**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**VÍCTOR PEY CASADO AND FOUNDATION PRESIDENT ALLENDE**

Applicants

and

**REPUBLIC OF CHILE**

Respondent

**ICSID Case No. ARB/98/2**
**Annulment Proceeding**

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# DECISION ON ANNULMENT

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***Members of the ad hoc Committee***
Professor Dr. Rolf Knieper, President
Professor Dr. Nicolas Angelet
Professor Yuejiao Zhang

***Secretary of the ad hoc Committee***
Ms. Ella Rosenberg

*Date of dispatch to the Parties:* 8 January 2020

## REPRESENTATION OF THE PARTIES

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Subsecretaría de Relaciones Exteriores

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## TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

| | |
|---|---|
| Additional Request | Applicants' additional request in defense of the integrity and the fairness of the proceeding dated 27 April 2019 |
| ICSID Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceeding in force as of 10 April 2006 |
| Applicants or Claimants | Mr. Víctor Pey Casado and Foundation President Allende |
| Annulment Application | Applicants' application for annulment of the award rendered on 13 September 2016 |
| Annulment Proceeding | Second annulment proceeding registered on 25 October 2017 |
| Articles on State Responsibility | Articles on Responsibility of States for Internationally Wrongful Acts, annex to United Nations General Assembly resolution 56/83 of 12 December 2001. |
| BIT or Treaty | Agreement between the Kingdom of Spain and the Republic of Chile for the Reciprocal Protection and Promotion of Investments signed on 2 October 1991 and entered into force on 29 March 1994 |
| C-[#] | Claimants' exhibits in the Annulment Proceeding |
| CL-[#] | Claimants' legal authorities in the Annulment Proceeding |
| Committee | *Ad hoc* Committee constituted on 20 December 2017 in the Annulment Proceeding |
| Counter-Memorial on Annulment | Respondent's Counter-Memorial on Annulment dated 20 July 2018 |
| Decision No. 43 | Decision of the Santiago court dated 28 April 2000 |
| RA-[#] | Respondent's exhibit in the Annulment Proceeding |

| | |
|---|---|
| FET, FET-standard | Standard of Fair and Equitable Treatment (Article 4 BIT) |
| First Annulment Decision | Decision rendered by the First Committee on 18 December 2012 |
| First Annulment Proceeding | Annulment proceeding registered on 6 July 2009 |
| First Arbitration | Arbitration proceeding submitted on 7 November 1997 and registered on 20 April 1998 |
| First Award | Award rendered by the First Tribunal on 8 May 2008 |
| First Committee | *Ad hoc* Committee composed of Professor Piero Bernardini, Professor Ahmed El-Kosheri and Mr. L. Yves Fortier, C.C., Q.C. constituted on 22 December 2009 in the First Annulment Proceeding |
| First Session on Annulment | First Session held on 16 February 2018 in the Annulment Proceeding |
| First Tribunal | Tribunal composed of Professor Pierre Lalive, Mr. Mohammed Chemloul and Professor Emmanuel Gaillard reconstituted on 14 July 2006 |
| Foundation | Foundation President Allende, established under Spanish law |
| Hearing on Annulment | Hearing held from 12 to 14 March 2019 |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| Memorial on Annulment | Applicants' Memorial on Annulment dated 27 April 2018 |
| R-[#] | Respondent's exhibit in the Resubmission Proceeding |

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|---|---|
| RL-[#] | Respondent's legal authority in the Resubmission Proceeding |
| Rectification Decision | Rectification decision rendered by the Resubmission Tribunal on 6 October 2017 |
| Rejoinder on Annulment | Respondent's Rejoinder dated 25 January 2019 |
| Reply on Annulment | Applicants' Reply to the Respondent Counter-Memorial on Annulment dated 9 November 2018 |
| Respondent or Chile | The Republic of Chile |
| Resubmission Award or the Award | Award issued by the Resubmission Tribunal on 13 September 2016 and as rectified by the Rectification decision rendered by the Resubmission Tribunal on 6 October 2017 |
| Resubmission Hearing | Hearing held in London in the Resubmission Proceeding from 13 to 16 April 2015 |
| Resubmission Proceeding | Resubmission arbitration registered on 8 July 2013 |
| Resubmission Tribunal or Tribunal | Tribunal composed of Sir Franklin Berman, Mr. Alexis Mourre and Mr. V.V. Veeder reconstituted on 31 January 2014 |
| RALA-[#] | Respondent's legal authority in the Annulment Proceeding |
| Tr. Day [#] ([Date]) [page],[line] | Transcript of the Hearing on Annulment |

# I. INTRODUCTION

1. This case concerns an application for annulment (the "**Annulment Application**") of the award rendered on 13 September 2016, as rectified by the decision of 6 October 2017 (the "**Resubmission Award**") in the arbitration proceeding (ICSID Case No. ARB/98/2) between Víctor Pey Casado and the Foundation President Allende (together the "**Applicants**" or the "**Claimants**") and the Republic of Chile ("**Chile**" or the "**Respondent**," and together with the Applicants, the "**Parties**"). The Parties' representatives and their addresses are listed above on page (i).

2. The Resubmission Award was rendered by a tribunal composed of Sir Franklin Berman (President), Mr. Alexis Mourre and Mr. V.V. Veeder (the "**Resubmission Tribunal**").

3. The dispute in the original proceeding (the "**First Arbitration**") was submitted by the Claimants to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on 7 November 1997 on the basis of the Agreement between the Kingdom of Spain and the Republic of Chile for the Reciprocal Protection and Promotion of Investments entered into force on 29 March 1994 (the "**BIT**" or the "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 (the "**ICSID Convention**").

4. The dispute arose from the confiscation of the assets of two Chilean companies (*Consorcio Publicitario y Periodístico S.A.* "**CPPSA**" and *Empressa Periodística Clarín Ltda* "**EPC Ltda**") following the *coup d'état* led by General Augusto Pinochet in 1973. In the arbitration, the Claimants alleged *inter alia* that the Respondent unlawfully expropriated their investments in CCPSA and EPC Ltda and failed to accord them fair and equitable treatment. In particular, the Claimants claimed that Chile discriminated against them and denied them justice in connection with the request that Mr. Pey Casado filed with the

Chilean courts in 1995 seeking reparation for the confiscation of a Goss printing press (the "**Goss press case**").[1]

5. In an award dated 8 May 2008 (the "**First Award**"), the tribunal composed of Professor Pierre Lalive, Mr. Mohammed Chemloul and Professor Emmanuel Gaillard (the "**First Tribunal**") dismissed the Claimants' expropriation claim finding that the expropriation of *El Clarín* (the Chilean newspaper published by CCPSA and EPC Ltda) was not covered *ratione temporis* by the BIT. The First Tribunal also found that the Respondent had breached Article 4 of the BIT due to its courts' failure to render a decision in the Goss press case for seven years (denial of justice) and due to its ministerial decision to award compensation to persons other than Mr. Pey Casado and the Foundation (the "**Decision No. 43**") (discrimination). After dismissing all other claims, the First Tribunal awarded the Claimants USD 10,132,690.18 (plus compound interest) in damages, USD 2,000,000 in legal fees and costs, and USD 1,045,579.35 in procedural costs.[2]

6. On 6 July 2009, the ICSID Secretary-General registered Chile's application for annulment of the First Award (the "**First Annulment Proceeding**"). On 18 December 2012, the *ad hoc* committee composed of Professor Piero Bernardini, Professor Ahmed El-Kosheri and Mr. L. Yves Fortier, (the "**First Committee**") issued a decision partially annulling the First Award (the "**First Annulment Decision**"). Specifically, the First Committee annulled paragraph 4 of the *dispositif* of the First Award and the corresponding paragraphs in the reasoning.[3]

7. On 18 June 2013, the Claimants filed a new request for arbitration pursuant to Article 52(6) of the ICSID Convention (the "**Resubmission Proceeding**"). In the Resubmission Proceeding, the Claimants argued *inter alia* that the daughter of Mr. Pey Casado (Ms. Coral Pey Grebe) was the proper party to the Resubmission Proceeding (being the assignee of

[1] Resubmission Award, para. 11.

[2] First Award, Section X.

[3] First Annulment Decision, para. 359.

Mr. Pey Casado's shares in CPPSA and EPC Ltda),[4] and sought damages in the amount of USD 150 million for the Respondent's breaches of the BIT, plus costs.

8. The Resubmission Award was rendered on 13 September 2016. The Resubmission Tribunal ruled that Ms. Coral Pey Grebe could not be a claimant in her own right in the Resubmission Proceeding. By the same award, it further found that the Claimants failed to prove any quantifiable injury due to a breach of Article 4 of the BIT (and thus no financial compensation could be awarded on this account) and dismissed the Claimants' claims for unjust enrichment and moral damages. The Claimants were ordered to bear three quarters of the arbitration costs.[5]

9. The Claimants applied for the rectification of four errors in the award of 13 September 2016 pursuant to Article 49 of the ICSID Convention. During the rectification proceeding, the Claimants unsuccessfully requested that two of the members of the Resubmission Tribunal (Sir Franklin Berman and Mr. V.V. Veeder) be disqualified. In a decision rendered on 6 October 2017 (the "**Rectification Decision**"), the Resubmission Tribunal rectified paragraphs 61, 66, 198, and paragraph 2 of the *dispositif* of the Resubmission Award and ordered that the Claimants bear the costs of the rectification proceeding.[6]

10. In this annulment proceeding, the Applicants are seeking the annulment of the Resubmission Award on the following grounds: (i) improper constitution of the Resubmission Tribunal (Article 52(1)(a) of the ICSID Convention); (ii) manifest excess of powers (Article 52(1)(b) of the ICSID Convention); (iii) serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention); and (iv) failure

[4] The first page of the request for arbitration refers to the case as "Víctor Pey Casado and Spanish Foundation President Allende (ICSID Case No. ARB/98/2) v. Republic of Chile." However, at page 3 of the request, the Claimants are identified as being Ms. Coral Pey Grebe and the Foundation President Allende.

[5] Resubmission Award, para. 256.

[6] Rectification Decision, para. 62.

to state the reasons on which the award is based (Article 52(1)(e) of the ICSID Convention).[7]

## II. PROCEDURAL HISTORY

11. On 10 October 2017, the Applicants filed the Annulment Application with ICSID pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").[8] The Annulment Application contained a request for the stay of the enforcement of the Resubmission Award pursuant to Article 52(5) of the ICSID Convention, and Arbitration Rule 54(2) (the "**Stay Request**").

12. On 25 October 2017, the ICSID Secretary-General registered the Annulment Application and notified the Parties that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).

13. On 20 December 2017, the *ad hoc* Committee (the "**Committee**") was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are: Professor Dr. Rolf Knieper (German), serving as President, Professor Dr. Nicolas Angelet (Belgian) and Professor Yuejiao Zhang (Chinese). All members were appointed by the Chairman of the Administrative Council.

14. On the same date, the Parties were informed that the Annulment Proceeding was deemed to have begun on that date, and that Mr. Benjamin Garel, ICSID Legal Counsel, would serve as Secretary of the Committee. The Parties were later informed that Ms. Laura Bergamini, ICSID Legal Counsel, would replace Mr. Garel as Secretary of the Committee.

[7] On 20 February 2019, the Applicants confirmed that they are not seeking the annulment of the Resubmission Award on the ground of Article 52.1(c) of the ICSID Convention, and that the reference to this provision in paragraphs 21 and 22 of the Reply on Annulment of 9 November 2018 was erroneous.

[8] The Annulment Application lists as Applicants in the Annulment Proceeding Mr. Víctor Pey Casado and the Foundation President Allende.

15. On 21 December 2017, the Applicants submitted a request for the production of certain documents, along with exhibits C-208 through C-212.

16. On 22 December 2017, the ICSID Secretariat wrote to the Parties regarding arrangements for the first session and circulated a draft Procedural Order No. 1 providing *inter alia* directions on the conduct of the proceeding. By the same letter, the Parties were informed of the Committee's decision to extend the provisional stay of enforcement of the Resubmission Award.

17. On 30 December 2017, the Applicants submitted their comments on draft Procedural Order No. 1.

18. On 31 December 2017, in light of the Parties' availabilities for the first session, the Committee requested the parties to indicate whether they would agree to hold the first session beyond the time period set forth in Arbitration Rule 13. The Parties responded on 5 January 2018.

19. On 9 January 2018, the Committee decided *inter alia* to hold the first session in person on 16 February 2018 (the "**First Session on Annulment**").

20. On 12 and 13 January 2018, after consulting the Parties, the Committee confirmed that the First Session on Annulment would be held in Washington, D.C.

21. On 15 January 2018, the Applicants submitted additional comments on draft Procedural Order No. 1.

22. On 19 January 2018, the Respondent submitted its comments on draft Procedural Order No. 1, its observations on the Stay Request and the Applicants' request for production of documents, along with exhibits RA-0001 through RA-0033 and legal authorities RALA-0001 through RALA-0012.

23. On 22 January 2018, the Applicants requested leave to respond to the Respondent's comments.

24. On 23 January 2018, the Committee set forth time limits for additional written submissions from the Parties on the Stay Request and the Applicants' request for production of documents.

25. On 2 February 2018, the Applicants responded to the Respondent's comments of 19 January 2018 (filing exhibits C-213 through C-241) and submitted additional comments on draft Procedural Order No. 1.

26. On 12 February 2018, the Respondent replied to the Applicants' submission of 2 February 2018 (filing exhibits RA-0034 and RA-0035 and legal authorities RALA-0013 through RALA-0015).

27. On 16 February 2018, the Committee held the First Session on Annulment at the World Bank's premises in Washington, D.C. Participating in the session were:

Members of the Committee:
Professor Dr. Rolf Knieper, President
Professor Dr. Nicolas Angelet
Professor Yuejiao Zhang

ICSID Secretariat:
Dr. Laura Bergamini, Secretary of the Committee

Representing the Applicants:
Dr. Juan E. Garcés, Garcés y Prada, Abogados
Mr. Hernan Garcés Duran, Garcés y Prada, Abogados
Professor Robert Lloyd Howse, New York University, School of Law
Ms. Alexandra Muñoz, Gide, Loyrette, Nouel (by video-conference)
Ms. Francisca Duran Ferraz de Andrade, President Allende Foundation Management

Representing the Respondent:
Mr. Paolo Di Rosa, Arnold & Porter
Ms. Mallory Silberman, Arnold & Porter
Ms. Caroline Kelly, Arnold & Porter
Ms. Aimee Kneiss, Arnold & Porter
Mr. German Savastano, Arnold & Porter

28. During the First Session on Annulment, the Parties and the Members of the Committee discussed draft Procedural Order No. 1 and the Applicants' request for production of

documents. The Parties further presented oral pleadings on the Stay Request and agreed on a procedural calendar for the Annulment Proceeding (including a document production phase relating to certain documents). The First Session on Annulment was recorded and transcribed (in English and French). Copies of the transcripts were subsequently transmitted to the Parties and the Committee.[9]

29. On 7 March 2018, the Committee issued Procedural Order No. 1.

30. On 15 March 2018, the Committee issued a Decision on the Stay Request (the "**Stay Decision**").[10]

31. On 16 March 2018, the Applicants requested leave to submit expert reports and documents regarding the functioning of Essex Court Chambers pursuant to paragraphs 16(3) through 16(5) of Procedural Order No. 1. The Applicants further informed the Committee that Mr. Toby Cadman had joined the Applicants' legal team.

32. On 19 March 2018, the Applicants submitted a document concerning the powers of Mr. Hernán Garcés Durán to represent them.[11]

33. On 20 March 2018, Chile responded to the Applicants' request of 16 March 2018 and submitted legal authorities RALA-0016 and RALA-0017.

34. On 23 March 2018, the Committee took note that Dr. Juan Garcés and Mr. Hernán Garcés Durán were acting in the Annulment Proceeding as agents of the Applicants while Ms. Muñoz, Ms. Malinvaud, Professor Howse, and Mr. Toby Cadman were acting as counsel.

35. On 24 March 2018, the Committee decided on the Applicants' request of 16 March 2018.

[9] The final version of the transcripts (in English and French), incorporating the Parties' agreed corrections, was transmitted to the Parties and the Committee on 17 August 2018.

[10] The French version of the Stay Decision was transmitted to the Parties on 9 April 2018 pursuant to paragraph 11(7) of Procedural Order No. 1.

[11] The Applicants submitted the French translation of this document on 5 April 2018.

36. On the same date, the Applicants submitted documents concerning the powers of Dr. Juan Garcés to represent Mr. Pey Casado, the Foundation and Ms. Coral Pey Grebe.

37. On 29 March 2018, the Applicants requested leave to submit expert reports and documents pursuant to paragraphs 16(3) and 16(5) of Procedural Order No. 1 and submitted legal authorities CL-258 through CL-260.

38. On 6 April 2018, the Respondent responded to the Applicants' request of 29 March 2018.

39. On 13 April 2018, the Committee ruled on the Applicants' request of 29 March 2018.

40. On 17 April 2018, the Applicants submitted additional documents to the Secretariat, which were not transmitted to the Committee in accordance with paragraph 16(7) of Procedural Order No. 1.

41. On 20 April 2018, the Respondent provided its comments on the Applicants' submission of 17 April 2018.

42. On 24 April 2018, the Committee invited the Applicants to submit the documents attached to their communication of 17 April 2018 when filing their memorial on annulment and took note of the Respondent's request that the costs relating to the exchanges on the admissibility of evidence be taken into consideration when allocating the costs of the proceeding.

43. On 27 April 2018, the Applicants filed a Memorial on Annulment along with several exhibits and legal authorities (the "**Memorial on Annulment**").

44. On the same date, the Applicants filed an additional request in defense of the integrity and the fairness of the proceeding, along with a number of exhibits and legal authorities (the "**Additional Request**").

45. On 29 April 2018, the Applicants submitted a corrected version of exhibit C-284f.

46. On 3 May 2018, the Committee invited the Respondent to provide its comments on the Additional Request, if any, in its Counter-Memorial on Annulment.

47. On 12 May 2018, the Applicants submitted a courtesy translation into English of the Memorial on Annulment, along with a corrected version of the Memorial on Annulment in French.

48. On 15 May 2018, the Centre acknowledged receipt of a corrected version of the Memorial on Annulment along with a list of *corrigenda* and exhibit C-292.

49. On 17 May 2018, the Applicants filed an electronic copy of exhibit C-292 (in French and Spanish).

50. On 25 May 2018, the Centre acknowledged receipt of hard copies of several exhibits submitted by the Applicants.

51. On 12 July 2018, the Respondent submitted updated powers of attorney for its counsel.

52. On 20 July 2018, the Respondent submitted its Counter-Memorial along with several exhibits and legal authorities (the "**Counter-Memorial on Annulment**"). In the Counter-Memorial on Annulment, the Respondent responded to the Additional Request and requested that the Committee reconsider the Stay Decision.

53. On 9 August 2018, the Committee dismissed the Respondent's request for reconsideration of the Stay Decision and fixed time limits for further exchanges on the Applicants' Additional Request.

54. On 20 August 2018, the Applicants submitted a request for the production of documents and a translation into French of exhibit C-220.

55. On 21 August 2018, the Respondent provided comments on the Applicants' request for production of documents and submitted a letter that it had addressed to the Applicants on 9 August 2018.

56. On the same date, the Applicants filed a corrected version of the request for production of documents.

57. On 30 August 2018, the Committee issued Procedural Order No. 2 concerning the Applicants' request for production of documents.[12]

58. On 8 October 2018, the Applicants informed the Committee that Mr. Pey Casado had passed away.

59. On 10 October 2018, the Committee invited the Applicants to indicate how they proposed the proceeding should move forward following Mr. Pey Casado's passing, which they did on 12 October 2018. On 18 October 2018, the Respondent provided its comments on the Applicants' proposal.

60. On 19 October 2018, the Committee took note of the Parties' agreement that the Annulment Proceeding should continue between the Applicants and the Respondent, and that Ms. Coral Pey Grebe should continue to be treated as Mr. Pey Casado's representative for the purposes of the proceeding.[13] The Committee further confirmed that the procedural calendar annexed to Procedural Order No. 1 remained in force.

61. On 9 November 2018, the Applicants filed a Reply to the Respondent's Counter-Memorial on Annulment (the "**Reply on Annulment**") along with numerous exhibits and legal authorities. On the same date, the Applicants also requested that (i) the ICSID Secretary-General transmit to the Parties and the Committee the responses that she had received from Mr. V.V. Veeder and Sir Franklin Berman regarding the Claimants' letter of 20 September 2016; and (ii) the Committee identify before the hearing, the topics, questions or legal provisions requiring clarifications at the hearing.

[12] The French version of Procedural Order No. 2 was transmitted to the Parties on 5 November 2018 pursuant to paragraph 11(7) of Procedural Order No. 1, along with a corrected version of Procedural Order No. 1 (in French).

[13] Applicants' letter dated 12 October 2018; Respondent's letter dated 18 October 2018.

62. On 13 November 2018, the ICSID Secretary-General answered to the Applicants' request of 9 November 2018.

63. On 16 November 2018, the Respondent provided comments on the Applicants' proposal of 9 November 2018.

64. On 20 November 2018, the Committee indicated the list of topics, legal provisions and/or questions to be addressed at the hearing, if any, would be transmitted to the Parties on or around 19 February 2019.

65. On 27 November 2018, the Applicants submitted a courtesy translation into English of their Reply on Annulment.

66. On 6 December 2018, the Centre *inter alia* acknowledged receipt of two subsequent revised versions of the Reply on Annulment (with their respective lists of *corrigenda*).

67. On 19 December 2018, the Respondent requested that the Committee reconsider the length of the hearing set forth in the procedural timetable annexed to Procedural Order No. 1. On the following day, the Applicants opposed to the Respondent's request. The Parties further exchanged communications regarding the proposed duration of the hearing on 27 December 2018 and 3 January 2019.

68. On 9 January 2019, the Committee informed the Parties that it would determine the exact days reserved for the hearing upon receipt of the Respondent's rejoinder on annulment.

69. On 14 January 2019, the Applicants submitted a letter regarding a decision of the Santiago Court of Appeal of 15 November 2018, along with several exhibits and legal authorities. On the same date, the Centre transmitted the Applicants' letter to the Committee without its attachments pursuant to paragraph 16(7) of Procedural Order No. 1.

70. On 15 January 2019, the Committee invited the Respondent to provide its comments on the Applicants' communication of 14 January 2019, which the Respondent did on 18 January 2019.

71. On 22 January 2019, the Committee invited the Applicants to specify what exceptional circumstances would justify the admission into the record of the decision of the Santiago Court of Appeal and the legal authorities attached to their letter of 14 January 2019.

72. On 25 January 2019, the Respondent filed its Rejoinder on Annulment (the "**Rejoinder on Annulment**") together with a number of exhibits and legal authorities.

73. On 28 January 2019, the Applicants responded to the Committee's request of 22 January 2019. The Respondent answered the Applicants' letter on 1 February 2019.

74. On 4 February 2019, the Committee decided that the hearing would be held from 12 to 14 March 2019 (with an additional day in reserve) and invited the Parties to liaise and agree on its organization.

75. On 5 February 2019, the Committee decided to admit into the record the documents attached to the Applicants' email of 14 January 2019.

76. On 6 February 2019, the Applicants filed a motion to exclude a few exhibits submitted by the Respondent with its Rejoinder on Annulment from the record. The Respondent responded to the Applicants' motion on 12 February 2019.

77. On 14 February 2019, the Committee invited the Parties to confer regarding the language(s) to be used at the pre-hearing organizational meeting. The Parties reverted to the Committee on this issue on 15, 19 and 21 February 2019.

78. On 19 February 2019, the Committee transmitted to the Parties a preliminary list of topics and questions to be addressed at the hearing. The Committee clarified that this preliminary list of topics and questions would not limit in any manner, the contents of the Parties' presentations or the questions that the Committee could ask the Parties at the hearing.

79. On 20 February 2019, the Committee confirmed receipt of the Parties' correspondence of 15 and 19 February 2019 regarding the language(s) of the pre-hearing organizational meeting and noted that, failing a different agreement of the Parties, the pre-hearing

conference call would be interpreted simultaneously into English and French pursuant to paragraphs 11(1) and 11(6) of Procedural Order No. 1.

80. On 20 February 2019, the Parties submitted comments regarding the organization of the hearing.

81. On 21 February 2019, the Applicants provided their comments on the Respondent's letter of 12 February 2019.

82. On 23 February 2019, the Applicants rectified material errors in two exhibits that they had submitted on 20 and 21 February 2019.

83. On 25 February 2019, the Committee ruled on the Applicants' motion to exclude a number of the Respondent's exhibits from the record.

84. On 26 February 2019, the President of the Committee held a pre-hearing organizational meeting with the Parties by telephone conference. The telephone conference was recorded and interpreted from and into French and English.

85. On the same date, the Respondent requested a clarification on the Committee's decision of 25 February 2019, which the Committee provided on 1 March 2019.

86. On 1 March 2019, the Committee issued Procedural Order No. 3 concerning the organization of the hearing.[14]

87. On 7 March 2019, the Applicants requested that the Committee grant them leave to submit the decision on annulment rendered in *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17) and dated 14 December 2018 (the "***Suez v. Argentina* Decision**").

[14] The French version of Procedural Order No. 3 was transmitted to the Parties on 5 March 2019 pursuant to paragraph 11(7) of Procedural Order No. 1.

88. On 8 March 2019, the Respondent agreed that the *Suez v. Argentina* Decision could be admitted into the record.

89. On 8 March 2019, the Parties submitted their respective skeleton arguments for the hearing.[15]

90. On 9 March 2019, the Applicants submitted a corrected version of their skeleton argument together with an electronic copy of the *Suez v. Argentina* Decision (identified as exhibit CL-414).[16]

91. On the same date, the Respondent objected that the Applicants' skeleton argument did not comply with the Committee's directions in Procedural Order No. 3 and requested that the Committee order the Applicants to submit a revised skeleton argument or, in the alternative, strike from discussion at the hearing all of the Applicants' new or reformulated claims or arguments. The Committee addressed the Respondent's objection to the admissibility of the Applicants' skeleton argument at the hearing and subsequently rejected it.

92. On 10 March 2019, the Respondent confirmed that a corrected version of exhibit RA-0205(ENG) (transcripts of the Resubmission Hearing day of 14 April 2015) had been filed into the record and transmitted to the Committee an electronic copy of it. On the same date, the Applicants objected that the exhibit transmitted by the Respondent was not the corrected version of exhibit RA-0205(ENG).

93. The hearing on annulment was held at the World Bank offices in Washington, D.C., from 12 to 14 March 2019 (the "**Hearing on Annulment**").[17] The following persons were present at the Hearing on Annulment:

[15] On the same date, the Centre acknowledged receipt of two USB devices containing copies of the Applicants' and the Respondent's submissions in the annulment and resubmission proceedings.

[16] On 10 March 2019, the Parties agreed that the *Suez v. Argentina* Decision be re-identified as exhibit CL-416.

[17] In accordance with paragraph 9 of Procedural Order No. 3, on 13 March 2019, after consulting with the Parties, the Committee decided that the Hearing on Annulment would end on 14 March 2019.

Members of the Committee:
Professor Dr. Rolf Knieper, President
Professor Dr. Nicolas Angelet
Professor Yuejiao Zhang

ICSID Secretariat:
Dr. Laura Bergamini, Secretary of the Committee

Representing the Applicants:
Dr. Juan E. Garcés, Agent, Garcés y Prada, Abogados
Mr. Hernan Garcés Duran, Co-agent, Garcés y Prada, Abogado
Professor Robert Lloyd Howse, New York University, School of Law
Ms. Alexandra Muñoz, Gide, Loyrette, Nouel
Mr. Toby Cadman, Guernica 37 International Justice Chambers
Mrs. Ruti Teitel, Ernst C. Stiefel Professor of Comparative Law, New York Law School Visiting Fellow, London School of Economics
Ms. Francisca Duran Ferraz de Andrade, President Allende Foundation Management

Representing the Respondent:
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Ms. Macarena Rodriguez, Republic of Chile
Mr. Paolo Di Rosa, Arnold & Porter
Ms. Gaela Gehring Flores, Arnold & Porter
Ms. Mallory Silberman, Arnold & Porter
Ms. Katelyn Horne, Arnold & Porter
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Ms. Barbara Galizia, Arnold & Porter
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Court Reporters:
Ms. Michelle Kirkpatrick (English), B&B Reporters
Ms. Catherine Le Madic (French), FrenchRealtime
Ms. Ait Ahmed ép. Oubella (French, scopist), FrenchRealtime
Ms. Audrey Lemée (French, scopist), FrenchRealtime

Interpreters:
Ms. Sarah Rossi, English-French interpreter
Ms. Chantal Bret, English-French interpreter
Ms. Christine Victorin, English-French interpreter

94. At the Hearing on Annulment, the Parties presented oral pleadings on the Annulment Application and the Additional Request. The Hearing was recorded. A verbatim transcript, in English and French, was made and circulated to the Parties.

95. At the end of the Hearing on Annulment, having consulted with the Parties, the Committee decided several post-hearing matters, including the timing for the corrections to the transcript and the timing and format of the statements of costs. The Parties agreed not to submit post-hearing briefs.

96. The Committee met to deliberate in Washington, D.C. on 15 and 16 March 2019 and continued its deliberations thereafter by various means of communication.

97. On 22 March 2019, the Committee extended the time limit for the Parties to transmit their agreed or proposed corrections to the transcript.

98. On 8 April 2019, the Parties submitted their proposed corrections to the English and French versions of the transcript and confirmed that they had reached an agreement on all of the corrections proposed by the Respondent. The Parties further indicated that they could not reach an agreement on a number of corrections proposed by the Applicants and, more generally, on the type of changes that could qualify as "corrections" under paragraph 20(3) of Procedural Order No. 1. In its letter of 8 April 2019, the Respondent specified the reasons why it could not agree on a number of revisions proposed by the Applicants.

99. On 11 April 2019, the Applicants responded to the Respondent's letter of 8 April 2019.

100. On 12 April 2019, the Committee took note that the Parties had reached an agreement on the corrections to the English transcript proposed by the Respondent and confirmed that the court reporter would enter these corrections into the transcripts. The Committee further ruled on the scope of the "corrections" authorised in paragraph 20(3) of Procedural Order No. 1 and fixed the time limits for the Applicants to provide their revised proposed corrections and for the Parties to liaise and revert to the Committee with their agreed or disputed revised corrections.

101. On 16 April 2019, the Applicants transmitted to the Respondent their proposed revised corrections to the transcript.

102. On 17 and 22 April 2019, the Parties exchanged their comments on the Applicants' proposed revised corrections and agreed that the transcript recording the original language used at the Hearing on Annulment should prevail over the transcript recording the interpretation.

103. On 23 April 2019, the Applicants transmitted to the Secretary of the Committee their proposed revised corrections to the transcript (in English and French) of the hearing days of 12 and 14 March 2019.

104. On 25 April 2019, the Respondent provided its comments on the Applicants' revised proposed corrections and requested the Committee to decide on the disputed issues.

105. On 29 April 2019, the Committee confirmed receipt of the Parties' correspondence regarding the revised transcript and took note of their agreement that the version of the transcript recording the language originally used at the Hearing on Annulment governs. The Committee further took note that all of the Applicants' proposed corrections included in the documents transmitted by the Applicants on 23 April 2019 not having a specific comment from Chile on the margin were to be considered as agreed between the Parties.

106. On 6 May 2019, the Respondent requested that the Committee order that the Applicants' counsel to abstain from posting comments about the case pursuant to paragraph 24 of Procedural Order No. 1. On the same date, the Applicants provided their comments on the Respondent's request.

107. On 10 May 2019, the Committee decided on the Respondent's request of 6 May 2019.

108. The Parties filed their respective submissions on costs on 15 May 2019 and their comments on the other Party's submission of costs on 30 May 2019.

109. On 11 June 2019, the Applicants requested that the Committee grant them leave to submit the decision on annulment rendered in *Mobil Exploration and Development Inc. Suc.*

*Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16) and dated 8 May 2019 (the "***Mobil v. Argentina* Decision**").

110. On 12 June 2019, the Committee invited the Respondent to comment on the Applicants' request of 11 June 2019.

111. On 18 June 2019, the Respondent provided its comments on the Applicants' request for leave to submit the *Mobil v. Argentina* Decision.

112. On 24 June 2019, the Committee (i) invited the Applicants to provide the Respondent and the Committee with an electronic copy of the *Mobil v. Argentina* Decision; and (ii) invited the Parties to provide, by July 1, 2019, their comments on whether, and to what extent, the findings of the annulment committee in the case *Mobil Exploration v. Argentina* were relevant for the decision in the present case.

113. On 25 June 2019, the Applicants provided an electronic copy of the *Mobil v. Argentina* Decision.

114. On 1 July 2019, each Party provided its comments on the findings of the committee in the case *Mobil Exploration v. Argentina*.

115. On 1 July 2019, the Respondent filed a request for clarification regarding the Stay Decision.

116. On 4 July 2019, the Committee invited the Applicants to comment on the Respondent's request for clarification regarding the Stay Decision.

117. On 8 July 2019, the Applicants submitted their comments on the Respondent's request of 1 July 2019.

118. On 9 July 2019, the Committee decided on the Respondent's request for clarification of the Stay Decision.

119. On 9 July 2019, the Centre informed the Parties that Ms. Ella Rosenberg would replace Dr. Laura Bergamini as the Committee's Secretary during Dr. Bergamini's maternity leave.

120. Following exchanges with the Parties, a corrected version of the decision on the Respondent's request for clarification of the Stay Decision was sent to the Parties on 15 July 2019.

121. On 27 August 2019, the Committee ruled upon the disputed revised corrections to the transcript.[18]

122. In accordance with Arbitration Rules 53 and 38(1), the Annulment Proceeding was declared closed on 11 September 2019.

123. On 4 December 2019, the Applicants requested leave to submit new evidence into the record. The Committee rejected the Applicants' request on 6 December 2019.

## III. THE RESUBMISSION AWARD

### A. THE RESUBMISSION PROCEEDING

124. In this section, the Committee briefly recalls the relevant procedural background of the Resubmission Proceeding (essentially as set forth in the Resubmission Award[19] and described by the Parties in the Annulment Proceeding).

125. On 18 June 2013, the Claimants lodged, pursuant to Article 52(6) of the ICSID Convention, a new request for arbitration which was registered by the Centre on 8 July 2013. In accordance with the terms of Article 52(6), the Resubmission Tribunal was constituted on 24 December 2013, composed of Sir Franklin Berman (President), appointed by the Chairman of the Administrative Council of ICSID in accordance with Article 38 of the

[18] The final version of the transcripts (in English and French), incorporating the Parties' agreed corrections and decision of the Committee of 27 August 2019, was transmitted to the Parties and the Committee on 4 December 2019.

[19] Resubmission Award, paras. 15-40; Rectification Decision, paras. 1-22.

ICSID Convention, Professor Philippe Sands, appointed by the Claimants, and Mr. Alexis Mourre, appointed by the Respondent. Following a challenge by the Respondent, Professor Sands informed the Centre by letter of 10 January 2014 that, while rejecting the grounds for the challenge, he took the view that the proper course was to allow the proceedings to continue without distraction, and accordingly relinquished his appointment as arbitrator.

126. On 13 January 2014, following the resignation of Professor Sands, the ICSID Secretary-General notified the vacancy to the Parties and the proceeding was suspended pursuant to Arbitration Rule 10(2). On the same date, the Tribunal consented to the resignation of Professor Sands pursuant to ICSID Arbitration Rule 8(2), and on 31 January 2014, Mr. V. V. Veeder was appointed to fill the vacant place on the Tribunal in accordance with Arbitration Rule 11(1) and the Tribunal was reconstituted on that date. Mr. Paul-Jean Le Cannu was appointed Secretary of the Resubmission Tribunal on the same date, and was later replaced in that office on 13 May 2014 by Mr. Benjamin Garel. Following a proposal by the President, and with the agreement of the Parties, Dr. Gleider Hernández was appointed as Assistant to the President on 12 December 2014.

127. On 11 March 2014, the Resubmission Tribunal held its first session with the Parties by telephone.

128. On 18 May 2014, the Resubmission Tribunal issued Procedural Order No. 1 laying down the procedure for the written and oral phases of the proceeding.

129. In accordance with the provisions of Procedural Order No. 1, the following written submissions were filed: the Claimants' Memorial on 27 June 2014, the Respondent's Counter-Memorial on 27 October 2014, the Claimants' Reply on 9 January 2015, and the Respondent's Rejoinder on 9 March 2015.

130. On 10 November 2014, the Claimants submitted to the Resubmission Tribunal a request for the production of documents under Procedural Order No. 1, to which the Respondent replied on 1 December 2014. A further response by the Claimants was received on 3 December 2014, to which the Respondent responded (with the leave of the Resubmission

Tribunal) on 8 December 2014. On 16 December 2014, the Resubmission Tribunal issued Procedural Order No. 2, containing its reasoned decision on the document production requests.

131. On 9 February 2015, the Claimants sought the Resubmission Tribunal's authorisation to produce: (a) two decisions rendered on 10 January and 3 February 2015 by the Santiago court, (b) the documents obtained through the search ordered by the Santiago court in these decisions, and (c) comments on such documents. On 13 February 2015, the Respondent expressed its consent to the Claimants' requests, and indicated that it would respond to the Claimants' comments in its Rejoinder. On 16 February 2015, the Tribunal granted leave to the Claimants to produce the documents in question, together with comments upon them, by 20 February 2015. On 20 February 2015, the Claimants submitted the documents in question and comments upon them.

132. On 2 April 2015, the Resubmission Tribunal issued Procedural Order No. 3 setting out the arrangements for the oral hearing and communicating the hearing schedule.

133. From 13 to 16 April 2015, the Resubmission Tribunal held an oral hearing in London. At the conclusion of the hearing, the President set out the procedure to be followed by the Parties for the submission of statements of costs for the purposes of Arbitration Rule 28(2). On 18 and 29 May 2015 respectively, the Claimants and the Respondent filed statements of costs and the Claimants filed a supplemental statement of costs.

134. On 9 June 2015, the Resubmission Tribunal took note of certain agreed corrections to the hearing transcripts, and decided on the remaining corrections on which the Parties could not agree.

135. On 18 September 2015, the Claimants sought the Resubmission Tribunal's authorisation to introduce into the record a judgment rendered by the Supreme Court of Chile on 14 September 2015, and on 28 September 2015, the Respondent submitted its comments on this request. On 9 October 2015, the Resubmission Tribunal authorised the introduction of the judgment into the record.

136. On 17 March 2016, the Resubmission Tribunal declared the proceeding closed under Arbitration Rule 38(1).

137. On 18 July 2016, the Resubmission Tribunal informed the Parties that, in accordance with ICSID Arbitration Rule 46, it had extended for a further 60 days the period to draw up and sign the Award.

138. On 13 September 2016, the Resubmission Tribunal rendered the Resubmission Award.

139. On 18 October 2016, the Applicants wrote to the Secretary-General stating that they had discovered new evidence of a conflict of interest on the part of President Berman and Mr. Veeder. The Centre replied to the Applicants that the Resubmission Tribunal had ceased to exist.[20]

140. By letter dated 27 October 2016, the Claimants submitted a Request for Rectification of the Resubmission Award pursuant to Article 49 of the ICSID Convention (the "**Request for Rectification**"). In that same letter, the Claimants made certain requests for inquiry and disclosure by Sir Franklin Berman and Mr. Veeder, and further requested that the rectification proceeding be suspended until the tribunal called upon to interpret the First Award of 8 May 2008 in accordance with the Claimants' request of 7 October 2016 had issued its decision on interpretation.

141. By email dated 4 November 2016, the Respondent asked the Secretary-General of ICSID for four weeks to file its response regarding the proper procedure to be followed in the circumstances presented by the Claimants' submissions.

142. By email dated 5 November 2016, the Claimants opposed the Respondent's request for a four-week time period.

143. On 8 November 2016, the Acting Secretary-General of ICSID registered the Request for Rectification. By letter of the same day, the Acting Secretary-General of ICSID invited the

[20] As also recalled in Applicants' submissions before the Chairman, p. 37 (C-118).

Parties to submit to the Tribunal their proposals regarding the procedure, conduct and timetable of the rectification proceedings (the "**Rectification Proceedings**").

144. By letter dated 10 November 2016, the Claimants submitted a request for suspension of the Rectification Proceedings, pending disclosure of certain information by Sir Franklin Berman and Mr. Veeder.

145. By letter dated 16 November 2016, the Resubmission Tribunal invited the Respondent to indicate, by 30 November 2016, whether it consented to the requested rectifications.

146. By letter dated 17 November 2016, the Respondent asked the Resubmission Tribunal to order the Claimants to submit a Spanish version of the Request for Rectification, and requested a period of at least three weeks following receipt of the Spanish version of the Request for Rectification to consider and submit to the Resubmission Tribunal its position on the proposed rectifications.

147. By letter dated 18 November 2016, the Claimants reiterated their requests for disclosure dated 27 October 2016 and 10 November 2016 to the Resubmission Tribunal.

148. By letter dated 21 November 2016, the Resubmission Tribunal took note of the references in the Request for Rectification to further declarations touching the independence and impartiality of Sir Franklin Berman and Mr. Veeder, and communicated to the Parties the fact that the two arbitrators had already responded to the Secretary-General of ICSID on these questions, and had nothing further to add.

149. By a second letter dated 21 November 2016, the Resubmission Tribunal rejected the request filed by the Claimants for the suspension of the Rectification Proceedings. In the same letter, the Resubmission Tribunal requested the Claimants to provide a Spanish translation of the Request by 2 December 2016, and set the procedural timetable for the Rectification Proceedings.

150. By letter of 22 November 2016, the Claimants proposed the disqualification of Sir Franklin Berman and Mr. Veeder (the "**Challenged Arbitrators**") under Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**First Disqualification Proposal**").

151. By letter dated 29 November 2016, the Centre informed the Parties that, pursuant to ICSID Arbitration Rule 9(6), the Rectification Proceedings were suspended until the First Disqualification Proposal had been decided.

152. On 21 February 2017, the Centre transmitted to the Parties, the Decision of the Chairman of the ICSID Administrative Council to dismiss the First Disqualification Proposal. By letter of the same date, the Resubmission Tribunal notified the Parties that, in accordance with ICSID Arbitration Rule 9(6), the Rectification Proceedings were resumed on that date.

153. On 23 February and 4 March 2017, the Claimants submitted further proposals for the disqualification of Mr. Veeder and subsequently for the disqualification of Sir Franklin Berman under Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. By letter of 23 February 2017, the Resubmission Tribunal notified the Parties that, pursuant to ICSID Arbitration Rule 9(6), the Rectification Proceedings were once again suspended.

154. By letter dated 6 March 2017, the Centre informed the Parties that it was treating the Claimants' further proposals for disqualification as a proposal to disqualify a majority of the Resubmission Tribunal, to be decided simultaneously by the Chairman of the Administrative Council of ICSID in accordance with Article 58 of the ICSID Convention (the "**Second Disqualification Proposal**").

155. On 13 April 2017, the Centre informed the Parties of the Decision of the Chairman of the Administrative Council to dismiss the Second Disqualification Proposal. By letter of the same day, the Resubmission Tribunal notified the Parties that the Rectification Proceedings had resumed with immediate effect.

156. By letter dated 18 April 2017, the Tribunal notified the Parties that the procedural arrangements as set out in the letter dated 21 November 2016 would stand, subject to a

prolongation of the procedural timetable by twenty weeks to take account of the suspensions of the Rectification Proceedings as set out above.

157. By letter dated 21 April 2017, the Claimants communicated a request to the Tribunal for the discontinuance of the Rectification Proceedings under ICSID Arbitration Rule 44.

158. In an Order dated 24 April 2017, the Resubmission Tribunal set 1 May 2017 as the date for the Respondent to state its position under ICSID Arbitration Rule 44 with respect to the Claimants' request for discontinuance of the Rectification Proceedings.

159. On 6 October 2017, the Resubmission Tribunal rendered the Rectification Decision.

## B. THE PARTIES' POSITIONS BEFORE THE RESUBMISSION TRIBUNAL AND ITS DECISIONS

160. The Claimants' position before the Resubmission Tribunal is set out in detail in paragraphs 42 to 122 of the Award of 13 September 2016, and in paragraphs 37, 38, 40, 42 and 44 of the Rectification Decision of 6 October 2017.

161. In essence, the Claimants submitted that Ms. Coral Pey Grebe was the proper party of the Resubmission Proceeding (being the assignee of all of Mr. Pey Casado's rights) and claimed that the Resubmission Tribunal had jurisdiction over her under Article 25 of the ICSID Convention.[21] On the merits, the Claimants argued that the purpose of the Resubmission Proceeding was only to establish the amount of damages due to them because of the denial of justice and discrimination they suffered (which had been determined by the First Tribunal)[22] and elaborated on the calculation and quantification of those damages.[23] As relief, the Claimants an award of EUR 11,156,739.44 and USD 517,533 as well as legal costs.[24]

[21] Resubmission Award, paras. 43-48.

[22] Resubmission Award, paras. 49-52.

[23] Resubmission Award, paras. 53-119.

[24] Resubmission Award, paras. 120-122.

162. The Respondent's position before the Resubmission Tribunal is described in paragraphs 123 to 270 of the Resubmission Award, and paragraphs 39, 41, 43 and 45 of the Rectification Decision of 6 October 2017.

163. The Respondent essentially argued that Ms. Coral Pey Grebe was not a proper party to the Resubmission Proceeding (because Article 52 of the ICSID Convention provides that only the parties of the original arbitration and annulment may resubmit the dispute to the new tribunal) and that, in any case, the Resubmission Tribunal lacked jurisdiction *ratione materiae* and *personae* over her.[25] On the merits, the Respondent contested the calculations and quantifications of damages presented by the Claimants and their expert, argued that the Claimants had failed to satisfy their burden of proving damages, and objected to the admissibility of a number of the Claimants' claims.[26] Accordingly, the Respondent sought the dismissal of the Claimants' claims and an award for costs and fees.[27]

164. In the Resubmission Proceeding, the Parties lengthily discussed the scope of the Resubmission Tribunal's mandate in light of the possible *res iudicata* effect of unannulled parts of the First Award.

165. In the Resubmission Award, the Resubmission Tribunal decided as follows:

> (1) That Ms Coral Pey Grebe cannot be regarded as a claimant in her own right in these resubmission proceedings;
>
> (2) That, as has already been indicated by the First Tribunal, its formal recognition of the Claimants' rights and its finding that they were the victims of a denial of justice constitutes in itself a form of satisfaction under international law for the Respondent's breach of Article 4 of the BIT;
>
> (3) That the Claimants, bearing the relevant burden of proof, have failed to prove any further quantifiable injury to themselves caused by the breach of Article 4 as found by the First Tribunal in its Award;

[25] Resubmission Award, paras. 123-130.

[26] Resubmission Award, paras. 131-167.

[27] Resubmission Award, paras. 168-170.

> (4) That the Tribunal cannot therefore make any award to the Claimants of financial compensation on this account;
>
> (5) That the Claimants' subsidiary claim on the basis of unjust enrichment is without legal foundation;
>
> (6) That there are no grounds in the circumstances of the case for the award of moral damages either to Mr Pey Casado or to the Foundation;
>
> (7) That the arbitration costs of these resubmission proceedings are to be shared in the proportion of three quarters to be borne by the Claimants and one quarter by the Respondent, with the result that the Claimants shall reimburse to the Respondent the sum of US$159,509.43;
>
> (8) That all other claims are dismissed.[28]

166. In the Rectification Decision of 6 October 2017, the Resubmission Tribunal decided that:

> (a) Paragraphs 61, 66, and 198, and paragraph 2 of the *dispositif*, of the Resubmission Award are rectified as set out in paragraphs 52, 53, 54, and 55 above.
>
> (b) The costs incurred by the Centre in respect of these Rectification Proceedings, including the costs resulting from the associated challenges to Sir Franklin Berman and Mr Veeder, shall be borne by the Claimants and the Claimants shall therefore reimburse to the Respondent the sum of US$ 22,963.36, in addition to the amount specified in paragraph 255 of the Resubmission Award. The Tribunal makes no further order as to costs.[29]

## IV. THE PARTIES' REQUESTS FOR RELIEF IN THE ANNULMENT PROCEEDING

### A. THE APPLICANTS' REQUEST FOR RELIEF

167. In their Memorial and Reply on Annulment, the Applicants request that the Committee:

[28] Resubmission Award, para. 256 (footnotes omitted).

[29] Decision on Rectification, para. 62.

> 1. Accept this [brief], and its documents attached, seeking the annulment
>
> i. of the whole resubmission Award notified on 13 September 2016, on the grounds of Article 52(1) of the Convention, including points (a), (b), (d) and (e) thereof, [and]
>
> ii. the annulment of §§58, 61 and 62(b) of the Decision of 6 October 2017, on the grounds of points (b), (d) et (e) of Article 52(1) of the Convention;
>
> 2. Order the Republic of Chile in due course to bear the costs of this annulment proceeding and of incidental issues – such as the one that arose on 12, 15 et 16 February 2018 – along with the fees and expenses of the members of the *ad hoc* Committee, the charges for use of ICSID facilities, the translation expenses and the professional fees and expenses of [the Applicants], lawyers, experts and/or any other persons called upon to appear before the *ad hoc* Committee, and pay the relevant amounts for any other infringements established as the *ad hoc* Committee may deem fair and equitable, with compound interest.
>
> 3. Adopt any other measures that the members of the Committee consider fair and equitable in the circumstances of this case.[30]

168. In the Additional Request, the Applicants request:

> [I]n order to preserve the integrity and the fairness of the procedure, and given the nature and the seriousness of the behaviour of the Respondent State on 12, 15 and 16 February 2018, its blatant bad faith, the non-rectification of its behaviour by its representatives, but the complete contrary, its deliberate amplification, that the *ad hoc* Committee exercises its powers and that, in compliance with Rule 26 of the IBA Guidelines on party representation:

[30] Memorial on Annulment, para. 759 (courtesy translation provided by the Applicants); Reply on Annulment, Section 13 (footnotes omitted); Annulment Application, para. 288; Applicants' Submission on Costs, pp. 11 and 12 (clarifying that the Applicants also seek the annulment of paragraph 7 (on costs) of the Resubmission Award). For the sake of completeness, the Committee considers that the Applicants' request for the annulment of the entire Resubmission Award extends to the requests for annulment of specific paragraphs of the award mentioned in their briefs.

(a) That it draws appropriate conclusions in its reasonable appreciation of the judicial evidence produced, as to the evaluation of the fact that, against this evidence, on 12, 15 and 16 February 2018 Chile presented the reference made by the Claimants in their submissions as deception, and to this end, explicitly pejorative, the injunction of 24 July 2017 of the 28th Civil Court of Santiago as being vacated since October 2017;

(b) That it draws appropriate negative inferences from the attempts by Chile's representatives, with consumed effrontery, to make the *ad hoc* Committee believe, with no foundation and against all of the evidence, that the Claimants' representatives lacked professional ethics by bluntly questioning the inaccuracy of the communication of 12 February 2018 submitted by the Defendant, and that such supposed failures are abundant and proven, since the start of the arbitration, without any evidence;

(c) That it sanctions the behaviour of the Republic of Chile for its communications of 12 and 15 February and at the hearing the following day by introducing and continuously supporting inaccurate facts, infringing upon the honour and the professional integrity of the Claimants, to the point of getting the *ad hoc* Committee to warn that it was ready, after deliberation, to also take measures against them by virtue of Article 44 of the Convention, and to encourage a Claimant's counsel to rectify, at the request of Chile, an entirely founded declaration produced in a circle of public debate;

(d) Warning to which the Claimants affirm, with a clear conscience, to have never exposed itself today or in the past, exclusive of the double deception in favour of which the Defendant State designated its own qualities before the *ad hoc* Committee on 12, 15 and 16 February, which characterise more than twenty years of the present arbitration […];

(e) That it takes into account these facts in the allocation of costs of the arbitration, by indicating if needed how and to what extent they have led the Committee to a different allocation of these costs;

> (f) That it takes all other appropriate measures to preserve the fairness and integrity of the procedure.[31]

### B. THE RESPONDENT'S REQUEST FOR RELIEF

169. In the Counter-Memorial and the Rejoinder on Annulment, the Respondent requests that the Committee:

> a. [R]eject Claimants' annulment request, in its entirety;
>
> b. [O]rder Claimants to cover the costs of the Annulment Proceeding in their entirety; and
>
> c. [O]rder Claimants to reimburse Chile for the full amount of its legal fees and expenses (with interest thereon, at a rate of six-month LIBOR plus 2% per annum, starting from the date of the Committee's decision and until the date of payment).[32]

## V. RULING CONCERNING THE ADDITIONAL REQUEST

170. Besides their requests for annulment of the Resubmission Award, the Applicants made an application on 27 April 2018, reiterated in their *Réplique* of 9 November 2018,[33] asking the *ad hoc* Committee to preserve the integrity and the equity of the proceeding by sanctioning the Respondent for alleged bad faith and fraudulent behaviour in the conduct of the case. The Applicants allege that they discovered a "*modus operandi*," by which the Respondent presents inexact and untrue facts "*en vue de frustrer l'arbitrage*" in general, and in particular to induce the Committee, first, to believe that the Applicants acted against rules of professional ethics, and, second, to draw the wrong conclusions with respect to the outcome of the case.[34]

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[31] Additional Request, para. 21 (courtesy translation provided by the Applicants).

[32] Rejoinder on Annulment, para. 142. In the Counter-Memorial on Annulment, the Respondent also requested interest on the cost of the proceedings (namely, under let. b. it sought "that the Committee order Claimants to cover the costs of the present annulment proceeding, in their entirety (with interest thereon, at a rate of six-month LIBOR plus 2% per annum, starting from the date of the Committee's decision and until the date of payment)").

[33] Reply on Annulment, paras. 506-518.

[34] Additional Request, pp. 7, 18, 19; Reply on Annulment, para. 506.

171. The Applicants allege that the Respondent employed this *modus operandi* systematically but refer explicitly to its allegedly false assertion that the courts of Chile "vacated" the Applicants' request for document production, where in reality, the request was still before the Chilean courts. This alleged false information was to mislead the Committee before its own decision on the Applicants' document production request relating to the business relations between Chile and the Essex Court Chambers.[35]

172. The Applicants request that the Committee formally recognise that the Respondent's submission was fraudulent, that it draw negative inferences from this, that it state the Applicants' conduct was professionally correct, that it take the incident into consideration when making its decision on costs, and that it take all appropriate measures to guarantee the integrity and equity of the proceeding.[36]

173. The Respondent refutes the accusations and insists that its presentation was correct and that "[i]t is [the Applicants] themselves who misled the Committee, by asserting – falsely – that Chile was in violation of a court-ordered obligation to produce documents to [the Applicants]."[37]

174. The Respondent further submits that this is not the only incident where the Applicants "accuse us of lying when they have been misrepresenting this issue for ten years." The Respondent refers to a judgment of a Chilean court,[38] which – according to the Applicants – has stated *ex officio* the nullity of the Decree No. 165 of 10 February 1975 (the "**Decree No. 165**"),[39] where in reality the court has given effect to the Decree.[40]

[35] Additional Request, pp. 9 ss.; Reply on Annulment, paras. 510 ss.

[36] Additional Request, paras. 20-21.

[37] Counter-Memorial on Annulment, para. 415.

[38] Referenced under Exhibit C-282.

[39] Memorial on Annulment, para. 697.

[40] Tr. Day 2 (13 March 2019), pp. 566-568; Tr. Day 3 (14 March 2019), pp. 788-789.

175. The Respondent asserts that "we never said that the proceeding was vacated. We said the particular court order was vacated."[41]

176. The Respondent further asserts that at the time of the evidentiary hearing the case was still pending before the Chilean courts and that therefore it is still under no obligation in Chile to produce documents.[42]

177. The Respondent requests the Committee to direct the Applicants to "cease and desist from their accusations" and "to take this whole deplorable episode into account at the time of awarding costs and legal fees."[43]

178. The Committee has carefully studied the Parties' submissions regarding the Chilean proceedings and in particular the Respondent's Second Submission on Preliminary Issues, dated 12 February 2018, which is at the centre of the dispute at hand. The submission states that while the Claimants appear to argue that the Committee's intervention is "necessary to give effect to a Chilean court order," "the court order in question was vacated on procedural grounds […] and the Chilean courts currently are reviewing Claimants' assertion."[44] The text makes it clear, and the context further confirms, that the Respondent only stated that the specific order had been vacated and not the whole proceedings.

179. The Committee does not find this statement to be misleading. In any event, it has not been misled and understood that the "vacation" of one court order has not terminated the proceeding before the Chilean courts with respect to document production.

180. As to the other controversial example quoted by both Parties, *i.e.* the judgment of the 1st Civil Tribunal of Santiago, the Committee has found that the judge discussed the issue of absolute nullity of the Decree No. 165 and a possible imprescriptibility of claims for confiscation in the conditional. The judge came to the conclusion, after detailed reasoning,

[41] Tr. First Session (16 February 2018), p. 135.
[42] Counter-Memorial on Annulment, para. 418(d).
[43] Counter-Memorial on Annulment, para. 419.
[44] Chile's Second Submission on Preliminary Issues, 12 February 2018, para. 13.

that Mr. Pey Casado's claim for restitution of the Goss printing machine was time barred after 20 years. She confirmed thereby that Decree No. 165 had not been without effect under Chilean law.[45]

181. The careful analysis of the judgment leads to the conclusion that the Applicants' reference to it is not correct. At the same time, the Committee was not misled because the Applicants had exhibited the judgment and allowed for the proper appreciation.

182. Both Parties have presented their cases with vigour, passion and sometimes unevidenced speculation on the state of mind and motivation of the other Party. The Committee has no reason to consider that the Parties did not believe in the truth of these speculations. Be that as it may, the Committee does not participate in the speculations and draws no inferences from them. It can state with certainty that they have not influenced its decision, nor have they led it to assume that either Party acted unprofessionally or in bad faith. Further, both Parties have contributed to a normal and constructive procedure.

183. For these reasons, the Committee finds that the integrity of the proceeding has been safeguarded and rejects the Parties' requests for reliefs in connection with the Applicants' Additional Request.

## VI. LEGAL STANDARDS

184. The First Committee devoted a comprehensive chapter on the legal standards of the three grounds for annulment that had been asserted by the Respondent, *i.e.* a manifest excess of powers, a serious departure from a fundamental rule of procedure, and a failure to state the reasons on which the award was based.[46]

185. Both Parties made the First Committee's determination their own and refer to it repeatedly and affirmatively.[47] They have refrained from presenting repetitive textbook explanations

[45] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008 under "quinzièmement" and "seizièmement" (C-282).
[46] First Annulment Decision, paras. 63-87.
[47] Cf. for instance: Reply on Annulment, paras. 62, 111; Counter-Memorial on Annulment, paras. 147-150.

and off-the-shelf documentation and have condensed their presentations to a number of basic, widely accepted and uncontroversial principles in order to establish the legal framework of this Annulment Proceeding, even with regard to the fourth ground of annulment, which was not asserted during the First Annulment Proceeding, *i.e.* the improper constitution of the tribunal.

186. The Committee sympathises with the Parties' approach, all the more so because it subscribes to the First Committee's analysis, which the Respondent summarises as follows:

> With respect to "[t]he ground for annulment for manifest excess of powers," the First Committee stated that "this ground is meant to ensure, *inter alia*, that tribunals do not exceed their jurisdiction or fail to apply the law agreed upon by the parties." To justify annulment, "[a] tribunal (1) must do something in excess of its powers and (2) that excess must be 'manifest.' It is a dual requirement." The phrase "excess of powers" would include an "inappropriate [] exercis[e] of jurisdiction (or failure to exercise jurisdiction); and [a] fail[ure] to apply the proper law." Nevertheless, "there is an important distinction between a failure to apply the proper law[,] which is a ground for annulment, and an incorrect or erroneous application of that law, which is not a ground for annulment." For its part, the term "manifest" means "sufficiently clear and serious." If the tribunal's conclusions "'seem tenable and not arbitrary, they do not constitute [a] manifest excess of powers'"
>
> Regarding the second ground for annulment — "that there has been a serious departure from [a] fundamental rule[] of procedure" – the First Committee "agree[d] with Chile that this ground involves a three-part test: (i) the procedural rule must be fundamental; (ii) the Tribunal must have departed from it; and (iii) the departure must have been serious." The ***first*** part of the test requires identification of "procedural rules that are essential to the integrity of the arbitral process and must be observed by all ICSID tribunals. The parties agree that such rules include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias." The ***second*** part (*i.e.*, the "departure" prong) "requires that the Committee examine the full record, including the Transcripts and the Award [,] to determine whether or not the Tribunal violated

> the rule in question." The ***third*** part of the test — the "seriousness" prong — requires "that the applicant must demonstrate 'the impact that the issue may have had on the award.'" The committee must "enquire whether, if the rule had been observed, there is a distinct possibility (a 'chance') that it may have made a difference on a critical issue."
>
> The First Committee also stated that, in addition to the above three prongs, there is a fourth, waiver-related issue to consider: "Pursuant to ICSID Arbitration Rules 27 and 53, a party may lose its right to object on the ground of a serious departure from a fundamental rule of procedure if it has failed to raise its objection to the tribunal's procedure upon becoming aware of it, or 'promptly' as mentioned in Rule 27."
>
> With respect to the issue of "failure to state reasons," the First Committee endorsed the statement of the *Vivendi I* committee to the effect that "'Article 52(1)(e) [of the Convention] 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.'" So long as "'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).'" Further, "'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.'" At bottom, the "[First] Committee believe[d] that as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow, whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations."[48]

The Respondent's summary also represents its position.

[48] Counter-Memorial on Annulment, paras. 147-150 (footnotes omitted; brackets in original; emphases in original).

187. The Parties not only agree with the analysis of the First Committee, they also agree that annulment proceedings are not to be equated to an appeal, which is obvious given the clear wording of Article 53(1) of the ICSID Convention.[49]

188. Beyond these fundamental principles, the Parties have discussed the following nuances.

189. With respect to the (im-)proper constitution of the tribunal (Article 52(1)(a) of the ICSID Convention), the Applicants[50] subscribe to the *ICSID Secretariat's Background Paper on Annulment*, explaining that the ground:

> [I]s intended to cover situations such as a departure from the parties' agreement on the method of constituting the Tribunal or an arbitrator's failure to meet the nationality or other requirements for becoming a member of the Tribunal[51]

as well as to Professor Schreuer who states that:

> [Q]uestions concerning the tribunal's proper constitution might arise from dissatisfaction in the manner in which challenges to arbitrators and alleged conflicts of interest have been handled. […] Appointment of an arbitrator who manifestly does not possess these qualities [as required by Art. 14(1) Convention] may be put forward as a ground for annulment.[52]

190. The Respondent does not disagree with these quotes but warns that Article 52(1)(a) is concerned with the constitution and not the composition of the tribunal.[53]

191. The Committee shares the quoted opinions. The distinction between constitution and composition has to be determined under the concrete circumstances of the case.

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[49] Memorial on Annulment, paras. 26-28; Counter-Memorial on Annulment, paras. 267-272; *see also* First Annulment Decision, paras. 87-88.

[50] Memorial on Annulment, paras. 31-35.

[51] ICSID Secretariat, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, 5 May 2016, para. 77.

[52] Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, para. 122 (RALA-0006).

[53] Rejoinder on Annulment, paras. 38-40.

192. With respect to a manifest excess of powers (Article 52(1)(b) of the ICSID Convention), the Applicants[54] expand on the First Committee's analysis by quoting decisions of previous *ad hoc* committees such as *Venezuela Holdings v. Venezuela*, which found that Article 52(1)(b) "covers the case where a tribunal exercises a judicial power which on a proper analysis had not been conferred on it (or vice versa declines to exercise a jurisdiction which it did possess)."[55] The Applicants further assert that for an excess of powers to be manifest, it must be both "obvious" and "serious."[56]

193. The Applicants assert that a tribunal commits a manifest excess of powers "*en s'élevant contre l'autorité de la chose jugée*."[57] ICSID Arbitration Rule 55(3) provides unequivocally that the "new Tribunal shall not reconsider any portion of the award not so annulled."

194. They rely on *Amco v. Indonesia (II)*, where the committee found 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." If a new Tribunal reconsiders an issue not annulled, it exceeds its power.[58]

195. The Applicants also refer to the Resubmission Tribunal in the present case, which found that "it would be a manifest excess of its own jurisdiction if the Tribunal purported to" investigate afresh issues that "had been finally determined with the quality of res judicata (or, in the French phrase used by the Committee, *'autorité de la chose jugée')*."[59]

196. The Applicants agree that a misapplication, a misinterpretation or an erroneous application of the law normally do not amount to a non-application of the proper law. However, they

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[54] Annulation Application, para. 254; Memorial on Annulment, paras. 38-57.

[55] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 ("*Venezuela Holdings v. Venezuela*"), Decision on Annulment, 9 March 2017, para. 110 (CL-306).

[56] Memorial on Annulment, paras. 50-57.

[57] Memorial on Annulment, paras. 45, 269-289.

[58] *Amco Asia Corporation and others v. Republic of Indonesia (II)*, ICSID Case No. ARB/81/1 ("*Amco v. Indonesia (II)*"), Decision on Annulment, 17 December 1992, para. 8.07 (CL-308).

[59] Resubmission Award, paras. 176, 178.

assert that in cases of egregious error – as observed in *Lahoud v. Congo* – "*une telle mauvaise application 'est d'une telle nature ou ampleur qu'elle équivaut objectivement* […] *à une non-application'.*"[60]

197. The Respondent observes that contrary to a failure to apply the proper law, an incorrect or erroneous application of that law is not a ground for annulment.[61] Further, the manifest nature of the excess of power does not refer to the seriousness of the excess or to the fundamental nature of the rule that has been violated, but to the ease with which it is perceived. For an excess of power to be "manifest," it must be perceived by the Committee without a complex analysis. Accordingly, the Applicants' alleged "contortions" *ipso facto* signal the absence of a "manifest" excess of power.[62] When a tribunal's conclusions seem tenable and not arbitrary, they do not constitute an excess of powers.[63]

198. The Committee agrees that an "*inapplication la plus absolue*" of the law which is to be applied in the circumstances of the case fulfils the requirement of an excess of power.[64] The Committee also agrees that an excess of powers that, in the words of *Soufraki v. UAE*,[65] is "textually obvious and substantively serious" is "manifest,"[66] whereas conversely, the alleged excess which is difficult to perceive even with some degree of analysis, or which has no substantively serious effect, does not qualify as "manifest."

199. With respect to a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention), the Applicants correctly expand on the First Committee's findings by specifying that "serious" and "fundamental" are cumulative requirements, so

[60] *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Democratic Republic of the Congo's Application for Annulment, 29 March 2016, para. 121 (CL-304).

[61] Counter-Memorial on Annulment, para. 147.

[62] Rejoinder on Annulment, para. 10.

[63] Counter-Memorial on Annulment, para. 147.

[64] Memorial on Annulment, paras. 47-48.

[65] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 ("*Soufraki v. UAE*"), Decision of the *ad hoc* Committee on the Request for Annulment of Mr. Soufraki, 5 June 2007, para. 40 (CL-305).

[66] Memorial on Annulment, paras. 53, 56; Reply on Annulment, paras. 318-319.

that "*l'inobservation grave d'une simple règle de procédure ne pourra conduire à l'annulation de la sentence, de même que la simple inobservation d'une règle fondamentale de procédure.*"[67]

200. They submit that fundamental rules of due process must be respected and in particular "*l'exigence d'indépendance et d'impartialité d'un tribunal, le principe d'égalité de traitement des parties, le droit à être entendu, ou encore le traitement des éléments de preuve ou de la charge de la preuve.*"[68]

201. In view of their central claims, the Applicants specify[69] that – as expressed by the *Klöckner v. Cameroon ad hoc* committee – "[i]mpartiality of an arbitrator is a fundamental and essential requirement […] any sign of partiality must be considered […] 'a serious departure from a fundamental rule of procedure,'"[70] as much so as conduct of the tribunal by which it might pretend to hear the parties' arguments and evidence but does not give them serious consideration.[71]

202. Finally, the Applicants align themselves with jurisprudence as summarised in *CDC v. Seychelles*, according to which a departure from a fundamental rule of procedure is serious:

> [W]here it is "substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide." In other words, "the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed."[72]

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[67] Memorial on Annulment, para. 60.

[68] Memorial on Annulment, paras. 648-650; Applicants rely on *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on the Request for Annulment by the Argentine Republic, 19 December 2016, para. 182.

[69] Memorial on Annulment, paras. 61-63, 648-653.

[70] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 ("*Klöckner v. Cameroon*"), Decision on Annulment, 3 May 1985, para. 95 (C-7).

[71] Reply on Annulment, paras. 210-218.

[72] *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14 ("*CDC v. Seychelles*"), Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005, para. 49 (CL-263) (footnotes omitted; brackets in original).

203. The Committee accepts the Applicants' arguments, which are not contested by the Respondent, as an expression of principle, being conscious of the fact that their application to the facts may require a certain re-calibration.

204. With respect to a failure to state the reasons on which the award is based (Article 52(1)(e) of the ICSID Convention), the Applicants follow the First Committee's position after an analysis of partly controversial annulment decisions as to "*le degré de contrôle de la motivation de la sentence.*"[73] They present, as matters of principle,[74] and the Committee agrees, that:

- the committee "has to verify the existence of reasons as well as their sufficiency – that they are adequate and sufficient reasonably to bring about the result reached by the Tribunal – but it cannot look into their correctness;"[75]

- reasons must not be frivolous or truly contradictory, whereby the contradiction must be serious enough "to vitiate the Tribunal's reasoning […] as a whole."[76]

205. The Committee is mindful of its limited role to protect the propriety and integrity of the proceeding and not to sit as a court of appeal. It is not authorised to qualify the Tribunal's reasoning as deficient, superficial or wrong, and inconsistencies between different parts of the Resubmission Award do not amount to a lack of reasons, unless the contradiction is of a kind that two arguments neutralise each other or "cancel each other out."[77]

[73] Memorial on Annulment, paras. 75-81.

[74] Memorial on Annulment, paras. 80-85.

[75] *Soufraki v. UAE*, Decision of the *ad hoc* Committee on the Request for Annulment of Mr. Soufraki, 5 June 2007, para. 131 (CL-305).

[76] *Venezuela Holdings v. Venezuela*, Decision on Annulment, 9 March 2017, para. 119 (CL-306).

[77] *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, para. 116 (C-7); *TECO Guatemala Holdings v. Republic of Guatemala*, ICSID Case No. ARB/10/23 ("*TECO v. Guatemala*"), Decision on Annulment, 5 April 2016, para. 250 (CL-316).

206. Finally, the Applicants contend that, given the seriousness of the Resubmission Tribunal's repeated violations of ICSID system's integrity and propriety, the Committee has no choice but to annul the Resubmission Award.

207. The Respondent disagrees and asserts[78] – in quoting *CDC v. Seychelles* – that "*a* Committee has discretion not to annul an Award even where a ground for annulment under Article 52(1) is found to exist."[79] This conclusion, the Respondent states, follows from Article 52(3) of the ICSID Convention which provides that *ad hoc* committees "have the authority" to annul awards, but not an obligation to do so.

208. The Respondent is conscious of certain limits to the exercise of the discretion not to annul an award, as expressed in *CEAC v. Montenegro*, where the committee held that the discretion:

> [I]s by no means unlimited and must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether they had – or could have had – a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties.[80]

209. However, the Respondent insists that the circumstances of the present case warrant upholding the Resubmission Award. It underlines that the Applicants brought the case in bad faith, never met their burden of proof for damages, rejected Chile's efforts to compensate for the injuries suffered during the military dictatorship, and have manoeuvred to keep the dispute alive for more than 20 years.[81]

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[78] Rejoinder on Annulment, para. 11.

[79] *CDC v. Seychelles*, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005, para. 37 (CL-263).

[80] *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/08, Decision on Annulment, 1 May 2018, para. 84 (RALA-0052).

[81] Rejoinder on Annulment, paras. 123-130; Tr. Day 2 (13 March 2019), pp. 308-313.

210. The Committee agrees with the position of the *CEAC* committee, which is itself in line with well-established case law,[82] that committees should not automatically declare an award annulled if one of the grounds for annulment is present but that they should exercise their authority in weighing, in particular, the gravity of the circumstances which constitute the ground for annulment and whether they had – or could have had – a material effect upon the outcome of the case. As stated by Professor Schreuer, annulment should be "contingent not only upon the presence of one of the defects listed in Article 52(1) but also upon its material impact on one or both parties."[83] This implies that the sheer duration of the proceeding cannot be taken as a criterion, in particular when both parties share the responsibility for the delays, nor the relative success of one or the other party in the previous stages.

211. The Committee will proceed in keeping these considerations in mind.

## VII. GROUNDS FOR ANNULMENT

### A. INITIAL CONSIDERATIONS

#### (1) The Background of the Dispute and Reasons of the Resubmission Tribunal

212. After the break-down of the military dictatorship and the re-establishment of democracy in Chile, Mr. Pey Casado, a Spanish citizen, returned to Chile, his second home country, from which he had been expelled by force at the beginning of the dictatorship. He sought redress for the injury and injustice inflicted upon him by turning to the Chilean government, Chilean courts, and international arbitration. These multiples *démarches*, as understandable and legitimate as they may be, are evidently not synchronised. This has necessarily contributed to the complexity of the case.

213. In this section, the Committee will set out the background and basic issues of the disputes as it sees it. They relate to the specificity and complexity of the case, which crosscut the

[82] For an overview of the evolution of the case law cf. Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, paras. 466-485 (RALA-0006).

[83] Christoph H. Schreuer, *op. cit.*, para. 485 (RALA-0006).

structure of the requests for annulment and the defences against them, and which have been present throughout the proceeding. Where appropriate, it will first make rulings on the requests for annulment.

214. During their closing statement at the Hearing on Annulment, on 14 March 2019, the Applicants explained the reasons for their perseverance in the dispute by insisting that it is the legal and moral duty of any person injured to fight for their subjective rights and to defend them and thereby objective justice against all odds, and that, by doing so, they "defend the collective interests of the international law, of law in general."[84]

215. They contend that the military *coup d'état* led by Augusto Pinochet in 1973 and the ensuing dictatorship, which ended in 1989 with the restoration of democracy, have unlawfully deprived them of their investments and use of property and caused hardship and injury to them. Personal belongings as well as business assets and shares in companies were first physically seized in 1973 *manu militari* and then by a sham administrative act, the Decree No. 165 of 10 February 1975. These unlawful and anti-constitutional acts were not capable of terminating Mr. Pey's legal title to ownership.[85]

216. Throughout the different stages of the proceedings, Decree No. 165 has been a central piece, "*un enjeu principal*"[86] of the Applicants' arguments. They assert that it had a factual, but never a legal existence since it contradicted fundamental principles of the Chilean Constitutions of all times, that, therefore, it was null and void from the beginning and could not have any legal effect, and that it has not extinguished their ownership rights. These

[84] Tr. Day 3 (14 March 2019), pp. 601, 828-830.

[85] Annulment Application, para. 237; Memorial on Annulment, paras. 293 ss., 681.

[86] Reply on Annulment, para. 136.

assertions were made before the First Tribunal,[87] before the First Committee,[88] before the Resubmission Tribunal,[89] and before the present Committee.[90]

217. The Applicants insist that as injustice has been done and its effects are still present, they have a moral and legal duty to themselves and to society to fight until justice is rendered and the injury is compensated.[91]

218. This deep conviction and indignation have led them to try every potential venue of remedies to reach the same goal: before national courts in Chile and before international arbitration tribunals, relying on both national and international laws.

219. As an interim result, Mr. Pey Casado has been compensated for the loss of his personal belongings.[92] Chilean courts rejected the claim for restitution of the Goss printing machine for being time-barred when it was brought in 1995, *i.e.* 20 years after Decree No. 165.[93] The 1st instance court did not deny the existence and effect of Decree No. 165. Rather, Mr. Pey argued before the court that the decree was "*entaché de nullité de droit public, imprescriptible [et] incurable, qui provoque son inexistence juridique.*"[94] This was disputed by the State which asserted that the decree had been enacted in accordance with constitutional provisions applicable at the time, with the consequence that Mr. Pey's request was time-barred.[95] The Court dismissed Mr. Pey's argument, reasoning that his claim was time-barred by calculating the relevant periods of time as from the enactment of Decree No. 165.[96] As to compensation for the confiscated shares in the Chilean companies

[87] *See* First Award, paras. 73 ss., 207, 447, 588 ss.

[88] First Annulment Decision, para. 348.

[89] Resubmission Award, paras. 56 ss., 141 ss., 196 ss.

[90] Annulment Application, paras. 262 ss.; Memorial on Annulment, paras. 681 ss.; Reply on Annulment, paras. 116, 135 s. and passim; Tr. Day 1 (12 March 2019), pp. 28 ss. and 49 ss.

[91] Tr. Day 3 (14 March 2019), pp. 601, 828-830.

[92] Counter-Memorial on Annulment, para. 46.

[93] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008 (C-282).

[94] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008, pp. 2 and 8 (C-282) (brackets in original).

[95] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008, pp. 4 and 5 (C-282).

[96] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008, pp. 9 and 10 (C-282).

and especially *El Clarín*, the Claimants initiated the present proceeding and informed the Chilean authorities by letter of 24 June 1999[97] that they had opted for this alternative as a "fork in the road" decision and would not pursue their claim under the Chilean compensation Law No. 19.568, dated 23 July 1998.[98]

220. The Resubmission Tribunal has rejected any pecuniary compensation although it recalls "a subsisting obligation on the Respondent […] for the redress of acknowledged past injustices."[99]

221. This statement echoes similar expectations formulated by the First Tribunal:

> *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.*
>
> *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.*[100]

222. According to the First Award, the Respondent has declared that:

> [L]*es gouvernements démocratiques qui remplacèrent en 1990, au moyen d'élection libres, le gouvernement de Pinochet, se sont primordialement préoccupés de réparer les dommages causés par le régime instauré au Chili par le coup d'état du 11 septembre 1973. En effet, le*

[97] Letter from J. Garcés to the Chilean Minister of National Assets, 24 June 1999 (RA-0054).

[98] Law No. 19.568, 12 June 1998 (RA-0053).

[99] Resubmission Award, para. 244.

[100] First Award, paras. 667-669 (footnotes omitted).

> *Gouvernement a pris les mesures pour réparer les dommages causés aux victimes dans tous les secteurs.*[101]

223. These declarations of the most diverse actors all recognise that injustice has been done and injuries were inflicted. At the same time, the Resubmission Tribunal dismissed the Applicants' request for compensation. The Applicants deduced from these seemingly contradictory findings that the Resubmission Tribunal was driven by a "systematic bias"[102] in the conduct of the proceeding, in its reasoning and finally, in its decision to the detriment of the Applicants.

224. They assert that this was only possible by systematically disregarding the binding force, the *res iudicata* effect of the non-annulled parts of the First Award,[103] and by speculating, allowing the Tribunal's position to be "*dictée par une écoute du Tribunal*" accommodating Chile's wishes.[104] The reproach is recurrent and repeated in paragraphs 55-63, 105-106 of the Reply on Annulment, in paragraphs 277, 305, 321, 335-349, 359, 397 ss., 431 ss., 468 s., 507-549, 550 ss., 558 ss., 598, 614, and 647 of the Memorial on Annulment, and in paragraphs 7, 8, 84, 174, 176-185, 200, 207 ss., 221-226, 238, 239, 250, 255 of the Annulment Application. On pages 156-181 of the Memorial on Annulment, the Applicants quote paragraphs 176, 178, 187, 195, 198, 199, 203, 211, 215, 216, 223, 232, 236, 238, 243, 244, and 286 of the Resubmission Award as examples of systematic bias amounting to a serious departure from a fundamental rule of procedure, and manifest excess of power.

225. The Applicants summarise their complaint as follows:

> *En outre, la partialité du Tribunal de Resoumission est manifeste en ce qu'il laisse entendre que le Comité* ad hoc *chargé de l'annulation n'est pas allé assez loin dans son acceptation de la demande d'annulation formulée par le Chili à l'égard de la Sentence initiale. En attaquant des aspects essentiels de la Sentence initiale où le Comité ad hoc*

[101] First Award, para. 668.

[102] Tr. Day 1 (12 March 2019), p. 151.

[103] Annulment Application, paras. 3-5.

[104] Annulment Application, para. 3.

> *n'a pas été d'accord avec le Chili sur ce qu'il y aurait eu une erreur susceptible d'entrainer l'annulation, mais a tranché en faveur des Demanderesses, le Tribunal de Resoumission s'est écarté d'une règle fondamentale de procédure, à savoir l'absence de biais.*[105]

226. The Respondent does not deny that injustice had been done during the military *coup d'état* and the dictatorship.[106] To the contrary, it contends that it deployed great efforts to compensate the people that "*had been mistreated by the Military Government*."[107]

227. The Respondent summarises its position by confirming that:

> Chile is ***not*** attempting to justify the expropriation, and is still conscious of the injury that the expropriation caused. As will be seen, however, this issue is entirely inapposite for the Committee's purposes.[108]

228. The Respondent contends that the reason for the Applicants' failure to receive compensation for the expropriation of *El Clarín* is twofold. On the one hand, they "voluntarily, consciously, and formally renounced their right to obtain reparations under Chilean law" by letter of 24 June 1999, by which they informed the Government that they made use of the "fork-in-the-road" option and pursued their claim through international arbitration.[109] On the other hand, the First Tribunal correctly "concluded that the expropriation exceeded the temporal scope of the BIT's substantive protections,"[110] that the expropriation was completed in 1975, before the entry into force of the BIT, and that compensation for expropriation could not be awarded under international law.[111]

229. The Respondent speculates about the Applicants' motivation to pursue the dispute so vigorously:

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[105] Annulment Application, paras. 243, 182 ss.; Memorial on Annulment, paras. 697 ss.

[106] Counter-Memorial on Annulment, para. 8 and paras. 38-40 in relation to the seizure of *El Clarín*.

[107] Counter-Memorial on Annulment, para. 42.

[108] Counter-Memorial on Annulment, para. 89 (emphasis in original).

[109] Counter-Memorial on Annulment, para. 63.

[110] Counter-Memorial on Annulment, para. 89.

[111] Counter-Memorial on Annulment, paras. 100 ss.

> Now, these particular Claimants are not motivated by rational economic considerations. They are motivated, obviously, by the prospect of a big payoff, but they also see inherent value in keeping this case alive, because by keeping this case alive, they keep their ideological cause in the public eye.
>
> This case continues to be very high profile in Chile. And so the longer this case goes on, the more of these hearings we have, the more it stays in the public eye; and, therefore, this case, in itself, just the actual act of continuing the case, has inherent value to them.[112]

230. To the Committee's mind, two interrelated aspects are crucial for the Applicants' refusal to accept a result that admits injustice and still denies monetary compensation, and for their conviction that the result must be tainted by systematic bias and partiality. One concerns the parallel but unsynchronised proceedings before national courts and international arbitral tribunals as well as the application or non-application of national law and international law. The other concerns the element of time, which is relevant under three headings: first, the temporal application of the BIT, second, the statute of limitations, and third, the length of Chilean court proceedings, amounting to – in the First Tribunal's *res iudicata* finding – a denial of justice and violation of the fair and equitable treatment obligation.

231. The Committee will deal with these aspects before addressing the different claims and requests for annulment one by one. It does so because their proper appreciation has repercussions for several of these claims, in particular for the allegation of a continuous manifest excess of power and a serious departure from a fundamental rule of procedure as operated through a systematic bias on the part of the Resubmission Tribunal.

### (2) The First Award and its partial confirmation by the First Committee

232. Article 10.2 of the BIT tries to prevent parallel proceedings by providing:

[112] Tr. Day 2 (13 March 2019), p. 569.

> If the dispute cannot be settled within six months of the time it was initiated by one of the Parties, it shall be submitted, at the discretion of the investor, to:
>
> - The national jurisdiction of the Contracting Party involved in the dispute; or
>
> - International arbitration in the conditions described in paragraph 3.
>
> Once the investor has submitted the dispute to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other procedure shall be final.

233. The First Tribunal found, with *res iudicata* effect that:

> *La requête d'arbitrage et la demande introduite devant le juge chilien ont donc un objet et un fondement distincts. La première consiste à demander réparation du préjudice découlant des actes de saisie et de confiscation relatifs aux sociétés CPP S.A. et EPC Ltda sur le fondement de certaines dispositions de l'API Chili-Espagne, tandis que la seconde vise la restitution d'un bien meuble bien identifié, la rotative Goss, et expressément exclu du champ du consentement à l'arbitrage, en se fondant sur le droit chilien.*[113]

234. In the end, the Applicants were not successful with their claim before national courts for the restitution of the Goss printing machine, abandoned this effort for a remedy and submitted their claim to the First Tribunal by complementing their initial request.[114]

235. Mr. Pey brought his claim before the Chilean courts on the basis of Chilean law, and the Chilean courts applied Chilean law.[115]

236. Things are more complicated with respect to the law to be applied by arbitral tribunals. Article 10.4 of the BIT provides:

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[113] First Award, para. 491.

[114] Counter-Memorial on Annulment, paras. 125-127.

[115] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008 (C-282).

> The arbitration body shall take its decision on the basis of the provisions of this Agreement, of the law of the Contracting Party that is a party to the dispute, including the rules relative to conflicts of laws, and of the terms of any specific agreements concluded in relation to investment, as well as of the principles of international law on the subject.

237. The Parties hold contradictory views on the proper law to be applied to the issues of Mr. Pey Casado's ownership of the shares in the Chilean juridical persons, of his nationality, and of his and the Foundation's investments, and of the expropriation.

238. The present *ad hoc* Committee's authority is limited to a review of the Resubmission Award. However, the Resubmission Award can only be assessed properly by setting it in the perspective of the First Award and the First Annulment Decision, which upheld important parts of it.

239. The First Tribunal did not apply the provisions of the BIT and national Chilean law cumulatively, incongruously and at random but rather differentiated its application in accordance with specific subject matters and spheres of application.

240. After a meticulous analysis of Chilean law in paragraphs 179-229 of the First Award, the First Tribunal established that Mr. Pey Casado had acquired shares of the Chilean companies CPP S.A. and EPC Ltda, incorporated under Chilean law, and that this acquisition was perfected before the expropriation was completed by Decree No. 165. It further established, in paragraphs 230-235 of the First Award, that the acquisition was a legal investment under Chilean law and thereby satisfied the criteria of an investment under Article 25 of the ICSID Convention. Finally, it established that Mr. Pey Casado transferred part of the legally acquired shares to the Foundation President Allende in accordance with "*le droit applicable à la cession (quel qu'il soit – espagnol, chilien ou autre)*" but in any event not international law.[116]

[116] First Award, para. 528.

241. For the First Tribunal, these findings are of crucial importance and it reiterates them in strategic contexts as follows in its Award:

> *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 les actions de la société CPP S.A.* (paragraph 229)
>
> *Au vu de l'ensemble des développements qui précèdent, le Tribunal conclut qu'il n'existait pas, dans le droit chilien en vigueur en 1972, de définition établie de l'investissement étranger et que l'opération réalisée par M. Pey Casado s'est conformée au droit chilien qui lui était applicable. En conséquence, le Tribunal considère que l'investissement de M. Pey Casado, l'achat d'actions d'une société chilienne du secteur de la presse au moyen de paiements en devises étrangères effectués sur des comptes bancaires en Europe, satisfait les conditions posées par l'API et plus particulièrement par ses articles 1(2) et 2(2).* (paragraph 411)
>
> *Sur la seconde question, celle de savoir si les investissements des demanderesses ont bénéficié d'un traitement juste et équitable, une réponse négative s'impose de l'avis du Tribunal arbitral, compte tenu des conclusions auxquelles il est parvenu précédemment aux termes de son appréciation des preuves et de son analyse juridique. En bref, il s'agit de la conclusion selon laquelle M. Pey Casado a bien démontré avoir procédé à des investissements et être propriétaire de biens meubles ou immeubles qui ont été confisqués par l'autorité militaire chilienne.*
>
> *On rappellera à ce propos l'existence d'un jugement chilien reconnaissant la propriété de M. Pey Casado sur les actions confisquées ainsi que le fait que les autorités chiliennes, exécutives et administratives (comme judiciaires) étaient informées des revendications et demandes formulées par les demanderesses.*
>
> *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*. (paragraphs 665-667)

242. The First Committee confirmed the First Tribunal's findings. It stated that the "Tribunal provided ample and indeed very detailed reasons to support its conclusions" and "that the Tribunal applied the 'proper law,' *i.e.*, Articles 1(2) and 2(2) of the BIT as well as the Chilean law to which these provisions refer."[117]

243. After having established the Claimants' ownership and investment, the First Tribunal went on to assess Chile's conduct after the *coup d'état*. It describes the seizure of Mr. Pey Casado's assets by the Chilean military forces in 1973 and the adoption of a series of laws, decrees and other normative acts, amongst which are Decree No. 165 of 10 February 1975 and Decision No. 43 of 28 April 2000. It describes the conduct and the regulatory texts as "*faits pertinents*,"[118] and it subsumes these facts under the provisions of the BIT and international law.

244. The First Tribunal considered the validity of Decree No. 165 pursuant to Chilean law for the specific purpose of determining whether the expropriation was a continuous or an instantaneous act. The Applicants argued that since the Decree was *inexistent* under Chilean law, they suffered a *de facto* expropriation which was continuous in nature, which still continued after the entry into force of the BIT and therefore fell within its temporal scope of application. The First Tribunal rejected this specific thesis of the inexistence (or nullity *ab initio*) of the Decree on the basis of an analysis of Chilean law:

> *Le Tribunal relève qu'un certain nombre de ces décrets a été annulé par les juridictions internes chiliennes.* […] *A la connaissance du Tribunal, le décret suprême n°165 est toujours en vigueur.*

And again:

> *A la connaissance du Tribunal, la validité du Décret n°165 n'a pas été remise en cause par les juridictions internes et*

[117] First Annulment Decision, paras. 148-156.

[118] First Award, paras. 585, 588-597.

> *ce décret fait toujours partie de l'ordre juridique interne chilien.*[119]

245. As a consequence thereof, the First Tribunal was not interested in qualifying Chile's acts as wrongful and unlawful, because in any event, the expropriation was completed in 1975 and could therefore not qualify as a violation of Article 5 of the BIT, which defines, as elements of a lawful expropriation, that they "must be adopted exclusively for reasons of public utility or national interest pursuant to constitutional and legal provisions, and shall in no case be discriminatory." The Tribunal held that "[l]*es biens des sociétés CPP S.A. et EPC Ltda ont fait l'objet d'une expropriation définitive en 1975*" executed by the cumulative acts of the seizure by the military in 1973 and the adoption of Decree No. 165[120], that *"l'expropriation dont se plaignent les demanderesses doit être qualifiée d'acte instantané, antérieur à la date d'entrée en vigueur de l'API,"* that in 1975, with the adoption of Decree No. 165 "*l'expropriation était consommée,* ***quelle que soit l'appréciation que l'on peut porter sur sa licéité****,"*[121] and that it is "*impossible d'exproprier deux fois de suite les mêmes biens.*"[122]

246. The First Tribunal's determination in this matter implicitly followed the Articles on State Responsibility, which the First Tribunal mentioned in other respects.[123] Article 14 of the Articles on State Responsibility provides that "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." In a Commentary, the International Law Commission argues that "[e]xceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act." The norm and

[119] First Award, paras. 593, 603, 608, 622.

[120] First Award, paras. 622, 608.

[121] First Award, para. 608 (emphasis added).

[122] First Award, para. 622.

[123] First Award, fn. 585.

commentary were discussed during the Hearing.[124] Without referring to Article 14 or the Commentary but in line with its contents, the First Tribunal discussed whether an exceptional situation existed in the dispute before it. It confirmed that it did not agree that a "*violation continue*" existed under the circumstances of the case and dismissed exceptional circumstances.[125]

247. The First Tribunal left no doubt about the "*invalidité des confiscations et au devoir d'indemnisation*" and urged Chile to follow up to its own respective recognition of these facts.[126] At the same time, it reiterated:

> *Quoi qu'il en soit de la pertinence et de la valeur des éléments qui ont été retenus à cet égard en droit interne chilien, ces éléments ne peuvent prévaloir sur les considérations qui ont conduit le Tribunal arbitral aux conclusions précédemment énoncées, en application des dispositions de l'API.*[127]

248. All of this is in line with the distinction between different issues where domestic law and international law each has its own sphere of application, as described by Professor Zachary Douglas:

> Any dispute concerning the existence or extent of the rights in rem alleged to constitute an investment that arises in an investment treaty arbitration must be decided in accordance with the municipal law of the host state for this is not a dispute about evidence (facts) but a dispute about legal entitlements. When the issue becomes the international validity of certain acts of the host state which have prejudiced the investor's legal entitlements under municipal law, then international law applies exclusively.[128]

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[124] Tr. Day 3 (14 March 2019), pp. 790 ss.; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press 2002 (RL-034).

[125] First Award, paras. 605-606.

[126] First Award, para. 667.

[127] First Award, para. 669.

[128] Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press 2009, para. 115 (RL-035).

249. The First Committee confirmed the finality of the Tribunal's assessment.[129] It rejected the Claimants' request to re-open the debate on the effect of the Chilean Constitution as time-barred.[130]

250. In conclusion, the First Tribunal, the First Committee, the Applicants and the Respondent agreed that Mr. Pey Casado was expropriated in violation of Chilean law. Notwithstanding this consensus, compensation for this illegal seizure has not been granted, as a result of the combined effects of (i) the rejection of a claim for illegal expropriation under international law by the First Tribunal because it fell outside the temporal scope of the BIT; (ii) the rejection of the claim for the restitution of the Goss machine by a Chilean court because it was time-barred; and (iii) Mr. Pey Casado's decision to bring the claims before an ICSID tribunal thus excluding national remedies in accordance with the "fork-in-the road" provision of Article 10.2 of the BIT.

251. This result is a consequence of the interplay and application of national and international law as well as of the passage of time. With respect to international law, the First Tribunal's finding was confirmed by the First Committee as final and is thus *res iudicata*. The First Committee confirmed the finality of the First Tribunal's determination that the Applicants had no entitlement to compensation for the illicit expropriation under international law *ratione temporis*.

252. Neither the Resubmission Tribunal nor the present *ad hoc* Committee has the authority to reverse the consequence, although the Committee understands that the Applicants perceive this as an ongoing and unacceptable injustice perpetrated by a military dictatorship.

253. The First Tribunal also found that Chile had breached its obligation to treat the Claimants' investment fairly and equitably, as provided in Article 4.1 BIT. The first such violation consisted in the adoption of Decision No. 43, dated 28 April 2000, *i.e.* after the entry into force of the BIT, "*accordant des compensations – pour des raisons qui lui sont propres et*

[129] First Annulment Decision, para. 159.

[130] First Annulment Decision, paras. 346-348.

*sont restées inexpliquées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués*."[131]

254. The second violation consisted in the delay of more than seven years (1995-2002) for proceedings before the Chilean first instance court on the Claimants' request for the restitution of the Goss machine. After these seven years, the Applicants abandoned the Chilean court proceedings and submitted the dispute over the Goss machine to the First Tribunal, in complementing their original request. The Tribunal determined that the answer to the "relatively simple question" of whether the period of seven years constituted a denial of justice:

> [N]*e peut être que positive, au regard des faits établis et déjà retenus par le Tribunal arbitral, l'absence de toute décision par les tribunaux civils chiliens sur les prétentions de M. Pey Casado s'analysant en un déni de justice. En effet, l'absence de décision en première instance sur le fond des demandes des parties demanderesses pendant sept années, c'est-à-dire entre septembre 1995 et le 4 novembre 2002 (moment de l'introduction de la demande complémentaire dans la présente procédure) doit être qualifié comme un déni de justice de la part des tribunaux chiliens. En fait, des délais procéduraux importants constituent bien une des formes classiques de déni de justice*.[132]

255. The Applicants interpreted the First Tribunal's finding on a denial of justice as opening the way to the Resubmission Tribunal's granting compensation based on the injury caused by the expropriation. The issue has caused considerable debate. It is therefore appropriate to quote the Applicants' position in some detail. They insist that they "*ne fondent leur prétention sur une remise en cause du raisonnement du Tribunal arbitral initial ou des*

[131] First Award, paras. 622, 674.

[132] First Award, para. 659. The First Tribunal relies – among others – on *Robert Azinian, Kenneth Daviatian & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (CL-300 in the original proceeding), and Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press 2005.

*parties de la Sentence qui ont autorité de chose jugée.*"[133] At the same time they invite the Resubmission Tribunal to take the alleged deliberate retention into account:

> [D]*ans la détermination du préjudice résultant du déni de justice, qui doit remettre les parties dans la situation dans laquelle elles auraient dû se trouver si le déni de justice n'avait pas eu lieu. Rappelons en effet, qu'en l'absence de déni de justice, le Tribunal arbitral initial n'aurait pas pu conclure dans la Sentence que « 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.*[134]

And:

> *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 chilien, et, par voie de conséquence, que les dispositions de l'article 5 de l'API étaient inapplicables aux faits de confiscation.*
>
> *Cette tromperie fondamentale démasquée, la Défenderesse ne saurait bien évidemment pas se prévaloir de ses manœuvres procédurales subséquentes.*[135]

256. The present *ad hoc* Committee does not share the Applicants' analysis in this respect.

257. In fact, the First Tribunal took care to dissociate the issue of expropriation from the two events that in its opinion amounted to a violation of Article 4.1 BIT. The dissociation was

[133] Resubmission Memorial of 27 June 2014, para. 294 (C-8).

[134] Resubmission Memorial of 27 June 2014, para. 277 (C-8).

[135] Resubmission Memorial of 27 June 2014, para. 286-287 (C-8) (footnotes omitted; emphasis omitted).

crucial for the temporal applicability of the BIT with respect to the violations of fair and equitable treatment. In that perspective, the First Tribunal determined that Decision No. 43 granting compensation for the expropriation of *El Clarín* to individuals who were not its owners, was not an expropriatory act, since the expropriation was once and for all completed. Rather, Decision No. 43 should "*s'analyser davantage en une application discriminatoire d'une loi postérieure au traité et des droits que celle-ci a créés. Il s'agit d'une question distincte et non pas d'un fait identique à l'expropriation*."[136] The Tribunal found that Mr. Pey Casado had become the owner of the shares and an investor. The discrimination was not caused by Decree No. 165 nor any other act of seizure but by the fact that Chile had decided to compensate "*de*[s] *personnes non-propriétaires*" to the detriment and injury of the real owner.[137] It has found that this discriminatory conduct had to be considered as an unfair and unequitable treatment.[138]

258. As to the long delay of the procedure before the Chilean courts, the First Tribunal found that this delay amounted to a denial of justice and unfair and unequitable treatment, without any reference to the subject matter, *i.e.* the seizure of the Goss machine.

259. The issue of the constitutionality and nullity of Decree No. 165 was irrelevant for the adjudication by the First Tribunal of the violation of Chile's obligation to guarantee fair and equitable treatment.

260. The First Committee confirmed the violations of the fair and equitable treatment standard and insisted that the First Tribunal had correctly determined that both the execution of Decision No. 43 and the denial of justice "were completely separate and distinct from the 1975 expropriation."[139] The First Committee explicitly stated that "the duty to provide redress for violation of rights persists even if the rights as such have come to an end, as long as the relevant treaty obligation was in force for the State concerned at the time of the

[136] First Award, para. 622.
[137] First Award, paras. 629 ss.
[138] First Award, paras. 671 ss.
[139] First Annulment Decision, para. 159.

alleged breach."[140] The First Committee thus dismissed Chile's assertion that subsequent to the expropriation, there was no investment left to which the fair and equitable treatment standard could apply. At the same time, these reasons made it clear that the finding of a breach of fair and equitable treatment was not dependent on the qualification of the expropriation as a continuous fact.

261. The First Committee confirmed the finality of the First Tribunal's determination that Chile owes compensation for the violation of its obligation to guarantee fair and equitable treatment, insofar as it occurred after the entry into force of the BIT.

262. The First Award's *res iudicata* effect also prevented the Resubmission Tribunal from taking into account the Applicants' argument that absent the denial of justice, the First Tribunal could have taken account of the judgment of the Santiago court to the alleged effect that Decree No. 165 was null *ab initio* so that the expropriation was a continuous fact. Having found that the expropriation was not within the temporal scope of application of the BIT, the First Tribunal reasoned that as a logical consequence thereof, arguments and evidence concerning the expropriation could not be used to establish a prejudice resulting from the denial of fair and equitable treatment. This statement was made in Chapter VIII, paragraph 688 of the First Award. As further discussed in paragraphs 620 ss. below, the First Committee quoted this paragraph affirmatively and confirmed in paragraph 283 of its Decision that "the Tribunal expressly stated that an evaluation of the damages allegedly suffered by the Claimants as a result of the expropriation was irrelevant and that all the allegations, discussion and evidence related to such damages could not be considered by the Tribunal." The First Committee thereby made the content of paragraph 688 of the First Award its own, with the consequence that it was *res iudicata* for the Resubmission Tribunal.

[140] First Annulment Decision, para. 168 (footnotes omitted).

### (3) The Resubmission Tribunal's general appreciation of the *res iudicata* effect

263. The Resubmission Tribunal defined its role as being limited to determining "the nature of the compensation due for the breach or breaches already established by the First Tribunal" and insisted:

> [T]hat the present Tribunal is absolved from any need to investigate afresh whether there was any breach of Chile's obligations towards the Claimants in respect of the present dispute, what that breach consisted in, or whether the breach gives rise to a right to compensation. All of those matters have been predetermined by the First Award and are binding on all Parties under Article 53(1) of the ICSID Convention. Not only is there no need for the Tribunal to go into these matters, but it would be a manifest excess of its own jurisdiction if the Tribunal purported to do so. That is the express consequence of Arbitration Rule 55(3).[141]

264. It held, however, that the duty to refrain from re-determining the non-annulled portions of the First Award did not:

> [P]revent the present Tribunal from proceeding to an interpretation of the First Award for the purposes of carrying out its mandate under the ICSID Convention and the ICSID Arbitration Rules. Indeed, it could hardly be otherwise; the essence of the Tribunal's mandate consists in giving effect, in the light of the arguments marshalled by the Parties, to certain paragraphs in the dispositif of the First Award, and this the Tribunal can hardly do without first understanding what those paragraphs mean.[142]

265. In that perspective, the Resubmission Tribunal recalls that the First Tribunal had rejected claims linked to the expropriation in 1973-1975 because the temporal scope of the BIT did not cover that period and that only the breach of the Respondent's obligation to accord fair and equitable treatment, including not to deny justice, which was linked to Chile's Decision No. 43 of the year 2000 to compensate non-owners instead of Mr. Pey Casado and to the

[141] Resubmission Award, para. 178.

[142] Resubmission Award, para. 207.

long delay of Chilean court proceedings starting in 1995, was a valid basis for compensation. The Resubmission Tribunal reasons that the Claimants try to circumvent this "insuperable obstacle" by a "complex" answer which it describes as follows:

> In certain places, the Claimants contend that elements of the non-annulled parts of the First Award need to be revisited and modified by the present Tribunal. That would however (as already indicated) be well beyond the Tribunal's functions and powers under ICSID Arbitration Rule 55 and will not be further considered in this Award. The main substance of the Claimants' answer is, however, different. It consists essentially in the contention that the central consequence of the denial of justice found by the First Tribunal to exist, as a result of the delays in the proceedings before the Santiago court over the Goss press, was that they (the Claimants) were disabled from invoking a conclusive argument that Decree No. 165 was absolutely null (*ex tunc*) and as such incapable of producing any legal effects. Had they been in a position to do so, the argument continues, they (the Claimants) would either have been able to recover their confiscated property in Chile, or at the least would have been able to establish before the First Tribunal that the expropriation of this property was not an instantaneous act taking final effect in 1975, but was not in fact completed until many years later, and the result of that would have been that the expropriation did indeed fall under the jurisdiction of the First Tribunal under the BIT, contrary to the findings in the First Award.[143]

266. The Resubmission Tribunal continues its reasoning through "a brief excursus on the status of Decree No. 165 under Chilean public law" and justifies this excursus as "convenient" since the issue has "absorbed an appreciable portion of the argument between the Parties, both in the written phase and at the oral hearing." It weighs the Respondent's expert's reasoning and finds merit in the opinion that the nullity *ab initio* of a normative act should be pronounced explicitly and that the Claimants' assertions are more "of the speculative than of the operational."[144]

[143] Resubmission Award, para. 196.

[144] Resubmission Award, para. 197.

267. The Resubmission Tribunal then considers that it "sees no need to go further into the matter as it has concluded that, even if the Claimants were able to establish the proposition for which they have been arguing, it would have no material bearing on these resubmission proceedings."[145] This is due to the possible consequences with respect to remedies which might result from the status of Decree No. 165:

> As the Tribunal sees it, there are only two: one is that the First Tribunal was wrong in its finding that the expropriation was excluded *ratione temporis* from the scope of the BIT; the other is that what amounted in effect (if not in form) to the expropriation took place with Decision No. 43. Each of these has figured, in various forms, in the submissions of the Claimants in the course of these resubmission proceedings. Both of them, however, encounter insuperable difficulties. As to the first, the Tribunal is in no doubt that the First Tribunal, although it used slightly different forms of words in different parts of its Award, was of the view that the expropriation was completed (*fait consommé*) with the physical seizure in 1975 and thus fell outside the scope of the BIT. More to the point, however, the present Tribunal is simply not empowered to hear an appeal against that finding, or to substitute a view of its own for that of the First Tribunal, or to award any relief of any kind whatsoever on that account. As to the second (i.e. that the effective expropriation did not take place until Decision No. 43), it is also in its turn incompatible with the First Tribunal's findings as to the chronology of the expropriation, but it is equally incompatible with Decision No. 43 itself, the whole tenor of which is that it was an award of compensation in respect of a confiscation *that had already occurred*. The Tribunal's final observation before leaving the subject, is that, if the alleged nullity under Chilean law of Decree No. 165 did indeed have decisive significance, the consequence would surely be that the investment continued to be, in law, the property of Mr Pey Casado and/or the Foundation – the remedy for which could lie in the domestic sphere but clearly not before this Tribunal in these resubmission proceedings.[146]

[145] Resubmission Award, para. 198.

[146] Resubmission Award, para. 198 (emphasis omitted; emphasis in original).

268. In other words, the Resubmission Tribunal reasoned that a finding that Decree No. 165 was null *ex tunc* would serve no useful purpose in the Resubmission Proceeding, since the Resubmission Tribunal was bound by the First Tribunal's *res iudicata* finding that the expropriation was an instantaneous act occurring at the time of that decree.

269. In addition, the Resubmission Tribunal found that it was also bound by the *res iudicata* finding in the First Award that the compensation for the violation of the fair and equitable treatment standard could not be based on the value of the expropriated assets. Paragraph 230(d) of the Resubmission Award thus provides that "any assessment of injury and damage based on the original expropriation is inconsistent with the First Award and must therefore be rejected."[147] This is discussed in more detail in paragraphs 661-672 below.

**(4) The Parties' positions before this Committee**

270. The anti-constitutionality, the illegality and the absolute nullity *ex tunc* of Decree No. 165 remain central elements in the Applicants' claim, "*la question la plus essentielle des échanges dans le cadre de la procédure en resoumission*."[148] They assert that this has been definitely established by the Chilean courts and is *res iudicata* between the Parties. As a consequence, the Applicants have never lost their status as legal owners and the confiscation in 1973 and 1975 was restricted to a purely physical seizure, to a *de facto* but not to a *de iure* confiscation:[149]

> *Comme il ressort des §§665-674 de la Sentence initiale, de la décision d'un Tribunal de Justice de Santiago du 29 mai 1995, des articles de la Constitution du Chili d'application directe et impérative tels qu'interprétés par la Cour Suprême, les Demanderesses continuent aujourd'hui à être les propriétaires légaux de tous les biens et droits du Groupe Clarin.*[150]

[147] Resubmission Award, para. 228 is to the same effect.

[148] Reply on Annulment, para. 79.

[149] Annulment Application, paras. 237, 259; Tr. Day 3 (14 March 2019), pp. 611-614.

[150] Memorial on Annulment, para 681 (footnotes omitted).

271. The Applicants further assert that they did not ask the Resubmission Tribunal to correct the First Tribunal's determination on the temporal scope of the BIT and the exclusion of a claim for compensation for the expropriation "*d'un iota*."[151] They have not found an error in the First Tribunal's reasoning with respect to Decree No. 165 at the time of the Award because at that time, the Tribunal "*avait estimé devoir s'aligner sur l'hypothèse de sa validité en droit interne*."[152]

272. Rather, they consider first that the First Tribunal granted a claim for compensation under Article 4 BIT and not under Article 5 because it had found that Chile had acted unfairly and unequitably in compensating non-owners instead of Mr. Pey Casado after the confiscation and its uncontested illegality, and second that the denial of justice had prevented the Applicants from proving the continuous character of the expropriation.[153] To this end, they quote in their Memorial on Annulment from their Resubmission Reply of 9 January 2015:

> *En effet, le déni de justice a consisté en ce que les Demanderesses ont été privées de la preuve des rapports de droits de leur investissement avec l'Etat du Chili. L'effacement des effets du déni de justice ne consiste pas à dire ce que le Tribunal arbitral initial aurait décidé, mais à statuer aujourd'hui en connaissance de cause au lieu et place du Tribunal arbitral initial, puisque cette partie de la décision a été annulée*.[154]

273. The Applicants assert that the Resubmission Tribunal:

- manipulated and denaturalized the Claimants' submissions with respect to the First Tribunal's arguments and findings in order to accommodate the Respondent's wishes, which amounts to a lack of impartiality and bias and represents a serious departure from

[151] Annulment Application, para. 263; Memorial on Annulment, paras. 4, 317, 697.

[152] Annulment Application, para. 209; Reply on Annulment, para. 135.

[153] Annulment Application, para. 260.

[154] Resubmission Reply of 9 January 2015, para. 212 (C-40); *see* Annulment Application, para. 690.

one of the most fundamental rules of procedure, *i.e.* the neutrality and impartiality of the tribunal;[155]

- failed to apply the applicable law and in particular Article 7 of the Constitution and Chilean court decisions when not treating Decree No. 165 as invalid and null *ab initio*;[156]

- contradicted itself within the structure of paragraph 198 of the Award, first by presenting a reasoning "*concernant l'application du droit applicable sur la question la plus essentielle des échanges dans le cadre de la procédure en resoumission,* [qui] *est donc limitée à une « brève digression », pourrait-on dire une remarque en passant !, ce qui en soit est contradictoire*"; and second by presenting a reasoning on the Claimants' submissions with respect to Decree No. 165 and Decision No. 43 that the Claimants have never made, these contradictions amounting to a lack of reasons;[157] and

- systematically disrespected the unannulled portions of the First Award, in flagrant contradiction of ICSID Arbitration Rule 55(3), and thereby usurped an authority that it does not have and manifestly exceeded its powers.[158]

274. The Applicants submit that Subchapter III.E. ("The Status of Decree No. 165") of the Resubmission Award, and in particular its paragraph 198, crystallises the Resubmission Tribunal's erroneous and annullable reasoning by denying the injustice perpetrated by the military dictatorship and by preventing a just compensation for the illegal confiscation of the Claimants' investments, caused by unfair treatment and denial of justice. Since paragraph 198 "*constitue le point d'ancrage des paragraphes suivants de la SR,*"[159] the Applicants request that the Committee not only to annul paragraph 198 but also "*les paragraphes de la SR 216, 219, 220, 221, 224, 227-229, 23-236, 244, qui découlent,*

[155] Memorial on Annulment, para. 697.

[156] Annulment Application, paras. 254-263; Memorial on Annulment, paras. 681-696; Reply on Annulment, para. 135.

[157] Reply on Annulment, paras. 78-81.

[158] Annulment Application, paras. 189-237; Memorial on Annulment, paras. 258-583.

[159] Reply on Annulment, para. 82.

*directement ou indirectement, des 'conclusions' établies au § 198* […] *ainsi que, en consequence, les points 2-7 du Dispositif dont ils constituent le fondement et l'ensemble de la SR.*"[160]

275. The Respondent refutes the Applicants' arguments and request. It asserts that the First Tribunal determined, with *res iudicata* effect, that the expropriation was completed in 1975, *i.e.* before the entry into force of the BIT and that "none of the BIT's substantive provisions applied to the expropriation of *El Clarín*."[161] The Respondent summarises that:

> [T]he Resubmission Tribunal concluded that the Chilean law issues under discussion were irrelevant simply because what [sic] Claimants' theory about the implications of Chilean law necessarily contradicted the conclusions in the First Award. The Resubmission Tribunal therefore could not have accepted such arguments without doing violence to the First Award, which had clearly held that "the expropriation [of El Clarín] was completed (fait consommé) with the physical seizure in 1975 [sic] and thus fell outside the scope of the BIT." Given that conclusion, Claimants' theories about Decree No. 165 were irrelevant, since the issue of whether or not the expropriation was a continuing one or not - for purposes of the BIT and of international law - did not depend on the legal status of Decree No. 165 under Chilean law. […] Accordingly, there was no need for the Resubmission Tribunal to take any decision or make any pronouncement on the Chilean law issues that had been raised by Claimants. The tribunal's handling of the applicable law issues was therefore unimpeachable.[162]

276. The Respondent asserts that the "*Claimants' arguments did not persuade the Resubmission Tribunal*" and that it is inadmissible to substitute the Resubmission Tribunal's determination by another one, which would necessarily amount to an appeal.[163]

[160] Reply on Annulment, para. 84; Memorial on Annulment, paras. 681-696.

[161] Counter-Memorial on Annulment, para. 399.

[162] Counter-Memorial on Annulment, para. 406 (footnotes omitted).

[163] Reply on Annulment, para. 108.

### (5) The Committee's Analysis

277. The Committee will address the asserted grounds for annulment in the subsequent sections of this Decision. In the context of these initial considerations, it will analyse the Resubmission Tribunal's reasoning and findings with a view to determining whether it was systematically biased in favour of Chile as alleged by the Applicants. Two indicators in that sense would be a denaturalization of the Applicants' submissions and a disrespect of the First Tribunal's adjudication in order to accommodate Chile's interests, thereby disregarding the injustice perpetrated by the military dictatorship through the violent seizure of the Applicants' investments and the ensuing adoption of an illegal, anti-constitutional and absolutely invalid sham normative act, Decree No. 165, again as alleged by the Applicants.

278. In that perspective, the Committee has juxtaposed and compared the arguments and findings of the First Tribunal as far as they were confirmed as final by the First Committee, the Resubmission Tribunal, and the Parties in relation to the qualification and relevance of Decree No. 165. After a careful analysis, it has found that the Resubmission Tribunal has not denaturalized the Applicants' submissions and has not reconsidered the non-annulled portions of the First Award. As a consequence, it cannot confirm that the Resubmission Tribunal acted in a partial and biased manner and favoured Chile by an inappropriate reasoning with respect to this issue. The Committee will document this determination in the following paragraphs.

279. Paragraph 198 of the Resubmission Award, which the Applicants present as the "anchor" of the Tribunal's decision on the qualification of the confiscation, starts by stating that the qualification of Decree No. 165 has no "material bearing" on the proceeding. In this light, it is unclear why the Resubmission Tribunal has embarked on a long discussion on that qualification in the preceding paragraph 197. Perhaps it wanted to pay tribute to the fact that the Parties, and in particular the Applicants, had taken the issue very seriously, that it had been a dominant feature during the initial phase, the first annulment phase and the resubmission phase of the proceeding, and that the First Tribunal had not treated the matter in as much detail as it could have done.

280. Be that as it may, the Resubmission Tribunal's statement does not distort the First Tribunal's *res iudicata* findings on the content and relevance of Decree No. 165. It remains an *obiter dictum. Obiter dicta* are not grounds for annulment since they are without relevance for the decision and are not outcome-determinative. The decisive finding of the Resubmission Tribunal is the first sentence of paragraph 198 according to which none of the controversial propositions by the Parties has a "material bearing."

281. This determination dovetails the First Tribunal's finding and thus respects the *res iudicata* effect of the First Award. It had decided that the expropriation had been completed irrespective of its illegality. The Resubmission Tribunal accepts this result as *res iudicata*. It had no authority to re-open this issue. The Applicants' reproach that it has failed to apply the Chilean Constitution therefore has no legal merit. This is not a matter of whether the Constitution was part of the applicable law before the Resubmission Tribunal. The point is that the First Tribunal's *res iudicata* finding that the expropriation was an instantaneous act occurring at the date of Decree No. 165, together with its reasoning that "[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,*"[164] barred the Resubmission Tribunal from applying the Chilean Constitution so as to reach the opposite conclusion that the decree was not part of the Chilean legal order so that the expropriation was a continuous act.

282. Whatever criticism the First Tribunal's reasoning may attract, it could not be directed against the Resubmission Award. It would be concerned with the First Tribunal's finding, as confirmed as final by the First Committee.

283. The Applicants submit that the First Tribunal did not have knowledge about the nullity of Decree No. 165 and therefore decided to "*s'aligner sur l'hypothèse de sa validité en droit interne*."[165] Instead of criticizing the First Tribunal for having made a wrong decision, the

[164] First Award, para. 603.

[165] Annulment Application, para. 209; Reply on Annulment, para. 135.

Applicants asked the Resubmission Tribunal to decide anew, "*en connaissance de cause au lieu et place du Tribunal arbitral initial,*"[166] taking account also of the Chilean court decision of July 2008 which, as a consequence of the denial of justice, was rendered too late for the First Tribunal to consider.

284. However, notwithstanding the Applicants' assertion, the Chilean court decision of July 2008 did not acknowledge the absolute nullity of Decree No. 165. As already mentioned, the decision decided the opposite. Mr. Pey argued before the court that Decree No. 165 was "*entaché de nullité de droit public, imprescriptible* [et] *incurable, qui provoque son inexistence juridique.*"[167] This was disputed by the State which asserted that the decree had been enacted in accordance with constitutional provisions applicable at the time, with the consequence that Mr. Pey's request was time-barred. [168] The Court dismissed Mr. Pey's argument, reasoning that his claim was time-barred by calculating the relevant periods of time as from the enactment of the decree.[169] The Chilean court's decision therefore appears to be to the effect that Decree No. 165 did exist in the Chilean legal order. One does not see how it would have changed the First Tribunal's determination that the decree was still part of the Chilean legal order.[170]

285. In sum, therefore, by aligning itself on the First Tribunal's *res iudicata* assessment, the Resubmission Tribunal complied with its obligation pursuant to Articles 52 and 53 of the ICSID Convention and ICSID Arbitration Rule 55(3) to recognize the non-annulled parts of the First Award as final. In doing so, it did not exceed its power nor did it express bias against the Applicants.

286. *The second sentence in paragraph 198* summarises the Applicants' argument that Decree No. 165 was illegal, that the physical seizure was not a legally effective expropriation and

[166] Claimants' Resubmission Reply of 9 January 2015, para. 212 (C-40).

[167] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008, pp. 2, 8-10 (C-282) (brackets in original).

[168] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008, pp. 4-5 (C-282).

[169] Judgment of the 1st Civil Tribunal of Santiago, 24 July 2008, pp. 9-10 (C-282).

[170] First Award, para. 603.

that, therefore, the Applicants were still the legal owners of the shares and the assets. This cannot be a distortion of the Applicants' argument, since they state unequivocally that they "*continuent aujourd'hui à être les propriétaires légaux de tous les biens et droit du Groupe Clarin*."[171]

287. The Applicants further assert that the Resubmission Tribunal implies, in *the third and fourth sentence of paragraph 198*, that the Applicants brought arguments which in fact they never brought, namely that "the First Tribunal was wrong in its finding that the expropriation was excluded *ratione temporis* from the scope of the BIT" and "that what amounted in effect (if not in form) to the expropriation took place with Decision No. 43."[172]

288. As concerns the first limb of this argument, the Applicants had asked the Resubmission Tribunal to decide that Decree No. 165 was null and void *ab initio*, "*en connaissance de cause au lieu et place du Tribunal arbitral initial*."[173] This was an invitation to correct the First Tribunal's finding. Even if the Applicants exonerate the First Tribunal from having committed an error by insisting that they did not know better, they nevertheless argue that it appeared – *ex post* – "wrong" to regard Decree No. 165 as valid, and, as an alleged consequence, that the expropriation was completed. The Committee therefore does not find any evidence of bias against the Applicants in the Resubmission Tribunal's assumption that the Applicants believed that the First Tribunal "*was wrong in its finding*" and that their request in effect, albeit indirectly, amounted to requesting the Resubmission Tribunal to overturn *res iudicata* findings of the First Award.

289. Along the same lines, the Resubmission Tribunal did not distort the Applicants' request and argument that it should grant compensation for the violation of fair and equitable treatment based on the value of the expropriated assets because the denial of justice had prevented the Chilean court decision being available in time for the First Tribunal to

[171] Memorial on Annulment, para. 681.

[172] Reply on Annulment, paras. 77, 79, 80, quoting, *inter alia*, Resubmission Award, para. 198; Memorial on Annulment, paras. 687-694.

[173] Resubmission Reply of 9 January 2015, para. 212 (C-40).

consider. This request was adequately summarised by the Resubmission Tribunal at paragraph 196 of the Resubmission Award:

> [T]he central consequence of the denial of justice found by the First Tribunal to exist, as a result of the delays in the proceedings before the Santiago court over the Goss press, was that they (the Claimants) were disabled from invoking a conclusive argument that Decree No. 165 was absolutely null (*ex tunc*) and as such incapable of producing any legal effects. Had they been in a position to do so, the argument continues, they (the Claimants) would either have been able to recover their confiscated property in Chile, or **at the least would have been able to establish before the First Tribunal that the expropriation of this property was not an instantaneous act taking final effect in 1975, but was not in fact completed until many years later, and the result of that would have been that the expropriation did indeed fall under the jurisdiction of the First Tribunal under the BIT**, contrary to the findings in the First Award. From this it follows, so the Claimants' argument concludes, that the loss suffered by them arising out of the denial of justice is the loss of that right to compensation in the original arbitration, so that such loss is the one they can now claim in the present proceedings.[174]

290. The Resubmission Tribunal then – implicitly but certainly – rejected this thesis at paragraph 198 of the Resubmission Award, where it reasoned that the Applicants' position was incompatible with the First Tribunal's finding that the expropriation had been completed with the physical taking in 1975, as well as with Decision No. 43 which purported to grant compensation for an expropriation that had already occurred.[175] Accordingly, the Resubmission Tribunal did not distort the Applicants' position and neither does its handling of the request and argument evidence any bias to the detriment of the Applicants.

291. The second limb of the Applicants' argument as to the Resubmission Tribunal's alleged bias evidenced by the fourth sentence of paragraph 198 concerns the Resubmission

[174] Resubmission Award, para. 196 (emphasis added).

[175] Resubmission Award, para. 198.

Tribunal's incriminated assumption on the Applicants' conclusion on Decision No. 43. The Applicants criticise the Resubmission Tribunal for assuming that they regarded Decision No. 43 as the expropriatory act, so as to oppose it to them. However, in considering, as it does, the various "conclusions the Claimants would seek to draw […] so far as the remedies available in the present proceedings are concerned," and in observing that "[a]s the Tribunal sees it, there are only two," the Resubmission Tribunal does not seek to attribute to the Applicants a thesis which was not theirs, but considers all possible ways to make concrete the Applicants' position in a manner that might possibly warrant the granting of compensation. There is no evidence of bias in these reasons.

292. As concerns *the fifth sentence of paragraph 198* of the Resubmission Award, the Applicants had argued during the resubmission phase that the First Tribunal had considered Decree No. 165 "*faisait toujours partie de l'ordre juridique interne chilien, et, par voie de conséquence, que les dispositions de l'article 5 de l'API étaient inapplicables aux faits de confiscation.*"[176] This assertion justifies the Resubmission Tribunal's statement in the fifth sentence of paragraph 198 that the arguments with respect to the continuous character of the expropriation and the effect of Decision No. 43 "figured, in various forms, in the submissions of the Claimants in the course of these submission proceedings." The Committee does not find any basis for annulment in this statement.

293. *The sixth sentence of paragraph 198* of the Resubmission Award prepares the following sentences and mentions "insuperable difficulties" of the Applicants' proposals, as assessed by the Resubmission Tribunal. In *sentences seven and eight*, the Resubmission Tribunal summarises the First Tribunal's determination correctly that the expropriation was completed in 1975 and states that it has no authority to "hear an appeal against that finding." The Committee does not find any basis for annulment in these statements. With respect to Decision No. 43, the Resubmission Tribunal reiterates that the Claimants' conclusions do not correspond to the First Tribunal's chronology and are in themselves

[176] Resubmission Memorial of 27 June 2014, para. 286 (C-8) (footnotes omitted).

based on the completed act of expropriation. Again, these statements do not distort the First Tribunal's findings.

294. In *the last sentence of paragraph 198*, the Resubmission Tribunal makes an observation on the alleged nullity of Decree No. 165 under Chilean law.[177] The Resubmission Tribunal believes that "if the alleged nullity under Chilean law of Decree No. 165 did indeed have decisive significance, the consequence would surely be that the investment continued to be, in law, the property of Mr Pey Casado and/or the Foundation – the remedy for which could lie in the domestic sphere but clearly not before this Tribunal in these resubmission proceedings."

295. The Applicants allege that "*la conséquence de ces contradictions étant de submerger les Demanderesses dans le déni de justice le plus absolu consistant en ce que la 2ème Sentence décline (§216) en faveur de 'la sphère domestique' la compétence pour porter remède au déni par l'État Chilien, depuis le 24 mai 1995, des droits des Demanderesses sur leur investissement que la Sentence initiale a déclaré sous la protection de l'API.*"[178]

296. The Committee does not share the Applicants' analysis. The Resubmission Tribunal does not renounce exercising the powers it otherwise has in favour of the domestic sphere. In the preceding sentences of paragraph 198, and in the last sentence itself, the Resubmission Tribunal makes it explicit that, for reasons totally unrelated to any recourse the Applicants may or may not have in the domestic sphere, the Resubmission Tribunal cannot, in accordance with the applicable international law, grant the Applicants the reparation requested. Accordingly, while the Resubmission Tribunal may have been wrong in suggesting that "the remedy […] could lie in the domestic sphere," this did not constitute a denial of justice, nor did it evidence any bias to the detriment of the Applicants.

[177] Initially, the Resubmission Tribunal had referred to Decision No. 43 instead of Decree No. 165. It has rectified this to his mind "purely clerical" error in paragraph 52 of its Decision on Rectification, in accordance with the Claimants' Request for Rectification of 27 October 2016. The Committee uses the rectified version of the Resubmission Award and does not discuss the Claimants' arguments as far as they are based on the non-corrected version, as in paragraph 233 of the Annulment Application and paragraphs 76 ss. of the Reply on Annulment.

[178] Annulment Application, para. 237.

297. In fact, the Resubmission Award echoes the First Award. When discussing the compensation granted by Decision No. 43 to the non-owners instead of Mr. Pey Casado whom the First Tribunal had identified as the real owner and investor, the First Award distinguishes clearly between the spheres of domestic law and international law. It states: "[q]*uoi qu'il en soit de la pertinence et de la valeur des éléments qui ont été retenus à cet égard en droit interne chilien, ces éléments ne peuvent prévaloir sur les considérations qui ont conduit le Tribunal arbitral aux conclusions précédemment énoncées, en application des dispositions de l'API.*"[179]

298. The First Tribunal had concluded that the Applicants were entitled to compensation for the consequences of the violation of Chile's obligation to treat the Claimants fairly and equitably in adopting Decision No. 43 in 2000 but not to compensation for the internationally wrongful act of illegal expropriation. The latter was precluded in international law *ratione temporis* but not necessarily in national law. This is the reason why both tribunals have urged Chile to compensate the Claimants and to "*rétablir la légalité et réparer les dommages causés par le régime militaire*," in light of the "*invalidité des confiscations*."[180] The First Tribunal does not doubt the illegality of the expropriation under Chilean law and the entitlement to compensation under Chilean law but sees no possibility to repair the damages under international law, given the inapplicability "ratione temporis *des obligations de fonds contenues dans l'API.*"[181]

299. This is what the Resubmission Tribunal expresses in the last sentence of paragraph 198 of its Resubmission Award. It does not violate the *res iudicata* effect of the First Award but to the contrary, it abides by it. The Committee does not find partiality in a determination that respects this effect.

300. In sum, the Applicants' perception of injustice indeed results from the fact that a violent confiscation by a military regime, which is wrongful, illegal and anti-constitutional under

[179] First Award, para. 669.

[180] First Award, paras. 667-668, 669.

[181] First Award, para. 577.

national law, is not sanctioned by an international arbitral tribunal. However, to the Committee's mind, this result is not attributable to the Resubmission Tribunal but to the *res iudicata* adjudication of the First Tribunal on the applicability of the law of expropriation under international law, which itself echoed the difficulties inherent in bringing a claim on the basis of a BIT for facts originating before the BIT's entry into force.

## B. THE APPOINTMENT OF MR. ALEXIS MOURRE AND THE RESUBMISSION TRIBUNAL'S APPROACH TO THE APPLICANTS' REQUESTS FOR HIS REMOVAL

### (1) The Applicants' Position

301. The Applicants asserted three grounds for annulment relating to Mr. Mourre's appointment by Chile, and the Resubmission Tribunal's failure to take action on his removal from the Tribunal:

(a) That the Tribunal was not properly constituted (Article 52(1)(a));
(b) That the Tribunal has manifestly exceeded its powers (Article 52(1)(b)); and
(c) That there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)).

In their Reply on Annulment, the Applicants withdrew their assertion that the Tribunal failed in this respect to state the reasons on which its award is based.[182]

302. With respect to the improper constitution of the Tribunal, the Applicants submit as follows.

303. During the first arbitration Chile forfeited its right to appoint one of the arbitrators when the arbitrator it had appointed resigned without the consent of the Tribunal. The resignation triggered the application of Article 56(3) of the ICSID Convention which provides that in such circumstances the "Chairman [of the Administrative Council] shall appoint a person from the appropriate Panel to fill the resulting vacancy."

[182] Reply on Annulment, para. 260.

304. The objective of Article 56(3) of the ICSID Convention is, according to an explicatory note of the ICSID Secretariat "to lessen the possibility of a party inducing an arbitrator appointed by it to resign, so as either to enable his replacement by a more tractable person or merely to delay the proceeding."[183]

305. The objective justifies the exception of the normal principle, according to which vacancies are to be filled in the same way as the original appointments. It reflects, in the words of A. Broches, "the suspicion that the party [that made the original appointment] may not be a stranger to the resignation." It serves "not only the principles of non-frustration and expediency but also the principle of the immutability."[184]

306. In the present case, the Applicants argue, the general suspicion has materialized through Chile's conduct before the First Tribunal. Chile had to admit before the ICSID Secretariat that its party appointed arbitrator ) – in the words of the First Award:

> [A]*vait* c*ru pouvoir communiquer* [le projet de décision partielle proposé par le Président] *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. L'existence de cette violation n'est pas contestée, mais au contraire reconnue par défenderesse. Le doute subsiste seulement sur la question de savoir qui en a pris l'initiative mais il n'incombe pas au présent Tribunal arbitral de se prononcer à ce sujet, malgré les protestations et demandes présentées au CIRDI par les demanderesses*.[185]

307. Chile's conduct was qualified by the First Tribunal as "*incidents parfois incompatibles avec les usages de l'arbitrage international*."[186]

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[183] As quoted in Annulment Application, para. 63.

[184] Christoph H. Schreuer, *The ICSID Convention - A Commentary* (2nd ed.), Cambridge University Press 2009, Article 56, paras. 35, 37 (where Mr. Broches is cited) (CL-387). The Applicants rely on these texts in the Annulment Application, paras. 63-64, Reply on Annulment, paras. 296 ss., and during oral arguments: Tr. Day 1 (12 March 2019), pp. 244 s.

[185] First Award, paras. 36-37.

[186] First Award, para. 729.

308. These findings were confirmed by the First Committee. They are *res iudicata*.[187]

309. Therefore, the Applicants argue, Chile has lost its right to appoint an arbitrator for the totality of the proceeding, encompassing the Resubmission Proceeding,[188] which are but "a continuation of the original arbitration" as explicitly recognised in the Resubmission Award.[189] Instead, the right and duty to appoint the arbitrator which under normal circumstances would have been to be appointed by Chile, had from the moment of resignation been transferred to the Chairman of the Administrative Council.

310. This is also in line with ICSID Arbitration Rule 55(2)(d) according to which the Secretary-General shall, upon receipt of an annulment request, invite the parties to proceed to constitute a new Tribunal, including the same number of arbitrators, and "appointed by the same method, as the original one." Articles 50(2) and 51(3) of the ICSID Convention and ICSID Arbitration Rules 51(3) and 55(2)(d) use the terms "*tribunal initial*," "*tribunal ayant statué*," "original tribunal" and "tribunal which rendered the award" interchangeably. The reference in ICSID Arbitration Rule 55(2)(d) to the "original" Tribunal must therefore be interpreted as a reference to the Tribunal which rendered the award.[190]

311. The decisions leading to Mr. Mourre's appointment and continued membership of the Resubmission Tribunal happened against systematic objections by the Applicants against every single step and decision of the Centre, the Tribunal and Mr. Mourre.[191]

312. In sum, the Applicants assert that:

> [L]*e Centre et, par extension, le Tribunal, auraient dû prendre en compte, au moment de la constitution du tribunal de resoumission, le fait que la Défenderesse avait perdu le droit de nommer un arbitre suite à la démission de*

[187] Annulment Application, paras. 54 ss.

[188] Annulment Application, paras. 48 ss.; Memorial on Annulment, paras. 89 ss.; Reply on Annulment, paras. 257 ss.; Tr. Day 1 (12 March 2019), pp. 251 ss.

[189] Resubmission Award, para. 188.

[190] Memorial on Annulment, paras. 93-102.

[191] Annulment Application, paras. 74-85; Memorial on Annulment, paras. 114-119.

> *M. Franco au cours de la procédure initiale avec la réprobation du Tribunal initial. Le fait d'avoir autorisé la Défenderesse à procéder à la nomination d'un arbitre en la personne de M. Mourre affecte la constitution du TR d'un vice au sens de l'article 52(1)(a) de la Convention.*[192]

313. With respect to the manifest excess of power, the Applicants submit as follows.

314. First, the Resubmission Tribunal has violated ICSID Arbitration Rule 55(3) which provides that the "new Tribunal shall not reconsider any portion of the award not so annulled."

315. During the first arbitration, the Tribunal had determined that the Respondent's appointed arbitrator had acted improperly and had resigned without consent of the other arbitrators, that Chile had provoked incidents that were contrary to good international arbitration practice, and that the Chairman of the Administrative Council had filled the resulting vacancy by appointing Professor Gaillard. All these findings are *res iudicata*.

316. The Applicants argue that the Resubmission Tribunal disrespected these *res iudicata* effects of the First Award and decided anew, thus arrogating a power that it does not have:

> O*r l'arbitre ayant rempli la place du Professeur Emmanuel Gaillard, M. Alexis Mourre, a été nommé par l'État Défendeur en enfreignant l'autorité de la chose jugée de la Sentence du 8 mai 2008 , notamment celle des §§34, 35, 36, 37, 729 en rapport avec les paras. 5 à 7 du Dispositif, la décision du 25 avril 2006 du Tribunal arbitral initial et le §359(4) de la Décision du 18 décembre 2012 du Comité* ad hoc*, obligatoires pour les parties.*[193]

317. Second, the Applicants requested that the Tribunal address the question of improper appointment of Mr. Mourre when Procedural Order No. 1 was discussed. Instead of responding to this question in accordance with the authority bestowed upon it by Articles 41(1) and 44 of the ICSID Convention, the Tribunal had simply rejected the request:

[192] Reply on Annulment, paras. 311-312.

[193] Annulment Application, para. 76 (footnotes omitted); Reply on Annulment, paras. 323 ss.

> At the first session, the Claimants, while indicating that they were not proposing the disqualification of the arbitrator nominated by the Respondent, nevertheless requested the Tribunal to decide whether the arbitrator in question had been duly appointed in accordance with the Convention and Arbitration Rules, and, if not, that the Tribunal invite him to resign; whereas the Respondent maintained that the arbitrator in question had been properly appointed in accordance with Article 37(2)(b) of the Convention. In the absence of a proposal for disqualification under the Convention and Rules, the Tribunal does not feel called upon to rule on the matter.[194]

318. The Applicants submit that since a refusal to exercise authority which in fact exists constitutes as much an excess of powers as the exercise of authority which does not exist, the decision of the Tribunal "*de ne pas trancher par la voie de l'article 44 de la Convention la question relative à la nomination irrégulière de l'un des arbitres,* […] *constitue un tel excès de pouvoir manifeste*."[195]

319. With respect to a serious departure from a fundamental rule of procedure, the Applicants submit as follows.

320. The Resubmission Tribunal rejected the Applicants' request to take action on the irregularity of Mr. Mourre's appointment stating that it was for the Applicants to initiate such action by a request for disqualification in accordance with Article 57 of the ICSID Convention. Article 57 provides that the disqualification can be proposed on account of facts indicating "a manifest lack of the qualities required by paragraph (1) of Article 14," or when the arbitrator "was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."

321. However, the Applicants consistently argued that their refusal to accept the appointment of Mr. Mourre was in no way based on any of his personal qualities but on the fact that he was appointed by a party that had forfeited its right to appointment. Therefore, "*en*

[194] Draft Procedural Order No. 1, para. 2.2 (RA-0150).

[195] Reply on Annulment, para. 320.

*imposant aux Demanderesses d'avoir recours à une procédure inapplicable pour trancher la question de procédure relative à la nomination de ce troisième arbitre le Tribunal a manqué aux règles du procès équitable*."[196]

322. It seems that the Applicants extend their assertion of a serious departure from a fundamental rule of procedure to the Centre, when they submit that they "*voient dans cette décision* [to incite the Applicants to have recourse to Article 57] ***du Centre*** *et du Tribunal l'observation grave d'une règle de procedure fondamentale.*"[197]

**(2) The Respondent's Position**

323. The Respondent refutes the Claimants' request and assertions and contends that none of the grounds evoked for annulment with respect to the appointment of Mr. Mourre exists.

324. With respect to the improper constitution of the Tribunal, the Respondent submits as follows.

325. Article 52(6) of the ICSID Convention "identifies a closed list of Convention provisions that govern the process of constituting a resubmission tribunal," meaning that other Articles such as Article 56(3) are not applicable.[198] Even if the Resubmission Proceeding is the continuation of the original arbitration, the Resubmission Tribunal is not a continuation of the tribunal in the original arbitration. It is, as explicitly stated in Article 52(6) of the ICSID Convention and ICSID Arbitration Rule 55(2)(d), a new tribunal. This new tribunal must be constituted in accordance with Articles 37 to 40 of the ICSID Convention. The unambiguous language of all provisions and their purpose leave no doubt that there is no place for the application of any further norm such as Article 56(3) of the ICSID Convention, be it "by analogy or otherwise."[199]

[196] Reply on Annulment, para. 341; Tr. Day 1 (12 March 2019), pp. 250-252.

[197] Reply on Annulment, para. 336 (emphasis added).

[198] Rejoinder on Annulment, para. 25.

[199] Tr. Day 3 (14 March 2019), p. 698; Counter-Memorial on Annulment, paras. 288 ss.

326. In any event, Article 56(3) cannot apply to the constitution of a tribunal because it relates to a situation that has occurred after such constitution, *i.e.* to the resignation of an arbitrator and a "resulting" vacancy and not the situation at the outset of the constitution of the tribunal. In addition, its plain language restricts the application to one single appointment and the replacement of one particular arbitrator. The Applicants' theory that an appointing party would be deprived of its right to appoint arbitrators again in any subsequent new proceeding contradicts not only the ordinary meaning of the terms of Articles 56(3), 52(6) and 37 to 40 of the ICSID Convention but also their purpose to establish general rules for the constitution of a new tribunal, on the one hand, and react to a specific situation which has occurred thereafter, on the other.[200]

327. The Applicants interpret ICSID Arbitration Rule 55(2)(d) as governing the composition of a new tribunal upon annulment in light of ICSID Arbitration Rule 51, which is concerned with interpretation and revision. Yet, it is useful to have revising and interpreting be done by the same tribunal that rendered the award, and only if that is not possible shall a new tribunal be constituted. The constitution of a new tribunal upon annulment is inherently different.[201]

328. Therefore, the Centre and the Resubmission Tribunal respected the procedure provided for in the ICSID Convention and the ICSID Arbitration Rules related to the constitution of the Resubmission Tribunal, and "there is no basis whatsoever for Claimants' assertion that Chile was not entitled to appoint an arbitrator to the Resubmission Tribunal, and any annulment claim that rests on that premise must therefore be rejected."[202]

329. <u>With respect to the manifest excess of power, the Respondent submits as follows.</u>

330. First, the First Tribunal's explanations on the resignation of one arbitrator in paragraphs 34-37 of the First Award and the statement on Chile's alleged delay tactics in paragraph

[200] Counter-Memorial on Annulment, para. 291; Rejoinder on Annulment, paras. 21 ss.

[201] Counter-Memorial on Annulment, paras. 294-295.

[202] Rejoinder on Annulment, para. 29.

729 do not amount to a binding decision with *res iudicata* effect with respect to the appointment of an arbitrator in the Resubmission Proceeding. Therefore, neither the Centre nor the Resubmission Tribunal exceeded their power when accepting the appointment of Mr. Mourre.[203]

331. Second, the Resubmission Tribunal did not fail to exercise the authority bestowed upon it by Articles 41(1) and 44 of the ICSID Convention. It has made a ruling on its competence in accordance with Article 41(1) when it found that no action was required with respect to Mr. Mourre's appointment in the absence of a formal request for disqualification.[204]

332. Further, the Resubmission Tribunal conducted the proceeding in accordance with the ICSID Convention and the Rules, when it respected the Convention's directives that the parties constitute the tribunal in accordance with Chapter IV Section 2, "which is exactly what was done, with the Centre's blessing." Since there was no issue which was not covered by the Convention and no "lacuna," there was no place for a decision of the Tribunal as required by Article 44 of the ICSID Convention.[205]

333. With respect to a serious departure from a fundamental rule of procedure, the Respondent submits as follows.

334. The Applicants asserted that the Resubmission Tribunal, by requiring them to make an application for the disqualification of Mr. Mourre under Article 57 of the ICSID Convention, committed a serious departure from a fundamental rule of procedure simply because the application would have been inappropriate. They neither substantiated what fundamental rule of procedure was in focus besides another simple assertion that due process had not been respected nor of what the departure consisted. "This is plainly not sufficient" to apply for annulment.[206]

[203] Counter-Memorial on Annulment, paras. 305-310.
[204] Counter-Memorial on Annulment, para. 303.
[205] Counter-Memorial on Annulment, para. 304.
[206] Rejoinder on Annulment, para. 31.

335. In addition, the Respondent submits that the Resubmission Tribunal acted correctly when inviting the Applicants to make a formal application without which it would not be authorised to rule on the matter either by inviting Mr. Mourre to resign or the Chairman to appoint another arbitrator, since there "is simply no mechanism in the body of ICSID norms that enables arbitrators to fire a co-arbitrator."[207] In fact, an application in accordance with Article 57 of the ICSID Convention does not only allow for the examination of the personal qualities of an arbitrator as required according to Article 14 of the ICSID Convention but also the determination of whether "he was ineligible for appointment." That is exactly what the Applicants' complaint was about. In other words, the Tribunal's invitation to make an application under Article 57 of the ICSID Convention did not depart from a procedural rule but indicated the procedurally correct way to trigger a formal determination of the lawfulness of Mr. Mourre's appointment.[208]

## C. CHALLENGES TO SIR FRANKLIN BERMAN AND MR. V.V. VEEDER, THEIR ALLEGED MANIFEST LACK OF IMPARTIALITY, THEIR ALLEGED FAILURE TO DISCLOSE INFORMATION, TO INVESTIGATE RELEVANT FACTS AND TO ORDER THE PRODUCTION OF DOCUMENTS TO CHILE, AND THEIR ALLEGED CONDUCT AFTER THE SECOND CHALLENGE

### (1) The Applicants' Position

336. The Applicants' narrative of events, conduct, decisions and circumstances allegedly warranting the annulment of the Resubmission Award of 13 September 2016, because of the participation of Sir Franklin Berman as president and Mr. V.V. Veeder as arbitrator in the Resubmission Tribunal, covers a period starting with the appointment of Sir Franklin Berman on 24 December 2013 and Mr. Veeder on 31 January 2014,[209] continuing with:

[207] Counter-Memorial on Annulment, para. 303.

[208] Rejoinder on Annulment, para. 32.

[209] Resubmission Award, para. 28.

- the Tribunal's decision of 21 November 2016 to refuse further disclosure on President Berman's and Mr. Veeder's impartiality;[210]

- President Berman's letter of 1 March 2017 where he refuses to decide the second challenge of Mr. Veeder;[211]

- two Decisions of the Chairman of the Administrative Council of 21 February 2017 and 13 April 2017, rejecting the proposals to disqualify President Berman and M. Veeder;

and ending with a Resubmission Tribunal's decision of 15 June 2017 to reject a request for information from Chile on payments made to Essex Court Chambers.[212]

337. The Applicants assert different facts and events for different grounds for annulment:

- The appointment to and the continued membership in the Resubmission Tribunal of President Berman and Mr. V.V. Veeder amount to an improper constitution of the Tribunal (Article 52(1)(a)) of the ICSID Convention) and a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention).[213]

- The Resubmission Tribunal's decision of 21 November 2016 "*constitue une infraction grave à la règle de procédure établie à la Règle 6(2)* […] *et elle comporte l'annulabilité de la Sentence du 13 septembre 2016 pour le même motif.*"[214]

- President Berman's letter of 1 March 2017 "*constitue une inobservation grave des articles 57 et 58 de la Convention, un excès de pouvoir, une inobservation grave d'une règle fondamentale de procédure et un défaut de motifs.*"[215]

[210] ICSID Letter communicating the Decision of the Resubmission Tribunal, 21 November 2016 (C-134); *see also* Annulment Application, paras. 110-118.

[211] Letter of Sir Franklin Berman to the Secretary-General of ICSID, 1 March 2017 (C-160); *see also* Annulment Application, paras. 166-172.

[212] Claimants' Disclosure Proposal to the Resubmission Tribunal, 9 June 2017, (C-135); *see also* Annulment Application, paras. 181-184.

[213] Memorial on Annulment, para. 234; Reply on Annulment, paras. 500, 505.

[214] Annulment Application, para. 117.

[215] Annulment Application, title before para. 166.

- The Decision of the Chairman of the Administrative Council, dated 21 February 2017:

> [C]*onstitue une inobservance grave de la Règle nº 6 et un excès de pouvoir ne pouvant pas valider le vice existant dans la constitution du Tribunal arbitral dans l'étape processuelle régie par l'article 49(2) de la Convention, le manque d'impartialité et de neutralité des arbitres, et son inobservance grave des règles de procédure applicables lors du traitement de la proposition de récusation du 22 novembre 2016.*[216]

- The Decision of the Chairman of the Administrative Council, dated 13 April 2017:

> [C]*onstitue une inobservance grave des obligations établies à la Règle nº 6 et à l'art. 14(1) de la Convention, et un excès de pouvoir ne pouvant pas valider, le vice dans la constitution du Tribunal arbitral lors de l'étape processuelle régie par l'article 49(2) de la Convention, le manque de neutralité et d'impartialité de M. Veeder et l'inobservance grave des règles de procédure applicables lors du traitement de la proposition de récusation de M. Veeder du 23 février 2017.*[217]

- The Decision of the Chairman of the Administrative Council, dated 13 April 2017:

> [C]*onstitue une inobservation grave des articles 57 et 58 de la Convention, un excès de pouvoir, avec défaut de motifs, ne pouvant pas valider le vice dans la constitution du Tribunal arbitral lors de l'étape processuelle régie par l'article 49(2) de la Convention, le manque de neutralité et d'impartialité de M. Berman et l'inobservance grave des règles de procédure applicables lors du traitement des propositions de récusation de M. Berman des 28 février et 4 mars 2017.*[218]

[216] Annulment Application, para. 139.

[217] Annulment Application, para. 165; the original wording of the Application was corrected by the Applicants during the Hearing: Cf. Tr. Day 3 (14 March 2019), pp. 652-653.

[218] Annulment Application, para. 173 (emphasis omitted); the original wording of the Application was corrected by the Applicants during the Hearing: Cf. Tr. Day 3 (14 March 2019), pp. 652-653.

- The Tribunal's decision of 15 June 2017 constitutes an "*excès de pouvoir, défaut de motifs et manquement à une règle fondamentale de procedure.*"[219]

338. The Applicants assert that, in sum, all circumstances, taken together, warrant the annulment of the Resubmission Award under Article 52(1)(a), (b), (d) and (e) of the ICSID Convention cumulatively or individually.

339. With respect to the improper constitution of the Tribunal, the Applicants submit as follows.

340. Close business relations existed between Chile and Essex Court Chambers "*depuis au moins une dizaine d'années*," *i.e.* throughout the period of the Resubmission Proceeding and before and after it. It generated a significant and regular income to Essex Court Chambers of "*plusieurs millions voire dizaine de millions de dollars*," and of which President Berman and Mr. Veeder, being members, profited at least indirectly. Chile was "*un client d'importance stratégique.*"[220]

341. The fact that members of Essex Court Chambers not only acted in favour of but also against Chile is irrelevant for the appraisal because it "*n'explique ni n'excuse l'absence de révélation par MM. Veeder et Berman, ou par la Défenderesse, des liens existant entre certains membres des Essex Court Chambers et la République du Chili.*"[221]

342. These are circumstances which should have caused both to decline the appointment or to step down as members of the Resubmission Tribunal, in accordance with the "IBA Guidelines on Conflicts of Interest in International Arbitration." Theirs is the typical situation as described in Article 1.4 as part of the Non-Waivable Red List when an arbitrator derives significant financial income from advisory services that he/she or his/her law firm dispenses to a party. Essex Court Chambers must be equated to a law firm, as they

[219] Annulment Application, title before para. 176.

[220] Reply on Annulment, paras. 426-428.

[221] Reply on Annulment, paras. 386.

present themselves like a law firm where individual barristers no longer act independently.[222]

343. Even if one followed the concept of the IBA Guidelines according to which "barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers," the same Guidelines provide that "disclosure may be warranted in view of the relationships among barristers, parties or counsel."[223] In fact, both the "Waivable Red List" and the "Orange List" require full disclosure, as widely confirmed in literature and case law.[224]

344. The obligation of disclosure in situations where business relations exist is commonly accepted in case law, literature and guidelines on ethical and professional conduct of arbitrators. In that sense, the *ad hoc* committee in *Vivendi v. Argentina (II)* held – in line with other committees - that "it is for the arbitrator personally first to consider such a connection in terms of a voluntary resignation as arbitrator. Such connection must otherwise be properly disclosed to the parties through an adequate amendment of earlier declarations under Rule 6."[225]

345. This duty to disclose also extends to publicly available information since arbitrators, as explained in *Tidewater v. Venezuela*, are in a better position to gather and evaluate the accurate information than the parties who would have to conduct difficult and intrusive investigations "and rely on indirect and not always reliable sources."[226]

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[222] Memorial on Annulment, paras. 174, 183 ss.; Reply on Annulment, paras. 438-461.

[223] IBA Guidelines, Explanation to General Standard 6.

[224] Memorial on Annulment, paras. 175-201.

[225] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 ("*Vivendi v. Argentina (II)*"), Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2017, 10 August 2010, para. 226 (C-107); the Applicants also rely on *Merck Sharpe & Dohme (I.A.) LLC v. The Republic of Ecuador*, PCA Case No. AA442, Decision on Challenge to Arbitrator Judge Stephen M. Schwebel, 8 August 2012, para. 83 (C-106).

[226] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, para. 17 (C-105).

346. Under the present circumstances, two connected aspects give rise to serious and objective doubts as to President Berman's and Mr. Veeder's impartiality and independence as required by Article 14 of the ICSID Convention and the objectively grounded suspicion that they would seek to rule in Chile's favour: first, the close business relationship between Chile and Essex Court Chambers from which they profited, and second, the failure to conduct an inquiry on these connections and disclose them, which – in the words of Article 4.1 of the "IBA Rules of Ethics for International Arbitrators" – "creates an appearance of bias, and may of itself be a ground for disqualification."

347. It is true that before their appointments, both President Berman and Mr. Veeder disclosed that they are members of Essex Court Chambers, and, during the disqualification procedure before the Chairman of the Administrative Council, that they did not and should not have had knowledge about relations between Chile and other members of their Chambers. These declarations are reproduced in the Chairman's "Decision on the Proposal to Disqualify Sir Franklin Berman QC and Mr. V.V. Veeder QC" of 21 February 2017, in paragraphs 13 and 14. Such declarations are, the Applicants submit, des "*tromperie*[s]" and "*mensongère*[s]":

> *Que les arbitres n'aient pas connaissance des montants précis en cause peut se comprendre. Qu'ils prétendent n'avoir pas eu connaissance de l'intervention de leurs collègues pour la République du Chili relève en revanche de la gageure*.[227]

348. According to the Applicants, not only have President Berman and Mr. Veeder failed to make a full disclosure of their Chambers' long-standing, close, and lucrative relationship with Chile, they have stubbornly, fraudulently and in bad faith refused to start or even facilitate an in-depth inquiry into this relationship.[228]

349. This conduct leaves no doubt that both President Berman and Mr. Veeder manifestly lack the qualities required under Article 14(1) of the ICSID Convention, and that they cannot

[227] Reply on Annulment, paras. 469, 493; *see also* Annulment Application, para. 157.

[228] Annulment Application, paras. 86-174; Memorial on Annulment, paras. 204-226; Reply on Annulment, paras. 492-497.

"be relied upon to exercise independent judgment." In fact, the doubt and suspicion have amply materialized, since both arbitrators demonstrated a systematic bias in favor of Chile.

350. For these reasons, both President Berman and Mr. Veeder must be disqualified, the Resubmission Tribunal was not properly constituted and the *ad hoc* Committee must annul the Award.

351. The *ad hoc* Committee has the authority and the duty to proceed accordingly.

352. It is true that the Chairman of the Administrative Council formally rejected the request for disqualification on two occasions and for different reasons by his two Decisions "on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC" dated 21 February 2017 and 13 April 2017. It is also true that other *ad hoc* committees - for instance in *EDF v. Argentina* and *Suez v. Argentina* - have found that in such circumstances:

> [T]he role of an *ad hoc* committee is not to determine whether or not an arbitrator possesses the requisite qualities of independence and impartiality; Articles 57 and 58 entrust that function to the remaining members of the tribunal, or to the Chairman of the Administrative Council. Only if the matter is raised for the first time after the proceedings are closed does the *ad hoc* committee become the primary decision-maker in respect of this issue;[229]

and:

> [A] decision has been made on this issue [of the proper constitution of the Tribunal] in the underlying proceedings and in light of the context as well as the object and purpose of the annulment proceeding, it is not for this Committee to perform a *de novo* review of any issues decided in the underlying proceedings.[230]

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[229] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 ("*EDF v. Argentina*"), Decision on Annulment, 5 February 2016, para. 144 (C-103), referred to in Reply on Annulment, para. 360.

[230] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 ("*Suez v. Argentina*") Decision on Argentina's Application for Annulment, 5 May 2017, para. 86 (C-109), referred to in Reply on Annulment, para. 360.

353. However, under the circumstances of the present proceeding, a *de novo* determination on the disqualification and, thus, on the improper constitution of the Tribunal is required because the Chairman's Decisions:

- were taken after the Resubmission procedure;
- did not take the merits into account and concentrated on purely procedural considerations and thereby have no *res iudicata* effect, at least as far as the Decision of 21 February 2017 is concerned;
- could not take facts into consideration that emerged only after the Chairman's decisions; and
- are untenable and manifestly unreasonable.[231]

354. Both the *ad hoc* committees in *EDF v. Argentina* and *Suez v. Argentina* confirm this approach. They ruled that an *ad hoc* committee has the authority to determine the reasons for the disqualification of arbitrators anew, if the Chairman's decision "not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision."[232] Both committees have correctly dismissed the narrow approach of the *ad hoc* committee in *Azurix v. Argentina* which had held that a committee "would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention."[233] The *Azurix* approach neglects evidently the necessity to protect the ICSID system against partial and biased tribunals.[234] The broad power of *ad hoc* committees to appreciate *de novo* a challenge previously

[231] Annulment Application, paras. 129 ss.; Memorial on Annulment, paras. 130-147; Reply on Annulment, paras. 363-365.

[232] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, para. 145 (C-103); as confirmed by *Suez v. Argentina*, Decision on Argentina's Application for Annulment, 5 May 2017, para. 86 (C-109), referred to in Reply on Annulment, para. 91.

[233] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 ("*Azurix v. Argentina*"), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 280 (C-69).

[234] Annulment Application, paras. 124 ss.; Memorial on Annulment, paras. 130 ss.; Reply on Annulment, paras. 405 ss.

decided upon by the Chairman of the Administrative Council finds further support in the annulment committee's decision in *Mobil v. Argentina*. [235]

355. In the present case, both Decisions of the Chairman of the Administrative Council of 21 February 2017 and 13 April 2017 are manifestly untenable and so plainly unreasonable that no reasonable decision maker could have come to such decisions. Further, they constitute a serious departure from ICSID Arbitration Rule 6 and an excess of power, together with (in the case of the Decision of 13 April 2017) a lack of reasons.[236]

356. With respect to the Decision of 21 February 2017, which rejects the proposal to disqualify Sir Franklin Berman and Mr. Veeder for purely procedural reasons, the Chairman has simply followed Chile's biased arguments and documentation through press clippings covering a period from 2012 to 2016, according to which the relations between Chile and Essex Court Chambers were publicly known and regularly reported in the press.

357. The Chairman has taken these submissions to deduce that "*les Demanderesses auraient dû avoir connaissance du fait que certains membres des Essex Court Chambers intervenaient ou étaient intervenus par le passé pour la République du Chili au moment du déroulement de la procédure en resoumission.*"[237] In reality, the press clippings mention a number of people acting as counsel for Chile but none mentions Essex Court Chambers itself. The available information was not detailed and notorious enough to arouse doubts and suspicion and it would have been manifestly unreasonable and excessive to start a systematic inquiry on the connection of the individuals mentioned with Chile and Essex Court Chambers. Before appointing Mr. Veeder, the Applicants had searched for a person who would

[235] Applicants' Réponse au Comité *ad hoc*, 1 July 2019, p. 2, referring to *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16 ("*Mobil v. Argentina*"), Decision on the Argentine Republic's Request for Annulment, 8 May 2019, para. 44.

[236] Annulment Application, paras. 124-175; Memorial on Annulment, paras. 130-147; Reply on Annulment, paras. 367-404 ss.

[237] Reply on Annulment, para. 375.

guarantee quality, prestige and independence and be "at the level of the President,"[238] who was member of Essex Court Chambers.

358. It was not the Applicants' duty to investigate relations between Essex Court Chambers and Chile but the arbitrators' duty to disclose it.

359. Only a few days after the notification of the Resubmission Award, on 18 September 2016, the press published an article which revealed relations between Chile and a member of Essex Court Chambers, specifying that until then these relations had been kept secret ("*sigilosa*"). The Applicants acted promptly upon this information. As from 20 September 2016, they started to investigate the relations themselves, and they requested in repeated communications to the Centre, that the arbitrators conduct an in-depth inquiry into the relations, which was refused in bad faith.

360. The Chairman of the Administrative Council exceeded his powers, departed from a fundamental rule of procedure and acted unreasonably by:

- assuming that it was the Applicants' duty to conduct a conflict search;
- believing Chile's arguments, failing to examine the press clippings and to add even new ones *sua sponte* that he had never shared with the Applicants;
- not ordering Sir Franklin Berman and Mr. Veeder to make an inquiry into the relations between Chile and Essex Court Chambers;
- not taking into consideration that the relations had been kept secret and therefore out of reach of the Applicants; and
- defining the period from which to determine whether the Applicants had acted "promptly" in the sense of Rules 9 and 27 from the moment of the appointment of the arbitrators and not from the moment when the Applicants started to have access to

[238] Tr. Day 3 (14 March 2019), pp. 677 s.

secret information, which would undoubtedly lead him to understand that "*le caractère prompt de la réaction des Demanderesses est manifeste.*"[239]

361. With respect to the Chairman's Decision of 13 April 2017 rejecting the proposal to disqualify Mr. Veeder, the Applicants assert that the Chairman has blindly believed Mr. Veeder's consciously false and prejudiced statements on his motivation why he had resigned from an arbitral tribunal in a different case under circumstances similar to the ones in the present case. The Chairman has failed to appraise the Applicants' evidence proving that Mr. Veeder's intention was to occult the fact that objectively the resignation was motivated by facts identical to the facts in the present case. By not taking these facts into consideration, the Chairman reached the untenable and unreasonable decision not to disqualify Mr. Veeder.

362. Therefore, the Committee must disregard the Chairman's Decision of 13 April 2017 and annul the Resubmission Award.[240]

363. With respect to the Chairman's Decision of 13 April 2017 rejecting the proposal to disqualify Sir Franklin Berman, the Applicants assert a failure to apply the law. The Chairman has rejected the proposal to disqualify Sir Franklin, although the latter had written a letter on 1 March 2017 whereby he announced that he would abstain from fulfilling his obligations under Article 58 of the ICSID Convention. The letter evidences "*d'un défaut de motifs et d'un biais qualifié défavorable évident à l'égard de celles-ci* [the Applicants], *incompatible avec des principes fondamentaux du droit* -due process- *et le niveau d'exigence de neutralité et impartialité des articles 57, 14(1) et 42(1) en rapport avec les articles 52(1)e) et 52(1)(d) de la Convention du CIRDI.*"[241]

[239] Annulment Application, paras. 126-140; Reply on Annulment, paras. 367-404.

[240] Annulment Application, paras. 141-165.

[241] Annulment Application, para. 169; *see also* Applicants' Letter of 11 March 2017 (C-162).

364. The Centre, in a "*coïncidence immédiate,*"[242] had accepted President Berman's withdrawal from the exercise of his functions under Article 58 of the ICSID Convention and decided that the Chairman would decide the matter although nothing in the Convention authorises him to do so. This is an issue of the international *ordre public*, and the Chairman's Decision of 13 April 2017 is a manifestation of an excess of power with lack of reasons and a serious departure from Articles 57 and 58 of the ICSID Convention.[243]

365. For all these reasons, both Decisions of the Chairman of the Administrative Council are untenable, unreasonable and made in violation of basic provisions of the ICSID Convention. The *ad hoc* Committee must not take them in consideration and determine *de novo* whether President Berman and Mr. Veeder must be disqualified and, as a consequence, whether the Tribunal was not properly constituted, which is beyond doubt.

366. With respect to the manifest excess of powers, the Applicants submit as follows.

367. Five decisions constitute an excess of power and warrant the annulment of the Award based on Article 52(1)(b).

368. First, the decision of the Resubmission Tribunal, communicated by letter of 21 November 2016[244] to refuse full disclosure of the relations between Chile and Essex Court Chambers.[245]

369. Second, the decision taken by President Berman in his letter of 1 March 2017 not to fulfil his duty to participate in the procedure leading to the disqualification of Mr. Veeder, as complemented by the Decision of the Chairman of the Administrative Council, dated 13 April 2017, to take over this duty.

[242] Annulment Application, para. 171.

[243] Annulment Application, paras. 172-173.

[244] ICSID Letter communicating the Decision of the Resubmission Tribunal, 21 November 2016 (C-134).

[245] Annulment Application, headline before para. 110.

370. While President Berman refused to exercise a power which was bestowed upon him through Article 58 of the ICSID Convention, the Chairman arrogated a power that he did not have.[246]

371. The Applicants do not specify in what way the excess of power was manifest.

372. Third, the Chairman's Decision of 21 February 2017, not to disqualify President Berman and Mr. Veeder for purely procedural reasons, whereas even assuming barristers are not supposed to know the activities of other members of their Chambers, a reasonable inquiry must nevertheless be held once the relevant facts become known, "*car le devoir de* disclosure *est permanent*."[247]

373. The consequence of the excess of power manifested in this decision is that the *ad hoc* Committee must annul the Resubmission Award in accordance with Article 52(1)(b) of the ICSID Convention.[248]

374. The Applicants do not specify in what way the excess of power was manifest.

375. Fourth, the Chairman's Decision of 13 April 2017, to refuse Applicants access to the ICSID archives, where they would have found evidence on Mr. Veeder's untruthful declarations, and to reject the proposal to disqualify him without addressing the objectively pertinent issues that the Applicants had put before him.[249]

376. This conduct of the Chairman constitutes an excess of power, from which it follows that the Committee must annul the Award in accordance with Article 52(1)(b).[250]

377. The Applicants do not specify in what way the excess of power was manifest.

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[246] Annulment Application, paras. 169, 173.
[247] Annulment Application, paras. 126, 139.
[248] Annulment Application, para. 140.
[249] Annulment Application, para. 157.
[250] Annulment Application, paras. 165, 174.

378. Fifth, the decision of the Resubmission Tribunal dated 15 June 2017 to refuse the well-founded Applicants' request to order Chile to produce documents to evidence the closeness and dimension of the relations between Chile and Essex Court Chambers. Chile had refused to produce these documents on 12 April 2017 without valid reason,[251] as later stated by Chilean courts.[252]

379. The incomprehensible[253] refusal by the Resubmission Tribunal to order the production of documents in accordance with Article 43(a) of the ICSID Convention and ICSID Arbitration Rules 53/34(2)(a), which would have proven that the premises of the Chairman's Decision on the disqualification did not exist, demonstrate that "[l]*es comportements du Tribunal de Resoumission et de l'État Défendeur sont objectivement concordants en vue de préserver l'opacité des rapports entre ce dernier et les* chambers *dont sont membres deux des arbitres*."[254] In fact, the Resubmission Tribunal has acted fraudulently and outside its competence and immunity when it refused information in concertation with Chile, a strategic client of their Chambers.[255]

380. Therefore, the Committee must annul the Award in accordance with Article 52(1)(b).

381. With respect to a serious departure from a fundamental rule of procedure, the Applicants submit as follows.

382. Six decisions constitute a serious departure from a fundamental rule of procedure.

383. First, Sir Franklin Berman's and Mr. Veeder's failure to decline the appointment as President and Arbitrator respectively of the Resubmission Tribunal or to resign at a later moment, as well as the refusal to disqualify despite the close connection between Chile and Essex Court Chambers, have not only caused the improper constitution of the Tribunal but

[251] Chile's Response to President Allende Foundation's Counsel, 12 April 2017 (C-138).

[252] Annulment Application, para. 181.

[253] The Applicants rely on *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006, p. 8 (C-185).

[254] Annulment Application, para. 181.

[255] Annulment Application, paras. 182-184.

constitute, at the same time, a serious departure from one of the most fundamental rules of procedure, namely the legitimate expectation of each party that all members of a tribunal act completely independently, impartially and without bias and that no reasonable person may have a legitimate doubt as to that impartiality. The Applicants rely on *EDF v. Argentina*, where the *ad hoc* committee held:

> 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.
>
> 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).[256]

384. Second, the decision of the Resubmission Tribunal, communicated by letter of 21 November 2016, to refuse full disclosure of the relations between Chile and Essex Court Chambers "[constitue] *un manque de neutralité et d'impartialité de la part du Tribunal et de chacun de ses membres et une inobservance grave des règles de procédure applicables (Règle nº 6 en rapport avec l'article 14)1) de la Convention), sanctionnée à l'article 52(1)(a) de la Convention.*"[257]

385. Third, the Decisions of the Chairman of the Administrative Council of 21 February 2017 and 13 April 2017 with respect to the disqualification of Mr. Veeder constitute a serious departure from Article 6 of the ICSID Convention, and with respect to the disqualification of Sir Franklin Berman a serious departure from Articles 57 and 58 of the ICSID Convention. The decisions cannot validate the serious departure from procedural rules applicable during the processing of the proposals for disqualification.

[256] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, paras. 124-125 (C-103).

[257] Annulment Application, para. 123, as reiterated at para. 117. The Committee considers that the reference to Article 52(1)(a) is a clerical error.

386. Fourth, both the decision taken by Sir Franklin Berman in his letter of 1 March 2017 not to fulfil his duty to participate in the procedure leading to the disqualification of Mr. Veeder, and the complementary Decision by the Chairman of the Administrative Council, dated 13 April 2017, to take over this duty, constitute a serious departure from Article 57 and 58 of the ICSID Convention. They cannot validate the serious departure from "*des règles de procédure applicables lors du traitement des propositions de récusation de M. Berman.*"[258]

387. Fifth, the decision of the Resubmission Tribunal, dated 15 June 2017, to refuse the well-founded Applicants' request to order Chile to produce documents to evidence the closeness and dimension of the relations between Chile and Essex Court Chambers constitutes a serious departure from a fundamental rule of procedure for the same reasons that it exceeds the Tribunal's power, as shown in paragraphs 366 ss. here above.[259]

388. With respect to the failure to state the reasons on which the Award is based, the Applicants submit as follows.

389. The Resubmission Tribunal failed to state the reasons why it did not apply ICSID Arbitration Rule 6(2) despite the Applicants' repeated requests in that sense.[260]

390. In his letter of 1 March 2017, President Berman failed to state the reasons why he denied fulfilling his duty to participate in the procedure to disqualify Mr. Veeder despite repeated communications from the Applicants.[261]

391. The Chairman of the Administrative Council has failed to state the reasons why it accepted to rule on the proposal to disqualify Mr. Veeder dated 24 February 2017.[262]

[258] Annulment Application, para. 173 and headline before para. 166.
[259] Annulment Application, title before para. 176.
[260] Annulment Application, para. 123 and title before para. 86.
[261] Annulment Application, title before para. 166.
[262] Annulment Application, para. 173.

### (2) The Respondent's Position

392. The Respondent submits that the Applicants' request to annul the Resubmission Award because the Tribunal was not properly constituted (Article 52(1)(a) of the ICSID Convention) and because an award rendered by an improperly constituted Tribunal represents a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention) is without merit.[263]

393. The Respondent asserts as follows:

394. The Tribunal was properly constituted in late 2013 and beginning 2014, in accordance with Chapter IV, Section 2 of the ICSID Convention ("Constitution of the Tribunal"). Chile appointed Mr. Mourre. The Secretary-General appointed Sir Franklin Berman who had declared that he was member of Essex Court Chambers. Sir Franklin Berman's appointment having been accepted by both Parties, and the Applicants appointed Mr. Veeder, knowing full well that he, like Sir Franklin Berman, was a member of Essex Court Chambers.[264]

395. The Applicants have not objected to the constitution of the Tribunal. In reality, they contest the composition and not the constitution of the Tribunal, which is not a ground for annulment.[265]

396. Further, and more importantly, the Chairman of the Administrative Council confirmed the proper constitution of the Tribunal in two Decisions on the Applicants' repeated proposals to disqualify Sir Franklin Berman and Mr. Veeder.

397. The Applicants' request to annul the Award amounts to an appeal against the Decisions of the Chairman, which is inadmissible: "an annulment committee cannot re-open or second-

[263] Counter-Memorial on Annulment, paras. 311-336; Rejoinder on Annulment, paras. 35-53.

[264] Counter-Memorial on Annulment, paras. 163-181.

[265] Counter-Memorial on Annulment, para. 331; Rejoinder on Annulment, para. 38.

guess the legal and factual findings set forth in a challenge decision."[266] Unlike what the Applicants assert, the annulment committee in *Mobil v. Argentina* did not widen the scope of permissible review in such circumstances, but explicitly validated the approach taken by the annulment committees in *EDF v. Argentina* and *Suez v. Argentina*.[267]

398. As far as the Applicants ask the Committee to disregard the Decisions of the Chairman of the Administrative Council and decide on the disqualification *de novo*, because they are allegedly plainly unreasonable, the argument is unfounded. First, the "Challenge Decision […] was reasoned, well supported, and consistent with the jurisprudence on the timeliness of challenges."[268] Second, the Applicants' request and "theory [appear] to part from the premise that, until 18 September 2016, it simply was unknowable that certain Essex Court Chambers barristers had been representing Chile in ICJ proceedings." That is simply not true because the facts were repeatedly reported in the Chilean press and were also readily accessible on different websites. Chile's objections to disclose sensitive documents in local Chilean courts do not change the general evidence that "Chile's representation by Essex Court Chambers barristers in ICJ matters had long been public knowledge." The Chairman of the Administrative Council had based his Decision of 21 February 2017 on these facts, which is plainly reasonable.[269]

399. Under these circumstances, the Applicants' proposal to disqualify Sir Franklin and Mr. Veeder was untimely. In accordance with ICSID Arbitration Rule 9(1), it should have been made "promptly, and in any event before the proceeding is declared closed." The Respondent relies on the *EDF v. Argentina* annulment decision, where the committee found:

> [A] party which is, or should have been, aware of the facts which it claims give rise to reasonable doubt about whether an arbitrator possesses the requisite qualities of

[266] Counter-Memorial on Annulment, para. 328.

[267] Chile's submission regarding *Mobil v. Argentina* decision, 1 July 2019, pp. 1-2.

[268] Counter-Memorial on Annulment, para. 332.

[269] Rejoinder on Annulment, paras. 46, 49 (footnotes omitted); Counter-Memorial on Annulment, paras. 329-330.

> independence and impartiality has a duty to raise the issue promptly. […] A party which could have raised the matter under Articles 57 and 58 before the proceedings were declared closed but failed to do so cannot, therefore, raise it on annulment.[270]

400. In any event, Chile's representation by other Essex Court Chambers barristers in unrelated cases has not caused a conflict of interest that may shed an objective and justifiable doubt on President Berman's or Mr. Veeder's independence and impartiality. They both disclosed their membership, they both did not and were not supposed to know about the activities of other members, they both acted as self-employed sole practitioners, as explained on the Essex Court Chambers website,[271] and the Applicants did not doubt their independence when they appointed one member of Essex Court Chambers after having approved another member of the same Chambers. The Respondent quotes an eminent tribunal's conviction that there is no:

> [H]ard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case. Equally, however, there is no absolute rule to opposite effect. The justifiability of an apprehension of partiality depends on all relevant circumstances.[272]

401. In light of these considerations, there can be no doubt that there is no conflict of interest in cases where barristers from the same chambers act in different cases.[273]

402. The Applicants' reference to the IBA Guidelines on Conflicts of Interest in International Arbitration is of no avail since the Guidelines state unequivocally that "barristers' chambers should **not** be equated with law firms for the purposes of conflicts."[274]

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[270] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, para. 131 (C-103).

[271] Rejoinder on Annulment, paras. 52-53.

[272] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. 05/24, Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceeding, 6 May 2008, para. 31 (RALA-0013).

[273] Counter-Memorial on Annulment, para. 334.

[274] Counter-Memorial on Annulment, para. 335; the Respondent quotes the IBA Guidelines, Part I, Explanation A to General Standard 6 (emphasis in original).

## D. THE RESUBMISSION TRIBUNAL'S TREATMENT OF THE EVIDENCE AND BURDEN OF PROOF

### (1) The Applicants' Position

403. The Applicants have asserted three grounds for annulment relating to the Resubmission Tribunal's treatment of the evidence that they have presented regarding the damage sustained by them as a consequence of Chile's violation of the BIT and of the burden of proof in that respect:

> (a) That the Tribunal has manifestly exceeded its powers (Article 52(1)(b));
> (b) That there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and
> (c) That the Resubmission Award has failed to state the reasons on which it is based (Article 52(1)(e)).[275]

404. The Applicants argue that most of the facts and arguments presented under this heading relate at the same time to the disregard of the *res iudicata* effect of the First Award but have chosen to separate the issues. The approach does not cause inconveniences except for possible redundancies, and the Committee accepts it.

405. With respect to a manifest excess of powers, the Applicants submit as follows.

406. "[L]*e rejet des arguments et éléments de preuve présentées par les Demanderesses et se rapportant à la démonstration de leur préjudice résultant des violations identifiées par la Sentence Initiale constitue un excès de pouvoir manifeste*."[276]

407. The Applicants assert that they have consistently provided detailed and coherent arguments and evidence with regard to the damages caused by the unfair and unequitable treatment by Chile both in their written submissions and in oral presentation during the Resubmission

[275] Annulment Application, paras. 238-251; Memorial on Annulment, paras. 584-680; Reply on Annulment, paras. 146-234.

[276] Reply on Annulment, para. 147; Annulation Request, para. 239; Memorial on Annulment, para. 598.

Proceeding and through financial expertise. As summarised during the hearing before the Resubmission Tribunal on 13 April 2015:

> [N]*ous avons établi que la violation du déni de justice et l'absence de jugement de la première Chambre civile de Santiago a finalement détruit le droit à réparation des Demanderesses au titre de l'API en application de son article 5 devant le Tribunal arbitral.*
>
> *Dans ces conditions, dès lors que le dommage doit venir rétablir les Demanderesses dans la situation dans laquelle elles se seraient trouvées en l'absence de violation, et donc en l'absence de déni de justice, la position que nous défendons est que la violation de l'article 4 et le déni de justice du Chili doivent être réparés en accordant une réparation aux Demanderesses équivalente à celle qu'elles auraient dû obtenir au titre des confiscations.*[277]

408. The Resubmission Tribunal refused to take the evidence into consideration as far as it clarifies the circumstances of the violent confiscation in 1973. It reasons that:

> [I]t is *res judicata* both (positively) that the breach consists in the composite failure to accord fair and equitable treatment (including the avoidance of denial of justice), and also (negatively) that the expropriation of the original investment is outside the temporal scope of the BIT, so that all evidence and argument related to that expropriation is to be excluded as not relevant to the dispute other than as background facts.[278]

409. In reality, the First Tribunal had determined, *res iudicata*, that facts preceding the date of the BIT, *i.e.* 29 March 1994, must be taken into consideration when examining the factual context of the acts that the Applicants have qualified as violations of the BIT after its entry into force.[279]

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[277] Transcript of the hearing before the Resubmission Tribunal (13 April 2013), p. 41 (C-43); *see also* Annulment Application, para. 231.

[278] Resubmission Award, para. 217 and repeated in paras. 228 and 230.

[279] Reply on Annulment, para. 167 where the Applicants refer to First Award, paras. 611 and 612.

410. Therefore, the Resubmission Tribunal failed to exercise its power and to examine the evidence brought before it concerning "*les éléments de fait antérieurs à l'entrée en vigueur de l'API.*"[280]

411. At the same time, the Resubmission Tribunal exceeded its powers when refusing to take issues into consideration that occurred after ("*postérieur*")[281] 3 November 1997, the date of the initial request for arbitration. On another occasion, the Applicants submitted that the Tribunal has "*indûment décliné sa compétence s'agissant d'actes de déni de justice postérieurs à la Sentence Initiale,*"[282] which is 8 May 2008.

412. The Applicants observe that with respect to the denial of justice occurring after the First Award, the Resubmission Tribunal has stated that this argument falls outside of its jurisdiction, which is limited to to the dispute submitted to the First Tribunal and for which the critical date was the original Request for Arbitration:

> The Tribunal should also interpolate at this point that part of the argument addressed to it by the Claimants in these resubmission proceedings was to the effect that the actions of the Respondent, since the handing down of the First Award, constituted a new denial of justice for which compensation is due, and can be awarded in these resubmission proceedings. This is an argument that the Tribunal must reject outright. The reason is not only that allegations of that kind would have to be subjected to a proper process of evidence and proof before they could properly come to decision in an arbitral process (which indeed they would); it is quite simply that the entire argument falls plainly outside the jurisdiction of the present Tribunal, which (as already indicated) is limited, under Article 52 of the ICSID Convention and Rule 55 of the ICSID Arbitration Rules, exclusively to 'the dispute' or such parts of it as remain in being after the annulment. That can only be taken to refer to 'the dispute' that had been submitted to arbitration in the first place, the critical date for which was the Claimants' original request for arbitration. Issues arising

[280] Reply on Annulment, para. 167.

[281] Memorial on Annulment, p. 166, paras. 326, 586 ss., 669; Reply on Annulment, para. 233; Annulment Application, paras. 232-236.

[282] Memorial on Annulment, para. 570.

> between the Parties after that date – and still more so issues arising out of post-Award conduct – cannot by any stretch of the imagination fall within the scope of resubmission proceedings under the provisions cited above, and the Tribunal sees no need to say more about the matter in this Award.[283]

413. The Applicants assert that this reasoning contradicts the first Tribunal's assessment of Chile's violations of Article 4 of the BIT that is based on factual and legal elements that have occurred between 1995 and 2002, *i.e.* the proceeding before the Chilean court on the restitution of the Goss machine, and the compensation of persons other than Mr. Pey through Decision No. 43 of 28 April 2000. They reduce the Applicants' rights to present arguments and evidence referring to events after 1997.

414. This excess of power is manifest because it can be distilled without a problem by simply reading the First Award, the First Annulment Decision, the Resubmission Award and by recalling a "*besoin élémentaire: en quoi une base de chiffrage peut-elle être déclarée inexacte pour toute évaluation au prétexte qu'une prétention n'a pas été acceptée* ratione temporis."[284]

415. The Applicants rely on a commentator of the Resubmission Award, Professor Benjamin Remy, who expressed doubts as to the rejection of the evidence:

> *En revanche, elle n'interdit pas que, dans le cadre de l'examen de la demande d'indemnisation du préjudice subi du fait du déni de justice, la réalité de la confiscation soit évoquée. Plus précisément, ce préjudice consistait en une perte de chance pour l'investisseur d'obtenir gain de cause auprès des juridictions chiliennes.* […] *Il est seulement question de savoir si, au regard du seul droit chilien, la prétention formulée par l'investisseur devant les juges chiliens avait des chances de prospérer et de fixer le montant des indemnités que l'investisseur aurait pu espérer. Les éléments de preuve et les arguments relatifs aux confiscations de 1973, ainsi utilisés, ne devraient donc pas*

[283] Resubmission Award, para. 216.

[284] Memorial on Annulment, para. 620.

> *se heurter à l'autorité de la chose jugée de la sentence initiale*.[285]

416. With respect to a serious departure from fundamental rules of procedure, the Applicants submit as follows.

417. The Resubmission Tribunal has systematically accepted Chile's arguments and its negative characterisation of the First Award and the First Annulment Decision, to the detriment of the Applicants' arguments and evidence. It has underlined, in paragraph 208 of the Resubmission Award, the difficulty to understand the First Award and has regretted, in paragraph 211 of the Resubmission Award, not to be allowed to re-open the debate instead of the First Committee. The Resubmission Tribunal's conclusions were predetermined and driven by the desire to bring the dispute to an end and "*rendre inefficace l'obligation d'indemniser établie dans la Sentence initiale.*"[286] These are manifestations of partiality and bias, *i.e.* a violation of one of the most fundamental duties of arbitral tribunals.[287]

418. Further, and as an additional demonstration of bias, the Resubmission Tribunal failed to take the Applicants' evidence into account and give it serious consideration:

> *La décision décision du TR d'écarter les arguments soutenus et les preuves produites par les Demanderesses, puis de considérer que celles-ci n'ont pas satisfait à la charge de la preuve qui pesait sur elle n'est que l'aboutissement des autres manifestations du parti pris du Tribunal*.[288]

419. With respect to the failure to state the reasons on which the Award is based, the Applicants submit as follows.

420. The Applicants have submitted coherent arguments and a detailed opinion, backed by abundant case law, doctrine and expert advice, on the damage caused by Respondent's

[285] Benjamin Remy, "Chronique des sentences arbitrales", J.D.I. (Clunet), 2017, pp. 282-283.

[286] Memorial on Annulment, para. 653.

[287] Annulment Application, paras. 243-251; Memorial on Annulment, paras. 647-667; Reply on Annulment, paras. 200-234.

[288] Reply on Annulment, para. 204.

violation of its duty to treat them fairly and equitably. In particular, they have demonstrated that "*les tribunaux arbitraux ont accepté que le principe de réparation intégrale implique que l'investisseur puisse être indemnisé pour la valeur de ses biens saisis, quand bien même sa demande n'était pas fondée sur l'expropriation mais sur la violation du traitement juste et équitable après l'entrée en vigueur de l'API le 29 mars 1994.*"[289] Even the Respondent's financial expert admitted that the calculation of damages caused by unfair and unequitable treatment could be based on a fair market value and therefore lead to a quantum "*equivalent au calcul résultant d'une expropriation.*"[290]

421. In light of these presentations, the Tribunal's failure to discuss the evidence presented by the Parties and its simple affirmation that the Applicants have not discharged their burden of proof of their prejudice are "*incompréhensibles,*" "*frivoles*" et "*grossièrement insuffisants.*"[291] As correctly stated by the *ad hoc* committee in *TECO v. Guatemala*, it is inadmissible for a tribunal to:

> [S]imply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.[292]

422. In violation of its duty, the Tribunal has:

- presented only a "*résumé sommaire*" of the Applicants' pleadings;
- completely failed to discuss the Applicants' arguments and evidence;
- not quoted one of the multiple awards and decisions that the Applicants presented; and

[289] Memorial on Annulment, para. 634.

[290] Reply on Annulment, para. 190.

[291] Memorial on Annulment, paras. 636-639.

[292] *TECO v. Guatemala*, Decision on Annulment, 5 April 2016, para. 131 (CL-316).

- not at all mentioned the debate between the Applicants and the financial experts, especially with the Respondent's expert during the hearing.[293]

**(2) The Respondent's Position**

423. The Respondent refutes the Applicants' arguments and requests annulment for all three asserted grounds. It submits as follows.

424. With respect to facts, arguments and evidence *anterior* to the entry into force of the BIT in 1994, it is simply not true that the Resubmission Tribunal exceeded its powers by refusing to hear and consider the Applicants' arguments and evidence.[294] On the contrary, the Tribunal explained that it has "done its utmost to listen with careful and sympathetic attention to all of the arguments that have been brought before it by the Parties in writing and orally, without seeking to apply in advance any a priori criterion of selection as to which of them would ultimately prove relevant and material to its Award."[295]

425. In fact, the Applicants have taken full advantage of the opportunity to present their case "submitting expert reports and hundreds of exhibits and authorities – many of which addressed the very point that Claimants now say they were prevented from addressing."[296]

426. It is true that the Tribunal excluded the evidence relating to the Applicants' expropriation in 1973-1975, as explained in the Award's paragraphs 217, 228 and 230. However, in doing so, the Tribunal has not failed to exercise its jurisdiction or to apply the proper law. Rather, it has respected ICSID Arbitration Rule 55(3) obliging it not to reconsider any unannulled portion of the award, and in this perspective, the *res iudicata* findings of the First Tribunal. As a result, the Tribunal correctly explained that it had no authority to take such evidence into consideration.

[293] Reply on Annulment, paras. 186-190.

[294] Counter-Memorial on Annulment, paras. 337-340 (emphasis added).

[295] Resubmission Award, para. 171.

[296] Counter-Memorial on Annulment, para. 344.

427. The First Tribunal held that the expropriation had been completed in 1975, that the provisions of the BIT were not applicable to the expropriation *ratione temporis*, that acts having occurred after 1994 could not be taken into account as expropriatory (because the same objects cannot be expropriated twice), and that the violations of the BIT after 1994 – the denial of justice and the compensation of individuals other than Mr. Pey through Decision No. 43 of 28 April 2000 – were distinct from the expropriation.[297] The First Tribunal had reasoned:

> *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 subi par les demanderesses du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui d'une autre cause, de fait et de droit, celle du déni de justice et du refus d'un "traitement juste et équitable"*.[298]

428. Even if these arguments figure in the annulled Chapter VIII of the First Award, they only repeat what the Tribunal had found in the unannulled Chapter VII. The Applicants' criticism of the Resubmission Tribunal's interpretation of the First Award in this respect, and their efforts to replace it by their own vision of what is *res iudicata*, "is just a direct, unabashed appeal of the Resubmission Award, and thus plainly inappropriate."[299]

429. Finally, the Applicants failed to explain in what way the alleged excess of powers was manifest.[300]

430. With respect to facts, arguments and evidence *posterior* to the initial request for arbitration on 3 November 1997, the Applicants have misrepresented the Resubmission Tribunal's reasoning.

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[297] Counter-Memorial on Annulment, paras. 383-386.

[298] First Award, para. 688 (footnotes omitted; emphasis omitted).

[299] Counter-Memorial on Annulment, para. 383.

[300] Counter-Memorial on Annulment, para. 385.

431. First, paragraph 216 of the Resubmission Award does not address Article 4 violations that the First Tribunal had found but considers alleged violations occurring after the First Award. Second, it does not exclude any evidence at all. In fact, in paragraph 228(c) of its Award, the Resubmission Tribunal states explicitly that it "*draws* [this] *conclusion from the above*" (including paragraph 216) the interpretation of the *res iudicata* part of the First Award leads to the conclusion, opposite to the Applicants' assertion:

> [T]hat there was a breach of the guarantee of fair and equitable treatment under Article 4, which consisted of the totality of the conduct of the Chilean authorities resulting in the seven-year delay in the Goss press litigation and Decision No. 43, and manifested itself in the award of compensation to persons who were not the owners of the assets confiscated while Mr Pey Casado's claims were rejected.[301]

432. Obviously, the Respondent argues, the dates of all the events having caused a violation of the FET obligations are posterior to the request for arbitration and were readily accepted as falling within the scope of the Resubmission Proceeding, thus belying the Applicants' allegation that the Resubmission Tribunal refused to take facts, arguments and evidence into account that post-date 3 November 1997.

433. With respect to a departure from a fundamental rule of procedure, the Respondent argues that the Applicants' allegation that the Resubmission Tribunal discarded relevant evidence without hearing it is belied by the fact that expert reports were submitted and discussed during the evidentiary hearing.

434. The Applicants try to curtail the Tribunal's authority as expressed in ICSID Arbitration Rule 34(1) according to which the tribunal is the "judge of the admissibility of any evidence and of its probative value."

435. The Applicants bore the burden to prove that Chile's violations of its duty to treat them fairly and equitably (Article 4 as opposed to Article 5 of the BIT) caused injury and quantum. They had ample opportunity to address the issues but have conscientiously failed

[301] Counter-Memorial on Annulment, paras. 372-373; the Respondent quotes para. 228 (c) of the Resubmission Award.

to do so, for instance by instructing their expert to quantify only the losses caused by the expropriation and not by the distinct denial of justice and further unfair and unequitable treatment.

436. The tactical reason behind this was to avoid a calculation of damages based on the 7-years delay of Chilean court proceedings and on the government's Decision to compensate other people, because such calculation would have led to minimal quanta. However, the strategy "*had zero chance of succeeding,*" given that the First Tribunal had determined with *res iudicata* effect that the violations of Articles 4 and 5 were distinct and that the evidence for an expropriation claim was of no use for a FET claim.[302]

437. The Resubmission Tribunal was bound to follow the First Tribunal's *res iudicata* determination, as it has explained convincingly. In exercising its authority and "after having evaluated the evidence and arguments of the parties, the Resubmission Tribunal determined that Claimants' theories were inapposite" to evidence the causation of damages by FET-standard violations.[303]

438. As to the inappropriate allegations of bias, they are based on pure speculation. The Respondent refers to the First Annulment Decision which has rejected a request for annulment based on speculative allegations of bias by accepting the Applicants' arguments that a committee cannot declare "*la nullité d'une sentence sur un simple apparence de partialité,*" and that "*l'accusation de partialité du Tribunal ou de ses membres ne doit pas être fondée sur des simples spéculations.*"[304]

439. With respect to the alleged failure to state reasons on which the Award was based, the Resubmission Tribunal has, in paragraphs 198, 217, and 232 of the Award, provided "ample explanation as to why Claimants' expropriation-based theories could not be accepted. Claimants very well may disagree with that explanation but [as Schreuer

[302] Rejoinder on Annulment, paras. 93 ss.

[303] Counter-Memorial on Annulment, para. 387.

[304] First Annulment Decision, paras. 336-337; Counter-Memorial on Annulment, para. 341.

explains] [i]t cannot be expected […] that reasons must go to such length as to persuade a disgruntled party why it has lost."[305]

440. In fact, the Tribunal has articulated its reasons that have led it to ascertain that the Applicants failed to discharge their burden to prove injury caused by FET-standard violations in 11 steps. The reasons are consistent and can be easily followed.[306]

## E. THE RESUBMISSION TRIBUNAL'S FAILURE TO GIVE *RES IUDICATA* EFFECT TO UNANNULLED FINDINGS

### (1) The Applicants' Position

441. The Applicants have asserted three grounds for annulment relating to the Resubmission Tribunal's alleged failure to give *res iudicata* effect to unannulled findings:

> (a) That the Tribunal has manifestly exceeded its powers (Article 52(1)(b));
> (b) That there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and
> (c) That the Resubmission Award has failed to state the reasons on which it is based (Article 52(1)(e)).[307]

442. With respect to a manifest excess of powers, the Applicants submit as follows.

443. The Applicants observe that the First Tribunal has determined in paragraphs 627-674, with *res iudicata* effect, that the Respondent violated its duty to afford the Applicants fair and equitable treatment by discriminating against them when it compensated other individuals for the illegal expropriation and not Mr. Pey, and by denying justice through the

[305] Counter-Memorial on Annulment, para. 382 (brackets in original); the Respondent quotes Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, para. 363 (RALA-0006).

[306] Rejoinder on Annulment, para. 92.

[307] Annulment Application, paras. 186-252; Memorial on Annulment, paras. 258-583; Reply on Annulment, paras. 53, 125-145.

unreasonable duration of court proceedings. It has summarised its adjudication in paragraph 674 of the Award as follows:

> [E]*n résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués, en même temps qu'elle paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable*.

and decided, in paragraph 3 of the *dispositif*:

> [L]*es demanderesses ont droit à compensation.*

444. It follows from there that "[n]*i l'existence d'un préjudice ni l'existence d'un dommage corrélatif ni la nécessité d'une indemnité financière pour compenser celui-ci ne font le moindre doute pour la Sentence initiale*."[308]

445. The First Committee upheld this part of the First Award as *res iudicata*.[309] It decided that "*la SI* [the First Award] *a correctement tranché que les Demanderesses avaient produit la preuve des faits et des fondement juridiques de la responsabilité de l'État du Chili pour la violation du traité,*"[310] as much so as their burden to identify and prove the damage.[311]

446. Therefore, the Applicants argue, the role of the Resubmission Tribunal was limited: "*compte-tenu des violations de l'API Espagne-Chili par le Chili après la date du 3 novembre 1997, et du droit à compensation reconnu aux Demanderesses, bénéficiant de l'autorité de la chose jugée de la Sentence initiale, son rôle était de déterminer le montant de l'indemnité à accorder aux Demanderesses.*"[312]

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[308] Annulment Application, paras. 198, 204, 211, 212 ss.; Memorial on Annulment, paras. 45, 277-292.

[309] First Annulment Decision, para. 359.3.

[310] Reply on Annulment, para. 117.

[311] Reply on Annulment, para. 118.

[312] Memorial on Annulment, para. 368.

447. The limitation was even obvious to outside commentators, as documented by a commentary on the First Annulment Decision by Professor Schreuer who opined:

> In the resubmitted proceedings, initiated in June 2013, the Tribunal will be restricted to determining the amount of damages flowing from the first Tribunal's finding of liability which is *res judicata*.[313]

448. It is equally incontestable, the Applicants argue, that the First Tribunal determined, with *res iudicata* effect, that "*les Demanderesses avaient acquis un droit à indemnisation de nature pécuniaire, et que tel était le sens du terme 'compensation' employé notamment dans le dispositif de la Sentence initiale.*"[314] The Tribunal has clearly established "*que la combinaison des actions et omissions constitutif* [sic] *de la conduite internationalement illicite du Chili à partir de 1995, tout au moins pris dans leur ensemble, avaient eu l'effet de bloquer toute possibilité raisonnable de redressement, à l'intérieur du système politico-légal chilien, de la saisie et confiscation illégale et inconstitutionnelle, que ce soit par restitution ou compensation.*"[315]

449. The correct legal base for defining the term "compensation" are Articles 31-37 of the Articles on State Responsibility. Article 36, in conjunction with Article 31, leaves no doubt that compensation is the correct remedy for "any financially assessable damage" caused by internationally wrongful acts as perpetuated by the Respondent, and not satisfaction, as wrongly decided by the Resubmission Tribunal, since the injury in the present case of a damaged investment can "be made good by […] compensation," as provided for in Article 37 of the Articles on State Responsibility.[316] Investment disputes are not about the protection of honour but about the violation and reparation of economic interests. Pecuniary compensation is the adequate remedy, as confirmed by ample literature.[317]

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[313] Christoph H. Schreuer, "Victor Pey Casado and President Allende Foundation v Republic of Chile, Barely an Annulment", ICSID Review, Vol. 29, No. 2 (2014), pp. 321 ss., 327 (CL-326).

[314] Annulment Application, para. 191; Memorial on Annulment, para. 288.

[315] Annulment Application, para. 218.

[316] Annulment Application, paras. 194-197; Memorial on Annulment, paras. 406-418.

[317] Memorial on Annulment, paras. 299 ss.

450. All these *res iudicata* findings of the First Tribunal were final and binding and could not be reconsidered by the Resubmission Tribunal. This is clearly stated in ICSID Arbitration Rule 55(3) as it is "an essential and settled rule of international law."[318]

451. Totally ignoring the finality of the unannulled findings of the First Award, the Resubmission Tribunal reopened the debate and analysis, through four questions asked during the hearing[319] related to (i) the Applicants' investment, (ii) the concept of compensation, (iii) the status of Decree No. 165 and (iv) the meaning of Decision No. 43 and decided the issues anew, under the guise of interpretation.

452. Certainly, the Applicants argue, arbitral tribunals have a "*certain pouvoir d'interprétation, essentiellement dicté par la nécessité de comprendre pour appliquer*."[320] However, this power is restricted to an "interpretative controversy" and must not be misused to undermine the *res iudicata* effect, in particular where there is no disagreement between the parties on a given issue.[321]

453. The Applicants rely on *Amco v. Indonesia (II)* to back their arguments that committees have the right to verify whether an interpretation is reasonable and does not interfere with the *res iudicata* principle. The *ad hoc* committee had found:

> If a new Tribunal reconsiders an issue not annulled, it exceeds its power. […] Its interpretation could be considered as a manifest excess of powers only if it were manifestly outside any bona fide interpretation of the first committee's decision and therefore obviously untenable.[322]

454. In the present case, the Resubmission Tribunal acted in bad faith and has not solved an interpretative controversy but created one by ignoring the agreement of the parties and the unambiguous language of the First Award.

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[318] *Trail Smelters Arbitration (United States v. Canada)*, Arbitral Tribunal Decision, 35 American Journal of International Law, 1941, pp. 684 ss., 699 (CL-318).

[319] Memorial on Annulment, paras. 293-349.

[320] Memorial on Annulment, para. 375.

[321] Tr. Day 3 (14 March 2019), pp. 632-636; Memorial on Annulment, paras. 374-395.

[322] *Amco v. Indonesia (II)*, Decision on Annulment, 17 December 1992, para. 8.07 (CL-308) (emphasis omitted).

455. Here, the Applicants assert, the Resubmission Tribunal:

- redefined the concept of compensation against the determination of the First Tribunal and against the clear substance of international law;

- disregarded the Parties' agreement on the definition of compensation as being necessarily pecuniary;

- refused to accept the First Tribunal's ascertainment that the Respondent has violated its duty to guarantee fair and equitable treatment and to abstain from denial of justice;

- rejected evidence that the First Tribunal had accepted;

- failed to accept prejudice, causality and damage as proven and has denied the existence of material damage, against the First Tribunal's findings in the opposite sense;

- refused to determine the quantum of damages in accordance with its limited mandate conferred to it by the First annulment Decision;

- consistently confounded injury, damage and compensation against the clear determination of the First Tribunal as validated by the First Committee; and

- distorted the First Committee's findings when it declares that the First Committee interpreted the First Tribunal as believing that "Claimants' arguments on damages were strictly limited to ones founded on the expropriation" (Resubmission Award, paragraph 229), where in reality the Committee had only found on a contradiction.[323]

456. The Applicants argue that this reasoning and determination by the Resubmission Tribunal is partly an exercise of authority and power that it did not have, partly a rejection of the exercise of power that it did have, and in any event, a failure to apply the applicable law, in sum and excess of power.

[323] Annulment Application, paras. 189 ss., 204, 206, 212-214; Memorial on Annulment, paras. 288, 298-314, 363-365, 397-398, 431-493; Reply on Annulment, paras. 55-63, 125-130, 142-144.

457. The Applicants assert that the excess is manifest. First, a simple reading of the First Award, the First Annulment Decision, the written submissions of the Parties and the transcript of hearing reveals that the Resubmission Tribunal substituted the *res iudicata* parts of the First Award with its own and disregarded the agreement of the Parties. That is "*évident, flagrant ou discernable sans effort.*"[324] Second, the consequences of the excess of powers are particularly serious. It has led the Resubmission Tribunal to deny the existence of injury and damage and has thereby completely annihilated the effect and result of the First Tribunal's final and binding adjudication.[325]

458. With respect to the serious departure from a fundamental rule of procedure, the Applicants submit that the conduct, arguments and determination presented in the context of the manifest excess of powers document at the same time a consistent bias and partiality in favour of the Respondent.

459. Examples of bias and partiality are: (1) the wrong definition of the concept of compensation, (2) the confusion between prejudice and quantum, (3) the rejection and misinterpretation of evidence, (4) the distortion of the First Committee's determination, (5) the disregarding of the agreement of the Parties as to the nature of damage and compensation. By these stratagems, the Resubmission Tribunal tried to wipe out the results of the First Award, as far as it was in favour of the Applicants, has given a reduced and caricatural description of the Applicants' arguments and has followed the Respondents' arguments fraudulently and in bad faith.[326]

460. With respect to a failure to state the reasons on which the Award is based, the Applicants submit as follows.

461. The Applicants have detailed their arguments on damages in their written submissions, through expert opinion, and through oral presentation before the Resubmission Tribunal.

[324] Memorial on Annulment, paras. 486-488, 578-581.

[325] Memorial on Annulment, paras. 489-492, 582.

[326] Annulment Application, paras. 203, 205, 231, 237; Memorial on Annulment, paras. 296, 320, 331, 338, 361; Reply on Annulment, para. 61(iii).

In particular, they argued coherently that the damage caused by the violations of the fair and equitable treatment standard was equivalent to the damage caused by the confiscation of the shares of CPP and EPC in 1973-1975 and had to be calculated to establish the fair market value at that moment.

462. Despite the *res iudicata* acknowledgment of these damages by the First Tribunal, the Resubmission Tribunal had only given a very superficial summary of these arguments in paragraphs 70-74 of the Award, and set out in paragraph 196 of the Award that the Applicants had pleaded "a full theory of damages."[327] This is "inconsistent with 232, which suggests that they hadn't even begun to outline such a theory."[328]

463. Further, by "*distortion frauduleuse*,"[329] the Resubmission Tribunal simply affirmed that the Applicants had not met the burden to prove "what injury was caused to either or both of them by the Respondent's breach of the standard of fair and equitable treatment in the BIT, and then of establishing the corresponding assessable damage in financial terms," and that "in some sense, they have not even tried to do so."[330]

464. In this way, "*la Sentence de Resoumission, par la façon dont elle a traité, ou plutôt refusé de traiter la théorie des Demanderesses concernant la nature de leur préjudice et l'évaluation de celui-ci, s'est donc rendue coupable tant d'un défaut de motifs que d'un excès de pouvoir manifeste.*"[331] In fact, it is impossible to understand "*le cheminement suivi par le tribunal pour parvenir à sa conclusion.*"[332] It is, the Applicants assert, frivolous, grossly insufficient and inadequate and must therefore be annulled for lack of reasons.[333]

[327] Tr. Day 3 (14 March 2019), p. 647.

[328] Tr. Day 3 (14 March 2019), pp. 650-651; Reply on Annulment, para. 61(ii).

[329] Annulment Application, para. 231.

[330] Resubmission Award, paras. 231-232.

[331] Annulment Application, para. 231.

[332] Memorial on Annulment, para. 637.

[333] Annulment Application, paras. 227-231; Memorial on Annulment, paras. 631-645; Reply on Annulment, paras. 193-199.

### (2) The Respondent's Position

465. The Respondent refutes the Applicants' assertions on a manifest excess of powers, a serious departure from a fundamental rule of procedure and an absence of reasons on which the Resubmission Award is based and asserts that the annulment request must be rejected.

466. The Respondent submits as follows.

467. At the outset, it notes that the Applicants have targeted a number of questions that the Resubmission Tribunal asked during the hearing concerning their investments, the nature of compensation, the status of Decree No. 165 and of Decision No. 43. The Applicants argue that through these questions, the Tribunal re-opened the debate on issues already decided *res iudicata.* Since only awards can be annulled and not questions, the Applicants' arguments are inappropriate and must be rejected summarily.[334]

468. In addition, the questions were pertinent, concerned issues that had been debated during the proceeding and came as no surprise.[335] The Applicants' allegations that the Tribunal demonstrated partiality and bias each time it sided with the Respondent is groundless, since such allegation requires – as found by the *Tulip v. Turkey ad hoc* committee, introduced by the Applicants – "clear and incontrovertible substantiation," which the Applicants have failed to provide.[336]

469. In substance, the Resubmission Tribunal has not re-opened any issue that had become final and binding after the First Committee's Decision, and has respected the *res iudicata* decisions of the First Tribunal.

470. With respect to the issues of the exact nature of the remaining investment after the expropriation and of the acknowledgment of the relevance of facts, events, arguments and evidence after the expropriation, the Resubmission Tribunal has accepted the First

[334] Counter-Memorial on Annulment, paras. 348-349.

[335] Counter-Memorial on Annulment, paras. 351-358.

[336] Counter-Memorial on Annulment, para. 360.

Tribunal's determination that the long delay in proceedings before Chilean courts, continuing well after 1997, and the Decision No. 43 of 28 April 2000 constituted violations of the Article 4 of the BIT, since the First Committee had found "that the duty to provide redress for violation of rights persists even if the rights as such have come to an end,"[337] thereby upholding the First Tribunal's finding as *res iudicata*, against the argumentation of Chile. These facts bely the Applicants' allegations that the Resubmission Tribunal disrespected the First Tribunal's findings on the Applicants' investments, and that it refused to take facts, events, arguments and evidence that occurred after 1997, into consideration. In reality, the Tribunal rejected only such facts and evidence coming to pass after the First Award.[338]

471. Further, the Applicants' allegations that the Resubmission Tribunal exceeded its powers by disrespecting the First Tribunal's *res iudicata* findings on injury, causation and damages are baseless: with respect to injury, the First Tribunal tried nowhere to "purport to identify any injury **at all** — let alone an injury resulting specifically from the BIT violation that it had found (which the First Tribunal expressly distinguished from an expropriatory act)."[339]

472. With respect to damages, the First Tribunal had stated that damages resulting from the confiscation did not require any particular analysis[340] and that for the alleged damages caused by FET-standard violations the Applicants had failed to adduce any evidence.[341] This is the contrary of what the Applicants allege. As a result, the Resubmission Tribunal cannot have exceeded its powers by non-respecting *res iudicata* findings of the First Tribunal, first because the First Tribunal never made such findings, and second because the parts of the First Award that do reveal the First Tribunal's findings were annulled and have no *res iudicata* effect.[342]

[337] First Annulment Decision, para. 168.

[338] Counter-Memorial on Annulment, para. 370; Rejoinder on Annulment, paras. 54-61.

[339] Rejoinderon Annulment, para. 84 (emphasis in original); Counter-Memorial on Annulment, para. 376.

[340] First Award, para. 680.

[341] First Award, para. 689.

[342] Counter-Memorial on Annulment, paras. 375-377; Rejoinder on Annulment, paras. 84-87.

473. The Applicants' allegation that the First Committee confirmed the First Tribunal's findings on injury and damages runs equally against its unequivocal statement:

> Having reviewed the entire record, including the parties' submissions, the Committee can only conclude that the by parties never pleaded the damages claims arising from the breaches of Article 4 of the BIT.[343]

474. The Respondent further argues that the Applicants mischaracterize the Resubmission Tribunal's ascertainment on compensation in a vain effort to demonstrate that it exceeded its powers and was biased by disregarding the First Tribunal's *res iudicata* decision on such compensation.

475. First, the Resubmission Tribunal explicitly recognized that the Applicants' right to compensation had been adjudicated as *res iudicata* in paragraph 3 of the First Award's *dispositif*. At the same time, it had understood that "what does remain open for re-litigation at the instance of the Claimants is the nature of the compensation due to them under paragraph 3 in consequence of the breach established in paragraph 2, following the annulment of the assessment made by the First Tribunal in paragraph 4."[344]

476. These two elements of the First Award had to be interpreted "*to evaluate what these determinations meant in practical terms,*" which is not – as a matter of principle – contested by the Applicants.[345] In accomplishing this exercise:

> [T]he Tribunal reads paragraph 3 as stating the entitlement to reparation that necessarily follows from the determination of the breach of an international obligation, but without predetermining what form or nature that reparation must take, except perhaps the non-explicit assumption that in the normal case it may take the form of monetary damages. But it does not read the paragraph as absolving a party claiming

[343] First Annulment Decision, para. 262.

[344] Resubmission Award, para. 177.

[345] Counter-Memorial on Annulment, para. 393.

> monetary damages from its normal obligation to prove such damage, including its causation.[346]

477. As a result, the Resubmission Tribunal confirmed that the Applicants had a right to compensation, as determined by the First Tribunal *res iudicata*, but that at the same time they had a duty to prove what compensation was due as a consequence of the violation of Article 4 of the BIT. The Applicants had ample opportunity to discharge this duty and burden but chose not to do so. The Resubmission Tribunal could not but confirm this failure and conclude that it "cannot therefore, on principle, make any award of damages."[347]

478. The Resubmission Tribunal took care to remain within the framework of the First Tribunal's *res iudicata* determination and developed its line of reasoning without internal contradictions by avoiding the repetition of the error of the First Tribunal to "select a damages figure arbitrarily," which had resulted in the partial annulment.[348]

479. Second, the Resubmission Tribunal has not substituted the term "compensation" by "satisfaction." Rather, after having interpreted the First Award, it noted *en passant* and in addition to its principal conclusion[349] that formal recognition of their status as victims of a denial of justice "constitutes in itself a form of satisfaction under international law."[350]

## F. THE RESUBMISSION TRIBUNAL'S FAILURE TO APPLY THE APPLICABLE LAW

### (1) The Applicants' Position

480. In paragraphs 253-264 of their Annulment Application and paragraphs 681-691 of their Memorial on Annulment, the Applicants develop their argument that the Resubmission Tribunal has failed to apply the applicable law, in particular the Chilean Constitution but also Chilean court decisions, to appreciate that the confiscation had been invalid and

[346] Resubmission Award, para. 201.

[347] Resubmission Award, para. 234.

[348] Counter-Memorial on Annulment, para. 396.

[349] Counter-Memorial on Annulment, paras. 393, 398.

[350] Resubmission Award, para. 256(2).

without legal effect and that it had not terminated the ownership of Mr. Pey. These arguments have been dealt with in Section VII.A. of this Decision.

481. In paragraphs 265-269 of their Annulment Application, the Applicants further submit that the Resubmission Tribunal failed to apply the applicable law when rejecting their claim for moral damages.

482. The Applicants refer to ICSID arbitration case law and also to doctrine to assert that it "*est incontestable que les tribunaux CIRDI ont compétence pour accorder des dommages moraux.*"[351]

483. Immediately thereafter, the Applicants assert that the categorical non-application of Chilean law in the treatment of moral damages by the Tribunal is manifest, whereby it has exceeded its powers.[352]

484. They arrive at this conclusion because, on the one hand, the Tribunal has not applied the case law of the Chilean Supreme Court that has repeatedly determined that a person having suffered moral damages is exempt from the burden of proving them,[353] and that on the other hand, in international law, the power to grant compensation for moral damages does not depend on a prior determination of material injury or damage.[354]

485. The latter argument, they assert, follows directly from the clear formulation in Article 31(2) of the Articles on State Responsibility, which provides that "any damage, whether material **or** moral," must be compensated.[355]

[351] Annulment Application, para. 265.

[352] Annulment Application, para. 266; *see also* para. 267 where the Applicants refer to their written submissions before the Resubmission Tribunal: paras. 339 and 340 of their Resubmission Reply of 9 January 2015 (C-40) and para. 164 of their Resubmission Memorial of 27 June 2014 (C-8).

[353] Annulment Application, para. 267.

[354] Annulment Application, para. 268.

[355] Annulment Application, para. 268 (emphasis in original).

486. The Applicants conclude from the foregoing that "*le paragraphe 243 de la Sentence dans la procédure en annulation doit être annulé pour excès de pouvoir manifeste*."[356]

487. In paragraphs 270-275 of their Annulment Application, the Applicants submit that the Resubmission Tribunal failed to consider their claim for the restitution of benefits, *i.e.* for unjust enrichment, under international law, although they have introduced it into the Resubmission Proceeding, as documented in paragraph 52 of the Resubmission Award.[357]

488. This amounts to a non-application of the applicable law because "les *Demanderesses faisaient valoir l'enrichissement injuste en tant que doctrine générale du droit international*" and "[la] *législation applicable selon l'article 10(4) de l'API Espagne-Chili inclut les principes du droit international.*"[358]

489. The Tribunal was competent under international law to address the issue of permanent violations of secondary obligations resulting from the breach of the fair and equitable treatment standard. It should have ordered the Respondent to disgorge the benefits drawn from the use of the Applicants' property. However, it misinterpreted the Applicants' position in this respect:

> *Le manquement absolu à appliquer la législation applicable dans ce contexte a amené le 2ème Tribunal à une compréhension ou énonciation erronée, dans la section K de sa Sentence, de la réclamation des Demanderesses comme constituant une reformulation de la demande selon laquelle la prétendue confiscation* ***initiale*** *était une violation du traité, ce qu'avait été exclu par le Tribunal initial avec l'autorité de la chose jugée, étant donné que l'acte en question était hors du domaine temporel du traité.*[359]

[356] Annulment Application, para. 269.

[357] Annulment Application, paras. 271- 272.

[358] Annulment Application, para. 271.

[359] Annulment Application, para. 275 (emphasis in original).

490. The Applicants request the annulment of Section K of the Award for non-application of the applicable law.[360] The Committee assumes that they refer to a manifest excess of powers.

### (2) The Respondent's Position

491. The Respondent has not developed a position with respect to the request for annulment of paragraph 243 (on moral damages) and of Section K (on unjust enrichment) of the Resubmission Award. It submits that the unjust enrichment claim "appears to have been abandoned in the Annulment Memorial,"[361] and in regard of the moral damages claims "Claimants appear to have abandoned this claim as well."[362]

## G. THE DISMISSAL OF THE RESTITUTION CLAIM FOR DAMAGES SUFFERED DUE TO THE DEFENSE OF THE INVESTMENT AND THE ACCESS TO ARBITRATION

### (1) The Applicants' Position

492. In paragraphs 8-23 of their Reply on Annulment, dated 9 November 2018, the Applicants introduced a request for annulment of the Resubmission Award, asserting that the ResubmissionTribunal:

- seriously departed from a fundamental rule of procedure (Article 52(1)(d));[363] and
- failed to state the reasons on which the Award is based (Article 52(1)(e)),

when it did not explain why it has rejected the Applicants' claim for "*dommages consécutifs à la défense de l'investissement et du droit à l'accès à l'arbitrage* [devant le CIRDI]."[364] and when it failed to take the documentation of these damages into

[360] Annulment Application, para. 270.

[361] Counter-Memorial on Annulment, p. 127, fn. 639.

[362] Counter-Memorial on Annulment, p. 127, fn. 643.

[363] In paragraphs 21 and 22 of the Reply on Annulment, the Applicants refer to Article 52(1)(c) instead of 52(1)(d). The Committee understands this to be a clerical error.

[364] Reply on Annulment, title of Section 3.

consideration, "*ce qui constitue un manquement à une répartition appropriée de la charge de la preuve et une manifestation de partialité grave*" by the Tribunal.[365] They reiterate the uncontroversial legal standard on the absence of reasons and the difference between an appeal and annulment,[366] as presented in Chapter VI of this Decision.

493. The Applicants submit that the request does not contain new grounds for annulment but new reasons to support the grounds already asserted in the Annulment Application of 10 October 2017 and the Memorial on Annulment of 27 April 2018. They react to the Respondent's Counter-Memorial on Annulment of 20 July 2018. This approach is generally admitted in ICSID proceedings as summarised in *Togo Electricité v. Togo*, where the Committee found that "*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 procedure.*"[367]

494. The Applicants contend that they have incurred incidental costs of almost 12 million Euro for actions between 1997 and 2013 to secure and enforce their claims caused by the Respondent's conduct during and after the initial proceeding and during the proceeding before the First Committee, and that they have brought these claims before the Resubmission Tribunal together with detailed and uncontested documentation, as evidenced by paragraphs 120, 121 and 132 of the Award.[368]

495. They submit that these costs must be reimbursed to guarantee *restitutio in integrum*, a principle generally admitted in international law. They rely on a commentary on Article 36 of the Articles on State Responsibility, which states that it "is well established that

[365] Reply on Annulment, para. 20.

[366] Reply on Annulment, paras. 21-23.

[367] *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, 6 September 2011, para. 89 (C-13); identical to *Soufraki v. UAE*, Decision of the *ad hoc* Committee on the Request for Annulment of Mr. Soufraki, 5 June 2007, para. 33 (CL-305).

[368] Reply on Annulment, paras. 9, 12, 18.

incidental expenses are compensable if they were reasonably incurred,"[369] and on international court and arbitration practice.[370]

496. They document the Resubmission Tribunal's line of reasoning[371] and assert that it amounts to an absence of reasons, particularly in light of Article 48(3) of the ICSID Convention which obliges tribunals to state the reasons on which they base their decision:

> *Il n'existe dans la SR aucune motivation appliquée à la demande relative aux dommages consécutifs qui permettrait de comprendre le raisonnement l'ayant porté à refuser, au 8ème point du Dispositif, la restitution des presque douze millions d'euros de dommages consécutifs que les Demanderesses ont été forcées d'engager dans la défense de leur investissement durant les dix-huit années écoulés entre la date de dépôt de leur Requête initiale d'arbitrage, le 3 novembre 1997, et celle de la fin de l'exécution forcée du point 5 du Dispositif de la Sentence initiale, le 2 novembre 2015.*[372]

497. As to the assertion of a serious departure from a fundamental rule of procedure, the Applicants write:

> *D'autre part, la SR a rejeté cette demande sans avoir en aucune façon pris en considération les pièces justificatives, incontestées, du montant des dommages causés aux Demanderesses, ce qui constitue un manquement à une répartition appropriée de la charge de la preuve et une manifestation de partialité grave de la part du TR sanctionnée à l'article 51(1)(d) la Convention.*[373]

498. The Applicants do not go further in their arguments.

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[369] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press 2002, Article 36, para. 34 (RL-034).

[370] Reply on Annulment, paras. 9-10.

[371] Reply on Annulment, para. 17.

[372] Reply on Annulment, para. 18 (footnotes omitted).

[373] Reply on Annulment, para. 20.

### (2) The Respondent's Position

499. The Respondent refutes the Applicants' arguments and request for procedural and substantial reasons in paragraphs 115-122 of its Rejoinder on Annulment with the following arguments.

500. First, it asserts that the First Tribunal and the First Annulment Committee made a final determination on costs of the different procedural phases and that these decisions are *res iudicata*.[374]

501. Second, the Applicants misrepresent the First Tribunal's *res iudicata* determination when they allege a violation of Article 3 of the BIT and Articles 53(1) and 54(1) of the ICSID Convention. Neither the Committee nor the First Tribunal have found on such violations.[375]

502. Third, the Applicants' request concern new claims. They were introduced more than two years after the Award, a very long time after the 120 days, provided for in Article 52(2) of the ICSID Convention.[376]

503. Fourth, it is inaccurate that the Resubmission Tribunal has not stated reasons for its decision not to grant prior costs claims. It has stated that its role was limited and it was not authorised to re-open *res iudicata* determinations such as the ones on costs, that in any event the Tribunal had explicitly stated – in footnotes 355 and 358 – that the decision on costs was not material to the Resubmission Proceeding and would not be re-considered, and that it could not make any award on damages.[377]

504. Fifth, it is obvious that the Tribunal lacked the authority to overturn the costs decision already rendered by the First Tribunal and the First Committee, and tribunals are not held "to explain self-evident truths."[378] The Respondent relies on Professor Schreuer, who states

[374] Rejoinder on Annulment, para. 116.
[375] Rejoinder on Annulment, para. 116.
[376] Rejoinder on Annulment, para. 118.
[377] Rejoinder on Annulment, para. 119.
[378] Rejoinder on Annulment, para. 120.

that an award "will not be annulled if the reasons for a decision, though not stated, are readily apparent to the *ad hoc* committee."[379]

505. Sixth and in particular with regard to the allegation that there was a serious departure of a fundamental rule of procedure, the Applicants presented only two totally insufficient assertions, which do not refer to a procedural rule, let alone a fundamental one, which do not demonstrate how the Tribunal departed from a rule, and which do not explain in what way the alleged departure was serious.[380]

## H. THE DECISION ON THE STATUS OF MS. CORAL PEY GREBE IN THE RESUBMISSION PROCEEDING

### (1) The Applicants' Position

506. In paragraphs 698-753 of their Memorial on Annulment, dated 27 April 2018, paragraphs 234-253 of their Reply on Annulment, dated 9 November 2018 and during the hearing,[381] the Applicants presented the issue of the status of Ms. Pey Grebe in the proceeding. They assert that the Resubmission Tribunal committed a series of annullable errors when it decided that she had no *ius standi* as a party in interest although being an investor, and that she was the representative of the Applicants instead.

507. They request, in paragraph 753 of the Memorial on Annulment, that the Committee annul the first paragraph of the *dispositif* and paragraphs 187-188 of the Resubmission Award for manifest excess of powers. They also request, in paragraph 250 of the Reply on Annulment, the annulment on the basis of the additional grounds of a serious departure from a fundamental rule of procedure and an absence of reasons. Furthermore, they

[379] Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, para. 362 (RALA-0006).

[380] Rejoinder on Annulment, para. 121.

[381] Tr. Day 1 (12 March 2019), pp. 109-118.

request, in paragraph 251 of the Reply on Annulment, that the Committee annul the whole Award for a serious departure from a fundamental rule of procedure (partiality).

508. They recall that Mr. Pey Casado remains a party to the proceeding being represented by his counsel Dr. Garcés and that it is an excess of powers and a failure to state reasons to replace Dr. Garcés and impose Ms. Pey Grebe as new counsel against the will of all parties involved.[382]

509. They further recall that Mr. Pey Casado had assigned his "*actions, titres, droits et créances*" by notarial deed of 15 March 2013 to his daughter Ms. Pey Grebe and that she substituted her father in the ongoing ICSID proceeding by agreeing in the deed that "*elle se subroge au lieu et place du CÉDANT pour ce qui concerne dudit arbitrage auprès du CIRDI* […] *conformément à ce que dispose l'article cinquante-deux (six) de la Convention CIRDI.*"[383]

510. Therefore, she had become an investor in CPP S.A. in the sense of Article 25 of the ICSID Convention, not differently from the Co-Applicant Foundation President Allende,[384] to whom Mr. Pey Casado had assigned part of his shares on 27 April 1990.[385]

511. In her quality as assignee, she had become a successor and a party to the proceeding, again no different from the Co-Applicant Foundation President Allende, given that the assignment was valid without government approval, that she had double nationality, like her father, and that the issue of nationality was finally settled with the registration of the original proceeding.[386] The Applicants rely on Professor Hanotiau who states that

[382] Memorial on Annulment, paras. 701-704; Reply on Annulment, paras. 236-238.

[383] Reply on Annulment, para. 248, citing the notarial deed (C-264) (emphasis omitted); Memorial on Annulment, para. 705.

[384] Memorial on Annulment, paras. 733-736; Reply on Annulment, paras. 238, 248.

[385] First Award, para. 538.

[386] Memorial on Annulment, paras. 720, 723-731, 740 ss.; Reply on Annulment, paras. 246-252.

"[p]ersons others than formal signatories may be parties to the arbitration agreement […] [such as] assignees."[387]

512. The First Tribunal recognised formally and with *res iudicata* effect that Mr. Pey Casado has *ius standi* before the ICSID tribunal as an investor and owner, as confirmed by the First Committee, and that this recognition applies to Ms. Pey Grebe as his successor, as much so as the *res iudicata* determination on the *ius standi* of the Foundation and on the nationality of Mr. Pey Casado apply *mutatis mutandis* to her.[388]

513. Under these circumstances of established facts and law, the Resubmission Tribunal manifestly exceeded its powers:

- when it denied Ms. Pey Grebe her status as investor, successor and thereby her quality as a party of the proceeding, in identity with her predecessor;[389]

- when it re-opened the issue of her nationality;[390]

- when it disrespected the First Tribunal's final determination of the quality of the Foundation as investor and did not apply it to her;[391]

- when it refused to recognize the identity of the Parties to the initial proceedings thus excluding Ms. Pey Grebe from accessing international arbitration and leaving her in a "*legal limbo*";[392] and

[387] Bernard Hanotiau, "Who are the Parties to the Contract(s) or to the Arbitration Clause(s)…?", in *Complex Arbitration: Multiparty, Multicontract, Multi-Issue and Class Actions*, Kluwer Law International 2006, para. 12 (CL-371).

[388] Memorial on Annulment, paras. 712, 740, 749, 723 ss.; Reply on Annulment, paras. 241-247.

[389] Memorial on Annulment, paras. 726 ss., 737 ss., 753; Reply on Annulment, para. 240. *See also* Reply on Annulment, para. 242.

[390] Memorial on Annulment, paras. 739 ss., 753.

[391] Memorial on Annulment, paras. 740 ss., 753; Reply on Annulment, paras. 244-248.

[392] Tr. Day 1 (12 March 2019), pp. 110-117.

- when it imposed Ms. Pey Grebe as new representative in the proceeding, in replacement of Dr. Garcés.[393]

514. The Resubmission Tribunal failed to state the reasons on which the Award is based:

- when it affirmed "*ex cathedra*"[394] and in contradiction to the findings of the First Tribunal that "the transfer would not have been such as to satisfy the normal requirement of an identity of parties";[395]

- when it contradicted itself by denying financial compensation and at the same time speculating about internal arrangements between Mr. Pey Casado and Ms. Pey Grebe with regard to such potential compensation;[396] and

- when it exceeded its powers by replacing counsel and by denying Ms. Pey Grebe's standing.[397]

515. All this:

> [E]*ntraîne, également, l'annulation de la SR dans son intégralité pour manque manifeste d'impartialité de la part du TR dans le traitement des droits de M. Pey Casado et Mme. Pey Grove garantis par l'API et l'autorité de la chose jugée de la SI relative à la transmission de la qualité d'investisseur étranger attachée à la transmission des actions de CPP S.A.*[398]

The Applicants do not specify this assertion further.

[393] Memorial on Annulment, paras. 701-704; Reply on Annulment, paras. 236-238.

[394] Reply on Annulment, paras. 246-247.

[395] Resubmission Award, para. 187.

[396] Reply on Annulment, para. 237.

[397] Reply on Annulment, para. 238.

[398] Reply on Annulment, para. 251.

### (2) The Respondent's Position

516. The Respondent refutes the Applicants' arguments on procedural and substantive grounds. It presents the following arguments.

517. First, the Applicants missed the deadline of 120 days for the introduction of a new annulment claim, as established in Article 52(2) of the ICSID Convention and ICSID Arbitration Rule 51(1)(c), without an excuse.[399]

518. Second, the Applicants failed to substantiate in what way an alleged excess of powers was obvious and serious, what fundamental procedural rule the Tribunal departed from, and in what way the alleged departure was serious, and how reasons were lacking or contradictory.[400]

519. Third, the Applicants try to establish that the Tribunal was wrong in its determination, which amounts to an inadmissible appeal of the Award.[401]

520. Fourth, the Tribunal's conclusions and reasoning as to the status of the Claimants of the dispute and the inadmissibility of admitting a new claimant are convincing, in line with Article 52 of the ICSID Convention, which requires the identity of the parties throughout the proceeding, and in any event "tenable." Further, the Tribunal stated the reasons on which it has based its decision. The fact that the reasoning was succinct does not deprive it of its existence.[402] Further, the reasoning on the internal distribution of a hypothetical compensation did not contradict the Tribunal's final rejection of financial compensation, since the Tribunal exposed its thoughts clearly in the conditional.[403]

521. Fifth, the Applicants misrepresent the Tribunal's finding on the status of Ms. Pey Grebe as representative of Mr. Pey Casado. The Tribunal never stated that it would consider her to

[399] Counter-Memorial on Annulment, paras. 365-366; Rejoinder on Annulment, paras. 67-68.
[400] Counter-Memorial on Annulment, para. 367; Rejoinder on Annulment, paras. 65, 66, 69-74, 78, 81.
[401] Counter-Memorial on Annulment, para. 367.
[402] Counter-Memorial on Annulment, para. 368; Rejoinder on Annulment, paras. 63, 71-74.
[403] Reply on Annulment, paras. 79-80.

be new counsel in the proceeding and continued to address Dr. Garcés as such but tried to give her a status under substantive law.[404]

## I. THE FINDING ON COSTS IN THE RECTIFICATION DECISION

### (1) The Applicants' Position

522. In paragraphs 276-280 of the Annulment Application and in paragraphs 754-757 of the Memorial on Annulment, the Applicants request the annulment of paragraphs 58, 61 and 62(b) of the Decision on Rectification of the Award, dated 6 October 2017. The request to also annul paragraph 7 of the *dispositif* of the Resubmission Award,[405] was withdrawn during the hearing.[406]

523. The Applicants submit that the Tribunal condemned them to pay the totality of the costs of the rectification proceeding, although they only lost the requests for the disqualification of arbitrators but had successfully challenged the errors in the Award, which the Tribunal was obliged to recognize and correct.[407]

524. The Tribunal's decision on the allocation of costs contradicts arbitral practice, where success in a dispute is normally taken into account by tribunals in their decisions to allocate costs including by one in which arbitrator Veeder sat and in which he had decided to split the costs after an equilibrated rectification decision.[408] It also contradicts the Tribunal's own determination in paragraphs 249-251 of the Resubmission Award.[409]

525. The Applicants allege a "*partialité évidente* […] *et le caractère arbitraire*" of the Tribunal and ask the Committee that it annuls "*dans sa totalité les §§58, 61 et 62(b) de la Décision du 6 octobre 2017, pour les motifs établis à l'article 52(1) de la Convention, lettres (b), (d)*

[404] Reply on Annulment, paras. 79-80.
[405] Memorial on Annulment, para. 757.
[406] Tr. Day 3 (14 March 2019), pp. 652-653.
[407] Annulment Application, para. 276.
[408] Annulment Application, para. 277; Memorial on Annulment, para. 755.
[409] Annulment Application, para. 279.

*et (e).*"[410] In paragraph 757 of the Memorial on Annulment, the Applicants also allege an "*inobservance grave d'une règle fondamentale de procédure, un excès de pouvoir manifeste et absence de motif.*"[411]

**(2) The Respondent's Position**

526. The Respondent contends that the Applicants have not articulated any of the grounds for annulment "in sufficient detail to be intelligible" and failed to address their various elements.[412]

527. Further, the fact that one member of the Tribunal was arbitrator in a different proceeding where the tribunal had come to a different result is irrelevant for the present case.[413]

528. The Respondent alleges that it is not true that the Applicants prevailed in their rectification requests. Indeed, "Chile had in fact agreed that certain rectifications were needed" and made proposals in that sense that were accepted by the Tribunal with one exception.[414]

529. Finally, it submits that the Applicants had used a "vexatious litigation strategy during the Rectification Proceeding" and had abused it as a vehicle to challenge arbitrators Sir Berman and Mr. Veeder. This approach hindered an efficient and economical conduct of the proceeding. It was appropriate that under the circumstances the Tribunal decided to order the Applicants to pay the totality of the costs.[415]

[410] Annulment Application, para. 280.
[411] Memorial on Annulment, para. 757.
[412] Counter-Memorial on Annulment, para. 409.
[413] Counter-Memorial on Annulment, paras. 410-411.
[414] Counter-Memorial on Annulment, para. 412.
[415] Counter-Memorial on Annulment, para. 412.

## VIII. THE COMMITTEE'S ANALYSIS ON THE GROUNDS FOR ANNULMENT

### A. THE APPOINTMENT OF MR. ALEXIS MOURRE AND THE RESUBMISSION TRIBUNAL'S APPROACH TO THE APPLICANTS' REQUESTS FOR HIS REMOVAL

530. The Applicants formulated their objections to the constitution of the Resubmission Tribunal with respect to Mr. Mourre when the Secretariat invited the Parties to appoint arbitrators. Therefore, their objections were timely, and this timeliness extends to the initiation of the present annulment proceeding, which was only possible after the rendering of the Resubmission Award. However, this request for annulment must be rejected for the following reasons.

#### (1) Improper constitution of the tribunal

531. Consent and the autonomy of the parties are essential elements of the ICSID system. Parties are in control of the proceedings. One of the fundamental expressions of autonomy relates to the constitution of tribunals. The autonomy is exercised by either agreeing on the method of appointment of arbitrators or by appointing one of them individually, as laid down in Article 37(2)(b) of the ICSID Convention. Since the right is fundamental, the ICSID Convention provides only for default mechanisms under specific circumstances.

532. These general considerations apply also for resubmission proceedings, as reflected in Article 52(6) of the ICSID Convention and ICSID Arbitration Rule 55(2)(d).

533. Article 52(6) provides that "the dispute shall […] be submitted to a new tribunal […]." The terms are unambiguous. As the Applicants rightly point out, when an award is annulled, it is no longer final and the proceeding starts afresh. The dispute continues but the proceeding is in the hands of a new adjudicating body. The resubmission tribunal has no link to the previous adjudicating body and is not a successor. Therefore, the Applicants are not correct when they assume that the newly appointed arbitrators "take the place" of the arbitrators of preceding phases of the dispute.

534. Article 52(6) further provides that the new tribunal shall be "constituted in accordance with Section 2" of Chapter IV, in other words with Articles 37 to 40 of the ICSID Convention. Whenever the drafters of the ICSID Convention refer to other provisions and their *mutatis mutandis* application, they do it with precision, as is the case in Article 52(4) of the ICSID Convention. The Committee has no doubt that the reference to Articles 37 to 40 is meant to exclude the applicability of other Articles for the constitution of the new tribunal.

535. In particular, the reference to Section 2 of Chapter IV unambiguously excludes a reference to Chapter V and more specifically to the powers of the Chairman pursuant to Article 56(3).

536. That does not mean that Article 56(3) of the ICSID Convention is inapplicable in resubmission proceedings. It would be applicable if and to the extent that its requirements are met. If one of the arbitrators resigns in the course of resubmission proceedings, the Chairman has the duty to appoint a replacement. In the present case, however, the situation is the opposite: the arbitrator whom the Applicants seek to replace through appointment of the Chairman explicitly declared that he did not wish to resign.

537. In addition, Article 56(3) on its own terms also precludes its application to the constitution of a resubmission tribunal as a mere consequence of the fact that the Article was applied to the first tribunal. Article 56(3) provides that if an arbitrator appointed by a party "shall have resigned without the consent of the Tribunal of which he was a member," the Chairman shall appoint a person from the Panel "to fill the resulting vacancy." These terms clearly limit the scope of application to the recomposition of the same tribunal.

538. ICSID Arbitration Rule 55(2)(d) implements Article 52(6). Pursuant to that provision, the Secretariat shall "invite the parties to proceed […] to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one." Again, since the new tribunal is not a continuation of the old one, the method to be used to constitute the resubmission tribunal is the method used to constitute the first tribunal. ICSID Arbitration Rule 55(2)(d) cannot provide differently given the clear terms of Article 52(6) of the ICSID Convention which it implements.

539. The Applicants assert that the reference to the "original one" ("*Tribunal initial*" in French) in ICSID Arbitration Rule 55(2)(d) does not point to the tribunal as originally constituted but rather to the one that rendered the award. According to the Applicants, this interpretation is necessary to give effect to the applicability of Article 56(3), a crucial norm for the propriety of arbitral proceedings and the continuous sanction of improper conduct of one party.

540. However, contrary to what the Applicants assert, the terms "original," "*initial*" and "tribunal which rendered the award" are not used interchangeably in the ICSID Convention and the Rules. It is true that the same formula, "the original one." is used in both ICSID Arbitration Rule 51(3) for interpretation and revision, and in ICSID Arbitration Rule 55(2)(d) for annulment proceedings. However, this argument finds no basis in the Convention, which prevails over the Rules. On the two occasions when the Convention refers to the "tribunal which has rendered the award," *i.e.* in Article 50(2) for interpretation and in Article 51(3) for revision, it does so because that very tribunal is most familiar with the award and therefore most competent to interpret it or to determine whether subsequent unknown facts were discovered warranting a revision. This is substantially different from resubmission proceedings where a case must, in whole or in part, be decided anew.

541. ICSID Arbitration Rule 55(2)(d) also requires the Secretariat to "invite the parties to proceed […] to constitute a new Tribunal" and not "the parties or the Chairman, if he appointed one of the members of the first tribunal pursuant to Article 56(3) of the Convention" – which would have been the appropriate formula further to the Applicants' position.

542. The Committee agrees with the Applicants that Article 56(3) has an important function for the efficiency and the propriety of the proceeding. There are, however, several reasons why this function could not be activated by an "analogous application" for the purpose of the constitution of the Resubmission Tribunal.

543. First, the Applicants' thesis is contradicted by the clear and self-sufficient terms of *both* Articles 52(6) and 56(3) that leave no room for an "analogous application."

544. Second, the Applicants' thesis finds no support in the context, or in the object and purpose of the relevant provisions.

545. The object and purpose of Article 52(6) is to provide for the constitution of a *new* tribunal. Under the ICSID Convention, the principle is that the constitution of arbitral tribunals is in the hands of the parties, in accordance with the principle of autonomy (Article 37 of the ICSID Convention). The appointment of arbitrators by the Chairman is the default rule (Article 38 of the ICSID Convention). Accordingly, the object and purpose of Article 52(6) and its context contradict the Applicants' thesis.

546. The same is true of the object and purpose of Article 56(3) of the ICSID Convention together with its context. When it comes to constituting a resubmission tribunal, the functions and purposes of Article 56(3) are either not at issue or achieved through other means. According to the sources relied upon by the Applicants,[416] such functions are threefold:

- A first function of Article 56(3) is to safeguard the immutability of the composition of tribunals. This function is not at issue since the resubmission tribunal is constituted anew and by definition, none of its members have resigned without the other arbitrators' consent.

- A second possible function of Article 56(3) is to prevent a party, in the course of the proceedings, from inducing the arbitrator which it appointed to resign so as to replace her or him with "a more tractable" one. This function is not at issue either when it comes to the constitution of a resubmission tribunal. There is no basis for a party to be dissatisfied with the performance of its party-appointed arbitrator and try to have her or him removed before the resubmission proceedings even started. At that initial stage, each party seeks to make the best appointment, and each arbitrator declares that she or

[416] Annulment Application, paras. 58 ss., referring among others to Mr. Broches, Professor Schreuer and a note from the Secretariat.

he is independent and impartial. Each arbitrator is presumed to be so unless she or he is challenged pursuant to the relevant provisions.

- A third function of Article 56(3) consists in preventing a party from delaying proceedings by causing the arbirator it appointed to resign and then postponing the appointment of a replacement arbitrator. Where the constitution of a resubmission tribunal is at stake, this function is achieved through other means. If a party fails to appoint an arbitrator within 90 days, the power to appoint *in lieu* of that party rests with the Chairman pursuant to Article 38 of the ICSID Convention upon the request of one of the parties.

547. In conclusion, the provisions dealing with the constitution of the resubmission tribunal in the ICSID Convention and the ICSID Arbitration Rules are straightforward, consistent, coherent and complete. The Committee does not see a gap which might justify an analogous application of the basic idea of a norm which is not applicable through interpretation in accordance with Article 31 of the VCLT. The non-application of Article 56(3) does not lead to a situation where the interpretation, pursuant to Article 31 of the VCLT, leaves the meaning of Articles 52(6) and 37 to 40 of the ICSID Convention "ambiguous or obscure" or leading to "manifestly absurd or unreasonable" results (Article 32 of the VCLT).

548. In addition, in the first phase of the present proceeding, the Chairman had appointed a specific arbitrator to replace another specific arbitrator. Nothing in this decision indicates that – assuming this is within the powers of the Chairman – it was meant to pronounce a sanction against Chile for wrongdoings in connection with its party-appointed arbitrator's divulgation of the First Tribunal's deliberation,[417] and that the Chairman sought to establish his power to appoint arbitrators instead of Chile for the remainder of the proceeding.

549. It may be added that the fears which, according to the Applicants' thesis, would justify an "analogical application" of Article 52(6) did not materialize. Chile did not seek to delay

[417] *Supra*, para. 306.

the proceedings by postponing the appointment of an arbitrator, quite the opposite. The appointment of Mr. Mourre was made promptly, and in appointing Mr. Mourre, Chile did not choose an arbitrator "more tractable" than other arbitrators before him, since the Applicants expressly confirmed that the personal qualities of Mr. Mourre were not in question and that they had no reason to challenge him.

550. For these reasons, the Committee determines that the appointment of Mr. Mourre by Chile complied with Articles 52(6) and 37(2)(b) of the ICSID Convention and the constitution of the Tribunal was proper. The Applicants' request for annulment based on Article 52(1)(a) with respect to Mr. Mourre is therefore rejected.

551. The determination on the proper constitution of the Resubmission Tribunal is not without effect on the other alleged grounds for annulment, *i.e.*, a manifest excess of power and a serious departure from a fundamental rule of procedure, allegedly exercised by the Tribunal but also by the Centre.

**(2) Manifest excess of power**

552. The Committee understands that the Applicants are asserting that the Centre and the Resubmission Tribunal have exceeded their powers, first by disrespecting the binding conclusions of the First Tribunal, and second by accepting the appointment of Mr. Mourre.

553. The Committee has studied the First Award carefully. It has not found a binding decision or even a statement to the effect that in potential resubmission phases, Chile would be precluded from appointing an arbitrator. Paragraphs 34-37 and 729 describe violations of the deontological duties of individual arbitrators and incidents which are incompatible with the practice of international arbitration but they do not envisage procedural steps in future phases of the dispute. The First Tribunal found that the resigning arbitrator had violated his deontological duties but considered that it was not within its power to inquire whether Chile had taken any initiative in this sense.[418] Therefore, the Centre did not violate a *res iudicata* effect when it monitored the procedure of constitution of the Resubmission

[418] First Award, paras. 36-37.

Tribunal in accordance with ICSID Arbitration Rule 55(2)(d), and the Resubmission Tribunal did not violate such effect by accepting its constitution of that Tribunal in accordance with the ICSID Convention and the ICSID Arbitration Rules.

554. Further, neither the Centre nor the Resubmission Tribunal violated Article 41(1) of the ICSID Convention when the Resubmission Tribunal held, during the controversial debates surrounding the drafting of Procedural Order No. 1 in 2013/2014, that it was properly constituted and competent to adjudicate the matters before it. The Resubmission Tribunal did what Article 41(1) of the ICSID Convention requests it to do, namely it ruled on its competence to decide on the Claimants' request regarding the role of Mr. Mourre in the Resubmission Tribunal.

555. Finally, neither the Centre nor the Resubmission Tribunal violated the duty established in Article 44 of the ICSID Convention. A violation of Article 44 of the ICSID Convention would require that a gap in procedural rules existed which had to be filled by the Tribunal's decision. However, no such gap exists in situations where an arbitrator is appointed in accordance with the procedural rules. There was no legal basis for the two other arbitrators to ask Mr. Mourre to resign, and there was no legal basis to ask the Chairman to appoint an arbitrator. Accordingly, the Centre acted in compliance with the ICSID Convention and the Arbitration Rules when monitoring the constitution of the Resubmission Tribunal in accordance with ICSID Arbitration Rule 55(2)(d).

556. Therefore, the Committee rejects the Applicants' request to annul the Resubmission Award for an excess of power in the context of the appointment of Mr. Mourre.

**(3) Serious departure from a fundamental rule of procedure**

557. With respect to an alleged departure from a fundamental rule of procedure, neither the Resubmission Tribunal – nor indeed the Centre – violated a rule of procedure by refusing to take action, at the request of the Applicants, to invite Mr. Mourre to resign, holding that it was not called to do so without a formal request for disqualification which the Applicants refused to submit.

558. Members of tribunals have no authority to take action against a co-arbitrator *sua sponte*. An initiation by one of the parties is required. The Committee does not subscribe to the Applicants' argument according to which a request for disqualification under Article 57 of the ICSID Convention was "inapplicable" since their refusal to accept the appointment of Mr. Mourre was not based on any of his personal qualities. As the Respondent observes, Article 57 of the ICSID Convention not only allows for the examination of an arbitrator's personal qualities but also allows for the determination of whether the arbitrator was "eligible for appointment" pursuant to Articles 37 to 40 of the ICSID Convention. While these Articles do not comprise the hypothesis envisaged by the Applicants, this is inherent in the fact that they were seeking an analogous application of provisions of the ICSID Convention. It was for the Applicants to act in a coherent manner on the basis of their position as to an analogous application of Article 56(3). Accordingly, it was for the Applicants to challenge Mr. Mourre by means of an application to disqualify him on the basis of the (analogous) application of Article 57. Absent any such request, the Resubmission Tribunal was not in a position to act. The Centre was in even less of a position to act.

559. Therefore, the Committee rejects the Applicants' request to annul the Resubmission Award for a violation of a fundamental rule of procedure in the context of the appointment of Mr. Mourre.

560. That leads to the overall result that all requests for annulment in the context of the appointment of Mr. Mourre as arbitrator of the Resubmission Tribunal are rejected.

## B. THE CHALLENGES TO SIR FRANKLIN BERMAN AND MR. V.V. VEEDER; THEIR ALLEGED MANIFEST LACK OF IMPARTIALITY; THEIR ALLEGED FAILURE TO DISCLOSE INFORMATION, INVESTIGATE RELEVANT FACTS AND ORDER THE PRODUCTION OF DOCUMENTS TO CHILE; THEIR ALLEGED CONDUCT FOLLOWING THE SECOND CHALLENGE

### (1) General observations: the Committee's powers

561. This *ad hoc* Committee has the authority and duty to determine, (i) whether the Resubmission Tribunal was properly constituted, (ii) whether, once constituted, it manifestly exceeded its powers and/or seriously departed from a fundamental rule of procedure and, (iii) whether the Resubmission Tribunal stated the reasons on which it based the Resubmission Award. Article 52(1) of the ICSID Convention unambiguously states that a party may only request the annulment of an "award." A rectification decision is no exception and is annullable because it is "part of the award" (Article 49(2)).

562. This Committee does not have the authority and duty to assess the Resubmission Tribunal's conduct to the extent that it has not had an impact on the Resubmission Award. That is the case for post-Award conduct, as long as such conduct does not evidence errors of the pre-Award phase, reflecting a pattern or *modus operandi* of continuous behaviour.

563. The Committee does also not have the authority and duty to assess whether decisions or opinions by individual arbitrators, expressed in letters or otherwise, state the reasons on which they are based. Article 52(1)(e) unequivocally states that an award can only be annulled when the tribunal failed to state the reasons on which the *award* is based. It does not allow for the annulment of an award because the tribunal or a member of the tribunal did not state the reasons on which procedural decisions outside the award, and even more so post-award procedural decisions are based.

564. Further, *ad hoc* committees cannot, in principle, address the independence and impartiality of an arbitrator *de novo* in disregard of the proceedings that have taken place pursuant to Articles 57 and 58 of the ICSID Convention. They may only address the issue *de novo* if

the decision taken pursuant to Articles 57 and 58 of the ICSID Convention was so plainly unreasonable that no reasonable decision-maker could have reached it. This is the approach taken in *EDF v. Argentina* and *Suez v. Argentina*.[419] The same position was taken by the *ad hoc* committee in *Mobil v. Argentina*.[420] As the Respondent argues, the *Mobil* committee expressly adhered to the two abovementioned decisions.[421] While the Applicants correctly observe that the *Mobil* decision recognized further powers of annulment committees,[422] this was to the effect that annulment committees can evaluate an arbitral tribunal's impartiality on the basis of the decisions taken by the tribunal (or by the majority of the arbitrators) regarding a challenge brought against one of them.[423] The Committee agrees with the *Mobil* committee in this respect and will proceed accordingly, but observes that this is not concerned with the circumstances under which an annulment committee can address *de novo* a challenge decided upon by the Chairman, rather than by the remaining arbitrators.

565. For these reasons, a first series of acts which the Committee will not analyse from the perspective of their possible annulment, is the following:

- the Tribunal's decision of 21 November 2016 to reject a request for disclosure of documents;

- President Berman's letter of 1 March 2017 announcing his intention not to participate in Mr. Veeder's disqualification procedure; and

- the Tribunal's decision of 15 June 2017 not to order Chile to provide information on its relation with Essex Court Chambers.

[419] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, para. 145 (C-103). *See also Suez v. Argentina*, Decision on Annulment, 5 May 2017, paras. 188-189 (C-109).

[420] *Mobil v. Argentina*, Decision on the Argentine Republic's Request for Annulment, 8 May 2019, para. 44.

[421] Chile's submission regarding *Mobil v. Argentina* decision, 1 July 2019, pp. 1-2.

[422] Applicants' Response to the *ad hoc Committee*, 1 July 2019, p. 2.

[423] *Op. cit.*, paras. 44-46.

These acts are not annullable *per se*. However, they will be analysed by the Committee so as to determine whether their possible deficiencies impact on the Resubmission Award so as to justify its annulment.

566. A second series of acts which the Committee will not analyse from the perspective of their possible annulment consists of the two decisions of the Chairman of the Administrative Council on the proposals to disqualify Sir Franklin Berman and Mr. Veeder, dated 21 February 2017 and 13 April 2017. This Committee will analyse only the decisions of the Chairman so as to determine whether they hinder or, to the contrary, call for a *de novo* examination of whether the Tribunal was properly constituted.

**(2) President Berman's letter of 1 March 2017: no pattern of pre-award conduct**

567. In that context, the Committee wishes to underline the following point from the outset. It does not consider that President Berman's position, expressed in his letter of 1 March 2017, evidences a pattern of pre-award conduct on his part.

568. With respect to the letter of 1 March 2017, the Applicants note that President Berman referred the challenge against Mr. Veeder to the Chairman of the Administrative Council because he regarded the challenge as an "appeal" against the Chairman's previous decision on the challenge brought against Mr. Veeder and himself. The Applicants assert that President Berman thereby disregarded the fact that the new challenge was based on new evidence, which allegedly proves a lack of impartiality on his part.

569. The Committee does not consider that President Berman's letter of 1 March 2017 proves a lack of impartiality. Qualifying the new challenge against Mr. Veeder as "not dissimilar to an appeal," as President Berman did, may not have been entirely adequate. However, since a first challenge against Mr. Veeder had been decided upon by the Chairman, and since the Applicants (as they themselves underline) were now alleging new facts, which were related to the facts previously submitted to the Chairman, the nature of the new challenge was a request for the revision of the Chairman's previous decision. Requests for revision are generally handled by the entity that rendered the original decision subject to which revision

is sought, as evidenced by Article 51 of the ICSID Convention. Against this background, President Berman's position does not constitute a refusal to admit that the Applicants were adducing new evidence. It cannot be qualified as unreasonable or interpreted as evidencing a lack of impartiality to the detriment of the Applicants.

570. President Berman's further comment that if he were to sit on the new challenge against Mr. Veeder, he would be open to the accusation that he (President Berman) lacked the necessary impartiality because he had just been challenged by the Applicants or because both the previous and the new challenge were concerned with the relationship between members of the same barristers' chambers, obviously sought to safeguard the integrity of the proceedings and more specifically the Applicants' rights and interests in that respect. This behaviour is the opposite of behaviour evidencing partiality to the detriment of the Applicants.

**(3) The Tribunal's decisions of 21 November 2016 and 15 June 2017: no pre-award knowledge of the allegedly relevant facts**

571. With respect to the refusal to investigate the relationship between Essex Court Chambers and Chile, President Berman and Mr. Veeder, and, for that matter, the Applicants themselves, declared that before the date of the Resubmission Award they did not know that members of Essex Court Chambers had worked as counsel for and against Chile and had been paid for these services. The Applicants allege that President Berman and Mr. Veeder were not truthful in this respect and Chile alleges that it is the Applicants that were not truthful in this respect.

572. Neither Party has proffered evidence for these allegations. The Committee has no reason to doubt the sincerity of the affirmations of President Berman, Mr. Veeder and the Applicants. It bases the reasoning of this Decision on Annulment on the assumption that none of them lied and none of them had knowledge about the relations between other members of Essex Court Chambers and Chile. The Committee further notes that neither the relations nor the fees paid by Chile were contested when the issue was raised after the Award had been rendered.

573. This observation leads to an unavoidable conclusion, similar to the one made in *Vivendi II* under comparable circumstances. That *ad hoc* committee found that the challenged arbitrator had no actual knowledge of circumstances which might have caused a party to doubt about the "reliability for independent judgment" (Article 14 of the ICSID Convention and ICSID Arbitration Rule 6). Therefore, the incriminated circumstances "had no material effect on the final decision of the Tribunal."[424]

574. Since neither President Berman nor Mr. Veeder had positive knowledge of relations between members of Essex Court Chambers and Chile at the time the Award was rendered, that knowledge could not impair their judgment with respect to the Award. Later knowledge does not reflect back to the time before the Award. It is therefore irrelevant whether the knowledge had any impact on the incriminated decisions of 21 November 2106 and 15 June 2017. The Convention is only concerned with the absence of bias affecting awards as the outcome of the arbitration process and not with subsequent conduct.

**(4) The institutional propriety of the Chairman's Decision of 13 April 2017**

575. The Applicants assert that the Decision of 13 April 2017 by which the Chairman rejected the proposal to disqualify Mr. Veeder was made by the wrong body. Therefore, the Decision must be disregarded and the Committee must adjudicate the issue of disqualification anew.

576. More precisely, the Applicants assert that President Berman had no right to refuse to decide on the proposal, together with the second arbitrator, in accordance with Article 57 of the ICSID Convention. They rely on *Azurix v. Argentina* where the *ad hoc* committee had found:

> Thus, for instance, a ground of annulment might exist under Article 52(1)(a) […] if a decision on a proposal for

[424] *Vivendi v. Argentina (II)*, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2017, 10 August 2010, para. 235 (C-107).

> disqualification was purportedly taken by a person or body other than the person or body prescribed by Article 58.[425]

577. However, as already mentioned, the Applicants' new challenge against Mr. Veeder was in fact a request for revision of the Chairman's previous decision on the challenge brought against President Berman and Mr. Veeder. In accordance with a general principle of procedural law, as evidenced by Article 51 of the ICSID Convention, requests for revision should, if possible, be brought before the organ which rendered the original decision. As a consequence, there is no basis to consider that the decision on the new challenge against Mr. Veeder was made by a person or body lacking the necessary authority.

578. Another consequence is that the Applicants' assertion that the decision-making process violated the principle of the international *ordre public* that "*un arbitre* [ne peut] *s'abstenir dans l'accomplissement de l'obligation que la première phase de l'article 58 lui impose tout en demeurant en fonction*"[426] is of no avail. The question is whether the Chairman was authorised to make the Decision and not whether President Berman was under the obligation to decide the challenge in the circumstances of the case. That is not an issue of *ordre public* but of the mechanics of the ICSID system.

579. In addition, the Applicants' argument that President Berman should have either heard the challenge against Mr. Veeder or resigned is not consistent with the solution that the ICSID system provides, as President Berman declined to hear the challenge. From this perspective, the issue before this Committee is not to decide whether President Berman was entitled to refuse to participate in the procedure but rather whether the Chairman acted correctly when he decided in the arbitrators' stead.

580. Article 58 of the ICSID Convention does not specifically address the situation when one of the remaining arbitrators declines (or for that matter, both arbitrators decline) to take part in the challenge procedure. However, Article 58 addresses a series of hypotheses where the decision shall be made by the Chairman, namely "where those [remaining]

[425] *Azurix v. Argentina*, ICSID Case No. ARB/01/12 ("*Azurix v. Argentina*"), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 282 (C-69).

[426] Annulment Application, para. 172.

members are equally divided, or in the case of a proposal to disqualify a sole […] arbitrator, or a majority of […] arbitrators." These hypotheses taken together make it clear that when the decision cannot be made by consensus between the two remaining arbitrators, it is for the Chairman to decide. This solution is also bound to apply where one or both of the remaining arbitrators, decline to make a decision. This has the consequence that the remaining arbitrators do not reach a consensual decision either in favour or against the challenge, which according to the terms of Article 58 triggers the Chairman's decision-making power.

581. The Committee agrees with the *ad hoc* committee in *EDF v. Argentina* that through Article 58 of the ICSID Convention the "machinery" for a challenge was put in place to allow "swift" solutions.[427] The provision breathes fair and rational procedural economy and the intention to limit the loss of time and the possibility of obstruction to a minimum, as specified in ICSID Arbitration Rule 9. Even assuming that the abstention of President Berman to decide were unjustified, a swift and procedurally economical solution was called for, which for the reasons set out above clearly consisted in having the decision made by the Chairman.

**(5) The Chairman's Decisions of 21 February and 13 April 2017**

582. The Committee also has to determine whether the Decisions of 21 February 2017 and 13 April 2017, rejecting the proposal to disqualify President Berman and Mr. Veeder are tenable and reasonable.

583. In turning to this exercise, the Committee agrees, as already mentioned, with the majority view of *ad hoc* committees which have found that decisions of remaining arbitrators or the Chairman on the disqualification of an arbitrator must be upheld unless they are "so plainly unreasonable that no reasonable decision-maker could have come to such a decision."[428] This position strikes a fair balance between considerations of procedural economy and integrity which are both central for the ICSID Convention. The procedural system of

[427] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, para. 115 (C-103).
[428] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, para. 145 (C-103).

challenges, as provided for in Articles 57 and 58, is mostly concerned with efficiency and procedural economy and promotes the finality of decisions, while the procedural system of annulment is mostly concerned with the propriety and integrity of the system and establishes the "*ad hoc* committee as the guardian of the integrity of the arbitral procedure."[429] The Committee agrees with *Suez v. Argentina*, where the *ad hoc* committee found that:

> [A] scope of review wide enough to safeguard the integrity of the proceedings but not so wide as to re-consider the merits of a decision that was already taken in the underlying proceedings is in line with the object and purpose of the annulment proceeding within the regime of the ICSID Convention and thus also in line with the interpretation principles of Articles 31 and 32 of the Vienna Convention.[430]

584. In maintaining this balance, the Committee does not venture into the field of an appeal proceeding, which would violate the principle of Article 53 of the ICSID Convention. It understands the apprehension of the *ad hoc* committee in *Azurix v. Argentina* that refused to decide whether "a decision under Article 58 was correct, as this would be tantamount to an appeal."[431] When examining whether the Chairman of the Administrative Council rendered decisions that no reasonable decision-maker would have rendered, the issue is not the correctness of the decisions but rather the protection of the basic integrity of the challenge procedure. The legitimate apprehension to avoid a test equivalent to an appeal must not engender the curtailing of committees' functions to a degree that would prevent the supervision of the integrity of the ICSID system.

585. On 21 February 2017, the Chairman rendered a decision which rejected the proposal to disqualify President Berman and Mr. Veeder on procedural grounds. He found that the

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[429] *EDF v. Argentina*, Decision on Annulment, 5 February 2016, para. 140 (C-103).

[430] *Suez v. Argentina*, Decision on Argentina's Application for Annulment, 5 May 2017, para. 92 (C-109), as confirmed by *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Intergrales de Agua S.A. v. Argentine Republic*, ICSID case No. ARB/03/17, Decision on Argentina's Application for Annulment, 14 December 2018, para. 166 (CL-416), and by *Mobil v. Argentina*, Decision on the Argentine Republic's Request for Annulment, 8 May 2019, paras. 44 ss.

[431] *Azurix v. Argentina*, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 282 (C-69).

proposal was not made "promptly, and in any event before the proceeding is declared closed" as required by ICSID Arbitration Rule 9(1). Since the Chairman had refused the proposal on procedural grounds, he did not make a determination as to the merits of the Applicants' assertions that the two arbitrators lacked the capacity to exercise independent judgment.

586. The Committee notes that the Chairman interpreted and applied the term "promptly" in appreciating the factual circumstances and the legal requirements.

587. He recalls in his decision that:

- during the appointment process, both President Berman and Mr. Veeder had disclosed that they were members of Essex Court Chambers;

- the Applicants appointed Mr. Veeder after having agreed to the presidency of Sir Franklin Berman, thereby implying that the fact that more than one member of Essex Court Chambers served on the Tribunal did not arouse any suspicion as to their independence and neutrality;

- both President Berman and Mr. Veeder had declared that they had no knowledge of the relations between other members of Essex Court Chambers and Chile;

- the Applicants requested the disqualification of President Berman and Mr. Veeder shortly after the Resubmission Award was rendered, when the Tribunal had ceased to exist but was reconvened to decide upon a request for rectification in accordance with Article 49(2) of the ICSID Convention. More specifically, the Applicants state that they discovered the alleged conflict of interest on 20 September 2016. They submitted the matter to the Secretary General on 18 October 2016, whereupon the Centre replied that the Resubmission Tribunal had ceased to exist, whereafter the Applicants filed a request for correction on 7 November 2016 and requested that Messrs. Berman and

Veeder make full disclosures of their chambers' relationship with Chile on 10 November, and finally requested their disqualification;[432] and

- that the Chilean press had regularly reported (including during the period of the Resubmission Proceeding) about the involvement of members of Essex Court Chambers in Chilean disputes before international adjudication fora, that the Applicants regularly introduced newspaper articles into the evidentiary record of the case, and that the Applicants based their inquiry into the involvement of members of Essex Court Chambers on an article in the Chilean press that was published a few days after the Resubmission Award of 13 September 2016.

588. These elements must be taken into consideration when determining whether no reasonable decision-maker would have possibly reached the decision to apply ICSID Arbitration Rule 9 as done by the Chairman of the Administrative Council,[433] and whether no reasonable decision-maker would have possibly rejected the Applicants' proposal to disqualify President Berman and Mr. Veeder for lack of timeliness.

589. The Committee recalls that, with respect to timeliness, the issue before the Committee and already before the Chairman was not to determine whether the members of the Resubmission Tribunal should have made inquiries into these relations and had failed to do so but to determine whether the Applicants should have known that the arbitrators might not have fulfilled their duties.

590. The Committee is aware that not all of the press clippings that the Chairman considered were shared with the Applicants. It believes that this was a procedural error which should not have occurred. However, this omission concerns only a few articles and was not result-determinative. The substance of the press clippings referred to are in footnote 69 at paragraph 88 of the decision where the Chairman reasons that the file, and notably press clippings submitted by the Respondent, evidence that it was public knowledge since

[432] Decision on the Proposal to disqualify Sir Franklin Berman and Mr. V.V. Veeder QC, 21 February 2017, pp. 2-5; Claimants' Proposal for the Disqualification of Messrs. Berman and Veeder, 22 November 2016, p. 37 (C-118).

[433] Decision on the Proposal to disqualify Sir Franklin Berman and Mr. V.V. Veeder QC, 21 February 2017, para. 94.

December 2012 that Chile was assisted in international proceedings by members of Essex Court Chambers. The Chairman then reasons, at paragraph 91, that the Applicants made a regular use of press clippings, which evidences that they studied the press on a regular basis. Only then does the Chairman refer to the press clippings that were not shared with the Parties (identified in footnote 72) to make the additional point that the Applicants used the same or similar sources as those where the information was published regarding Chile's representation by barristers of Essex Court Chambers. This last point is not indispensable to the Chairman's finding that the Applicants could and should have known that barristers from Essex Court Chambers were working for Chile in international proceedings.

591. The Committee is further aware that press clippings published before the one which triggered the Applicants' research mentioned names of members of Essex Court Chambers but not their affiliation to the Chambers. The Committee understands the Applicants' argument that this made it impossible or unreasonably difficult for them to match the publicly available information with Essex Court Chambers and Messrs. Berman and Veeder. However, while the Applicants have presented this argument before the Committee, it does not appear to have been raised before the Chairman. The Applicants' submissions before the Chairman set out that their challenge was formulated promptly after the press article was discovered on 20 September 2016, but it did not argue why the Applicants could not have found the relevant information at an earlier date.[434] In addition, the argument is not self-evident. It may be convincing when presented, but it does not come to mind on a first analysis of the relevant facts. The Committee considers that, in the same way as for an excess of power to be "manifest," it must be perceived without a thorough analysis,[435] for a decision of the Chairman to be plainly unreasonable its defect must be perceivable with little effort and without deeper analysis. This is not the case here, since the Applicants' argument regarding the conclusions that could or could not be drawn from

[434] Claimants' Proposal for the Disqualification of Messrs. Berman and Veeder, 22 November 2016, paras. 74 ss. (C-118).

[435] *Supra*, para. 197.

press clippings before the one which triggered their research does not come to mind on a first analysis.

592. In addition, the Chairman's decision is not based exclusively on the finding impugned by the Applicants that they could and should have discovered that other members of Essex Court Chambers worked for Chile in international proceedings through the press.

593. One further element in the Chairman's reasoning is that the Applicants could and should have questioned Mr. Veeder about the professional relationships of other barristers of Essex Court Chambers:

> *92.* […] *Si les Demanderesses étaient préoccupées par des conflits d'intérêts potentiels susceptibles de résulter des relations professionnelles d'autres barristers des Essex Court Chambers, elles auraient pu soulever ce point au moment de la nomination des Arbitres mis en cause. Cela aurait été prudent, notamment car il est notoire que les chambers de barristers considèrent que les barristers opèrent dans une stricte indépendance les uns à l'égard des autres, et que les chambers ne sont pas traitées comme l'équivalent de cabinets d'avocats en matière de conflits. Le dossier de la procédure ne contient aucun élément indiquant que les Demanderesses avaient des préoccupations à ce sujet.*

594. The Chairman's reasoning in this respect is based on the specific circumstances of the case, namely that the Applicants knew President Berman and Mr. Veeder were members of the same barristers' chamber, on the one hand, and that barristers' chambers are generally known for considering that their members are independent from each other, on the other hand. Based on these two elements of prior knowledge and of general knowledge, respectively, it was not plainly unreasonable for the Chairman to consider that if the Applicants had concerns regarding possible conflicts of interests arising from membership in the same barristers' chamber, they could have raised the issue at the time the Arbitrators were appointed. Neither was it plainly unreasonable for the Chairman to take account of this element in his appreciation as to whether the challenge had been brought in a timely manner.

595. Another further element relied on by the Chairman was that the challenge had been brought after the Award had been rendered, whereas ICSID Arbitration Rule 9 provides that challenges must be brought promptly "and in any event before the proceeding is declared closed":

> *94. Pour que la Demande de récusation soit considérée comme ayant été soumise "dans les plus brefs délais", elle aurait dû être soumise au début de l'instance de nouvel examen,* ***et en tous les cas avant sa clôture****. Le Tribunal de nouvel examen, tel que reconstitué, a commencé l'instance en janvier 2014, a clôt l'instance en mars 2016 et a rendu la Sentence rejetant les prétentions des Demanderesses le 13 septembre 2016. Les Demanderesses ont fait une demande de renseignements sur la représentation du Chili par des barristers des Essex Court Chambers pour la première fois Ie 20 septembre 2016 et leur Demande a été soumise le 22 novembre 2016. Le Président du Conseil administratif considère que cette Demande ne peut être considerée comme soumise "dans les plus brefs délais" au sens de l'article 9(1) du Règlement d'arbitrage, et doit être rejetée*. [emphasis added ; footnotes omitted]

596. This reasoning, based on the terms of ICSID Arbitration Rule 9(1) goes at the finality of arbitral awards. In the present case, it was concerned with the fact that the Resubmission Tribunal was resurrected by a request for the correction of errors made by the Applicants after they had addressed the Secretary-General regarding the alleged conflict of interest and the Secretary-General's response that the Resubmission Tribunal was *functus officio*.

597. Again, the Chairman identified a relevant Arbitration Rule, took into account of its express terms, and confronted them with the specific features of the facts of the case that were relevant for the application of the Rule. This syllogistic reasoning is not plainly unreasonable.

598. Considering these observations together, it was not plainly unreasonable and untenable for the Chairman of the Administrative Council to apply ICSID Arbitration Rule 9(1) and decide that the Applicants' proposal to disqualify President Berman and Mr. Veeder, made after the closing of the proceeding, was not made promptly.

599. It may also be recalled that neither President Berman nor Mr. Veeder had positive knowledge of relations between members of Essex Court Chambers and Chile at the time the Resubmission Award was rendered. As a consequence, such relations could not impair their judgment with respect to the Resubmission Award.

600. Therefore, the Chairman's Decision of 21 February 2017 does not violate the integrity of the ICSID proceeding, and the Committee has no authority to disregard it and decide the issue *de novo*.

601. On 13 April 2017, the Chairman of the Administrative Council rendered a second "Decision on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC." The Decision combines two distinct proposals for the disqualification of each one, based on unrelated assertions.

602. With respect to Mr. Veeder, the Applicants scrutinized the declarations that he had made to explain why he had resigned as president in a different ICSID case.[436] The Committee has carefully studied the allegations and finds them correctly summarised by the Chairman:

> The Claimants' proposal to disqualify Mr. V.V. Veeder QC rests, in substance, on two grounds: a) Mr. V.V. Veeder QC lied concerning when he learned that Sir Christopher Greenwood QC's was appearing as counsel for the claimants in the *Vannessa Ventures* case ("First Ground"); and b) Mr. V.V. Veeder QC lied when he explained his resignation was not due to the fact that Sir Christopher Greenwood was practicing at Essex Court Chambers ("Second Ground").[437]

603. The Chairman compared the Applicants' allegations with Mr. Veeder's explanations as well as additional documents submitted by the Parties and Mr. Veeder. As a result of his review, he did not find "any evidence that Mr. V.V. Veeder QC lied as alleged by the

[436] Annulment Application, paras. 141-165.

[437] Chairman of the Administrative Council, Decision on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC, 13 April 2017, para. 51.

Claimants."[438] In paragraphs 54 to 67 of the decision, he stated the reasons for his analysis and determination.

604. The Chairman's interpretation of the evidence contradicts the Applicants' interpretation. The Committee has no authority to decide between the two interpretations. It is not a court of appeal. Rather, it has to examine whether the Chairman's analysis and determination are clearly unreasonable and untenable and violate the integrity and propriety of the proceeding.

605. The Committee has studied the Chairman's analysis. The Chairman considered that the Applicants' allegation that Mr. Veeder lied was based on the assumption that the terms he used, "at the jurisdictional hearing" referred to the precise moment of the hearing – the physical appearance of counsel before the tribunal – rather than to the broader period of time. The Chairman notes that Mr. Veeder has explained that he had learned about the relevant facts during the hearing preparation period, a few days before the hearings started. The Chairman concludes that the terms used by Mr. Veeder do not constitute a lie or a misleading formulation.[439] This is a consistent assessment of facts, neither influenced by dishonest submissions nor by bias, and neither untenable nor unreasonable. Therefore, the Committee has no authority to disregard it and to decide the issue *de novo*.

606. With respect to President Berman, the Applicants take issue with his letter of 1 March 2017 where he comments the second challenge of Mr. Veeder. President Berman wrote that "it does not seem to me right that I should sit on this challenge" because it "would lay itself open to an accusation that I lacked the necessary objectivity an impartiality," especially as "the new challenge, based as it is on the same ground as the old challenge, is not dissimilar to an appeal against the rejection of the latter." He had therefore opined that "it would be more conducive to the health of the arbitration system […] if the new challenge, like the

[438] Chairman of the Administrative Council, Decision on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC, 13 April 2017, para. 53.

[439] Chairman of the Administrative Council, Decision on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC, 13 April 2017, paras. 54-57.

old, were to be heard and decided by the Chairman of the Administrative Council. That would not, in my view, be in any sense incompatible with the provisions of the Convention and the Rules."[440]

607. The Committee has already rejected the Applicants' assertion that the Chairman of the Administrative Council appropriated authority that he did not have when he took it upon himself to decide on the challenge after having received President Berman's letter.

608. Further, the Committee has carefully studied the Chairman's detailed analysis and determination with respect to the merits of the Applicants' proposal, in paragraphs 68-77 of the Decision. That analysis dismissed a number of the Applicants' assertions as manifestly incorrect. The Chairman thus considered that President Berman did not state that the new challenge against Mr. Veeder was "completely identical" to the previous one but that it was "not dissimilar." The Chairman further considered that President Berman did not prevent the Applicants from accessing documents as contended by the Applicants, since he did not have the authority to authorise their disclosure, and the Applicants had requested them from the Centre, not from President Berman. On the basis of these and other assessments, the Chairman provided a different interpretation of President Berman's letter than the Applicants. The Committee has no authority to decide between these different interpretations. It is not a court of appeal. Rather, it has to examine whether the Chairman's analysis and determinations are clearly unreasonable and untenable, and violate the integrity and propriety of the proceeding.

609. In this respect, the Committee observes, first, that the Chairman's interpretation of the letter is consistent with its text as reproduced above. Second, the Chairman did not apply a manifestly erroneous test in considering that "a third party undertaking a reasonable evaluation of Sir Franklin Berman QC's letter dated 1 March 2017 would not find a

[440] Letter of Sir Franklin Berman to the Secretary-General of ICSID, 1 March 2017 (C-160).

manifest lack of the qualities required under Article 14(1) of the ICSID Convention."[441] It follows that the Chairman's decision is not clearly unreasonable and untenable.

610. Therefore, the Committee has no authority to disregard the Chairman's Decision and to decide the issue *de novo*.

611. None of the specific circumstances relied upon by the Applicants warrant a different conclusion in this respect:

- The fact that the Chairman's decisions were taken after the Resubmission procedure, *i.e.* in the course of the proceedings on the request for rectification, does not warrant a *de novo* examination but to the contrary, contributed to the Chairman's finding that the challenge had not been brought in a timely manner.

- Neither is a *de novo* examination warranted by reason of the fact that the Chairman did not take the merits into account but concentrated on purely procedural considerations which allegedly have no *res iudicata* effect. The rules on timeliness are part and parcel of the balance between the safeguard of independence and impartiality, on the one hand, and legal certainty, on the other hand. The finding on timeliness is therefore *res iudicata* as concerns the challenge, in the same way as a finding on the merits would be.

- No new facts have emerged after the Chairman's decisions that alter the conclusions reached above.

612. In sum, the *ad hoc* Committee decides that it would exceed its powers as determined at paragraphs 558 ss. above to determine that the Resubmission Tribunal was not properly constituted. Therefore, it rejects the Applicants' request to annul the Resubmission Award based on Article 52(1)(a) of the ICSID Convention.

[441] Chairman of the Administrative Council, Decision on the Proposals to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC, 13 April 2017, para. 77.

613. It follows from there that the Resubmission Award was rendered by a properly constituted Tribunal. Therefore, the Committee rejects the Applicants' request to annul the Resubmission Award, which they base on the assertion that an award rendered by an improperly constituted tribunal also represents a serious departure from a fundamental rule of procedure, in accordance with Article 52(1)(d). The Committee does not doubt the correctness of the statement. However, the requirements for this ground are not met in the present case.

## C. THE RESUBMISSION TRIBUNAL'S TREATMENT OF EVIDENCE AND BURDEN OF PROOF

614. The Applicants' assertions on the Resubmission Tribunal's manifest excess of powers, its serious departure from a fundamental rule of procedure and its failure to state the reasons on which it has based the Resubmission Award are closely interrelated. They submit that the Resubmission Tribunal manifestly exceeded its powers by rejecting evidence on facts that had occurred before the entry into force of the BIT on 29 March 1994 as well as after the initiation of the arbitration on 3 November 1997. By doing so, they submit, the Resubmission Tribunal refused to hear and consider the Applicants' case and demonstrated bias and partiality in Chile's favour, and it deconstructed the First Award through contradictory, frivolous and incomprehensible reasoning.

### (1) General background

615. The analysis of these assertions requires a full understanding of the Resubmission Tribunal's conduct and reasoning taking into account the determinations of the First Tribunal and the First Committee and considering the arguments and conduct of the Parties which are still relevant in this phase of the proceeding. The exercise is as complex as it is unavoidable.

616. The First Tribunal, the Resubmission Tribunal, the First Committee, the Applicants and the Respondent agree that the confiscations between 1973 and 1975 by the military regime were illegal, anti-constitutional and warranted compensation under Chilean law.

617. The First Tribunal found and the First Committee and the Resubmission Tribunal confirmed and accepted as final that Mr. Pey was an investor when the confiscation was completed in 1975 and that the Applicants were investors when they initiated the ICSID arbitration in 1997. In so finding, both tribunals and the First Committee rejected the Respondent's argument that Mr. Pey's alleged investments ceased to exist with the confiscation,[442] contrary to the Applicants' allegation that the Resubmission Tribunal had followed the Respondent's arguments. Therefore, the allegation that the Resubmission Tribunal was partial does not find a basis in the Resubmission Award.[443]

618. That is the factual background that brought the First Tribunal to ascertain its jurisdiction *ratione temporis*, in accordance with Article 2(2) BIT, which extends its applicability "to investments made prior to its entry into force."[444]

619. After having distinguished "*la compétence ratione temporis du Tribunal de l'applicabilité* ratione temporis *des obligations de fond continues dans l'API,*"[445] the First Tribunal rejected the claims for expropriation, on the basis that it was completed by Decree No. 165 of 10 February 1975. As analysed in Chapter VII.A. of this Decision, the First Tribunal found considerations of illegality and anti-constitutionality of Decree No. 165 irrelevant for the determination of the completion of the expropriation. The First Tribunal concluded that "*les dispositions de fond de l'API n'étaient pas applicables à l'expropriation des biens des sociétés CPP S.A. et EPC Ltda.*"[446]

620. The First Tribunal presented as a logical consequence of this finding that allegations, discussions and evidence in relation to the expropriation were not pertinent and could not be used to establish a prejudice resulting from a different cause. This statement is made in unambiguous terms in Chapter VIII, paragraph 688 of the First Award:

[442] Chile's Memorial on the Annulment of the Award of 10 June 2010, para. 418 (C-269).
[443] Cf. Resubmission Award, paras. 177-179, 181-183, 244.
[444] First Award, paras. 419-465.
[445] First Award, paras. 466, 577.
[446] First Award, para. 620.

> *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 subi par les demanderesses du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui d'une autre cause, de fait et de de droit, celle du déni de justice et du refus d'un "traitement juste et équitable"*. [footnotes omitted ; emphasis omitted]

621. The First Committee validated the rejection of claims based on expropriation but annulled paragraph 4 of the *dispositif* of the First Award ordering Chile to compensate the Applicants for damages "and the corresponding paragraphs in the body of the Award related to damages (Section VIII)."[447]

622. The First Committee "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,"[448] and that "the issue in the present case is not per se the quantum of damages determined by the Tribunal. Nor does the problem lie per se in the Tribunal's chosen method of calculating the damages suffered by the Claimants. The issue lies precisely in the reasoning followed by the Tribunal to determine the appropriate method of calculation, which, as demonstrated above, is plainly contradictory."[449]

623. There has been some discussion during this annulment proceeding as to what the Committee might have meant when it annulled the "corresponding paragraphs in the body of the Award related to damages (Section VIII)" and both Parties have referred to paragraphs of Section VIII to back their arguments.[450] The Resubmission Tribunal also examined paragraphs of Chapter VIII, especially where they "relate to matters of factual evidence and proof, they are not tainted by the criticism of the *ad hoc* Committee relating

[447] First Annulment Decision, para. 359.1.

[448] First Annulment Decision, para. 271.

[449] First Annulment Decision, para. 286.

[450] Tr. Day 1 (12 March 2019), pp. 70-72; Annulment Application, paras. 194, 211; Memorial on Annulment, paras. 503-504; Reply on Annulment, para. 73; Rejoinder on Annulment, para. 86.

to the assessment of material damages,"[451] because they "illuminate the reasoning of the First Tribunal in the un-annulled portions of the Award."[452]

624. The issue is of immediate relevance with respect to paragraph 688 of the First Award. It is notable that the First Committee repeatedly referred to paragraph 688 and quoted it twice, each time affirmatively and drawing conclusions that hinge upon the finality of paragraph 688. That is the case in paragraph 261 of the Annulment Decision where the First Committee finds an acknowledgment by the First Tribunal that backs the First Committee's arguments, and that is the case in paragraph 283 of the Annulment Decision where the First Committee quotes paragraph 688 to find that "the Tribunal expressly stated that an evaluation of the damages allegedly suffered by the Claimants as a result of the expropriation was irrelevant and that all the allegations, discussion and evidence related to such damages could not be considered by the Tribunal."

625. In both cases, the First Committee made the content of paragraph 688 its own. This becomes evident when the wording is compared. While the First Tribunal formulates in paragraph 688 that the "*preuves relatives au dommage subi par les demanderesses du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui d'une autre cause, de fait et de de droit, celle du déni de justice et du refus d'un 'traitement juste et équitable',"* the First Committee formulates, in introducing the debate on paragraph 688, that an expropriation-based calculation of damages was irrelevant for the calculation of damages resulting from FET violations, "since the Claimants' claim for expropriation was outside the tremporal scope of the BIT." [453] It would be plainly contradictory to assume that the First Committee wanted to confirm the substance of paragraph 688 of the First Award and at the same time to annul it. Therefore, this Committee interprets the First Committee's decision to annul "the corresponding paragraphs in the body of the Award related to damages (Section VIII)"[454]

[451] Resubmission Award, para. 243.

[452] Resubmission Award, para. 223.

[453] First Annulment Decision, para. 282.

[454] First Annulment Decision, para. 359(1).

as meaning that only the paragraphs that adjudicate compensation for damages resulting from violations of the fair and equitable treatment standard by referring to the standard of expropriation are concerned. It believes that the First Committee's formulation in paragraph 359(4), where it mentions "Section VIII," is but a short-hand reference to paragraph 359(1) and does not express the intention to contradict it.

626. As a consequence of the foregoing, it is *res iudicata*, as explicitly confirmed in paragraphs 282 and 283 of the First Annulment Decision, that the evidence presented by the Applicants to prove their prejudice caused by the expropriation could not be taken into consideration, neither by the First Tribunal nor by the Resubmission Tribunal, to calculate the damages caused by the violation of fair and equitable treatment standard.

627. This is what was expressly acknowledged in the Resubmission Award. At some point, the Resubmission Award seems to suggest the unannulled parts of the First Award only established the breach and left the determination of the injury entirely untouched: this is the case where the Resubmission Tribunal states that "[s]ince the first stage, the establishment of breach, has already been determined with binding effect by the First Award, the Tribunal can begin with the second, the ascertainment of the injury caused by the breach."[455] At a later stage in its reasoning, however, the Resubmission Tribunal leaves no doubt that the First Award's *res iudicata* effect extends to the First Tribunal's finding that the damage arising from the violation of the fair and equitable treatment standard cannot be based on the damage caused by the expropriation. At paragraph 228 of its award, the Resubmission Tribunal thus states:

> The present Tribunal draws the following conclusions from the above, **which represent its interpretation of the *res judicata* portions of the First Award** for the purposes of carrying out its own mandate of deciding on the "compensation" due under paragraph 3 of the dispositive of the First Award for the breach determined in paragraph 2 thereof: a) that the original expropriation of El Clarín and the related assets belonging to Mr Pey Casado was consummated in 1975 and consequently lies outside the

[455] Resubmission Award, para. 217.

> scope of the BIT; **that all arguments based on or arising out of the expropriation may not be taken into consideration, except in so far as they constitute factual background** to matters that are properly within the scope of the dispute under the BIT. [emphasis added]

And further at paragraph 230 of the Resubmission Award:

> The consequence of this interpretation of the First Award is, in the opinion of the Tribunal, as follows: […]
>
> d) that **any assessment of injury and damage based on the original expropriation is inconsistent with the First Award** and must therefore be rejected. [emphasis added]

For the reasons set out in paragraphs 623 to 625 above, this interpretation by the Resubmission Tribunal was in conformity with the First Committee's Decision and therefore with the First Award's *res iudicata* effect.

**(2) The Applicants' handling of the *res iudicata* effect**

628. The Applicants assert the relevance of the evidence they presented to establish the fair market value of their investment at the time of the confiscation in 1973/1975 from what they consider to be a different perspective. They submitted, before the Resubmission Tribunal, that the amount of compensation to be granted under the denial of justice/fair and equitable treatment claims had to be appraised on the basis of the value of the assets confiscated in 1973/1975. If the Chilean courts had not denied justice by delaying a judgment that would have recognized the absolute nullity of Decree No.165 from the outset, the First Tribunal would have found that the nature of the expropriation was continuous and would have ascertained the respective claim. For that reason, the amount of damages owed under Article 4 BIT is the equivalent of the amount due under Article 5.

629. For these reasons, the Applicants requested the Resubmission Tribunal to "*condamne*[r] *la Défenderesse à indemniser les Demanderesses à hauteur de l'indemnisation qu'elles auraient dû recevoir, si le déni de justice, la discrimination et leur effet n'avaient pas eu*

*lieu, en compensation des saisies de CPP S.A. et EPC Ltée*."[456] In their *Mémoire en Réplique*, the Applicants contended:

> *La conséquence du déni de justice a donc été de priver les Demanderesses de faire pleinement valoir leurs rapports de droit vis-à-vis l'Etat du Chili existant après l'entrée en vigueur de l'API, dans leur demande de réparation pour le préjudice résultant de la privation* de facto *de leur droit sur l'investissement effectué en 1972 et au dédommagement correspondant. Il s'agit bien de la réparation due au titre de la violation par la Défenderesse de l'article 4 de l'API. Comme cela sera exposé ultérieurement, cette réparation doit être calculée sur la base de la* fair market value *des sociétés CPP S.A. et EPC Ltée à la veille de leur saisie de facto.*[457]

630. In that perspective, and as instructed by the Applicants, the Applicants' financial expert based his calculation on the "*position de départ de notre raisonnement* […] *que M. Pey avait droit à être indemnisé au titre de la saisie en 1973 de son investissement,*"[458] that "*un ensemble de violations*" had to be taken into account and not only the isolated acts of denial of justice between 1995 and 2002 and/or the Decision No. 43 of 28 April 2000.[459] That is why he did not do a "but for *uniquement pour (en anglais)* the denial of justice *mais un* but for *pour l'ensemble de la violation.*"[460] He had expressed his assumption, without an exact calculation, that the damage based on the two isolated violations of the fair and equitable treatment standard "*serait zéro.*"[461]

[456] Resubmission Memorial of 27 June 2014, para. 338 and paras. 147, 286 ss., 308 ss., 451 ss. (C-8).

[457] Resubmission Reply of 9 January 2015, para. 235 and paras. 334, 343, 350, 353, 358 (C-40).

[458] Cross-examination of expert Saura, Transcript of the hearing before the Resubmission Tribunal (15 April 2015), p. 98, ls. 13-14 (C-43).

[459] Cross-examination of expert Saura, Transcript of the hearing before the Resubmission Tribunal (15 April 2015), p. 109, l. 44 (C-43).

[460] Cross-examination of expert Saura, Transcript of the hearing before the Resubmission Tribunal (15 April 2015), p. 112, l. 1 (C-43).

[461] Cross-examination of expert Saura, Transcript of the hearing before the Resubmission Tribunal (15 April 2015), p. 113, l. 43 (C-43).

631. The Respondent's financial expert agreed with the Applicants' expert that for the discrimination through Decision No. 43 the amount of damage would be "*zero*" and that for the denial of justice, no damage had been calculated.[462]

632. The Committee has carefully studied the reasoning of the First Award and of the First Committee and has found that they both determined that the violations of the fair and equitable treatment standard must be separated and isolated from the illegal expropriation.

633. The First Tribunal stated that "[l]*a saisie et le transfert de la propriété à l'Etat des biens des sociétés CPP S.A. et EPC Ltda sont constitutifs d'un fait consommé et* ***distinct*** *des violations postérieures à l'entrée en vigueur de l'API dont font état les demanderesses.*"[463]

634. Paragraphs 686 ss. of the First Award reveal what the tribunal had in mind when it used the term "*distinct.*" It did not restrict the separation to the legal requirements of Articles 4 and 5 of the BIT but insisted that the evidence presented for the damages resulting from expropriation was not relevant for damages resulting from the unfair and unequitable treatment that had occurred after the entry into force of the BIT. This is explicitly and unambiguously stated at paragraph 688 of the First Award, which the First Committee validated and where the First Tribunal reasoned that "*les* […] *preuves relatives au dommage* […] *du fait de l'expropriation* […] *ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant* […] *du déni de justice et du refus d'un 'traitement juste et équitable.' "*

635. It is further evidenced by paragraph 689 of the First Award where the tribunal determined that "*les demanderesses n'ont pas apporté de preuve, ou de preuve convaincante* […] *des importants dommages allégués et causés par les faits relevant de la compétence ratione temporis du Tribunal arbitral*"[464] – thus confirming, again, that the evidence the Applicants

[462] Cross-examination of expert Kaczmarek, Transcript of the hearing before the Resubmission Tribunal (15 April 2015), p. 164, ls. 24-26; p. 166, ls. 10-11 (C-43).

[463] First Award, para. 620 (emphasis added).

[464] First Award, para. 689.

adduced regarding the expropriation was irrelevant to the valuation of damages arising from the breach of fair and equitable treatment.

636. The First Committee confirmed the First Tribunal's determination that "the duty to provide redress for violation of rights persists even if the rights as such have come to an end,"[465] that "the post-BIT acts by Chile that it [the First Tribunal] ultimately considered to be treaty violations […] were completely separate and distinct form the 1975 expropriation,"[466] and that "the parties never pleaded damages claims arising from the breaches of Article 4 of the BIT."[467]

637. The Resubmission Tribunal was confronted with these determinations. It examined both parties' experts during the evidentiary hearing,[468] summarised the Applicants' position as presented in the written submissions,[469] and was convinced that the "resubmission proceedings, which were thorough and complete, allowed the Claimants the fullest opportunity" to show "what particular injury and damage could be proved to have been caused to them by the breach of the guarantee of fair and equitable treatment under Article 4 of the BIT determined in the First Award."[470] For the reasons already mentioned, it stated "that any assessment of injury and damage based on the original expropriation is inconsistent with the First Award and must therefore be rejected."[471] It further formulated the "central question" as to whether "the Claimants have met that burden of proving what injury was caused to either or both of them by the Respondent's breach of the standard of fair and equitable treatment in the BIT, and then of establishing the corresponding assessable damage in financial terms."[472]

[465] First Annulment Decision, para. 168.
[466] First Annulment Decision, para. 159.
[467] First Annulment Decision, para. 262.
[468] Transcript of the hearing before the Resubmission Tribunal (15 April 2015), pp. 160 ss. (C-43).
[469] Resubmission Award, paras. 70-73.
[470] Resubmission Award, para. 244; *see also* para. 215.
[471] Resubmission Award, para. 230(d).
[472] Resubmission Award, para. 231.

638. The Resubmission Tribunal answered the question in the negative, after having presented the Respondent's position, that the Applicants did not suffer "demonstrable material damage at all" and found "much merit in the Respondent's submission."[473] However, the decisive point for the Resubmission Tribunal was that the Applicants failed "to address their own burden of proof."[474] The brusqueness of the statement might seem inconsiderate, as it was, indeed, resented by the Applicants. However, in the light of the above, the statement must be understood as meaning that the Applicants failed to adduce evidence of their prejudice that was not based on the value of the expropriated assets and which the Resubmission Tribunal could take into account given the *res iudicata* effect of the First Award. This is correct, since the Applicants argued before the Resubmission Tribunal that the damages should be calculated by reference to the expropriation.

639. This conclusion does not contradict the First Tribunal's observation, as asserted by the Applicants, that it was not hindered "*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,*" for "purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force." [475] The Resubmission Tribunal echoes this view when it writes that it would take evidence and arguments on expropriation into consideration "in so far as they constitute factual background to matters that are properly within the scope of the dispute under the BIT."[476] However, while these passages taken in isolation might warrant the approach taken by the Applicants before the Resubmission Tribunal, this isolated reading was contradicted by the unambiguous determination by the First Tribunal, that the valuation of damages for the breach of fair and equitable treatment could not be based on the value of the expropriated assets.

[473] Resubmission Award, paras. 232, 233.

[474] Resubmission Award, para. 233.

[475] First Award, paras. 611, 614, citing *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 93.

[476] Resubmission Award, para. 228(a).

640. Therefore, when the Resubmission Tribunal rejected the evidence which the Applicants presented in the context of the expropriation to prove damages caused by violations of Article 4 BIT, it neither exceeded its powers, nor was it biased when it followed the *res iudicata* determination of the First Tribunal as confirmed by the First Committee. The fact that the decision favoured the Respondent cannot be interpreted as a documentation of bias. Further, the Resubmission Tribunal has repeatedly and consistently explained why it felt obliged to reject the evidence, in other words it stated the reasons that motivated its decision.

641. This Committee understands that since the Applicants considered, in good faith, that paragraphs 611 and 614 of the First Award allowed them to base their claim for reparation before the Resubmission Tribunal on the value of the expropriated assets, they could not understand the Resubmission Tribunal's statement that they had failed to address their burden of proof. As set out above, however, the Applicants' position was based on an erroneous interpretation of the *res iudicata* effect of the First Award.

**(3) The alleged "denial of justice"**

642. The Resubmission Tribunal did not commit a denial of justice by not considering the evidence for expropriation, as asserted by the Applicants in reliance on Professor Benjamin Remy's comment of the Resubmission Award.[477] Professor Remy's argument is that the damages related to the denial of justice consist in a loss of opportunity to obtain compensation for the expropriation in Chilean courts based on Chilean law, and that the Resubmission Tribunal took too broad a view on the *res iudicata* effect of the First Award in holding that it precluded the Resubmission Tribunal from calculating the damage caused by the violation of the fair and equitable treatment standard by reference to the value of the expropriated assets.

643. Professor Remy more specifically argues that the *res iudicata* effect of the First Tribunal's finding that the expropriation of 1973 did not violate the BIT precluded the Resubmission

[477] Benjamin Remy, "Chronique de la jurisprudence du CIRDI", J.D.I. (Clunet), 2017, pp. 278 ss. (CL-333).

Tribunal from finding that the expropriation did violate the BIT, but did not prevent it from taking account of the expropriation as a fact for the purpose of evaluating the damage caused by the violation of the fair and equitable treatment standard.[478] This analysis would be undisputable if the First Award's *res iudicata* effect were indeed limited to the finding that the expropriation did not violate the BIT. However, as set out in detail in the previous section, the First Award's *res iudicata* effect as determined by the First Committee was not so limited. It extended to the finding that the evidence relating to the damage caused by the expropriation could not be used to establish the damage caused by the denial of justice and the breach of the fair and equitable treatment standard. Accordingly, the Resubmission Tribunal did not take too broad a view of the First Award's *res iudicata* effect.

644. As a consequence, the Resubmission Tribunal did not commit a denial of justice in dismissing the Applicants' argument seeking to establish the damage caused by the denial of justice and the violation of the fair and equitable treatment standard on the basis of the damage caused by the expropriation.

645. In addition, the Applicants erred in complaining that the Resubmission Tribunal oriented the issue of the nullity of Decree No. 165 and the resulting claims towards the "domestic sphere" by stating that "if the alleged nullity under Chilean law of Decision No. 43 did indeed have decisive significance, the consequence would surely be that the investment continued to be, in law, the property of Mr Pey Casado and/or the Foundation, the remedy for which could lie in the domestic sphere but clearly not before this Tribunal."[479] This opinion, they assert, equates to a denial of justice by the Resubmission Tribunal, since it knew that the Applicants had chosen international arbitration under the fork in the road clause in Article 10 of the BIT and that this choice was "*irreversible.*"[480] The assertion is incorrect because the Resubmission Tribunal did not dismiss the Applicants' claim for damages under international law *because* it considered there was a claim to be brought under domestic law. Rather, having found that there was no remedy in the international

[478] Benjamin Remy, *op. cit.*, pp. 282-283 (CL-333).

[479] Resubmission Award, para. 198.

[480] Reply on Annulment, para. 59.

sphere, the Resubmission Tribunal added *obiter* that it could possibly be found in the domestic sphere: "the remedy *could* lie in the domestic sphere *but clearly not* before this Tribunal in these resubmission proceedings" (emphasis added). Accordingly, the Resubmission Tribunal did not dismiss the Applicants' international claim to the advantage of a domestic claim. It dismissed the international claim on its own merits. This is not a denial of justice. Nor is it a denial of justice that due to the exercise of their rights under the fork-in-the-road provision, the Applicants are deprived of compensation in both the domestic and international spheres.

**(4) The arguments and evidence postdating the request for arbitration**

646. The Applicants not only alleged an improper lack of consideration of evidence and arguments before the entry into force of the BIT in 1994, they also alleged that the Resubmission Tribunal rejected arguments and evidence covering the period after 3 November 1997, date of the request for arbitration.

647. The Applicants refer to paragraph 216 of the Resubmission Award. The Committee has carefully studied that paragraph and finds that the thrust of the Resubmission Tribunal's reasoning is that it has no authority to address issues, arguments and evidence that were not before the First Tribunal, *i.e.* having occurred "after the handing down of the First Award." It is true that the Resubmission Tribunal refers to the critical date of the original request for arbitration and states that issues arising between the Parties after that date do not fall within the scope of Resubmission Proceeding. However, it is also true that the Resubmission Tribunal accepted, without hesitation, the determination of the First Tribunal as *res iudicata* with respect to the actions and omissions of the Respondent that occurred after the request for arbitration, in particular, the Decision No. 43 of 28 April 2000 and the unsuccessful Chilean court proceedings that had lasted 7 years before they were abandoned on 2 November 2002 in order to expand the scope of the ICSID proceedings.

648. The Resubmission Tribunal also accepted the First Tribunal's determination that disputes between the Parties had begun in 2000 and 2002, leading to the establishment of

jurisdiction under Article 2.3 BIT.[481] However, it had not taken into consideration that a Chilean court rendered a judgment on 24 July 2008 on the nullity of Decree No. 165. This judgment post-dates the First Award of 8 May 2008, and the Applicants have, indeed, criticised the Tribunal for not having taken issues into account "*postérieurs à la Sentence Initiale.*"[482]

649. Taken together, the Committee finds that in paragraph 216 of the Resubmission Award the Tribunal tried to express that it had no jurisdiction over issues, arguments and evidence that had not been before the First Tribunal. That is reflected in the repeated affirmation that issues arising after the date of the First Award are outside the scope of the proceedings.

650. A different interpretation of the Resubmission Tribunal's reasoning would lead to the contradictory and absurd result that the Committee would have to assume that the Resubmission Tribunal considers on the one hand that events that were before the First Tribunal would be outside the scope, and on the other hand that the events between 1997 and 2008 that were before the Tribunal would be inside the scope of the proceedings.

651. The Tribunal's reasoning is intelligible when paragraph 216 of the Resubmission Award is read in the context of the general reasoning as meaning that issues, arguments and evidence that have not been submitted before the First Tribunal were outside the scope of the resubmission proceedings. This interpretation corresponds to paragraphs 68/69 of the Resubmission Award, where the Tribunal lists events that have not been before the First Tribunal and that the Applicants qualified as a new denial of justice.

652. This interpretation is all the more appropriate since the alternative literal interpretation and a finding on its internal contradiction would not impact on the result. Even accepting its insufficiency, the Resubmission Tribunal has not followed its own statement but accepted all of the determinations of the First Tribunal based on facts occurring after 3 November 1997 and before the date of the Award on 8 May 2008 as *res iudicata*.

[481] First Award, paras. 448-464.

[482] Memorial on Annulment, paras. 570-577.

653. For all these reasons, the Committee determines that the Resubmission Tribunal's treatment of evidence and the qualification of the burden of proof do not contain annullable errors rising to the level of a manifest excess of powers or a serious departure from a fundamental rule of procedure. It further holds that the Resubmission Tribunal did not fail to state the reasons on which it has based the Award.

## D. THE RESUBMISSION TRIBUNAL'S ALLEGED FAILURE TO GIVE *RES IUDICATA* EFFECT TO UNANNULLED FINDINGS

654. The *ad hoc* Committee also has to determine whether the Resubmission Tribunal, when dealing with the First Award and delimitating the annulled parts and the final findings:

(1) manifestly exceeded its powers;
(2) seriously departed from a fundamental rule of procedure; and/or
(3) failed to state the reasons on which it based the Award.

### (1) Manifest excess of powers

655. The Committee recalls that a resubmission tribunal exceeds its powers when:

- it determines an issue *de novo* that the original tribunal already determined, and that was confirmed by an *ad hoc* committee and not annulled and therefore is final, *res iudicata*;

- it fails to decide issues brought before it although it had the mandate and power to decide; and

- it fails to apply the applicable law instead of applying and interpreting it, even erroneously.

656. The standard is uncontroversial and explicitly acknowledged by the Resubmission Tribunal. It noted that:

> [I]t has been finally determined: that the dispute falls within ICSID jurisdiction; that Chile (the Respondent) was in

> breach of its obligation to accord to the Claimants fair and equitable treatment (including to abstain from any denial of justice); that the Claimants have a right to compensation; and finally that any further or other claims were rejected. All of that, in other words, has the quality of *res judicata* ('chose jugée')
>
> […]
>
> Not only is there no need for the Tribunal to go into these matters, but it would be a manifest excess of its own jurisdiction if the Tribunal purported to do so.[483]

657. The Committee will analyse the issue of compensation at a later stage. Here, at the outset, it rejects the Applicants' assertions that the Resubmission Tribunal re-opened the debate and analysis on the protection of the Applicants' rights and investment through the BIT of 1994 against unfair and unequitable treatment that had occurred during 1995 and 2002 for the denial of justice and in 2000 for arbitrary and discriminatory treatment. In accepting the First Tribunal's determination and not deciding *de novo* on the relevance of facts after 1997, the Resubmission Tribunal respected the *res iudicata* determination on the fair and equitable treatment standard violations and on the relevance of facts after 1997. The fact that the Resubmission Tribunal asked questions during the hearing on the issues of investment and on the relevance of Decision No. 43 of 28 April 2000 is irrelevant for this finding since the questions are not reflected in the Award.

#### *(a) The First Annulment Decision as concerns Section VIII of the First Award*

658. The Applicants also allege that the Resubmission Tribunal re-opened the issue of evidence with respect to injury and damages and their causation by the violation of Article 4 BIT against the *res iudicata* determination of the First Tribunal according to which the arguments, the theory and the evidence presented by the Applicants for the injury and damage caused by the confiscation in 1973-1975 met the requirements of identification and proof of injury and damages caused by the unfair and unequitable treatment. The

[483] Resubmission Award, paras. 176, 178 (footnotes omitted).

Applicants allege that the Resubmission Tribunal came to its erroneous appreciation because it systematically and fraudulently confused the issues of injury and damage on the one hand and compensation and quantum on the other.

659. In order to properly assess these assertions, it is necessary to appraise exactly which parts of the First Annulment Decision were established as *res iudicata* of the First Award and which parts were annulled.

660. The First Committee squarely annulled the First Award's decision on quantum of compensation. However, as already quoted in paragraphs 620 ss. of this Decision, it is less evident what it intended to annul when it stated "and the corresponding paragraphs in the body of the Award related to damages (Section VIII)" and later that "the body of the Award but for Section VIII are *res judicata.*"[484]

661. That sounds straightforward without being so. As we have seen, the First Committee relied on several of the paragraphs from Section VIII to make certain arguments. This Committee does not assume that the First Committee would have approved the content of statements that it considered should be annulled. Further, at the beginning of Section VIII, the First Tribunal summarised that the Applicants were investors and treated unfairly and unequitably by the Respondent, that Article 4 BIT is applicable, that the illegality of the confiscations is uncontested,[485] and that it remains as the Tribunal's task "*à tirer les conséquences de ce qui précède, quant à l'obligation d'indemniser, son exécution concrète et le calcul de son montant*."[486]

662. If the First Committee's determination in paragraph 359 of its Decision was interpreted as meaning that Section VIII is annulled in its totality, this would lead to the absurd result that key determinations of the First Award would be annulled as being part of Section VIII, while the very same determinations would be upheld as also being part of the unannulled Section VII. Accordingly, the Committee interprets paragraph 359 of the First Annulment

[484] First Annulment Decision, paras. 359(1) and (4).

[485] First Award, paras. 675-678.

[486] First Award, para. 679.

Decision, as already presented in paragraph 625 of this Decision, as meaning that only those paragraphs of Section VIII that deal with the adjudication of damages are annulled.

663. As a consequence, it is *res iudicata* that (a) the claim for compensation for the injury and damage caused by the illegal confiscation is outside the temporal scope of the BIT and that (b) the claim for compensation for the injury and damage caused by the fair and equitable standard violations is inside the scope of the BIT. These are final determinations of the First Tribunal, as developed in Section VII and summarised in the first five paragraphs of Section VIII of the First Award and as validated by the First Committee.

664. Section VII of the First Award does not specifically explain whether the damages caused by the completed expropriation and thereby their proof and calculation are also precluded *ratione temporis*. The First Tribunal notes that the instantaneous act of the expropriation "*n'est pas créatrice d'une situation continue*" and that the expropriatory acts "*étant achevés et ne pouvant donner naissance à une situation continue.*"[487] It further referred to the Articles on Responsibility of States, which provide, in Article 14, that the breach of an international obligation occurs when the act is performed, define in Article 2 that a breach of an international obligation constitutes an internationally wrongful act, and establish in Article 31 the obligation of full reparation for the injury caused by the internationally wrongful act. This implies that injuries caused by breaches that are not covered by an international treaty cannot be adjudicated.

665. These reasons indicate that the First Tribunal considered that the facts and evidence proving damages and quantum caused by the expropriation could not be taken into consideration for violations that occurred after the entry into force of the BIT. By no means do they indicate positively that the Tribunal found these facts and evidence relevant for the proof of damages caused by the violations of the fair and equitable treatment standard.

666. Apparently, the Resubmission Tribunal was in no hurry to develop its findings on injury and damage in Section VII, because it had reserved the discussion on the three issues (1)

[487] First Award, para. 610.

"*obligation d'indemniser*," (2) "*son exécution concrète*," (3) "*et le calcul de son montant*" for Section VIII, as exposed in paragraph 679 of the First Award.

667. Paragraph 679 is part of the introductory portion of Section VIII. The Applicants have consistently argued that it is not annulled and have relied on it for their arguments.[488] The Committee agrees with the Applicants: it does not concern the damages but refers back to Section VII and clarifies it.[489]

668. This reading of paragraph 679 is reinforced by the First Annulment Decision. In Section G of the First Annulment Decision, which is devoted to "Damages," the First Committee states, in paragraph 262, that the "Parties never pleaded the damages claims arising from the breaches of Article 4 f the BIT" and specifies in paragraphs 267 to 269 that it understands "damages claims" as meaning "the standard of compensation and evaluation of damages" as well as "damages methodology and calculations."

669. Taken together, these findings of the First Tribunal, as confirmed by the First Committee, give strong indications in favour of an interpretation consistent with the Resubmission Tribunal's finding that the First Tribunal had not considered the facts and evidence with regard to the uncontested illegal expropriation as relevant for the proof of damages and their amount under Article 4 BIT, and that "all evidence and arguments related to that expropriation is to be excluded as not relevant to the dispute"[490] over compensation under Article 4.

670. This interpretation is further reinforced by paragraph 688 of the First Award, which confirms the existence of damages caused by confiscation but adds that:

> [L]*es allégations, discussions et preuves relatives au dommage subi par les demanderesses du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui*

[488] Annulment Application, paras. 194, 206, 211; Memorial on Annulment, para. 504; Reply on Annulment, para. 73.
[489] Memorial on Annulment, para. 502.
[490] Resubmission Award, paras. 217, 228, 230.

> *d'une autre cause, de fait et de droit, celle du déni de justice et du refus d'un* "traitement juste et équitable". [491]

671. As explained in paragraph 625 of this Decision, the First Committee has repeatedly approved this statement of the First Tribunal.

672. As a consequence, the Committee holds that the First Tribunal did not determine, with *res iudicata* effect, that the proof of damages caused by the confiscation was relevant for the proof of damages caused by the violation of the fair and equitable treatment standard. It actually determined the opposite. Therefore, the Resubmission Tribunal did not disrespect a *res iudicata* finding and did not exceed its powers when it decided not to consider the evidence relied upon by the Applicants, and when it decided to examine whether the fair and equitable treatment standard violations, as a distinct claim, had caused injury and damage.

### *(b) The Resubmission Tribunal's interpretation of the term "compensation"*

673. With respect to the Resubmission Tribunal's determination not to grant financial compensation by defining the concept of compensation in a way that contradicts the First Tribunal's *res iudicata* decision, the Applicants present two related arguments.

674. First, they assert that the Parties had agreed that under international law the term compensation necessarily implies pecuniary indemnification and that the Resubmission Tribunal was bound to exercise its authority in respect of this agreement.

675. In paragraphs 200 and 201 of its Award, the Resubmission Tribunal took note of the fact that during the hearing the Applicants had argued that it should "understand the term 'compensation' as referring only to monetary compensation", and that the "Respondent, for its part, agreed with much of the Claimants' answer." The Tribunal had taken "note of these views but does not subscribe fully to the reading."[492]

[491] First Award, para. 688 (footnotes omitted; emphasis omitted).

[492] Resubmission Award, paras. 200, 201.

676. The Committee agrees with the Applicants' argument that the authority of arbitral tribunals is based on the agreement of parties which exercise their autonomy and that tribunals exceed their authority by not respecting the parties' agreements. However, an agreement in the meaning of a common expression of the parties' intention to enter into a binding undertaking requires a meeting of the minds in this sense.

677. This is not the case when, as here, the Parties hold similar views on an issue of interpretation of the law. In such instance, there is no meeting of their minds binding the Tribunal in its interpretative powers.

678. This leads to a second assertion. The Applicants submit that independently of the Parties agreement, the term "compensation" in international law, as described and specified by Articles 31-39 of the Articles on State Responsibility, necessarily refers to financial reparation as expressed in Article 36 and not to satisfaction under Article 37, which is reserved to cases where compensation does not provide full reparation of damages.

679. The Committee essentially agrees with the Applicants' argument. The Resubmission Tribunal cannot be blamed for not having defined the term "compensation" by reference to Article 36 of the Articles on State Responsibility, because the Resubmission Tribunal was explicitly using the French term "*compensation*" as in the French authentic version of the First Award,[493] and the French version of Article 36 uses the term "indemnisation," not "compensation." It remains, however, that the term "compensation" was used in the First Award as a term of art influenced by English legal terminology and referring to financial reparation.

680. The Resubmission Tribunal, however, considered that the fact that the internationally wrongful act in the present case "[was] one in which the breach is constituted not by a single act but by a course of conduct" changed the factual situation in a way that a different interpretation of the term "compensation" was adequate.[494] In that perspective, it "[saw] in

[493] Resubmission Award, para. 199.
[494] Resubmission Award, para. 204.

the First Award no sign that the First Tribunal was setting out to make a conceptually systematic usage of these various terms that would justify treating paragraph 3 [of the First Award] as a deliberate determination that monetary damages must necessarily follow."[495] Therefore, the Resubmission Tribunal felt authorised to give the term a broader meaning than the one necessarily encompassing a financial element.

681. The Committee disagrees. It does not make any difference whether a wrongful act is a single act or "a course of conduct," as explicitly provided for in Articles 14 and 15 of the Articles on State Responsibility. A course of conduct cannot remove the wrongfulness of one or many acts, and it cannot remove the obligation of the wrongdoer to make full reparation for injury, as provided for in Article 31 of the Articles on State Responsibility.

682. The Committee hesitated as to how to qualify the Resubmission Tribunal's approach: as a non-annullable misapplication and misinterpretation of international law or as an annullable non-application of the applicable law.

683. In that context, the Committee recalls that it is not a court of appeal. It is convinced that "a misapplication of the applicable law is not an annullable error […] provided it is not of a magnitude as to amount to a veritable non-application of the proper law as a whole."[496] It is also conscious of the legitimacy of the annulment mechanism. Its objective is to "reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice."[497]

684. In this perspective, the Committee has examined what the impact on the result of the Resubmission Proceeding would be if the Resubmission Tribunal had correctly interpreted the term "compensation" as used in the First Award. No annulment should follow if the error has no bearing on the outcome of the proceeding. This is of direct relevance to the present case. Keeping this basic consideration in mind, the Committee may not be called

[495] Resubmission Award, para. 201.

[496] Christoph H. Schreuer, *The ICSID Convention - A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, para. 232 (RALA-0006).

[497] ICSID Secretariat, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, 5 May 2016, para. 7.

upon to make a final determination on the qualification of the Tribunal's error under the circumstances of the case.

685. For the Resubmission Tribunal to have manifestly exceeded its power, the finding of the First Tribunal would have to be read as meaning, not that the Applicants have a right to compensation provided that their prejudice is established, but that they have an unreserved right to compensation whatever the evidence or the absence thereof.

686. The interpretation of the First Award as conferring upon the Applicants an unreserved right to compensation irrespective of the evidence is not reasonable. It is incompatible with the prohibition under Article 42(3) Convention for ICSID Tribunals to decide *ex aequo et bono* unless the parties so agree.

687. It follows that the Applicants' "*right to compensation*" pursuant to the *res iudicata* effect of the First Award must be interpreted as being implicitly conditional on the establishment of damages in accordance with the applicable rules of international law. Therefore, the First Award accords the Applicants a right to compensation "for any financially assessable damage that they may establish."

688. In light of this, the Resubmission Tribunal affirmed that it read the First Tribunal's determination that the Applicants "*ont droit à compensation*" (paragraph 3 of the *dispositif*), following the determination that the Respondent violated its duty to guarantee fair and equitable treatment (paragraph 2 of the *dispositif*) and preceding the order to pay a precise amount of compensation (paragraph 4 of the *dispositif*):

> [A]s stating the entitlement to reparation that necessarily follows from the determination of the breach of an international obligation, but without predetermining what form or nature that reparation must take, except perhaps the non-explicit assumption that in the normal case it may take the form of monetary damages. But it does not read the paragraph as absolving a party claiming monetary damages

> from its normal obligation to prove such damage, including its causation.[498]

689. Thus the Resubmission Tribunal referred to two cumulative limbs for the adjudication of damages. One is the "form or nature" of reparation and the other is the burden to prove the damage. As concerns the burden of proof, the Resubmission Tribunal reasons that it is "a basic tenet of investment arbitration that a claimant must prove its pleaded loss."[499]

690. By this line of reasoning, the Resubmission Tribunal refers to the definition in Article 36(2) of the Articles on State Responsibility which links compensation to "financially assessable damage." The Resubmission Tribunal did not state that the Applicants did not suffer damage. Nor did it state that the damage was not financially assessable. What it did state is – and that it is not in contradiction to a *res iudicata* finding – that material damage not only had to be assessable but assessed and proven as resulting from violations of the fair and equitable treatment standard to justify compensation.

691. The First Tribunal identified two distinct claims, one based on illegal expropriation and another one based on violations of the fair and equitable treatment standard. It found that the expropriation claim was outside the temporal scope of the BIT. It therefore urged Chile to compensate the Applicants under Chilean law, because it did not see a basis for compensation under international law. The Resubmission Tribunal came to a similar conclusion in paragraph 198 of the Resubmission Award.

692. The First Tribunal also found that damage caused by the violation of the fair and equitable treatment standard would have been inside the temporal scope of the BIT but that the Applicants had concentrated their efforts on proving damages caused by that violation on the damage caused by expropriation and thus, had not discharged their burden of proof with respect to damage caused by violations of the fair and equitable treatment standard. Driven by the wish to grant some monetary compensation, the First Tribunal replaced the Applicants' burden to prove damages by some "*éléments objectifs*," which it had found in

[498] Resubmission Award, para. 201.

[499] Resubmission Award, para. 205.

a parallel compensation for expropriation.[500] It reproduced this line of reasoning in paragraphs 2, 3 and 4 of the *dispositif* of the First Award and condemned the Respondent to pay an amount of money to the Applicants although the damage had not been proven, and had relied on calculations which had been made to assess the damage for expropriation.

693. The First Committee annulled this reasoning and result because the Parties had not been afforded an opportunity to be heard on the methodology, standard and calculation, and because they were contradictory in the sense that they neutralised each other. It found that the allocation of damages based on the value of the expropriated assets contradicted the Tribunal's previous finding that the evidence regarding the damage caused by the expropriation was irrelevant since the expropriation did not fall in the temporal scope of application of the treaty. As a result, it is *res iudicata* that the Respondent violated the fair and equitable treatment standard after the entry into force of the BIT and after the request for arbitration, and that it owed the Applicants compensation, but it is not *res iudicata* that the Applicants discharged their burden of proof for injury and damage suffered nor, in the alternative, that they were entitled to receive compensation without having to prove the existence and quantum of injury and damage.

694. The Resubmission Tribunal tried to avoid the First Tribunal's annulled errors. It appropriated the First Tribunal's general statement that the Applicants bore the burden of proving that damage had been caused by the distinct fair and equitable treatment standard violations, that the proof of damages resulting from expropriation was irrelevant, and could not be transplanted, and that "*la simple vraisemblance d'un dommage dans les circonstances concrètes de l'espèce ne* [suffisait] *évidemment pas.*"[501]

695. The Resubmission Tribunal relied on these findings of the First Tribunal because it considered them to be principles of international law. The Resubmission Tribunal insisted that it:

> [B]elieves this analysis to be entirely consistent with the findings of the *ad hoc* Committee in its Annulment Decision,

[500] First Award, para. 692.

[501] First Award, para. 689.

> notably its paragraph 261, in which the *ad hoc* Committee draws from the First Award the holdings by the First Tribunal that the Claimants' arguments as to damages were strictly limited to ones founded on the expropriation; that these were not relevant to the claims for denial of justice and discrimination; and that the Claimants had not produced any convincing proof of damage in respect of these claims.[502]

696. The Applicants allege that the Tribunal's statement in paragraph 229 distorts the meaning of paragraph 261 of the First Annulment Decision.[503] This Committee has studied and compared both paragraphs. It has not found a distortion but an almost literal reproduction.

697. In the end, and as explained in detail in the preceding Section, the Resubmission Tribunal found that the Applicants had been given a full opportunity to prove their injury and damage caused by the violations of the fair and equitable treatment standard and that they failed to present evidence to prove such a claim. This finding does not contradict any *res iudicata* effect of the sections of the First Award which were not annulled.

698. Therefore, of the two cumulative limbs necessary to ascertain an excess of powers by not granting monetary compensation, in contradiction to the First Tribunal's *res iudicata* findings, one limb does not exist to support the request. Even if the Committee had found an annullable error in the Resubmission Tribunal's definition of the term "compensation" and not only a non-annullable misapplication, such finding would have no bearing on the result of the proceeding, since the Applicants have not satisfied the criteria of the second limb, *i.e.* their burden to prove the financially assessable damage.

699. As a result, the Committee rejects the Applicants' assertion that the Resubmission Tribunal exceeded its powers when it denied the claim for alleged damages for a violation of the Respondent's duty to guarantee fair and equitable treatment.

[502] Resubmission Award, para. 229.

[503] Annulment Application, para. 201.

### (2) A Serious Departure from a fundamental rule of procedure

700. The Applicants allege that the Resubmission Tribunal disrespected the *res iudicata* effect of the First Award and distorted the First Award and the First Annulment Decision in order to serve the Respondent's interests, that it systematically sided with the Respondent to avoid an order to oblige it to pay financial compensation, and that, generally, it has acted in bad faith. They argue this systematic bias in favour of the Respondent represents a departure from the most fundamental rule of procedure, *i.e.* the obligation to treat parties neutrally and equally.

701. The Committee has found that the Resubmission Tribunal did not exceed its powers. Beyond the repeated expression of suspicion with regard to the Tribunal's intentions, the Applicants have neither substantiated nor proved their allegations.

702. Therefore, the Committee is unable to discern bias and partiality on the part of the Resubmission Tribunal and thereby a departure from a fundamental rule of procedure.

### (3) A failure to state the reasons on which the Award is based

703. The Resubmission Tribunal opens the Section on its Analysis with a detailed description of its role where it summarises the major findings of the First Tribunal and the First Committee, situates its task in this frame and asserts that it is aware that transgressing the frame and the *res iudicata* findings would be a manifest excess of power.[504]

704. It then presents the Applicants' request for relief by referring to their financial expert, as well as the controversy between the Parties with respect to the admissibility of the claim.[505]

705. After an excursus on the status of Decree No. 165, which was very much in the Parties' focus,[506] and a detailed discussion on the concept of compensation, which has been

[504] Resubmission Award, paras. 171-179.
[505] Resubmission Award, paras. 189-196.
[506] Resubmission Award, paras. 197-198.

addressed in the preceding part of this Decision,[507] the Tribunal devoted some thirty paragraphs to the crucial issue of the burden of proof, first by setting out the standard and then by applying the standard to the facts of the case. It regularly re-assured itself that it moved its reasoning within the frame of *res iudicata*.

706. The Committee has no vocation to criticise the quality of or to express its agreement with the reasoning. However, it does not hesitate to confirm that it was able to follow the reasoning and did not find it frivolous.

707. However, the Committee has considered whether there is a contradiction between paragraphs 196 and 232-233 of the Resubmission Award with respect to the consideration of evidence and burden of proof.

708. Paragraph 196 of the Resubmission Award follows up on the Resubmission Tribunal's reasoning at paragraph 195 that the *res iudicata* effect of the First Award seems "to put an insuperable obstacle in the way of the Claimants now advancing a claim to damage which in its essence goes back to that original dispossession, by using the value of the then-expropriated property as its central element." In summarising the Applicants' answer thereto at paragraph 196, the Resubmission Award contains a concise but specific and clear presentation of the Applicants' position regarding its damage, which they understood as being caused by a loss of opportunity. More specifically, the Resubmission Award summarises the Applicants' position as being that:

> [T]he central consequence of the denial of justice found by the First Tribunal to exist, as a result of the delays in the proceedings before the Santiago court over the Goss press, was that they (the Claimants) were disabled from invoking a conclusive argument that Decree No. 165 was absolutely null (*ex tunc*) and as such incapable of producing any legal effects. Had they been in a position to do so, the argument continues, they (the Claimants) would either have been able to recover their confiscated property in Chile, or at the least would have been able to establish before the First Tribunal that the expropriation of this property was not an

[507] Resubmission Award, paras. 199-204.

> instantaneous act taking final effect in 1975, but was not in fact completed until many years later, and the result of that would have been that the expropriation did indeed fall under the jurisdiction of the First Tribunal under the BIT, contrary to the findings in the First Award. From this it follows, so the Claimants' argument concludes, that the loss suffered by them arising out of the denial of justice is the loss of that right to compensation in the original arbitration, so that such loss is the one they can now claim in the present proceedings.[508]

709. Paragraphs 232 and 233 conclude that the Applicants failed to discharge their burden of proof with regard to the injury, the damage and the quantification of damage and that "in some senses they have not even set out to do so in as much as they have focussed their submissions on the evaluation of damage, without undertaking the prior step of showing the precise nature of the injury, causation and damage itself."[509]

710. The Applicants qualified these two presentations on proof of damage as "inconsistent."

711. The Committee has to determine whether they are contradictory in a sense that they neutralise each other or "cancel each other out." Inconsistency and error are not enough to warrant an annulment.

712. The Committee has come to the conclusion that there is no contradiction. Paragraph 196 summarises the Applicants' position with respect to the evidence on injury and damages resulting from the confiscation and its possible transplant to unfair and unequitable treatment. In paragraphs 232 and 233, the Resubmission Tribunal analyses whether the Applicants have effectively met their burden of proof, as announced in paragraph 231, which introduces the Chapter.

713. The Resubmission Tribunal's statement at paragraph 232 that the Applicants failed to set out their damage does not imply that the Resubmission Tribunal did not consider or answer the Applicants' position as summarised at paragraph 196. This position of the Applicants

[508] Resubmission Award, para. 196.

[509] Resubmission Award, paras. 232-233 (emphasis omitted).

was addressed in detail in Section H of the Resubmission Award, which is situated between paragraphs 196 and 232, and where the Resubmission Tribunal analyses the scope of the First Award's *res iudicata* effect. As already mentioned in paragraphs 661-672 above, the Resubmission Tribunal finds that it has been decided with *res iudicata* effect that the damage caused by the violation of the fair and equitable treatment standard cannot be based on the value of expropriated assets. In paragraph 230, which is the penultimate paragraph of Section H, the Resubmission Tribunal thus concludes that the "consequence of this interpretation of the First Award is, in the opinion of the Tribunal, as follows: […] d) that any assessment of injury and damage based on the original expropriation is inconsistent with the First Award and must therefore be rejected." The Resubmission Tribunal then pursues in paragraph 231 that the remaining question is "whether, and to what extent, the Claimants have met that burden of proving what injury was caused to either or both of them by the Respondent's breach of the standard of fair and equitable treatment in the BIT, and then of establishing the corresponding assessable damage in financial terms." The Resubmission Tribunal's reasons taken as a whole are thus to the effect that (i) the Applicants assert that the damage caused by the violation of the fair and equitable treatment standard must be calculated on the basis of the expropriated assets; (ii) the First Tribunal has found with *res iudicata* effect that this cannot be done; and therefore (iii) the Applicants have "not even set out" to establish their damage *within the limits set by the First Award's* res iudicata *effect*. This nuance to the Resubmission Tribunal's statement in paragraph 232 of the Resubmission Award is implicit but certain in the light of the reasons in the preceding Section H.

714. The Committee therefore concludes that the Resubmission Tribunal did not fail to state the reasons on which it based its Award.

715. For these reasons, the Committee rejects the Applicants' request to annul the Award for having failed to give *res iudicata* effect to the First Tribunal's unannulled findings.

## E. THE RESUBMISSION TRIBUNAL'S FAILURE TO APPLY THE APPLICABLE LAW IN THE RESUBMISSION AWARD

716. With respect to moral damages, the Resubmission Tribunal did not deny that international arbitration tribunals are competent to award compensation for moral damages. Therefore, as a matter of principle, its position is in line with the Applicants' assertion, the authorities presented by them, and the First Tribunal.[510]

717. It excluded *a limine* a claim for moral damages of the second Applicant, the Foundation President Allende, because "no attempt was made to advance, or to justify, a specific claim that moral damage had been suffered by the Foundation."[511] The Committee sees no error in this.

718. As to the claim of Mr. Pey Casado, the Resubmission Tribunal found that he bore the burden, under international law, to prove his moral damage and that he had failed to meet this burden. This finding echoes the First Tribunal's finding in paragraph 704 of the First Award. The Resubmission Tribunal presents this finding as its own position "on the basis of the written and oral submissions made to it by the Claimants," and refers to paragraph 704 being aware that it figures in the annulled Section of the First Award, "but, as they relate to matters of factual evidence and proof, they are not tainted by the criticisms of the ad hoc Committee relating to the assessment of material damages."[512]

719. The Applicants contend that the Resubmission Tribunal should have applied Chilean court practice, which exempts damaged persons from the burden of proof. The Committee does not agree. Where reparation is due for a violation of *international* law, there is no need to determine reparation pursuant to the domestic law of the host State and its courts' practice in that respect. Violations of the BIT trigger responsibility under international law and give

[510] First Award, para. 704. Although sitting in the annulled Section of the Award, the statement of principle may be referred to, particularly since no consequence follows from there.

[511] Resubmission Award, para. 243.

[512] Resubmission Award, para. 243.

rise to reparation under international law. Chilean court practice is not relevant for the rules on evidence for a claim under international law.

720. Contrary to what the Applicants' argue,[513] this remains unaffected by the fact that the reparation concerned is for a violation of the fair and equitable treatment standard and a denial of justice by the Chilean domestic courts and in the Chilean domestic legal system. First, when it comes to determining the damage caused by a denial of justice and a breach of fair and equitable treatment by reference to the reparation the investor could, absent these violations, have obtained in the domestic legal system, the rules of domestic law determining that reparation are not part of the law applicable by the ICSID tribunal. They are part of the *minor* of the legal syllogism, that is, they are part of the facts to which the relevant rule of international law must be applied, and in the same way as a domestic law is a fact when it comes to determining whether it is compatible with the state's international obligations. Second, the Applicants cannot claim moral damages by reference to what they could have obtained in the Chilean domestic legal system, because there is no evidence that the relevant Chilean proceedings were ever concerned with moral damages. The Chilean court proceedings that were delayed in violation of the prohibition of denial of justice were concerned with the restitution of the Goss Press, reparation of possible damages to the press and *lucrum cessans*.[514] Decision No. 43 granted third parties compensation for the expropriation of El Clarín without there being question of moral damages.[515] Accordingly, absent the denial of justice and the violation of fair and equitable treatment, the Applicants would still not have obtained any moral damages in the Chilean legal system. As a consequence, the Applicants' argument is also based on a wrong factual assumption.

[513] Professor Robert Howse, Tr. Day 1 (12 March 2019), pp. 33-34 (French version).

[514] Demande de M. Pey Casado auprès du 1er Tribunal civil de Santiago en restitution des presses GOSS, 4 October 1995, in particular pp. 3-4 (C-266).

[515] Décision nº 43 du Ministère des Biens Nationaux du Chili, 28 April 2000, in particular pp. 2-3 (C-180).

721. Further, the Applicants criticise the Resubmission Tribunal for not having applied Article 31(2) of the Articles on State Responsibility, which provides that moral damage may be compensated even if no material damage is present.

722. However, it is only after having found that "the claim to moral damages must be […] rejected" for want of proof,[516] that the Resubmission Tribunal discussed, in the conditional, what would have happened if the claim for material damages had been proven and the claim for moral damages had been made out. It speculates what it might have done under such hypothetical circumstances. The Committee has no authority to make a judgment on such speculation. However, it could not possibly give rise to an annullable error, since it was *obiter* and thus left the Award unaffected.

723. Therefore, the Committee does not find that the Resubmission Tribunal exceeded its powers when it rejected a claim for moral damages. It rejects the Applicants' claim to annul paragraph 243 of the Resubmission Award without further inquiry as to whether the Applicants abandoned it, as alleged by the Respondent.

724. With respect to the alleged claim for unjust enrichment, the Resubmission Tribunal explained that the First Tribunal adjudicated the Applicants' claim for compensation based on violations of the fair and equitable treatment standard, and that this is as much *res iudicata* as its "definitive rejection of all the Claimants' claims in the dispute other than those covered by paragraphs 2 and 3 of the dispositive part of the First Award."[517] The Resubmission Tribunal further considered that the Applicants' claim for unjust enrichment could be interpreted in two ways, both of which were incompatible with the First Award's *res iudicata* effect. According to a first approach, the unjust enrichment claim amounted to bringing a claim disconnected from any violation of the BIT, which was incompatible with the First Award's *res iudicata* effect of granting compensation only for the denial of justice and the violation of the fair and equitable treatment standard.[518] According to a second

[516] Resubmission Award, para. 243.
[517] Resubmission Award, para. 176.
[518] Resubmission Award, para. 239.

approach, the unjust enrichment claim was a means of calculating damages for a right to compensation established by other means, by reference to the value of the confiscated assets and lost profits. In that case, the Resubmission Tribunal considered, this amounted to "reintroducing under another guise the precluded expropriation claim."[519]

725. It follows that the Applicants err in criticizing the Resubmission Tribunal for not having applied the law applicable to unjust enrichment, namely general international law which is part of the law applicable pursuant to Article 10(4) of the BIT. The Resubmission Tribunal rejected the Applicants' claim on the basis of the First Award's *res iudicata* effect. It was therefore not authorised to apply the doctrine of unjust enrichment pursuant to the law applicable to it. The Applicants' request for annulment based on the non-application of the applicable law therefore fails.

726. In addition, the Committee finds that the Resubmission Tribunal thereby correctly interpreted and respected the First Award's *res iudicata* effect. To the extent that the unjust enrichment claim was detached from any violation of the BIT, it could not be decided upon by the Resubmission Tribunal whose powers were limited by paragraphs 2 and 3 of the First Award's *dispositif*. To the extent that the unjust enrichment claim was *not* detached from any violation of the BIT, and to the extent that it triggered a calculation based on the value of the expropriated assets and lost profits, it was precluded either by the *res iudicata* finding that expropriation fell outside the temporal scope of application of the BIT, or by the *res iudicata* finding that damages caused by the violation of fair and equitable treatment could not be calculated by reference to the expropriated assets. Contrary to what the Applicants assert,[520] this was not a misinterpretation of the Applicants' thesis but a correct analysis of its ambit and implications.

727. Therefore, the Committee rejects the Applicants' request to annul Section K of the Resubmission Award without further inquiry into whether the Applicants abandoned it, as alleged by the Respondent.

[519] Resubmission Award, para. 240.

[520] Annulment Application, para. 275.

## F. THE DISMISSAL OF THE RESTITUTION CLAIM FOR DAMAGES SUFFERED DUE TO THE DEFENSE OF THE INVESTMENT AND THE ACCESS TO ARBITRATION

728. The Committee rejects the Applicants' request for procedural reasons, as well as on the merits.

729. It agrees with the Applicants that they were not obligated to submit a complete presentation of their requests for annulment for the four grounds invoked with their application for annulment. The time bar of 120 days after the date of the award does not hinder new arguments from being developed in the course of the proceeding.

730. While this is uncontested, *ad hoc* committees are not exempt from analysing whether new presentations represent new grounds for annulment, which would be precluded after 120 days after the award, or new elaborations on grounds which are already on file, which would be admissible.

731. It is not enough to submit an annulment application copying Article 52(1) of the ICSID Convention and leave the arguments for a later stage. As unequivocally stipulated in ICSID Arbitration Rule 50(1)(c), the application for annulment shall "state in detail […] the grounds on which it is based." This wording clarifies that a simple listing of the reasons invoked does not fulfil the requirements of a complete application.

732. The reason behind the time limit as well as for the quality requirement is to protect the finality of the award. Finality is a central feature of the arbitration system. Parties are accorded four months to conclude whether, in their view, the award is tainted by such fundamental flaws that its maintenance endangers the integrity and propriety of the system. They may be convinced that the totality of the award is tainted by such deficiencies or only parts. They may define specific issues, topics and/or conduct, which violate the integrity of the proceeding by an excess of power, a departure from a fundamental rule of procedure and/or the absence of reasons. These grounds for annulment have to be established for each issue, topic and conduct separately.

733. The other party and the *ad hoc* committee should be informed of the precise reasons which motivate an applicant to question the integrity and propriety of the constitution of the tribunal, the tribunal's conduct and/or the outcome of the proceeding, early on. Therefore, the detailed statement of grounds is not a purely procedural orientation without substantial relevance. Rather, it sets the stage for the annulment proceeding.

734. That does not mean that the annulment application has to be a complete presentation of the arguments. If so, the sequence referred to in ICSID Arbitration Rule 31 would be superfluous. It is in this sense that the *ad hoc* committee in *Wena v. Egypt* reasoned:

> The ICSID Convention thus does not preclude raising new arguments which are related to a ground of annulment invoked within the time limit fixed in the Convention. This is of no harm to the opposing party, which is not requested to answer the Request, but later only the first memorial of the Applicant.[521]

735. The *Wena* committee considered the element of timeliness important but accepted that no harm was to be expected as long as the arguments concerning previously invoked grounds were introduced with the first memorial thus giving the opposing party an opportunity to understand the motivation and react to the arguments.

736. In the present case, the Applicants presented conduct related to a number of well-defined issues which to their conviction were tainted with serious and annullable flaws, such as the Resubmission Tribunal's treatment of evidence, of claims for unjust enrichment and moral damages, the application of the applicable law, or the Decision on Rectification. It is evident for the Committee that these issues were set out in the Annulment Application and that nothing hindered the Applicants from complementing their initial arguments with respect to the different issues at a later stage.

737. With respect to incidental expenses and costs, the situation is different.

[521] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, para. 19 (CL-314).

738. First, contrary to the *Wena* case, as referred to above, the Applicants did not complement the initial Annulment Application with fuller arguments in the Memorial on Annulment. Rather, they introduced the topic only with the Reply on Annulment, although they were fully aware of the problem from the beginning of the annulment proceeding, and nothing in the Respondent's Counter-Memorial existed to trigger a new awareness.

739. Second, the incidental costs issue is not a new argument in the context of a targeted conduct of the Tribunal within the sphere of defined issues. Rather, it is a new issue referring to specific conduct. A detailed statement in the sense of ICSID Arbitration Rule 50(1)(c) would have required presenting the conduct and the issue early on, in order to establish the framework for the annulment request. The Applicants had the duty to scrutinise the Award and form their conviction as to what conduct, issues and topics were so entrenched with errors that warranted annulment. By informing the Respondent, the Centre and the *ad hoc* Committee of these issues and topics, they stated implicitly that the other conduct, issues and topics were not tainted by annullable error and were to be considered final.

740. Nothing would have hindered the Applicants from complementing their initial arguments by more elaborate ones, once the framework was established in the initial application. Conversely, it was untimely to introduce the topic only with the Reply on Annulment.

741. For this procedural reason, the Committee rejects the Applicants' request for annulment for the Tribunal's treatment of incidental costs as untimely.

742. Further, the Committee finds that the Resubmission Tribunal did not violate its duty to state the reasons for the rejection of "all other claims" (paragraph 256(8) – Decision of the Resubmission Award), including the claim for incidental costs.

743. As presented by the Applicants, the claim for incidental costs was connected to their claim under Article 4 of the BIT, for violations of the fair and equitable treatment standard.

744. Indeed, such expenses and costs are closely related and connected to the primary claim for compensation of damages resulting from violations of duties under Article 4 of the BIT.

They arise, in the words of Article 46 of the ICSID Convention, "directly out of the subject-matter of the dispute."

745. The Resubmission Tribunal correctly determined that the *res iudicata* cost decisions of the First Tribunal and the First Committee did not enter into the realm of its authority. With respect to the financial compensation, it had decided that the Respondent did not owe the Applicants any, and that "it cannot therefore, in principle, make any award of damages"[522] for the principal claim. It had further decided that it "will make no further order as to costs," in addition to the costs of the arbitration.[523]

746. In the Committee's mind, there is no doubt that the Resubmission Tribunal considered the claim for incidental costs as contingent on the original claim, and that the dismissal of the second claim implied the dismissal of the first, and that no specific cost decision was appropriate.

747. The Applicants allege that the Tribunal did not respect Article 48(3) of the ICSID Convention when it did not address the claim for incidental costs. However, the Committee agrees with Professor Schreuer who explains that "[i]f an argument rests on premises that have been dismissed by the tribunal, the argument need not be addressed as long as the tribunal has stated reasons for dismissing the premises."[524] Applied to the situation in the present case, the Committee finds that since the original claim was dismissed and reasons are stated, the dismissal of the claim for consecutive damages and the reasons for it can be deduced as being implied in the dismissal of the principal claim. The reasoning *in toto* is understandable and does not warrant annulment for lack of reasons.

748. In light of this result, the Resubmission Tribunal was under no procedural obligation to consider the documents evidencing the amount of the costs, because it had decided that the Applicants had no claim in principle. The fact that this result favours the Respondent does

[522] Resubmission Award, para. 234.

[523] Resubmission Award, para. 251.

[524] Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, para. 433 (RALA-0006).

not allow for the assumption of the existence of partiality. The Respondent has not provided substantiated reasons that would lead to a different result.

749. Therefore, the requests for annulment of the Resubmission Award for lack of reasons and a departure from a rule of procedure in the treatment of "*dommages consécutifs*" or incidental damages are rejected.

## G. THE DECISION ON THE STATUS OF MS. CORAL PEY GREBE IN THE RESUBMISSION PROCEEDING

750. The Applicants did not introduce the issue of Ms. Pey Grebe's status and the grounds warranting annulment of the Award in the context of this issue into the Annulment Proceeding with the Annulment Application but only with the Memorial on Annulment of 27 April 2018. They have not explained why they failed to do so despite the fact that the issue had been addressed prominently and in detail in Section III.B. of the Resubmission Award.

751. In light of these circumstances, the Committee rejects the Applicants' request to annul the first paragraph of the *dispositif* and paragraphs 187-188 of the Resubmission Award for manifest excess of powers, as requested in paragraph 753 of the Memorial on Annulment, and for the additional grounds of a serious departure from a fundamental rule of procedure and absence of reasons, as requested in paragraph 250 of the Reply on Annulment, and to annul the whole Award for a serious departure from a fundamental rule of procedure (partiality), as requested in paragraph 251 of the Reply on Annulment, both for procedural reasons and on the merits.

752. With respect to procedural reasons, the Committee reiterates the arguments developed in Chapter VIII.F. of this Decision.

753. The Applicants had the duty to establish the framework for the annulment proceeding by stating, in detail, which circumstances, issues, conduct and topics warrant annulment and on the basis of which grounds. Once done within the period of 120 days after the Award, the Applicants were free to complete the application with new arguments.

754. The Applicants chose not to introduce the issue of Ms. Pey Grebe's status in a timely manner, although they were aware of the Resubmission Tribunal's conduct and determination. No new information has come up to explain that choice. In accordance with Article 52(2) of the ICSID Convention and ICSID Arbitration Rule 50(1)(c), they failed to present their conviction that the Resubmission Award was tainted by annullable errors in this regard and have not validly questioned its finality.

755. Further, the Committee finds that the Resubmission Tribunal did not violate its duties in any of the ways described in Article 52(1)(b), (d), and (e) of the ICSID Convention. The Resubmission Tribunal exercised its powers in accordance with its interpretation of the ICSID Convention. The interpretation might be contested but the Committee has no authority to judge what interpretation is correct or preferable.

756. In paragraphs 43-48, 125-130 and 185-186 the Resubmission Tribunal summarised the Parties' positions on the status of Ms. Pey Grebe, and in paragraphs 187-188 it developed its analysis and determination on the subject-matter.

757. Contrary to the Applicants' assertion, the Resubmission Tribunal did not deny that Mr. Pey Casado validly assigned his shares to Ms. Pey Grebe. It also did not deny the validity of the assignment of shares to the Foundation President Allende or its status of investor and Party in the arbitration proceeding.

758. Contrary to the Respondent's position, and in line with the First Tribunal's determination as confirmed by the First Committee, the Resubmission Tribunal held, that the expropriation of 1973-1975 had no effect on the transferability of the shares for the purposes of the arbitration proceeding, neither for the transfer of shares to the Foundation President Allende in 1990 nor for the transfer of shares to Ms. Pey Grebe in 2013:

> [T]here is no dispute between the two sides that there has been a cession of rights, in good faith, between Mr Pey Casado and his daughter, which has been made for good reason, or that both the cession itself and the reason for it

> were disclosed to the Tribunal, as they had been to the First Tribunal at an earlier stage.[525]

759. Further and again contrary to the Applicants' assertion, the Resubmission Tribunal did not re-discuss the nationality requirement of Article 25 of the ICSID Convention. It indeed stated its conviction that "a new claimant party cannot simply freeload on the back of jurisdictional claims of others […] evading the jurisdictional requirements of […] the ICSID Convention."[526]

760. The Applicants seem to interpret this statement as an indication that the Resubmission Tribunal wanted to question the fulfilment of the nationality requirement of Ms. Pey Grebe. If that were the case, they would have failed to read the sentence that follows immediately the sentence quoted. The Resubmission Tribunal stated: "[t]hat is not the case here,"[527] meaning that the jurisdictional requirements for Ms. Pey Grebe need not be examined because they were irrelevant for the ongoing proceeding.

761. The Resubmission Tribunal came to this conclusion after having examined the scope of the Resubmission Proceeding in interpreting Articles 52(6) and 53(1) of the ICSID Convention and ICSID Arbitration Rule 55(3)[528] and finding that "the present proceedings are a continuation of the original arbitration."[529]

762. The Tribunal deduced that:

> The jurisdictional link as between Mr Pey Casado and the Foundation, and the Republic of Chile, has been definitively established by the First Award, and is *res judicata*; those persons or entities continue to be the Parties under whose name the present proceedings are conducted.[530]

[525] Resubmission Award, para. 187.
[526] Resubmission Award, para. 187.
[527] Resubmission Award, para. 187.
[528] Resubmission Award, paras. 173-178.
[529] Resubmission Award, para. 188.
[530] Resubmission Award, para. 187.

763. This reasoning is consistent. It does not deny Ms. Pey Grebe's status as an investor after the assignment and it does not refer to nationality requirements. Rather, it determines that she cannot substitute Mr. Pey Casado in the Resubmission Proceeding. It focuses its analysis on the quality of the parties that initiated the proceeding in 1997 and conducted them through the original arbitration and the first annulment phases, and it considers decisive that these parties must remain parties in the resubmission phase.

764. The Resubmission Tribunal applied Article 52(6) of the ICSID Convention in its literal and ordinary meaning, as explained in Schreuer's Commentary:

> Submission to a new tribunal is in respect of "the dispute". This means that the parties to the resubmitted proceeding must be the same parties as in the original proceeding. […] [P]roblems may arise if there is a change of corporate structure, assignment of rights or a dissolution of a corporate investor.[531]

765. Therefore, the Resubmission Tribunal not only exercised its authority when not admitting Ms. Pey Grebe as one of the Claimants, but it also exercised this authority in application of the applicable law, *i.e.* the ICSID Convention. The Committee has no power to analyse whether the application is erroneous.

766. The result of the Resubmission Tribunal's determination is that Ms. Pey Grebe cannot be considered a Claimant in the proceeding as a consequence of the assignment of shares. That is a specific ruling, which is not correctly characterised by the Applicants' generic suggestion that she is in "legal limbo" and that the Resubmission Tribunal blocked her access to and protection by international arbitration. For the present proceeding, the Resubmission Tribunal indicated that harm was not unavoidable in the circumstances, because she was able to influence the proceeding as mandated by her father in cooperation with counsel and that possible proceeds could be shared by an "internal arrangement."[532]

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[531] Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, paras. 670-671 (RALA-0006).

[532] Resubmission Award, para. 188.

767. Further, the Resubmission Tribunal stated the reasons for its determination by first recapitulating the Parties' position and then presenting its own analysis. Unlike what the Applicants assert, this is no "*ex cathedra*" assertion but an application of Article 52 of the ICSID Convention, which has the advantage of corresponding to its ordinary meaning. Again, the Committee will refrain from analysing whether the reasons are adequate or not. It concludes that the Resubmission Tribunal did not fail to state the reasons on which it based the decision not to admit Ms. Pey Grebe as co-Claimant.

768. The Resubmission Tribunal's reasons are not contradictory. The Applicants submit that it mused over the internal distribution of financial compensation between Mr. Pey Casado and Ms. Pey Grebe, only to dismiss the claim for financial compensation at a later stage. These two statements do not neutralise each other. The first one addresses an eventuality of financial compensation and considers its possible distribution. The second one decides on the reality of the rejection of financial compensation. Therefore, both statements are concerned with different matters and cannot cancel each other out.

769. The Applicants further contend that the Tribunal exceeded it powers by disrespecting the First Tribunal's *res iudicata* finding that the assignment of shares and rights had been effective and had founded the quality of co-Claimant in the proceedings.

770. The Applicants refer to the assignment of rights to the Foundation President Allende.

771. However, the reference and the reasoning are inapposite in the context of the assignment of rights to Ms. Pey Grebe. They confuse the substantive validity of the assignment, which is not questioned by the Resubmission Tribunal, with the procedural issue of change of parties, which is questioned.

772. The latter issue did not exist in the initial phase. Mr. Pey Casado had transferred a part of his shares to the Foundation in 1990. They both initiated the arbitration proceeding in 1997. Once the question of a valid assignment of expropriated shares resolved in favour of the Claimants – as done by the First Tribunal, confirmed by the First Committee (and accepted

as *res iudicata* by the Resubmission Tribunal) – there was no doubt that the Foundation could be a co-Claimant.

773. Obviously, the First Award of 8 May 2008 was not called upon to and could not make any *res iudicata* determination on the procedural status of Ms. Pey Grebe based on the transfer of shares in 2013. A *res iudicata* effect does not extend by analogy to future events.

774. This is all the more so since the circumstances are not comparable. The standing of the Foundation resulted from its ownership of shares acquired some seven years before the dispute was brought to arbitration, whereas Ms. Pey Grebe's acquisition of ownership post-dates the initiation of the proceeding by some 16 years, and the case had been pending with identical Parties for this period. No *res iudicata* effect hindered the Resubmission Tribunal from deciding an issue differently from a decision of the First Tribunal which concerned a different issue.

775. In addition, and again contrary to the Applicants' assertion, the Tribunal has not imposed Ms. Pey Grebe as new counsel on the Applicants and even less replaced Dr. Garcés by her. The Applicants confuse the procedural power of attorney and the mandate under substantive law.

776. The lack of the Tribunal's intention in this direction is well documented in the Resubmission Award. On the cover page, the Tribunal lists Dr. Garcés as the only representative of the Applicants, in cooperation with others, among whom Ms. Pey Grebe does not figure. In paragraph 35 of the Award, Ms. Pey Grebe is mentioned as representing the Foundation.

777. Instead, the intention of the Resubmission Tribunal was to define a place for Ms. Pey Grebe in proceedings in which she had had an active role. As set out in paragraph 187 of the Resubmission Award, the Resubmission Tribunal considered that "the substance of the arrangements in their actual operation is that Ms Pey Grebe, the daughter, acts in practice as the legal representative of her aged father," which the Resubmission Tribunal clarified as meaning that "counsel for the Claimants were in practice taking detailed instructions

from Ms Pey Grebe on her father's behalf, rather than from Mr Pey Casado in person." In other words, the Resubmission Tribunal did not regard Ms Pey Grebe as acting *in lieu* of Dr. Garcés, but as acting *in lieu* of her father in instructing Dr. Garcés and also "for all purposes relating to the award of such compensation."[533] This was also confirmed by the Applicants. In their letter of 12 October 2018 addressed to the Centre, they wrote in the context of the continuation of the proceeding after Mr. Pey Casado's death that Ms. Pey Grebe has instructed counsel – as the Foundation had done before – that the proceeding should continue. That is an unequivocal statement in the sense that they wanted a defined role for her, in case she was not admitted as party, and that this role would consist in her instructing counsel as her father had done originally.

778. It follows that the Resubmission Tribunal did not impose a new counsel on Mr. Pey Casado and did not replace Dr. Garcés with Ms. Pey Grebe. Accordingly, the Applicants' allegation that the Resubmission Tribunal departed from a fundamental rule of procedure has no factual basis.

779. Finally, in paragraph 251 of their Reply on Annulment, the Applicants vaguely associate the two assertions of an excess of powers and the failure to present reasons to allege that they evidence a manifest partiality. The Applicants did not substantiate the allegation. The Committee is therefore unable to enter into a deeper analysis of the allegation and has to reject the request for annulment for manifest partiality.

780. In sum, the Applicants' requests for annulment of parts and/or the totality of the Resubmission Award with respect to the issue of Ms. Pey Grebe's status in the proceeding fail for procedural and substantive reasons.

## H. THE FINDING ON COSTS IN THE RECTIFICATION DECISION

781. It is uncontroversial that tribunals have broad discretion to determine, in accordance with Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j), "how and by whom" the expenses and costs of ICSID, the tribunal and parties are borne. Discretion does

[533] Resubmission Award, para. 188.

not imply complete freedom. It must be based on retraceable rationality and not be exercised arbitrarily.

782. Although based on discretion, a decision on costs is part of an award. The duty to state reasons for the decision extends to it.

783. With respect to this principle, the Committee agrees with the Applicants. It has to examine whether these criteria are met in the present case.

784. In its decision on costs for the Resubmission Proceeding, the Tribunal concluded that "as a general principle, a successful litigant […] ought to be protected against the cost and expense of having to litigate."[534] Still, and in accordance with the First Tribunal, it took additional circumstances into account, including the general conduct of the Parties. As a result, it split the arbitration costs between the Parties although it recognised that the Respondent had prevailed. An important reason for the Resubmission Tribunal was that "the Claimants had good reasons to bring the resubmission proceedings as such."[535] No resistance was voiced by the Respondent or by the Applicants, in whose partial favour the Resubmission Tribunal had decided.

785. In its Rectification Decision, the Tribunal stated that it "can see no good reason why the same principle should not apply" for the rectification proceeding.[536]

786. In applying the principle, the Resubmission Tribunal outlined the procedural history of the rectification proceeding. The proceeding had taken almost one year and was punctuated by the Applicants' requests for suspension linked to repeated requests for document production and their request for discontinuance, as well as suspensions due to the Applicants' repeated proposals to disqualify President Berman and Mr. Veeder. Both of these proposals were rejected by the Chairman of the Administrative Council.

[534] Resubmission Award, para. 249.
[535] Resubmission Award, para. 250.
[536] Rectification Decision, para. 56.

787. The Tribunal found that the different requests and proposals had no connection to the rectification proceeding and decided that they "will not be further considered in the present Decision except in relation to the allocation of costs."[537]

788. The Resubmission Tribunal rectified four errors in the Resubmission Award, partly in response to the Applicants' proposals, partly in response to the Respondent's proposal. It found that three of them are "of purely formal import," and that in any event none of them had "any perceptible impact on the meaning or effect of the Resubmission Award as such."[538] The Committee reviewed the rectifications and has no reason to object to the Resubmission Tribunal's appreciation.

789. The Resubmission Tribunal took "these factors into account"[539] and recalled the principle that good reasons should exist to bring issues before a tribunal and unnecessary costs should be avoided. It concluded that taken together, the factors justified a cost decision to exempt the Respondent from any expenses and costs and to place the burden on the Applicants.

790. These are considerations and reasons stated to explain the non-arbitrariness of the cost decision.

791. It would have been for the Applicants to explain why this line of reasoning and determination amounted to a manifest excess of power and/or a serious departure from a fundamental rule of procedure, and in what way paragraphs 56-58 of the Rectification Decision, in conjunction with paragraphs 249-251 of the Resubmission Award, can be equated to an absence of reasons. They have failed to do so. Neither paragraph 280 of the Annulment Application nor paragraph 757 of the Memorial on Annulment contain any substantiation to this end.

[537] Rectification Decision, fn. 2.

[538] Rectification Decision, para. 57.

[539] Rectification Decision, para. 58.

792. In any event, the Resubmission Tribunal's Decision does not contradict the principle formulated in paragraph 249 of the Resubmission Award. The Resubmission Tribunal did not state, in paragraph 56 of the Rectification Decision, that it would apply the same allocation key as the one applied in the Resubmission Award. Instead, it stated that it would apply the same *principles* as for the allocation of costs in proceedings on the merits. These principles, enunciated in paragraphs 249 and 251 of the Resubmission Award, were that "as a general principle, a successful litigant, whether claimant or respondent, ought to be protected against the cost and expense of having to litigate" so that costs are allocated depending on the extent to which a party won or lost. This is what the Resubmission Tribunal did in its Rectification Decision, in allocating the costs against the Applicants because they failed in their challenges against Messrs. Berman and Veeder and the errors were devoid of practical relevance.

793. Therefore, the request to annul paragraphs 58, 61 and 62(b) of the Rectification Decision is rejected.

## IX. COSTS

794. As agreed at the Hearing on Annulment, the Parties filed their submissions on costs on 15 May 2019 and their response to the other Party's submission on 30 May 2019.

795. The Applicants request that the Committee order the Respondent to pay all of the costs of the Annulment Proceeding[540] (including the costs relating to the Stay Request and other activities listed in the Submission on Costs,[541] the translation of their briefs,[542] the English interpretation and transcription of meetings, sessions and hearing).[543] In the event the Annulment Application were to be dismissed, the Applicants request that the Committee

[540] Annulment Application, para. 288.3; Memorial on Annulment, para. 759.2; Reply on Annulment, Section 13, para. 2.

[541] Applicants' Submission on Costs, pp. 2 ss., 12.

[542] Applicants' Submission on Costs, p. 12.

[543] Applicants' Submission on Costs, p. 13.

order that each Party pay half of the annulment costs and bear its own legal costs.[544] The Applicants seek compound interest (at a rate of 6-month "LIBOR+4" until actual payment) on the costs awarded.[545]

796. The Respondent requests that the Applicants be ordered to pay all of the costs of the Annulment Proceeding and reimburse the Respondent for all its legal fees and expenses plus interest (at a rate of 6-month LIBOR plus 2% per annum, from the date of the decision until the date of payment).[546] In its Submission on Costs, Chile requests that the Applicants also reimburse it for the payment of the Live Note transcript in English at the First Session plus interest (at a rate of six month LIBOR plus 2% per annum from the decision to the date of actual payment).[547]

## A. THE APPLICANTS' SUBMISSION ON COSTS

797. In their Submission on Costs, the Applicants claim reimbursement of the following costs: (i) USD 725.845 (amount paid to ICSID in connection with the annulment proceeding); (ii) EUR 23.190,98, USD 5.323,27 and GBP 3.930 (expenses incurred during the Annulment Proceeding); (iii) EUR 2,187,081.00, USD 1.00 and GBP 1.0 (legal fees); and (iv) any other amount that the Committee considers it appropriate.[548]

798. The Applicants describe the costs above as follows:

| **Amount paid to ICSID (lodging fee and advance on costs)** | |
|---|---|
| Sub-total | USD 725,845 (25,000 + 700,845) |
| **Travel – flights and train** | |
| Sub-total | EUR 6,331.45 + USD 1,374.23 + GBP 2,950.00 |
| **Accommodation** | |

[544] Applicants' Submission on Costs, pp. 1, 11 ss.

[545] Applicants' Submission on Costs, p. 15.

[546] Counter-Memorial on Annulment, para. 456; Rejoinder on Annulment, paras. 142(b) and (c); Respondent's Submission on Costs, paras. 1, 3, 12.

[547] Respondent's Submission on Costs, para. 16(b); *see also* Counter-Memorial on Annulment, para. 456(b).

[548] Applicants' Submission on Costs, p. 15.

| | |
|---|---|
| Sub-total | USD 3,625.89 + UK£ 980.00 |
| **Translation Costs** | |
| Sub-total | EUR 9,569.26 |
| **Legal fees and costs** | |
| Garcés y Prada, Abogados, Madrid | EUR 1,594,681 (HT) |
| Gide, Loyrette, Nouel, Paris | EUR 592,400 (HT) |
| Professor Robert l. Howse, New York University, *ad honorem* | USD 1.00 |
| Mr. Toby Cadman, Guernica 37 Chambers, London, *ad honorem* | UK£ 1.00 |
| Sub-total | EUR 2.187.081 + USD 1.00 + UK£ 1.00 |
| **Copies, print out and other** | |
| Sub-total | EUR 3,765.54 + EUR 3,414.15 |
| **Taxies and restaurants** | |
| Sub-total | EUR 110.58 + USD 323.15 |
| | |
| Total | USD 731,169.27 + UK£ 3,391.00 + EUR 2,210,271.98 |

## B. THE RESPONDENT'S SUBMISSION ON COSTS

799. The Respondent requests to be reimbursed of the following costs: (i) USD 1,315 (procedural costs related to the Live Note transcription in English of the First Session); and (ii) USD 2,061,596.92 (legal fees and expenses incurred by the Respondent and its representatives).[549]

800. The Respondent describes the costs above as follows (and provides further details on each figure in Tables A, B1, B2, B3, and C attached in the Submission of Costs).

| Type of Costs | Amount (USD) | Table |
|---|---|---|
| Procedural costs | 1,315.00 | A |

[549] Respondent's Submission on Costs, paras. 16(b) and (c). Chile has indicated that the figure under (ii) is based on an estimate of the legal fees and expenses incurred in April 2019 and reserved its right to amend it in due course (see para. 13 and fn. 47).

| | | |
|---|---|---|
| Arnold & Porter's Legal Fees and Expenses | 2,054,731.80 | Tables B(1)-(3) |
| Additional Expenses (Travel to Hearing) | 6,865.12 | Table C |
| **Subtotal of Chile's costs, fees and expenses** | 2,062,911.92 | |

## C. THE COMMITTEE'S ANALYSIS

801. The costs of this Annulment Proceeding, including the fees and expenses of the Committee as well as ICSID's administrative fees and direct expenses, amount to USD 804,967.24:

Committee's fees and expenses:

| | |
|---|---|
| Professor Dr. Rolf Knieper | USD 254,236.79 |
| Professor Dr. Nicolas Angelet | USD 134,416.87 |
| Professor Yuejiao Zhang | USD 153,243.44 |
| ICSID's administrative fees | USD 126,000 |
| Direct expenses[550] | USD 137,070.14 |
| **Total** | **USD 804,967.24** |

802. The above costs have been paid out of the advances made pursuant to ICSID Administrative and Financial Regulation 14(3)(e). The remaining balance will be reimbursed to the Applicants.

803. Article 61(2) of the ICSID Convention provides, in its relevant part, that:

> The Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the

[550] This amount includes actual charges relating to the dispatch of this Decision (printing, copying and courier).

> Tribunal and the charges for the use of the facilities of the Centre shall be paid.

804. Under this provision, applicable to this Annulment Proceeding by virtue of Article 52(4) of the ICSID Convention, the Committee has broad discretion in allocating the costs of the proceeding and the Parties' legal costs and expenses.

805. The Committee finds it appropriate to follow, in a broad brush, *mutatis mutandis*, the approaches of the two Tribunals as well as the consideration of the First Committee.

806. The Tribunals had applied the widely accepted principle that costs should follow the event by at the same time taking into account the specific circumstances of the case and the conduct of the Parties. The *ad hoc* Committee had recalled that "[i]n most of the decisions of annulment committees, the committees have decided that each party should bear its own litigation costs and that the costs of the proceeding should be borne equally by the parties" and had seen no reason "to depart from the prevailing practice."[551]

807. Of course, the circumstances of the second annulment proceeding are specific and the result is not fully comparable to the previous phases and decisions.

808. It is true that the Applicants' Request for Annulment is rejected. At the same time, the application was far from frivolous, superficial or tainted by extraneous considerations. They had good reason to have an *ad hoc* committee scrutinise whether the Tribunal was properly constituted, whether the Award did not suffer from fundamental defects, whether the suspicion of bias had a basis in reality, and whether the propriety and integrity of the procedure were respected. In that respect, the remedy of annulment is important to guarantee the legitimacy and acceptability of the ICSID arbitration system.

809. The Committee has found that in the present case the Tribunal, the arbitrators' conduct and the Award were free from such flaws. Both Parties have greatly assisted the Committee to reach its conclusions, each one in its specific style and manner.

[551] First Annulment Decision, paras. 352, 357 (footnotes omitted).

810. Taken together, the Committee believes that it is fair to complement the "cost follow the event" principle by another principle of cost allocation according to which "costs lie where they fall."

811. Both principles reinforce each other under the present circumstances: In accordance with ICSID Administrative and Financial Regulation 14(3)(e) the Applicants have advanced the costs of the proceeding, and the Parties have paid the legal costs and expenses.

812. The Committee decides that all costs and expenses should lie where they fall, meaning that the costs of the proceeding, including the fees and expenses of the Committee and the costs of the Centre are finally paid out of the advances made by the Applicants, and that each Party bears its own legal fees and expenses.

## X. DECISION

813. For the reasons set forth above, the *ad hoc* Committee unanimously decides as follows:

(1) The Application for Annulment of the Award is rejected;

(2) Each Party bears its own costs and fees;

(3) The Applicants bear the costs of the Annulment Proceeding, including the fees and expenses of the Committee and the costs of the Centre;

(4) The stay of enforcement is lifted.

[Signed]

Professor Dr. Nicolas Angelet
Member

Date: 7 January 2020

[Signed]

Professor Yuejiao Zhang
Member

Date: 7 January 2020

[Signed]

Professor Dr. Rolf Knieper
President of the *ad hoc* Committee

Date: 7 January 2020