CONCURRING OPINION OF NICOLAS ANGELET

1. I am in full agreement with the Committee's decision to reject the Application for Annulment of the Award. In this opinion, I wish briefly to explain why I do not subscribe to the reasons set out in the Committee's Decision as concerns the interpretation of the First Annulment Decision regarding the *res iudicata* effect of paragraph 688 of the First Award, and why this leaves the Committee's decision to reject the Application unaffected. I write this opinion with much esteem for the different view of my colleagues in the Committee on this truly complex issue.

Paragraph 688 of the First Award and the Committee's Decision

2. At paragraph 688 of the First Award, the First Tribunal reasoned that since the expropriation fell outside the scope of application of the BIT, the allegations and evidence regarding the damage caused by the expropriation were not relevant and could not be relied upon in order to establish the damage caused by the denial of justice and the failure to accord fair and equitable treatment:

> *688. L'expropriation survenue avant l'entrée en vigueur du traité ayant été écartée de l'examen du Tribunal arbitral, il en résulte que, pour cette raison déjà, les allégations, discussions et preuves relatives au dommage 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 *».* [Emphasis in original]

3. The Committee's Decision states that the First Committee repeatedly referred to paragraph 688, quoted this paragraph affirmatively in paragraphs 261 and 283 and drew conclusions that hinge upon the finality of paragraph 688. According to the Committee's Decision, the First Committee thus made the content of paragraph 688 its own. In this light, the First Committee's decision in dispositive paragraph 1 to annul "the corresponding paragraphs in the body of the Award related to damages (Section VIII)" must be interpreted as meaning that only the paragraphs that adjudicate

compensation for damages resulting from the denial of justice and the violation of the fair and equitable treatment standard by referring to the standard of expropriation are concerned. By contrast, the statement in paragraph 688 of the First Award that the damage caused by the denial of justice and the violation of fair and equitable treatment cannot be calculated by reference to the expropriation, would *be res iudicata*.[1] The Decision proceeds with noting that some ambiguities notwithstanding, the Resubmission Tribunal essentially took the same position.[2]

4. For the reasons set out hereafter, I regard this finding as incompatible with the relevant passages of the First Committee's Decision.

The Dispositive Paragraphs of the First Annulment Decision

5. The Committee's reasoning starts from the *dispositif* of the First Annulment Decision. The Committee observes that there has been some discussion between the Parties as to the meaning of dispositive paragraph 1 of the First Annulment Decision, which annuls paragraph 4 of the First Award and the "corresponding paragraphs in the body of the Award related to damages (Section VIII)" – in the French version: "*et les paragraphes correspondants dans le corps de la Sentence relatifs aux dommages-intérêts (Section VIII)*".[3] The question is whether this covers the entirety or only a part of Section VIII.

6. Dispositive paragraph 1 is arguably ambiguous because of the reference it makes to the "corresponding paragraphs […] related to damages" before mentioning Section VIII between brackets. This may be interpreted as referring to the whole of Section VIII or only to some paragraphs thereof.

7. However, dispositive paragraph 1 of the First Annulment Decision must be read in conjunction with dispositive paragraph 4. Whereas paragraph 1 enunciates the scope of annulment of the First Award, paragraph 4 enunciates what in the First Award is *res iudicata*. Paragraph 4 is the mirror image of paragraph 1. It is bound to say exactly the same in the opposite terms.

[1] Decision of the Committee (hereafter: "Decision") at paras. 623-626. See also paras. 659 ss.
[2] Decision, para. 626, referring to the Resubmission Award at paras. 228 and 230(d).
[3] Decision, para. 623. See also para. 625, which also mentions paragraph 4 of the *dispositif*.

8. In dispositive paragraph 4, the First Committee finds that "paragraphs 1 to 3 and 5 to 8 of the *dispositif* as well as the body of the Award but for Section VIII are *res judicata* – in French: "*les paragraphes 1 à 3 et 5 à 8 du dispositif ainsi que le corps de la Sentence, à l'exception de la Section VIII, ont autorité de chose jugée*". The terms "but for Section VIII" and "*à l'exception de la Section VIII*" unambiguously mean that Section VIII as a whole is not *res iudicata*.

9. Therefore, any ambiguity dispositive paragraph 1 may be tainted with is dispelled by paragraph 4.

The Reasons of the First Annulment Decision

10. The Committee's Decision does not focus on operative paragraph 4 of the First Annulment Decision but rather on its reasons. The Committee's Decision states that paragraph 688 of the First Award is quoted affirmatively in paragraphs 261 and 283 of the First Annulment Decision, with the consequence that the First Committee made the content of paragraph 688 its own. It would follow that dispositive paragraph 1 must be read as meaning that not all of the reasons in Section VIII are annulled.[4] In my submission, this conclusion is not sustained by paragraphs 261 and 283 of the First Annulment Decision, and it is further contradicted by paragraph 286 thereof.

11. Paragraph 261 of the First Annulment Decision is concerned with whether the First Tribunal violated Chile's right to be heard by valuating damages without having heard the Parties on the valuation method applied. In that context, the First Committee observed that the First Tribunal "acknowledged in the Award" ("*a reconnu dans la Sentence*") that (i) the Claimants' damages arguments were strictly limited to their expropriation, (ii) the expropriation-based calculation of damages was not relevant to the BIT violations in terms of denial of justice and discrimination forming the basis of the Award, (iii) Claimants presented no convincing evidence of damages on the denial of justice or discrimination claims and (iv) the First Tribunal would be able to proceed to the evaluation of the damages based on objective elements, the Chilean authorities having themselves fixed the amount of compensation due to persons entitled to be

[4] Decision, para. 624.

indemnified under Decision No. 43 (i.e. the Chilean domestic law decision granting compensation for expropriation to Chilean persons who wrongfully alleged being the owners of the Applicants' assets). The First Committee then reasoned in paragraph 262 that even if *arguendo* the First Tribunal had the power to calculate the Applicants' damage on this basis, it should have heard the Parties in that respect.

12. Nothing in this passage indicates that the First Committee thereby "made the content of paragraph 688 its own". I have considered that such appropriation might be inferred from the use of the term 'acknowledged', when the First Committee lists the various points the First Tribunal "acknowledged" in the First Award. The term could imply a validation of what the First Tribunal did. This argument, however, proves too much, because the 'acknowledgment' not only applies to the decision that the expropriation-based calculation of damages was not relevant to the denial of justice and breach of fair and equitable treatment (second indent), but also to the contradictory decision that damages could be calculated by reference to the expropriation value pursuant to Decision No. 43 (fourth indent). It follows that nothing in paragraph 261 of the First Annulment Decision indicates that the First Committee made paragraph 688 of the First Award its own. The First Committee merely summarised the First Tribunal's reasons.

13. Paragraph 283 of the First Annulment Decision is, in turn, concerned with whether the First Award's reasons regarding the valuation of damages were contradictory. In paragraph 282, the First Committee announced that it agreed with Chile that the First Tribunal's valuation of the damages by reference to the Chilean Decision No. 43 – which was for expropriation – was incompatible with the First Tribunal's prior decision that the valuation of damages caused by expropriation was not relevant for the valuation of damages due to the denial of justice and the breach of fair and equitable treatment. The First Committee then recalled the reasons in paragraph 688 of the First Award (§283) and confronted them with the valuation of damages by reference to Chilean Decision No. 43 (§284) before reiterating its conclusion that the reasons were contradictory (§285). Again, the First Committee did not thereby "made paragraph 688 its own" but merely presented the contradiction.

14. Importantly, the First Committee then specified in paragraph 286 that the problem lied specifically in the contradictory reasoning, and not as such in the quantum of damages, nor in the method applied by the First Tribunal to calculate the damages:

> […] 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. [emphasis added]

15. The First Tribunal's "method of calculating the damages" mentioned in the second sentence here above can only refer to the valuation of the damages caused by the denial of justice and the violation of fair and equitable treatment by reference to the amounts accorded pursuant to Decision No. 43 for unlawful expropriations. The First Committee made it explicit that this method was not *per se* problematic.

16. The First Committee did not thereby positively validate the method used by the First Tribunal, which was not within the powers of the First Committee to do. However, the First Committee made it explicit that it did not invalidate that method either. It sanctioned the contradiction between two elements without rendering judgment on the intrinsic validity of any of these elements.

17. It follows that the First Annulment Decision did not accord *res iudicata* effect to paragraph 688 of the First Award.

The Committee's Decision Remains Unaffected

18. However, the above does not affect the Committee's decision to reject the Application for Annulment. There are two reasons for this.

19. First, paragraph 4 of the First Annulment Decision's *dispositif* is also to the effect that "the body of the Award but for Section VIII" is *res judicata*. As the Decision correctly notes, this confers *res judicata* effect to paragraphs 611 and 612 of the First Award, where the First Tribunal considered that it could have regard to facts preceding the entry

into force of the BIT as an element of context in deciding on the violation of the BIT by acts postdating its entry into force. This statement was different from that contained in paragraph 688 of the First Award. Yet, the Resubmission Tribunal appears to have *inferred* from paragraphs 611 and 612 that the contents of paragraph 688 was also *res judicata*. It presented as "its interpretation of the *res judicata* portions of the First Award" *inter alia* that the arguments related to expropriation may not be taken into consideration except insofar as they constitute factual background,[5] and that the "consequence of this interpretation of the First Award" was that the assessment of damage based on the expropriation should be rejected as "inconsistent with the First Award".[6] For the reasons explained above, I regard this reasoning as incompatible with the First Annulment Decision. In addition, when it comes to interpreting the First Award's subsisting portions rather than the First Annulment Decision, I do not agree that the contents of paragraph 688 can be endowed with *res judicata* effect on the basis of an inference from paragraphs 611 and 612, which contain general statements that are not part of the First Award's *dispositif* nor a necessary underpinning of a relevant part of the *dispositif* (a "*motif décisoire*"). However, this does not turn the Resubmission Tribunal's decision into a *manifest* excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention. Its deficiencies notwithstanding, the Resubmission Tribunal's reasoning finds a partial basis in the First Annulment Decision's unreserved finding that "the body of the Award but for Section VIII" is *res judicata*. As a consequence, the excess of powers is not obvious, and therefore not manifest.

20. Second, as stated in the Decision by reference to the case law and the writings of 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".[7]

21. This is of direct relevance to the Resubmission Tribunal's decision that "any assessment of injury and damage based on the original expropriation is inconsistent with the First Award".[8]

[5] Resubmission Award, para. 228.
[6] Resubmission Award, para. 230 (d).
[7] Decision, para. 210, quoting from Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, Article 52, para. 485.
[8] Resubmission Award, paras. 228 and 230(d).

22. The Applicants' valuation of the damage caused by the denial of justice and the violation of fair and equitable treatment as it was argued before the Resubmission Tribunal is based on an alleged loss of opportunity.[9] The Applicants' position is that absent the denial of justice, which consists of the undue delay in the domestic proceedings initiated by Mr. Pey Casado, the Applicants would have been in possession of a Chilean court judgment (the judgment of the 1st Civil Tribunal of Santiago of 24 July 2008) before the First Award was rendered. They could thus have argued on the basis of that judgment that the expropriation suffered by Mr. Pey Casado was null and void *ab initio* pursuant to Chilean law, with the consequence that it was a continuing fact falling within the temporal scope of application of the BIT.[10]

23. However, as also stated in the Decision,[11] this argument has no factual basis. The Chilean court judgment did not consecrate the nullity *ab initio* of the expropriation. Quite the opposite, it rejected Mr. Pey Casado's claim on the basis that it was time-barred. This implies that the expropriation was qualified as an instantaneous act, not as a continuing act. It follows that even if the Applicants had obtained the judgment in due time for it to be filed as evidence before the First Tribunal, it would have been of no avail. To the opposite, it would have confirmed the First Tribunal's eventual decision that the expropriation fell outside the temporal scope of application of the BIT.

24. In more general terms, it bears emphasis that since the opportunity allegedly lost by the Applicants was in fact inexistent, no annulment of the Resubmission Award could have paved the way to the allocation of damages.

*

[9] Before the Resubmission Tribunal, the Applicants did not seek to establish their damage by reference to the amounts paid pursuant to Decision No. 43, as the First Tribunal had done. See Decision, paras. 630, 631.
[10] See Decision at paras. 216, 255, 265, 708, and further at para. 645 regarding the Applicants' position that there could be no loss of opportunity to obtain reparation in the Chilean domestic legal system since the BIT's fork-in-the-road provision had caused them to waive their right to domestic reparation in order to expand their arbitration claim.
[11] Decision, paras. 180 and 219.

Professor Dr. Nicolas Angelet
Member

Date: 07 JAN. 2020