***25 April 2018*** *(i.e., two days before their 27 April 2018 letter to this Committee), Claimants' counsel in Chile, Mr. Víctor Araya, filed an appeal of that decision, asking that the Court of Appeals reverse the decision in which the lower court had accepted the confidentiality privilege.* *In their 27 April 2018 letter,* ***Claimants also***

[654] "**Art. 277** (267). *S'il y avait lieu aux mesures mentionnées aux numéros 3º et 4º de l'article 273 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, elle perdra le droit de les faire valoir après, sauf si l'autre partie les faisait également valoir à l'appui de sa défense, ou si elle se justifie ou qu'il apparaît manifestement qu'elle ne pouvait les produire plus tôt, ou s'ils font référence à des faits distincts de ceux qui ont motivé la demande de production. Cela s'entend sans préjudice de ce que dispose l'article précédent et le paragraphe 2° Titre II du Livre I du Code de Commerce"*; "Siempre que se dé lugar a las medidas mencionadas en los números 3° y 4° del artículo 273, y la persona a quien incumba su cumplimiento **desobedezca**, existiendo en su poder los instrumentos o libros a que las medidas se refieren, perderá el derecho de hacerlos valer después, salvo que la otra parte los haga también valer en apoyo de su defensa, o si se justifica o aparece de manifiesto que no los pudo exhibir antes, o si se refieren a hechos distintos de aquellos que motivaron la solicitud de exhibición. Lo cual se entiende sin perjuicio de lo dispuesto en el artículo precedente y en el párrafo 2°, Título II, del Libro I del Código de Comercio" [Underlining added]

[655] **Document C284f**

[656] Memorial of 27 April 2018: § 144: "*Ces précisions, intervenues après la reddition des Première et Seconde décisions sur la récusation des arbitres, constituent ainsi des éléments nouveaux qui militent en faveur d'une réouverture complète de la question, au même titre que la décision du 28e Tribunal Civil de Santiago du 24 août 2017 ayant ordonné au Chili de produire les détails des paiements effectués par l'État chilien aux membres des Essex Court Chambers, injonction à laquelle le Chili s'est employé à résister depuis [footnote 108: documents C110, C208, C220, C221, C283], jusqu'à obtenir que* ***le 20 avril 2018*** *ce Tribunal, sans avoir pris connaissance du contenu de ces informations, les ait considérées "confidentielles" [footnote 109:* ***document C284****] après avoir statué le contraire entre le 24 juillet 2017 et le 20 avril 2018 [footnote 110: documents C184, C110, C242, C191, C220, C221, C242, C242bis, C243, C244, C245]. La Fondation Président Allende a formé un* ***appel le 25 avril suivant****. [footnote 111:* ***document C290****]*." [emphasis added].

[657] **Document C284f**

[657] **Document C290f** was communicated to the *ad hoc* Committee and to Chile on 27 April 2018

[658] Appeal hearings took place on 11 September 2018 (see **documents C315f** and **C315e),** the Santiago Appeals Court did not notify its decision to the claimant Spanish Foundation

	failed to mention this appeal *— even though it had just been filed two days earlier. (…)*
On 3 May 2018 the Claimants sent the paper version of their Memorial by urgent courier, attaching the ruling of **2 May 2018** (**C292**) upholding the appeal of 25 April, which ruling was received in Madrid when the Memorial was already printed and in the package to be handed over to the courier (as they told the *ad hoc* Committee and the State in their letter of 3 May §4).[659] On 16 May 2018 the Secretary of the second *ad hoc* Committee sent the parties by email: 1) the letter of 15 May, acknowledging receipt of the paper version of **documents C284, C290** and **C292**, and saying: "*le Comité m'a demandé de confirmer aux parties qu'il a bien reçu la nouvelle pièce C292 des Demanderesses. (…)*" 2) The Claimants' email of 16 May with the electronic version in Spanish and French of **document C292,** communicated on that day by the Claimants. [Emphasis added]	[Ibid.] *Further, Claimants' concealment from the Committee of the court's* [***20 April 2018***] *confidentiality determination, and of their own local counsel's appeal of that decision, is deplorable because this information was obviously relevant to Claimants' original accusation against Chile, and because it must be assumed that the omission was conscious and deliberate, since those developments had just occurred and were therefore fresh on Claimants' minds* [Conclusion of the preceding fabrication] *420. Finally, Chile notes that this episode aptly illustrates several of the phenomena that have rendered this dispute so lengthy, controversial, and costly: (i) Claimants' practice of lobbing serious but* ***baseless accusations****, and then repeating those accusations ad nauseam — even after they have been disproven;(ii) Claimants'* ***utter disregard for the truth****, and their evident belief that "the ends justify the means"; (iii) Claimants'* ***boldness in accusing others of the very practices and improprieties in which they themselves incur (including, in particular, "guerrilla tactics"*** *— of which their recent fraud accusations constitute a paradigmatic example); (iv) Claimants' willingness to* ***distort the record, to hide relevant information, and to mislead the arbitral panel*** *— even to score points on secondary, tertiary, or completely irrelevant issues (…).* [Emphasis added]

Res ipsa loquitur.

[659] The Centre distributed Claimants' letter on 3 May 2018 in an email of16 May

516. Once an appeal had been filed on 25 April 2018[660] against the judge's decision of 20 April, the State waited to learn of the decision of the *ad hoc* Committee of 30 April 2018 (refusing the production of the documents requested by the Claimants) before on the next day, 31 August, opening the way to setting the date of the hearings before the Santiago Court of Appeal for 4 September 2018. These finally took place on 11 September 2018.[661]

517. Today the State seems to be waiting to see this Rejoinder before letting the Claimants learn of the Appeal Court's decision, for no access to it has been allowed at the time of these pleadings' being sent electronically to ICSID.[662]

518. The Claimants respectfully ask the *ad hoc* Committee for it to allow them to make any comments on this decision in relation to the incident of February 2018 at the hearings scheduled for 11 March 2019.

***

11. THE COUNTER-MEMORIAL CONFIRMS THE CHILEAN STATE'S CONTINUING INTENTION TO PREVENT THE CLAIMANT-INVESTORS FROM HAVING ACCESS TO INTERNATIONAL ARBITRATION

519. Since 3 November 1997 the Respondent State has pursued the same main aim of consolidating the effects of the denial of justice vis-à-vis the investors and, to this end, preventing them having access to the remedies for settling disputes provided in the Agreement between the Spain and Chile for the receiprocal protection and support of investments, signed on 2 October 1991.[663]

520. To this same end the State has deployed licit and illicit means, as attested, with *res judicata* effect, by section IV of the OA[664] – putting the Arbitral Tribunal under influence,[665] *ex parte* meetings with the ICSID Secretariat,[666] manoeuvres which finally brought down the Arbitral Tribunal in 2005 and 2006[667] –, the Decision of the 1st *ad hoc* Committee[668] or the resubmission Award.[669]

---

[660] **Document C290f**, sent by the Claimants to the *ad hoc* Committee on 27 April 2018
[661] **Documents C315f** and **C315e**
[662] See la **document C359,** information published on the Appeal Court of Santiago web site, as on November 9 2018
[663] **Document C3**
[664] **Document C2,** v. pages 33-181 of 232
[665] **Document C347**
[666] See les **documents C345** et **C346**
[667] **Ibid**., v. §§ 35-37
[668] **Document C20**, section V, letters A and B

521. §§ 421 et seq. of the Counter-Memorial refer to current arbitration in the Permanent Court of Arbitration at the Claimants' initiative. It should suffice to point out that the purpose of this argument is, once again, to prevent the investors from effectively exercising the rights recognised by the Arbitral Award of 8 May 2008, the Decision of the 1st *ad hoc* Committee of 18 September 2012 and the Arbitral Award of 13 September 2016 (subject to the current request for annulment of the latter), notably:

Arbitral Award of 8 May 2008:

"179. Au vu des éléments exposés et des documents produits par les parties, le Tribunal estime tout d'abord que M. Pey Casado a effectivement procédé à l'acquisition des sociétés CPP S.A. et EPC Ltda, contrairement aux allégations de la défenderesse.

229. 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.

525. De l'avis du Tribunal arbitral, la Fondation a démontré qu'elle était en possession de 90% des actions de CPP S.A.,467 qui lui ont été transmises par M. Pey Casado au moyen d'écritures passées entre le 6 octobre 1989 et le 27 mai 1990. Cette transmission a été parfaite à la date de l'inscription de cette dernière au Registre des Fondations du Ministère espagnol de la Culture, le 27 avril 1990.

537. De l'avis du Tribunal arbitral, la Fondation Presidente Allende a obtenu la qualité d'"investisseur "en vertu de la cession des actions en sa faveur de la part de la première partie demanderesse, M. Pey Casado

538. Par la cession des actions qui était valable à la date de l'inscription de cette dernière au Registre des Fondations du Ministère espagnol de la Culture, le 27 avril 1990, une partie des droits découlant de l'investissement avait été transmise par M. Pey Casado en faveur de la Fondation.[486]

Decision of the 1st *ad hoc* Committee:

§168. (...) le Comité est d'accord avec les Demanderesses sur le fait 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

§359. Par ces motifs, le Comité rend les décisions suivantes : (...)

2. rejette les autres fondements de la Demande en annulation de la République ; (…)

4. estime que les paragraphes 1 à 3 et 5 à 8 du dispositif ainsi que le corps de la Sentence, à l'exception de la Section VIII, ont autorité de chose jugée ;

---

[669] **Document C9**, v. in particular §§ 127 (non-existence of the investment); 130 (non-existence of foreign investor status); 131-132 and 133-137 (non-compétence *ratione temporis* and *ratione materiae*, respectivelly); 138-157, 164 (denaturalization of the *res iudicata* of the OA and the 1st Committee *ad hoc* Decision*)*

Arbitral Award of 13 September 2016:

§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 (…). Elle correspond donc à une obligation qui pèse toujours sur la Défenderesse (…).

522. Despite what was determined in the Award of 8 May 2008, more than ten years after the Chilean State failed to guarantee the claimant-investors fair and equitable treatment, to the point that Mr Pey, as victim or person affected, died on 5 October 2018 at the age of 103 knowing that the State continued to deny his rights and to maintain its accusations and claims against his dignity and the Original Award's *res judicata*.[670]

523. The State is in continuous infringement of the obligations provided in Article 4 of the BIT and points 2 and 3 of the Award of 8 May 2008, *res judicata*.

524. As no compensation has been offered to the Claimants since then, it is manifest that the State continues to infringe Articles 4 and 10(5) of the BIT.

525. The infringements of the BIT have caused harm to the investors whose evaluation has been *sub-lite* since 12 April 2017 before the Arbitral Tribunal constituted according to the BIT and the UNCITRAL Rules of 1976 (CPA case No. 2017-30**)**.

526. The Claim filed on 6 January 2018 to that Arbitral Tribunal made the following preliminary proposal:

With the return of democracy to Chile after the formal end of the Pinochet era on March 1990, a fundamental goal of the new regime was the restoration of the rule of law and the just reparation of Pinochet's victims. The claimant in this case, Mr. Pey Casado, a Spanish national, is one of those victims. Owner of the leading newspaper in Santiago, Chile, friend of the deposed democratic leader Dr. Salvador Allende, with the September 11, 1973 Pinochet coup Mr. Pey Casado saw his business seized by the military in the coup d'état, and he was forced to leave Chile until the end of the military Junta.

This act of seizure, and later confiscation in 1975 (Decree num. 165), was extra-constitutional. It was clearly compensable under Chile's transitional justice framework put in motion since March 1990 by the Chilean Judiciary, the Legislative and the Executive branches of Government. And yet since the very beginning of Mr. Pey Casado's efforts to obtain justice under that legal framework, his efforts, for whatever motivations, have been blocked by Chile's deep state, despite the regime's overall commitment to transitional justice.

In the absence of compensation under the transitional justice scheme, Chile's laws left open to Mr. Pey Casado to also pursue his rights under the Constitution. Now, Mr. Pey Casado's

[670] See les **documents C34** et **C36,** de même que la réponse du Ministre des Affaires Étrangères du 27 novembre 2017 (**document C342)** à une interpellation de la Chambre des Députés

access to constitutional justice has also been blocked definitively by the Chile state. But as an investor under the Chile-Spain BIT, Mr. Pey Casado also has rights under international law. (...)

It remains to discuss the question of double recovery.

Since the damages in this claim would properly be the value of the property the benefit of which Mr. Pey Casado has been deprived and unable to recover in Chile due to denial of justice, an award of that amount would also cover the losses established in the ICSID proceeding, so that, assuming the claimant's request for annulment succeeded and then its further arguments as to quantum before a new resubmission proceeding were to also succeed, further pursuit of damages before the present tribunal could create a risk of double recovery. The claimant therefore proposes that

1) should this tribunal make an award of damages along the lines just described while the ICSID proceedings remain open, the claimants will abandon the ICSID proceedings once the award under this tribunal is paid by Chile;

2) should the claimant succeed in annulment proceedings in ICSID, the claimant will refrain from resubmission proceedings at ICSID concerning damages until the present tribunal has rendered its award on the merits and damages, and if damages are awarded along the lines just described by the present tribunal, the claimant will permanently abandon ICSID proceedings once that award is paid.

The claimants have always been sensitive throughout the ICSID arbitration to avoid the risk of double recovery (Memorial, para. 225(b)).”

527. The Respondent’s arguments on this subject therefore lack both a legal and a moral basis.

***

12. EXPENSES AND PROCEDURAL COSTS

528. The preceding facts and legal grounds, as well as the Chilean State’s conduct throughout the resubmission proceedings, and in particular in this annulment proceeding, justify it being ordered to pay all of the procedural costs and the expenses borne by the Claimants.

529. In making this request the Claimants respectfully draw attention to the fact that this is a case of investors who are victims of discrimination and denial of justice for which the Chilean State has been found liable with *res judicata* effect, and yet it has never shown the slightest intention to respect the obligation resting with it, as evidenced by the conclusion of the Foreign Minister’s reply of 27 November 2017 to a question tabled on 20 September in the Chilean Chamber of Deputies.[671]

[671] **Documents C342f** , page 4, et **C199**

***

13. FOR THESE REASONS,

THE *AD HOC* COMMITTEE IS RESPECTFULLY ASKED,

1. To accept this Rejoinder to the Respondent's Counter-Memorial, along with its attached documents, seeking the annulment:

   - of the whole resubmission Award, notified on 13 September 2016, on the grounds provided in Article 52(1) letters (a), (b), (d) and (e) of the ICSID Convention, including

   - the annulment of §§ 58, 61 and 62(b) of the Decision of 6 October 2017, on the [i]grounds of Article 52(1) letters (b), (d) and (e) of the Convention.

2. To order the Republic of Chile to bear the costs of this annulment proceeding and its incidents (including the one arose on 12, 15 and 16 February 2018),[672] and including the fees and expenses of the members of this *ad hoc* Committee, expenses for the use of ICSID facilities, translation expenses and also the expenses and professional fees of the Claimants, lawyers, experts and/or persons called on to appear before the *ad hoc* Committee, and to pay any amounts pursuant to any other infringments that the *ad hoc* Committee may deem fair and equitable, with compound interest.

3. To take any other measures that the members of the Committee consider fair and equitable in the circumstances of this case.

Madrid/Washington 9 November 2018

Dr. Juan E. Garcés
Representative of Mrs Coral Pey-Grebe
and of the President Allende Foundation

---

[672] 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.