

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE AGREEMENT BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC
OF CHILE ON THE RECIPROCAL PROTECTION AND PROMOTION OF
INVESTMENTS DATED 2 OCTOBER 1991**

-and-

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW 1976 (the “UNCITRAL Rules”)**

PCA CASE NO. 2017-30

-between-

**“PRESIDENT ALLENDE” FOUNDATION, VICTOR PEY CASADO,
CORAL PEY GREBE (Spain)**

(“Claimants”)

-and-

THE REPUBLIC OF CHILE

(“Respondent”)

AWARD

The Arbitral Tribunal

Prof. Bernard Hanotiau (Presiding Arbitrator)

Prof. Dr. Hélène Ruiz Fabri

Mr. Stephen L. Drymer

Tribunal Secretary

Ms. Iuliana Iancu

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I. THE PARTIES

CLAIMANTS

1. The “President Allende” Foundation (the “**Foundation**”) is a philanthropic-cultural foundation, established in 1990 in Madrid, Spain, on the basis of Decree No. 2930 of 21 July 1972. The Foundation is registered in the Foundation Register held by the Spanish Ministry of Education and Culture under Number 225, CIF G79339693, and has its seat at 11 Zorrilla Street, 1st floor, 28014 Madrid, Spain.
2. Mr. Victor Pey Casado¹ was a Spanish national, previously residing at 13 Ronda Manuel Granero, 28014 Madrid, Spain.
3. Ms. Coral Pey Grebe is a Spanish national, whose residence for purposes of these proceedings is at 11 Zorrilla Street, 1st floor, 28014 Madrid, Spain.

collectively referred to as “**Claimants**”.

4. Claimants are represented in this arbitration by their duly authorized attorneys and counsel mentioned at page 2 above.

RESPONDENT

5. Respondent is the Republic of Chile (“**Chile**” or “**Respondent**”).
6. Respondent is represented in this arbitration by its duly authorized attorneys and counsel mentioned at page 2 above.

II. PROCEDURAL HISTORY

7. By Notice of Arbitration dated 12 April 2017, Claimants commenced arbitration proceedings against Respondent pursuant to Article 10 of the Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments dated 2 October 1991 (the “**Treaty**” or the “**BIT**”).² Claimants proposed that the arbitral tribunal be made up of one arbitrator and requested that Mr. Luis Moreno Ocampo be confirmed as sole arbitrator. Claimants also proposed that the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) be

¹ Please see Section VI. below, Mr. Victor Pey Casado passed away during the pendency of these arbitral proceedings and was replaced by his successor in rights, his daughter, Ms. Coral Pey Grebe.

² The Tribunal shall hereinafter refer to the following documents as the BIT or the Treaty: the Spanish original included in Accord entre le Royaume d'Espagne et la République du Chili pour la Protection et le Soutien Réciproque des Investissements (Exhibit C-6e); the French translation of the Treaty submitted by Respondent as Chile-Spain BIT (2 October 1991) (Exhibit R-0001); and the English translation of the Treaty published in the United Nations Treaty Series, and submitted by Respondent as Chile-Spain BIT (2 October 1991) (Exhibit R-0001).

designated as the appointing authority pursuant to Article 7(2) of the 1976 UNCITRAL Arbitration Rules.

8. On 12 April 2017, Respondent received the Notice of Arbitration.
9. On 12 May 2017, Respondent submitted its Response to the Notice of Arbitration, arguing that the Notice of Arbitration was inadmissible. Subject to this position, Respondent tentatively objected to the tribunal being composed of a sole arbitrator and indicated that it intended to appoint Mr. Stephen L. Drymer, a national of Canada, as its party-appointed arbitrator.
10. On 18 May 2017, Claimants appointed Prof. Dr. Hélène Ruiz Fabri, a national of France, as their party-appointed arbitrator.
11. On 24 May 2017, invoking Article 11 of the 1976 UNCITRAL Arbitration Rules, Claimants challenged Mr. Drymer.
12. On 9 and 12 June 2017, Claimants requested that the Secretary-General of the PCA decide their challenge to Mr. Drymer.
13. On 30 June 2017, Respondent argued that the PCA should not recognize the Notice of Arbitration as giving rise to new arbitral proceedings since the claims advanced therein had been finally decided in a prior ICSID award. On this basis, Respondent argued that the challenge to Mr. Drymer was premature given that it had not yet appointed him as arbitrator, but only indicated an intention to do so. Respondent nonetheless went on to state: “In the event that the PCA has decided to recognize Claimants’ purported UNCITRAL ‘Notice’ as giving rising to a new arbitral proceeding — which, for the reasons explained above, Chile considers improper — Chile hereby designates Mr. Drymer as its party-appointed arbitrator for such proceeding, and invites Mr. Drymer to conduct the enquiry contemplated in Article 11 of the UNCITRAL Arbitration Rules.” That letter was inadvertently not transmitted to Mr. Drymer at the time, and was sent to him only after Mr. Drymer’s 11 July 2017 e-mail discussed below.
14. On 1 July 2017, Claimants withdrew their challenge to Mr. Drymer and requested that the PCA appoint the second arbitrator on behalf of Respondent.
15. On 10 July 2017, Respondent indicated that it did not agree to the Secretary-General of the PCA acting as appointing authority in this matter and proposed that the Secretary-General of ICSID be designated as the appointing authority.
16. On 11 July 2017, Claimants objected to Respondent’s proposal above and reiterated their request that the PCA should proceed to appoint the second arbitrator on behalf of Respondent.

17. On the same day, the PCA noted that the 1976 version of the UNCITRAL Arbitration Rules was applicable and that the Parties had not agreed to the Secretary-General of the PCA acting as the appointing authority. The PCA invited Claimants to indicate whether they requested that the Secretary-General of the PCA proceed to designate an appointing authority pursuant to Article 7(2)(b) of the 1976 UNCITRAL Arbitration Rules.
18. By e-mail later that same day, Mr. Drymer took note of the Parties' and the PCA's repeated references in their correspondence (on which he had been copied) to Respondent's 30 June 2017 letter (which he had not seen) concerning his potential, or conditional appointment as arbitrator, and responded to a series of detailed questions posed by Claimants concerning his independence and impartiality.
19. By letters dated 11, 12 and 13 July 2017, Claimants accepted Mr. Drymer's appointment to the Tribunal, but requested that the PCA designate itself as appointing authority. The Respondent opposed this request on 19 July 2017.
20. On 11 August 2017, the Secretary-General of the PCA designated Judge Dominique Hascher as appointing authority.
21. On 5 September 2017, in accordance with the agreement of the Parties and Article 7(1) of the 1976 UNCITRAL Arbitration Rules, the first two arbitrators appointed Prof. Bernard Hanotiau, a national of Belgium, as the Presiding Arbitrator of the Tribunal.
22. On 26 September 2017, after consulting both Parties, the Tribunal decided that the first procedural hearing would take place on 18 October 2017 by means of a telephone conference. The Tribunal communicated to the Parties an agenda for the hearing and requested that the Parties file simultaneous submissions on 9 and 16 October 2017, respectively, on the following issues: the language(s) of the proceedings; the seat of the arbitration; the procedural calendar and the administration of the proceedings.
23. On 9 October 2017, both Parties filed the first round of simultaneous submissions on the issues above.
24. On 16 October 2017, both Parties filed the second round of simultaneous submissions on the issues to be discussed at the first procedural hearing.
25. On 18 October 2017, the Tribunal and the Parties participated in the first procedural hearing. During the hearing, Respondent requested the bifurcation of these proceedings (the "**Request for Bifurcation**"). The Tribunal directed the Parties to file simultaneous submissions addressing the Request for Bifurcation on 8 November 2017.
26. On 3 November 2017, the Tribunal issued Procedural Order No. 1, concerning the languages of the proceedings, the applicable procedural rules and the case administration. The Tribunal decided that the UNCITRAL Arbitration Rules of 1976

(the “**UNCITRAL Rules**”) shall apply in this arbitration and that the PCA would act as Registry.

27. On 8 November 2017, the Parties filed simultaneous submissions in which they set out their positions with regard to the possible bifurcation of these proceedings.
28. On 20 November 2017, the Parties and the Tribunal signed the Terms of Appointment. Geneva, Switzerland, was selected as the seat of arbitration. Ms. Iuliana Iancu, an associate at the Presiding Arbitrator’s law firm, was appointed as Administrative Secretary.
29. On 29 November 2017, the Tribunal issued Procedural Order No. 2, postponing the decision on the Request for Bifurcation until after the Parties had filed their first round of submissions on jurisdiction and the merits. The Tribunal directed the Parties to agree on a procedural calendar and to set out their complete case on both the merits and jurisdiction in their first round of submissions.
30. On 30 November 2017, Claimants communicated to the Tribunal that they would file their Memorial at the latest on 6 January 2018 and argued that Respondent should file its Counter-Memorial within a 40-day deadline following receipt of the Memorial.
31. On 7 December 2017, Respondent indicated that it had no objections to Claimants’ proposed deadline for the submission of the Memorial, but that it objected to the 40-day deadline proposed by Claimants for the Counter-Memorial. Respondent requested that the Tribunal fix the deadline for the Counter-Memorial to 3 July 2018.
32. On 9 December 2017, the Tribunal decided that Claimants’ Memorial should be filed on 6 January 2018, and that Respondent’s Counter-Memorial should be filed on 21 May 2018.
33. On 6 January 2018, Claimants filed their Memorial (the “**Memorial**”), accompanied by factual exhibits and legal authorities, numbered as Exhibits C-0 through C-460e, as well as by the expert reports of Mr. Roberto Avila Toledo; Mr. Victor Araya Anchia; and Messrs. Schmit and Saura of Accuracy.
34. On 8 January 2018, the Tribunal directed Claimants to submit the translations into English or French of the expert reports of Messrs. Avila and Araya by 29 January 2018.
35. On 29 January 2018, Claimants submitted the translations into French of the expert reports of Messrs. Avila and Araya.
36. On 11 April 2018, Claimants requested leave from the Tribunal to submit into the record of this arbitration the Decision of 15 March 2018 of the second ICSID annulment committee.

37. On 16 April 2018, following an invitation from the Tribunal, Respondent indicated that it had no objection to the introduction of this document into the record.
38. On 17 April 2018, the Tribunal granted Claimants leave to introduce the document into the record as Exhibit C-461.
39. On 21 May 2018, Respondent filed its Counter-Memorial (the “**Counter-Memorial**”), accompanied by factual exhibits R-0001 through R-0166, legal authorities RL-0001 through RL-0047, as well as by the expert reports of Prof. Cristian Maturana Miquel (in Spanish), Prof. Enrique Barros Bourie (in Spanish) and Mr. Brent C. Kaczmarek. In the Counter-Memorial, Respondent raised the following five jurisdictional objections:
 - Objection No. 1: the Tribunal lacks jurisdiction to grant Claimants’ requests for relief;
 - Objection No. 2: the BIT does not apply to any of the claims asserted;
 - Objection No. 3: the Tribunal lacks jurisdiction to entertain claims for the alleged non-performance of the First Award;
 - Objection No. 4: the Tribunal lacks jurisdiction to entertain claims related to the Essex Court Chambers Issue;
 - Objection No. 5: the Tribunal lacks jurisdiction to entertain claims based on the Goss Machine case.
40. On 24 May 2018, the Tribunal invited the Parties to update their submissions concerning the possible bifurcation of these proceedings in light of the Memorial and Counter-Memorial.
41. On 31 May 2018, pursuant to the Tribunal’s instructions, Respondent submitted its Updated Request for Bifurcation.
42. On 7 June 2018, pursuant to the Tribunal’s instructions, Claimants submitted their Updated Answer to the Updated Request for Bifurcation.
43. On 27 June 2018, the Tribunal rendered its Decision on Bifurcation (the “**Decision on Bifurcation**”). The Tribunal decided to hear with priority Respondent’s Objections Nos. 1 through 4, and to join to the merits Objection No. 5. The Tribunal directed the Parties to confer and agree on a procedural calendar dedicated to Objections Nos. 1 through 4.
44. On 16 July 2018, after receiving submissions from both Parties on this issue, the Tribunal issued Procedural Order No. 3, setting the calendar for submissions on jurisdiction and deciding that a hearing on the bifurcated objections (the “**Hearing**”) would take place. The Tribunal inquired as to the Parties’ availabilities for the Hearing.

45. On 25 July 2018, after receiving submissions from both Parties regarding their availabilities, the Tribunal decided that the Hearing would take place in Brussels, Belgium, on 5 March 2019.
46. On 17 September 2018, Claimants submitted their Counter-Memorial on Jurisdiction (the “**Counter-Memorial on Jurisdiction**”), accompanied by Exhibits C-195f, and C-462 through C-585.
47. On 18 September 2018, Respondent submitted the translations into English and French of the expert reports of Messrs. Cristian Maturana Miquel and Enrique Barros Bourie.
48. On the same day, Claimants objected to what they argued was the belated submission of the English and French translations of the expert reports of Messrs. Maturana and Barros and requested their exclusion from the record.
49. On 20 September 2018, following an invitation from the Tribunal, Respondent commented on Claimants’ application.
50. On 22 September 2018, the Tribunal dismissed Claimants’ application to exclude from the record the English and French translations of the expert reports of Messrs. Maturana and Barros.
51. On 28 September 2018, Respondent filed a request for clarifications, inquiring whether a translation into French of the expert report of Mr. Kaczmarek was necessary.
52. On 2 October 2018, the Tribunal noted that it would have no objections to the expert report of Mr. Kaczmarek being submitted into the record in English only, subject to any objections from Claimants.
53. On 4 October 2018, Claimants indicated that they had no objections to the Tribunal’s proposal above. On the same day, considering the absence of objections from Claimants, the Tribunal confirmed that the expert report of Mr. Kaczmarek could be filed in English only.
54. On 8 October 2018, Claimants informed the Tribunal and Respondent that Mr. Victor Pey Casado had passed away on 5 October 2018.
55. On 19 November 2018, Respondent submitted its Reply on the Bifurcated Objections (the “**Reply on Jurisdiction**”), accompanied by Exhibit R-0167 and legal authority RL-0048.
56. On 11 December 2018, Respondent sought leave from the Tribunal to introduce into the record the Reply on Annulment, submitted by the claimants in the second ICSID annulment proceedings.

57. On 14 December 2018, following an invitation from the Tribunal, Claimants objected to Respondent's application above, arguing that the application had been filed with delay and that these proceedings and the second ICSID annulment proceedings were not connected. Claimants added that, to the extent the Tribunal were minded to grant Respondent's application, they were seeking permission to introduce into the record other pleadings from the second ICSID annulment so as to provide useful context.
58. On 18 December 2018, Respondent indicated that, if the Tribunal were to accept its application for leave to introduce an additional document into the record, it would have no objections to Claimants being granted a similar right to file additional documents.
59. On 19 December 2018, the Tribunal granted both Parties leave to introduce into the record of these proceedings Claimants' Reply on Annulment, Chile's Counter-Memorial on Annulment as well as additional documents that Claimants had exhibited as Exhibits C-588, C-589 and C-590.
60. On the same date, Respondent submitted into the record Chile's Counter-Memorial on Annulment (marked as Exhibit R-0168) and Claimants' Reply on Annulment (marked as Exhibit R-0169, in English and French, respectively).
61. On 20 December 2018, Claimants submitted a corrected version of the French version of their Reply on Annulment, arguing that the version circulated by Respondent was incorrect.
62. On the same date, Respondent submitted into the record as Exhibit R-0169, in French, the correct version of Claimants' Reply on Annulment.
63. On 21 January 2019, Claimants submitted their Rejoinder on the Bifurcated Objections (the "**Rejoinder on Jurisdiction**"), accompanied by Exhibits C-172e, C-387f, C-475, C-476, C-587, C-588, C-596e, C-596f, C-600, C-604, C-605, C-609 to C-612, C-616 to C-645, and C-651.
64. On 29 January 2019, the Tribunal circulated to the Parties a list of issues to be decided in connection with the upcoming Hearing.
65. On 5 February 2019, Respondent reverted to the Tribunal on the issue of which experts (if any) could be examined at the Hearing. Respondent took the view that no experts could be cross-examined, as their testimony had been submitted exclusively in support of Respondent's arguments on the merits of the case, and not in support of its case on jurisdiction.
66. On 7 February 2019, following an invitation from the Tribunal, Claimants commented on Respondent's letter above. Claimants took the view that the testimonies of Messrs. Barros and Maturana were directly relevant to Respondent's jurisdictional objections. Claimants argued that, since Respondent had not waived the arguments that Messrs.

Barros and Maturana supported, as a matter of equality of the Parties, Claimants should be recognized the right to cross-examine the experts.

67. On 11 February 2019, the Tribunal decided not to call Messrs. Barros and Maturana to testify at the Hearing and put Respondent on notice that it could not rely upon their testimonies in its oral or written argument as support for its jurisdictional objections.
68. On 18 February 2019, after receiving both Parties' comments, the Tribunal issued Procedural Order No. 4 concerning the organization of the Hearing.
69. On 28 February 2019, Respondent sought leave from the Tribunal to introduce a new exhibit into the record, a letter filed by the claimants in the second ICSID annulment proceedings.
70. On 1 March 2019, following an invitation from the Tribunal, Claimants indicated that they had no objection to Respondent's application, but that the document's proper import could only be understood if reference was made to other documents that were not part of the record.
71. On the same day, the Tribunal dismissed Respondent's request, noting the proximity of the Hearing and the fact that the request could have been filed at an earlier time.
72. The Hearing took place on 5 March 2019, at Hotel Amigo, Brussels. In addition to the Tribunal members and the Secretary of the Tribunal, the following persons participated at the hearing:

On behalf of Claimants:

Dr. Juan Garcés, Garcés y Prada, Abogados, Madrid
Prof. Dr. Robert Howse
Mr. Hernán Garcés, Garcés y Prada, Abogados, Madrid

On behalf of Respondent:

Ms. Mairée Uran-Bidegain, Republic of Chile
Mr. Paolo Di Rosa, Arnold & Porter Kaye Scholer LLP
Ms. Mallory Silberman, Arnold & Porter Kaye Scholer LLP
Ms. Caroline Kelly, Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena, Arnold & Porter Kaye Scholer LLP

Court reporters:

Ms. Tricia Brady, Opus 2 (English)
Mr. Stuart Marshall, Opus 2 (English)
Ms. Simone Bardot (French)
Ms. Christine Rouxel-Merchet (French)

Interpreters:

Ms. Marie Dalcq (English to French and French to English)
Ms. Karine Dreyfus (English to French and French to English)

73. On 25 March 2019, both Parties transmitted their own corrections to the English and French transcripts.
74. On 28 March 2019, in view of the fact that the Parties had not agreed on the corrections, the Tribunal decided to submit the Parties' respective corrections to the transcripts to the court reporters for verification.
75. On 5 April 2019, the final French transcript was received from the court reporters (“**Tr. (Fr.)**”).
76. On 9 April 2019, pursuant to the Tribunal's directions at the end of the Hearing, the Parties submitted their statements on costs (“**C-SC**” and “**R-SC**”, respectively).
77. On 10 April 2019, Respondent objected to the substance of the C-SC, arguing that it contravened the Tribunal's direction that the Parties would submit only statements on costs, as opposed to submissions on costs. Respondent requested that the Tribunal give no weight to Claimants' substantive arguments included in the C-SC.
78. On 11 April 2019, Claimants made an additional request for correction of the English transcript, arguing that the version circulated by the court reporters was inconsistent with the floor recording and with the French transcript.
79. On 12 April 2019, following an invitation from the Tribunal, Claimants answered Respondent's application of 10 April 2019. Claimants argued that Respondent's request lacked merit, as it was contrary to the Tribunal's directions at the end of the Hearing.
80. On the same date, Respondent objected to Claimants' additional request for correction of the English transcript, arguing that it was untimely and did not conform with the Tribunal's directions at the end of the Hearing.
81. On 16 April 2019, in answer to the Parties' respective applications, the Tribunal noted that there was a discrepancy between the English and French transcripts. The Tribunal recalled that its instructions at the Hearing had been for the Parties to file cost statements, as opposed to cost submissions. The Tribunal decided to accept the C-SC, noting that the discrepancy between the transcripts had occurred through no fault of Claimants' and that the issue of the proper allocation of costs had been amply debated in writing and at the Hearing, so that Respondent could not have suffered any procedural prejudice.
82. On 22 May 2019, the final English transcript was received from the court reporters (“**Tr. (En.)**”).
83. On 8 November 2019, the Tribunal closed these proceedings.

III. THE FACTUAL BACKGROUND OF THE DISPUTE

A. The expropriation of *El Clarín* and Chile's return to democracy

84. Claimants were the shareholders of the Chilean company *Consortio Publicitario y Periodístico S.A.* (“**CPP**”), which in the early 1970s was the owner of the Chilean newspaper *El Clarín*, a publication established in 1952³ and incorporated under the name *Empresa Periodística Clarín Ltda.* (“**EPC**”). *El Clarín* was one of the most widely read newspapers in Chile in 1973 and a vocal supporter of former Chilean president, Dr. Salvador Allende, elected on 4 September 1970.
85. In September 1973, a military *coup d'État* toppled the Allende government and *de facto* seized the assets of CPP and EPC. The military government then enacted Decree Law No. 77 in which it declared unlawful, and legally dissolved, all Marxist entities, political parties and their affiliates, and transferred title of their property to the State. Subsequently, by means of Decree No. 165 of 10 February 1975 (“**Decree No. 165**”), the military government applied Decree Law No. 77 to *El Clarín*. Decree No. 165 dissolved CPP and EPC and transferred their assets to the Chilean State. Mr. Pey Casado left Chile for Spain.
86. Following the fall of the military regime, Chile adopted a series of measures in order to make reparations for the crimes and illegal acts committed during the dictatorship, including for politically motivated takings of property. In April 1990, the newly-elected President Aylwin created “the National Truth and Reconciliation Commission”, the purpose of which was to disclose the human rights violations under the Pinochet regime. Around the same time, the Chilean Parliament adopted a law creating a National Office for Returning Exiles.
87. Mr. Pey Casado returned to Chile in May 1989 and began focusing on obtaining the restitution of his properties, both his personal properties and *El Clarín* property. He successfully obtained the restitution of his personal property in the Chilean courts.

B. The initiation of the ICSID arbitration and of local proceedings in the Santiago courts

88. In September 1995, Mr. Pey Casado initiated judicial proceedings before the First Civil Court of Santiago against the Chilean Treasury, seeking restitution of a Goss-brand printing press that had been seized from *El Clarín* by the military authorities in 1973. Also in September 1995, Mr. Pey Casado made a request with the President of Chile for the restitution of several other *El Clarín* assets. This request was forwarded by the Chilean President to the Chilean Ministry of National Assets, which responded to Mr. Pey Casado in November 1995. According to the Ministry, a bill seeking to establish

³ Notice of Arbitration, at 8.

the appropriate remedy (compensation or restitution) for the expropriations during the Pinochet regime was at that time before the Chilean Parliament. The Ministry of National Assets represented that, until such time as the law was adopted, it was not possible to order the restitution of the requested assets.

89. On 3 November 1997, Mr. Pey Casado and the Foundation commenced arbitration proceedings against Chile before the International Centre for the Settlement of Investment Disputes (“**ICSID**”) on the basis of the Treaty (the “**First Arbitration**”). In those proceedings, Mr. Pey Casado and the Foundation invoked the seizure in February 1975 of the entirety of EPC’s and CPP’s rights, interests and assets. However, they carved out of the proceedings the seizure of the Goss Machine printing press.
90. In July 1998, Chile passed Law No. 19,568 which established a reparations program for the expropriations which had occurred during the Pinochet regime.
91. In June 1999, Mr. Pey Casado and the Foundation wrote to the Chilean Ministry of National Assets declaring that they were not applying for reparations under Law No. 19,568. Mr. Pey Casado and the Foundation referred in this respect to their submission of an arbitral dispute before ICSID and to the existence of a fork-in-the-road clause in the BIT.
92. In April 2000, by means of Decision 43, the Chilean Ministry of National Assets ruled on an application that had been filed by six individuals (not including Mr. Pey Casado) seeking compensation for the expropriation of *El Clarín* and its assets. The Ministry of National Assets concluded that, under Chilean law, the true owners of CPP at the time of the military *coup* had been four of those individuals whose names appeared in the shareholder registry. By means of Decision 43, the Ministry of National Assets awarded compensation to these four individuals. Decision 43 did not mention either Mr. Pey Casado or the Foundation.
93. In November 2002, Mr. Pey Casado and the Foundation submitted to the ICSID tribunal constituted to hear their claims (the “**First Tribunal**”) an ancillary claim seeking damages for the seizure of the Goss printing press.⁴
94. On 8 May 2008, the First Tribunal rendered its award (the “**First Award**”). The First Tribunal ruled that it lacked jurisdiction *ratione temporis* over Mr. Pey Casado’s and the Foundation’s expropriation claim, finding that the expropriation of their investment had consummated in 1975 upon the entry into force of Decree No. 165, and thus before the entry into force of the Treaty. The First Tribunal however upheld jurisdiction and found in favor of the claimants in respect of their claim for breach of the Fair and Equitable Treatment standard. In this latter regard, the First Tribunal concluded that Chile had committed a denial of justice as a result of its delay in rendering a judgment

⁴ First Award, at 29.

on the merits in Mr. Pey Casado's case before the Santiago civil court, coupled with its decision to award compensation by means of Decision No. 43 to individuals who in the First Tribunal's view were not the lawful owners of *El Clarín*. The First Tribunal however found that the claimants had not put forward any evidence for the damages relating to this FET breach and stated that it would proceed to an evaluation of damages based on objective elements. The First Tribunal determined that the compensation to be awarded the claimants for the FET breach would be equal to the amount that Chile had awarded to third parties under Decision No. 43.

95. On 2 June 2008, Mr. Pey Casado and the Foundation commenced revision proceedings against the First Award, arguing that they had uncovered new evidence and requesting that the First Tribunal revise the First Award by accepting their "continuing expropriation" theory and awarding them USD 797 million in damages for the expropriation of *El Clarín*.
96. On 18 November 2009, the Revision Decision was rendered, dismissing the claimants' application for revision of the First Award as inadmissible.

C. The Santiago Civil Court Judgment of 24 July 2008 and the ensuing abandonment proceedings

97. On 24 July 2008, the Santiago civil court seized with Mr. Pey Casado's request for restitution rendered its judgment on the merits (the "**Santiago Civil Court Judgment**"). The court dismissed Mr. Pey Casado's claim for restitution of the Goss printing press due to his lack of standing to sue and on account of the expiry of the applicable statute of limitations.
98. In June 2009, the Chilean State agency representing the Chilean Treasury in court proceedings filed a request with the Santiago court for a declaration of abandonment of the proceeding by the claimant, invoking Mr. Pey Casado's failure to notify the judgment to the defendant for more than six months. The Santiago first instance court rejected the request in August 2009, but this decision was overturned by a court of appeals in December 2009. In the present arbitration, Claimants complain that, due to machinations by the Chilean Government, they were not notified of the Santiago Civil Court Judgment or made aware of the abandonment proceedings. They submit that the abandonment proceedings were conducted without notice thereof being given to Mr. Pey Casado and without Mr. Pey Casado having had an opportunity to present his case. Claimants submit that Mr. Pey Casado only found out about the Santiago Civil Court Judgment's existence in January 2011. Claimants add that, despite Mr. Pey Casado's subsequent efforts to exercise and obtain damages for the forty-year long deprivation of the rights that had been recognized by the Santiago court, those efforts were systematically rejected by Respondent.

99. For its part, Respondent argues that it is implausible that Claimants were not aware of the Santiago Civil Court Judgment considering their eagerness to pursue their claims. In its view, the far more likely scenario is that Mr. Pey Casado viewed the judgment as unfavorable and therefore decided not to move the case forward by notifying it to the defendant, as would have been required under Chilean law. Respondent adds that, in any event, following the decision of the court of appeals finding that the proceedings had been abandoned, the Santiago Civil Court Judgment no longer has any effect under Chilean law.
100. Claimants submit that they only learned of both the existence of the Santiago Civil Court Judgment and the ensuing abandonment proceedings on 24 January 2011 and, four days later, filed an appeal against the decision finding that the proceedings had been abandoned. This appeal was dismissed by the Santiago Court on 28 April 2011 and was subsequently maintained on appeal by the Court of Appeal on 31 January 2012. A subsequent effort by Mr. Pey Casado to have this latter judgment set aside was dismissed by the Chilean Supreme Court in July 2012.

D. The first annulment and the ensuing resubmission proceedings before ICSID

101. In parallel with these developments before the Chilean courts, on 5 September 2008, Chile submitted a request for annulment of the First Award before an ICSID *ad hoc* Committee (the “**First Committee**”). On 15 October 2010, Mr. Pey Casado and the Foundation also submitted a claim for annulment of the First Award, arguing that the First Award had failed to refer to provisions of the Chilean Constitution that supported the argument of Decree No. 165’s nullity *ab initio*. In support of this argument, in March 2011, Mr. Pey Casado and the Foundation submitted a number of exhibits, including the Santiago Civil Court Judgment. On 18 April 2011, the First Committee issued Procedural Order No. 2, declaring these new documents inadmissible and directed Mr. Pey Casado and the Foundation to resubmit their Rejoinder without any reference to any exhibit that had not been part of the original record of the arbitration.
102. On 18 December 2012, the First Committee rendered its decision on annulment (the “**First Annulment Decision**”), partially annulling the First Award and specifically the section on damages. The First Committee found that Chile had been denied the right to be heard on the issue of damages and that the First Tribunal had given contradictory reasons for its findings on damages.
103. On 1 February 2013, Chile requested that the First Committee supplement the First Annulment Decision by identifying the interest that was due by Chile to Mr. Pey Casado and the Foundation on the portion of the costs that had been incurred in the First Arbitration by Mr. Pey Casado and the Foundation.

104. On 18 June 2013, Mr. Pey Casado, the Foundation and Ms. Coral Pey Grebe filed a request for resubmission with ICSID (the “**Resubmission Proceedings**”). The claimants appointed Mr. Philippe Sands and Respondent appointed Mr. Alexis Mourre as party-nominated arbitrators. On 18 December 2013, Chile requested the disqualification of Prof. Sands, who then resigned. The claimants then appointed Mr. V.V. Veeder as replacement arbitrator. On 24 December 2013, Mr. Franklin Berman was appointed as president by the Chairman of ICSID Administrative Council.
105. On 11 September 2013, the First Committee issued its Supplementary Decision, identifying the amount of interest due.
106. On 13 September 2016, the Resubmission Tribunal rendered its award (the “**Resubmission Award**”). The Resubmission Tribunal concluded that Ms. Pey Grebe could not be considered an independent claimant because she had not been a claimant in the first arbitration. The Resubmission Tribunal found that the only issue properly before it was the nature of the compensation due for the breaches established by the First Award. The Resubmission Tribunal ruled that the claimants’ allegations pertaining to the Santiago Civil Court Judgment were outside of its jurisdiction, which was limited to the dispute that had originally been submitted to ICSID arbitration. The Resubmission Tribunal confirmed that the First Tribunal’s ruling that it lacked jurisdiction *ratione temporis* over the claimants’ expropriation claim had *res judicata* effects and that the claimants’ request for damages resulting from the original expropriation was to be rejected on that basis. Finally, the Resubmission Tribunal concluded that the claimants had only put forward evidence that sought to calculate damages based on the expropriation claim, but not on the violation of the FET standard. The Resubmission Tribunal thus concluded that the only relief to which Mr. Pey Casado and the Foundation were entitled was satisfaction.
107. On 20 September 2016, the claimants wrote to ICSID, submitting that they had just discovered that barristers who were members of the same set of chambers as Messrs. Berman and Veeder (*viz.*, Essex Court Chambers) had worked on a number of other matters involving Chile. The claimants argued that this issue raised questions about Mr. Berman’s and Mr. Veeder’s independence and impartiality and requested a detailed account of any relationships that any Essex Court Chambers barristers may have had with Chile.
108. On 27 October 2016, the claimants initiated a Rectification Proceeding and asked the Resubmission Tribunal to suspend the Rectification Proceeding so that they could pursue interpretation proceedings in relation to the First Award. The Resubmission Tribunal dismissed this request.
109. On 22 November 2016, the claimants requested the disqualification of Messrs. Berman and Veeder, invoking Chile’s representation by other barristers from Essex Court Chambers in other proceedings.

110. On 21 February 2017, the then Chairman of the ICSID Administrative Council, Dr. Kim, issued a decision rejecting the claimants' challenges to Messrs. Berman and Veeder, finding that the challenges were untimely. Dr. Kim concluded that the information which formed the basis for the challenges had been publicly available in the media since 2012 but that no concerns had been raised at that time in the arbitral proceedings.
111. On 23 February 2017, the claimants filed a second challenge against Mr. Veeder. The following day, the claimants asked Mr. Berman to recuse himself from deciding the challenge against Mr. Veeder. Mr. Berman recused himself on 1 March 2017. On 4 March 2017, the claimants also challenged Mr. Berman and requested that the two challenges be submitted to the PCA for a decision.
112. On 6 March 2017, ICSID informed the parties that it would treat the claimants' second requests to disqualify Messrs. Veeder and Berman as a proposal to disqualify the majority of the Resubmission Tribunal, to be decided by the Chairman of the ICSID Administrative Council.
113. On 13 April 2017, Dr. Kim issued a second decision dismissing the claimants' challenges to Messrs. Berman and Veeder.
114. On 21 April 2017, the claimants requested the discontinuance of the Rectification Proceeding but, following Chile's opposition, the request was dismissed.
115. On 9 June 2017, the claimants (i) asked the Resubmission Tribunal to order Chile to disclose any information not publicly available relating to any payments made to Essex Court Chambers barristers by Chile's Ministry of Foreign Affairs; and (ii) asked the Resubmission Tribunal and ICSID to investigate this issue and disclose the results to the parties.
116. On 15 June 2017, the Resubmission Tribunal rejected the claimants' request on the basis that it lacked any connection with the rectification requested.
117. On 29 June 2017, the Foundation initiated legal proceedings in the Santiago civil court seeking documents regarding the retainer by Chile of barristers from Essex Court Chambers.
118. On 6 October 2017, the Resubmission Tribunal issued its Rectification Decision in which it corrected three clerical errors in the Resubmission Award.

E. The second annulment proceedings before ICSID

119. On 10 October 2017, the claimants submitted an annulment request to ICSID in respect of the Resubmission Award (the “**Second Annulment**”).
120. On 15 March 2018, the *ad hoc* committee constituted to hear the Second Annulment (the “**Second Committee**”) dismissed the claimants’ application for a stay of the Resubmission Award’s binding effect, finding that an award remains binding and its *res judicata* effect remains untouched unless the award is annulled.

F. Claimants’ claims in these proceedings

121. The Tribunal summarizes below Claimants’ substantive claims in these proceedings. This summary is not meant to be an exhaustive or detailed account of Claimants’ contentions and is focused solely, and briefly, on matters directly germane to the issue of jurisdiction to be decided by the Tribunal.
122. Claimants argue that Respondent breached the Treaty in several respects.
123. First, Claimants contend that Chile breached Articles 10(5), 3, 4 and 5 of the BIT by failing to comply with its obligations under the First Award. Claimants argue that Respondent refused to accede to their requests, dated February 2013 and April 2017, that Respondent enforce the First Award, recognize their ownership over their investment and pay damages for the Treaty violations it had committed.⁵
124. Second, Claimants take the view that Respondent breached Article 4 of the Treaty on account of its failure to put an end to the Treaty violations established in the First Award, including denial of justice.⁶
125. Third, Claimants contend that Respondent breached Articles 3, 4 and 10(5) of the Treaty through its conduct concerning two of the members of the Resubmission Tribunal, Messrs. Berman and Veeder, members of Essex Court Chambers. In particular, Claimants take exception to what they allege are close and secretive financial connections between Chile and several members of Essex Court Chambers, and to Respondent’s alleged refusal to disclose such connections. Claimants consider that this amounts to fraudulent conduct which had the direct effect that the Resubmission Award « a entièrement, radicalement, altéré le sens littéral, le contexte, l’intention et la finalité systématiques des paras. 1, 2 et 3 du Dispositif et de tous les paragraphes de la Sentence du 8 mai 2008 ayant l’autorité de la chose jugée ». ⁷ In Claimants’ view, this conduct

⁵ Memorial, at 15-31.

⁶ *Id.*, at 44-48.

⁷ *Id.*, at 63.

by Respondent consolidated the denial of justice established by the First Award and is a separate breach of the Treaty.⁸

126. Fourth, Claimants argue that Respondent breached Articles 3(1), 4, 5 and 10 of the BIT by dismissing Mr. Pey Casado's claim before the Santiago civil court for the restitution of the Goss Machine printing press on account of the expiry of the applicable statute of limitations. Claimants submit that this holding stands in marked contrast with other decisions taken in similar cases by the Chilean courts with respect to Chilean investors, where the statute of limitations was not an issue. Claimants add that the application of the statute of limitations in circumstances where Mr. Pey Casado was prevented by the restrictions imposed by the military regime to return to Chile and enforce his rights is in breach of principles of international law.⁹
127. Fifth, Claimants submit that Respondent breached Articles 1, 3(1), 4, 5, 10(2) and 10(5) of the BIT through a complex and composite act consisting of a series of actions and omissions in relation to the Santiago Civil Court Judgment and the ensuing abandonment proceedings. Claimants submit that a first element of this composite legal act is a procedural fraud committed by Respondent, which consisted of Respondent unilaterally changing the cause of action of the claim submitted by Mr. Pey Casado before the Santiago court in order to then dismiss the claim for lack of *ius standi* and expiry of the applicable statute of limitations. In Claimants' view, a second element of this complex and composite act consists of Respondent's machinations that prevented the notification of the 24 July 2008 judgment of the Santiago civil court to Mr. Pey Casado, in breach of the requirements of Chilean procedural law. Due to these machinations, Mr. Pey Casado only learned of the existence of this judgment in January 2011. A third element of this act, in the view of Claimants, is represented by the subsequent decisions of the Chilean courts finding *inaudita parte* that Mr. Pey Casado had abandoned the proceedings, despite the fact that the legal requirements had not been met, and subsequently dismissing his efforts to have those judgments set aside.¹⁰

IV. THE PARTIES' REQUESTS FOR RELIEF

128. Respondent requests that the Tribunal:

- "a. Dismiss all of Claimants' claims for lack of jurisdiction;
- b. Order Claimants to pay for the totality of the costs of this arbitration (with interest);
- c. Order Claimants to reimburse Chile (with interest) for the totality of the legal fees and expenses, and of all other costs and expenditures, incurred by Chile in connection with the present proceeding; and

⁸ *Id.*, at 49-68.

⁹ *Id.*, at 32-43, 118-159.

¹⁰ *Id.*, at 185-240.

d. In light of the vexatious nature of Claimants' claims, and of the tortuous history of this dispute, award Chile such other relief as it may deem just and proper for the purpose of deterring Claimants from any further pursuit of their abusive and relentless arbitral campaign against Chile."¹¹

129. Claimants request that the Tribunal:

« 1. Qu'il prenne acte du décès de M. Victor Pey Casado le 5 octobre 2018 et accepte Mme. Coral Pey Grebe en qualité de successeur en droit et de cessionnaire de 10% des actions de CPP S.A.

2. Qu'il tienne compte des observations/rectifications concernant les faits retenus dans l'"Historique de la Procédure" de la Décision du 26 juin 2018, en vue de leur correction en conformité avec les faits et les arguments correspondants tels qu'établis dans la Sentence arbitrale du 8 mai 2008, la Décision du 1^e Comité *ad hoc* du 18 décembre 2012, la Sentence du 13 septembre 2016 et la Décision du 2^{ème} Comité *ad hoc* du 15 mars 2018.

3. Que sans limiter son écoute ou abdiquer sa faculté de juger sur aucun des points soumis à l'arbitrage – car tel point spécifique peut conditionner la solution du litige qui lui a été confié – il déclare inadmissibles les exceptions 1, 2, 3 et 4 sur la compétence bifurquées que soulève L'Etat Défendeur, et déclare sa compétence constatant que ces exceptions enfreignent a) les principes et les normes de droit international et de droit interne citées et/ou b) les articles 1(2), 2(2), 10(1), 10(3), 10(5) de l'API, ou c) qu'elles constituent un abus de procès et de manque de bonne foi, d) ne respectant pas l'effet positif et négatif de l'autorité de chose jugée de la Sentence arbitrale du 8 mai 2008, de la Décision du 1^{er} Comité *ad hoc* du 18 décembre 2012, de la Sentence de réexamen du 13 septembre 2016 et de la Décision du 2nd [sic] Comité *ad hoc* du 15 mars 2018, et e) replaident des exceptions qui avaient préalablement été explicitement rejetées du fait qu'elles entraient dans le champ de compétence du Tribunal arbitral respectif et/ou du Comité *ad hoc*.

4. Que, subsidiairement, il joigne au fond toute exception qui ne serait pas exclusivement préliminaire et qu'il apparaîtrait difficile de séparer de la substance factuelle et/ou légale des demandes des Demanderesses ;

5. Qu'il condamne l'Etat Défendeur à supporter l'intégralité des frais du présent incident, y compris des audiences, de même qu'à rembourser aux parties Demanderesses l'ensemble des frais et honoraires des avocats et des personnes dont elles ont sollicité l'intervention pour la défense de leurs intérêts, portant, en cas de non remboursement, intérêts capitalisés jusqu'à complet paiement, ainsi qu'à toute autre somme que le Tribunal arbitral estimerait juste et équitable.

6. Qu'il dispose le calendrier en vue de la poursuite de la procédure. »¹² [internal citations omitted]

¹¹ Reply on Jurisdiction, at 109.

¹² Rejoinder on Jurisdiction, at 196.

V. THE APPLICABLE LEGAL FRAMEWORK

130. Article 1 (“**Definitions**”) of the Treaty reads in relevant part:

“2. The term ‘investment’ means any kind of assets, such as goods and rights of all sorts, acquired under the laws of the host country of the investment, including, but not limited to, the following:

- Shares and other forms of participation in companies;
- Claims, securities and rights arising from all types of contributions made for the purpose of creating economic value, expressly including any loans granted for this purpose, whether capitalized or not;
- Movable and immovable property and rights of any kind related thereto;
- Any rights in the field of intellectual property, expressly including patents and trademarks, as well as manufacturing licenses and know-how;
- Rights to engage in economic and commercial activities authorized by law or by virtue of contract, particularly those relating to the prospecting, cultivation, extraction or exploitation of natural resources.

[...]

4. The term ‘territory’ means the land territory and territorial sea of each of the Parties, as well as the exclusive economic zone and the continental shelf extending beyond the limits of the territorial sea of each of the Parties, over which they have or may have jurisdiction and sovereign rights under international law for the purpose of prospecting, exploring and conserving natural resources.”

131. Article 2 (“**Promotion, Acceptance**”) provides as follows in relevant part:

“2. This Agreement shall apply to investments made following its entry into force by investors of one Contracting Party in the territory of the other. However, it shall also apply to investments made prior to its entry into force which are considered foreign investments under the laws of the relevant Contracting Party.

3. Nonetheless, it shall not apply to disputes or claims initiated or settled prior to its entry into force.”

132. Article 3 (“**Protection**”) provides:

“1. Each Party shall protect in its territory the investments made in accordance with its laws by investors of the other Party, and shall not hamper, by means of unjustified or discriminatory measures, the management, maintenance, use, enjoyment, expansion, sale or, as the case may be, liquidation of such investments.

2. Each Party shall grant the necessary permits relating to these investments and shall allow, within the framework of its laws, the execution of contracts relating to manufacturing licences and technical, commercial, financial and administrative assistance.

3. Each Party shall also grant, where necessary and in accordance with its laws, the permits required in connection with the activities of consultants or experts hired by investors of the other Party.”

133. Article 4 (“**Treatment**”) reads in relevant part:

“1. Each Party shall guarantee in its territory, in accordance with its domestic laws, fair and equitable treatment of the investments made by investors of the other Party, in conditions which are not less favourable than those enjoyed by its national investors.

2. This treatment shall not be less favourable than that which is extended by each Party to the investments made in its territory by investors of a third country.”

134. Article 5 (“**Nationalization and Expropriation**”) provides:

“Nationalization, expropriation or any other measure having similar characteristics or effects that may be adopted by the authorities of one Party against the investments in its territory of investors of the other Party 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 Party adopting such measures shall pay to the investor an adequate indemnity in freely convertible currency without unjustified delay. The legality of the expropriation, nationalization or comparable measure and the amount of the indemnity shall be subject to appeal in ordinary judicial proceedings.”

135. Article 10 (“**Disputes between one Party and Investors of the other Party**”) paragraphs (1) and (4) read as follows in the original Spanish:

“1. Toda controversia relativa a las inversiones, en el sentido del presente Tratado, entre una Parte Contratante y un inversionista de la otra Parte Contratante será, en la medida de lo posible, solucionada por consultas amistosas entre las dos partes en la controversia.

[...]

4. El órgano arbitral decidirá en base a las disposiciones del presente Tratado, al derecho de la Parte Contratante que sea parte en la controversia-incluidas las normas relativas a conflictos de leyes-y a los términos de eventuales acuerdos particulares concluidos con relación a la inversión, como así también los principios del derecho internacional en la materia.” [emphasis added]

136. The French translation of Article 10, paragraphs (1) and (4) reads:

“1. – Toute controverse relative aux investissements, dans le sens du présent Traité, intervenant entre une Partie contractante et un investisseur de l’autre Partie contractante sera, dans la mesure du possible, solutionnée par consultations amiables entre les deux parties dans la controverse.

[...]

4. - L’organisme arbitral décidera sur les bases des dispositions du présent Traité, au droit de la Partie contractante qui sera partie dans la controverse – inclues les normes relatives à conflits de lois- et aux termes d’éventuels accords particuliers conclus relativement à l’investissement, ainsi de même manière aux principes du droit international en la matière.” [emphasis added]

137. The English translation of the same texts is as follows:

“1. Any dispute concerning investments, as defined in this Agreement, which arises between a Contracting Party and an investor of the other Contracting Party shall, to the extent possible, be settled by means of friendly consultations between the two parties to the dispute.

[...]

4. 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.” [emphasis added]

VI. THE REPLACEMENT OF MR. PEY CASADO AS CLAIMANT BY MS. CORAL PEY GREBE

138. Claimants note that the Claimant Mr. Victor Pey Casado passed away on 5 October 2018 at the age of 103. Claimants request that his daughter, Ms. Coral Pey Grebe, be formally designated as Mr. Pey Casado’s successor in these proceedings.¹³ Respondent does not oppose this request.

139. The Tribunal, taking into account the death of the Claimant Mr. Victor Pey Casado and the fact that Ms. Coral Pey Grebe is his daughter, grants Claimants’ request and hereby replaces Mr. Victor Pey Casado with Ms. Coral Pey Grebe acting in the capacity as his successor in rights.

VII. WHETHER THE BIT APPLIES TO THE CLAIMS ASSERTED

140. In this arbitration, Respondent raised the following jurisdictional objections:

- Objection No. 1: the Tribunal lacks jurisdiction to grant Claimants’ requests for relief;
- Objection No. 2: the BIT does not apply to any of the claims asserted;
- Objection No. 3: the Tribunal lacks jurisdiction to entertain claims for the alleged non-performance of the First Award;
- Objection No. 4: the Tribunal lacks jurisdiction to entertain claims related to the Essex Court Chambers issue;
- Objection No. 5: the Tribunal lacks jurisdiction to entertain claims based on the Goss Machine case.

141. In its Decision on Bifurcation, the Tribunal decided to deal with Objections 1, 2, 3 and 4 as preliminary questions. As discussed in Section **VII.C** below, the Tribunal has decided to uphold Respondent’s Objection No. 2. Since upholding this objection has led the Tribunal to conclude that it lacks jurisdiction to hear all of Claimants’ claims, for reasons of judicial economy, the Tribunal considers that there is no need to

¹³ *Id.*, at 137-144.

summarize and address the numerous arguments, both factual and legal, which underpin the remaining jurisdictional objections that have been bifurcated.

142. In the paragraphs below, the Tribunal will first set out Respondent’s arguments in support of Objection No. 2 (A.), followed by Claimants’ answer thereto (B.). For purposes of this summary presentation, the Tribunal has not only considered the positions of the Parties as summarized in the ensuing Section, but also their numerous detailed arguments made in their voluminous written memorials and at the Hearing. To the extent that these arguments are not referred to expressly, they are nonetheless subsumed in the Tribunal’s analysis.

A. Respondent’s Position

143. Respondent argues that the BIT does not apply to Claimants’ claims, as set out in the request for relief included in the Memorial, as Claimants have not provided evidence that they had an investment within the meaning of the Treaty at the time of the measures challenged in this arbitration.

144. In particular, Respondent contends that Claimants, despite referring to numerous Chilean laws and various international norms, only brought forward claims based on the Treaty, and in particular, on Articles 3(1), 4, 5 and 10(5) thereof. According to Respondent, Article 10(5), which provides that arbitral awards rendered by tribunals constituted on the basis of the BIT are final and binding on the parties to a dispute, cannot constitute “investments” that may serve as the basis of a new BIT merits claim. Further, in order for Articles 3(1), 4 and 5 of the BIT to be applicable to Claimants’ claims, Claimants were required to make a demonstration that they had an investment in Chile’s territory on the date of each BIT violation alleged. As support for its position, Respondent refers to the wording used in these Articles of the Treaty:¹⁴

- Article 3(1): “Each Party shall protect in its territory the investments made in accordance with its laws by investors of the other Party, and shall not hamper, by means of unjustified or discriminatory measures, the management, maintenance, use, enjoyment, expansion, sale or, as the case may be, liquidation of such investments.” [emphasis added]
- Article 4(1): “Each Party shall guarantee in its territory, in accordance with its domestic laws, fair and equitable treatment of the investments made by investors of the other Party, in conditions which are not less favourable than those enjoyed by its national investors....” [emphasis added]
- Article 5: “Nationalization, expropriation or any other measure having similar characteristics or effects that may be adopted by the authorities of one Party against the investments in its territory of investors of the other Party must be

¹⁴ Counter-Memorial, at 267-270.

adopted exclusively for reasons of public utility or national interest pursuant to constitutional and legal provisions, and shall in no case be discriminatory... .” [emphasis added]

145. Referring *inter alia* to *Mesa Power v. Canada*,¹⁵ *Vito Gallo v. Canada*¹⁶ and *Phoenix Action v. Czech Republic*,¹⁷ Respondent adds that investment treaty tribunals have consistently upheld the principle that a claimant must possess an investment at the time of the treaty violations alleged.¹⁸
146. Respondent notes that, according to Claimants, the alleged BIT violations occurred after the date of the First Award, *i.e.*, 8 May 2008. Consequently, according to Respondent, Claimants must demonstrate that they owned an investment in Chile after this date. In Respondent’s view, Claimants have failed to carry this burden.¹⁹
147. First, Respondent deems as “fanciful”²⁰ Claimants’ argument pursuant to which “[d]ès lors que l’API attache des droits spécifiques au fait qu’il y ait eu un investissement, ces droits constituent en eux-mêmes un investissement, dont seul, par définition, un Tribunal compétent peut édicter les modalités de mise en oeuvre, ou, au contraire, l’extinction” [emphasis added].²¹ Respondent considers that such an argument cannot be accepted as the BIT is an international treaty, and “investments” are concepts stemming from domestic law – as evidenced by the definition included in Article 1(2) of the BIT: “[t]he term ‘investment’ means any kind of assets, such as goods and rights of all sorts, acquired under the laws of the host country of the investment”. According to Respondent, Claimants’ attempt, in the Counter-Memorial on Jurisdiction, to recast this argument by contending that the right to international arbitration constitutes an investment, is untenable. This argument fails for two reasons. The first is that Claimants elided from the text of Article 1(2) the wording “acquired under the laws of the host country” in order to support their position. The second is that, according to Respondent, such an interpretation is contrary to Article 31(1) of the Vienna Convention on the Law of Treaties (the “**VCLT**”) and is untenable on its face.²²

¹⁵ *Mesa Power Group LLC v. Government of Canada*, Award, 24 March 2016, at 326 (Exhibit RL-0019) (“*Mesa Power v. Canada*”): “[I]nvestment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted”.

¹⁶ *Vito G. Gallo v. Government of Canada*, Award, 15 September 2011, at 328 (Exhibit RL-0020) (“*Vito Gallo v. Canada*”): “Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted”.

¹⁷ *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, at 67 (Exhibit RL-0021) (“*Phoenix Action v. Czech Republic*”): “It does not need extended explanation to assert that the Tribunal has no jurisdiction *ratione temporis* to consider Phoenix’s claims arising prior to December 26, 2002, the date of Phoenix’s alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix ‘invested’ in the Czech Republic”.

¹⁸ Counter-Memorial, at 270; Reply on Jurisdiction, at 70.

¹⁹ Counter-Memorial, at 271; Reply on Jurisdiction, at 70.

²⁰ Reply on Jurisdiction, at 71.

²¹ Memorial, fn. 24.

²² Counter-Memorial, at 272, 273; Reply on Jurisdiction, at 71, 72.

148. Second, Respondent disputes Claimants' contention, according to which the First Award held that "les droits des investisseurs espagnols sur cet investissement subsistent aujourd'hui aux termes de l'API".²³ Respondent contends that, to the contrary, the First Award concluded with finality that the claimants' investment was expropriated definitively in 1975, upon the seizure of the assets of CPP and EPC and the companies' simultaneous dissolution. Respondent argues that the *res judicata* principle bars Claimants from challenging in this arbitration the conclusion that no investment by Mr. Pey Casado remained after the definitive confiscation of *El Clarín* in the 1970s. Similarly, Respondent disputes that the First Award concluded that their investment continued to exist after the entry into force of the BIT. Respondent maintains that "an investor whose property has been expropriated does not retain a right *ad aeternitatem* to assert BIT claims based on the State's post-expropriation treatment or handling of the property".²⁴ Respondent adds that Claimants' situation in this arbitration is to be distinguished from that of an investor whose property was treated unfairly and inequitably and then expropriated at a time when the underlying treaty obligations were in force. In the case before the Tribunal, the expropriation of Claimants' investment occurred instantaneously and definitively well before the BIT entered into force and Claimants are submitting claims for post-expropriation conduct that relates to the property that had been taken away.²⁵
149. Third, Respondent disputes Claimants' contention that the First Award can be deemed an investment within the meaning of the BIT. Respondent considers that such an interpretation falls foul of the language of Article 1(2) of the Treaty, which requires that an investment consist of assets "acquired under the laws of the host country". In contrast, the First Award is a creation of international law. Moreover, the First Award cannot be considered as an investment in Chile's territory as required under Article 1(2) of the Treaty.²⁶

B. Claimants' Position

150. Claimants argue that the First Award established with *res judicata* effects that their initial investment in CPP and, if necessary, the residual investment in CPP are protected under the BIT:²⁷

"[L]e 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

²³ Memorial, at 11.

²⁴ Counter-Memorial, at 276.

²⁵ *Id.*, at 274-276; Reply on Jurisdiction, at 74-76.

²⁶ Reply on Jurisdiction, at 73.

²⁷ Memorial, at 268, 269; Rejoinder on Jurisdiction, at 97.

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).”²⁸

“En résumé, la seconde partie demanderesse a établi, aux yeux du Tribunal arbitral, qu'elle remplissait bien les conditions posées pour la compétence tant par l'article 25 de la Convention CIRDI que par l'API. Il résulte dès lors que le Tribunal arbitral est compétent pour statuer sur le fond du litige pour ce qui concerne la deuxième partie demanderesse, la Fondation Président Allende.”²⁹

151. According to Claimants, the First Award found that investments made before the BIT's entry into force (such as Claimants' investment in CPP) were protected under the Treaty. The First Tribunal concluded that the wording of Article 2 of the BIT excluded from its jurisdiction only disputes that arose prior to the Treaty's entry into force. The First Award found that the disputes between Mr. Pey Casado, the Foundation and Respondent, and in particular the disputes connected with Decision No. 43 and the alleged denial of justice, only arose after the BIT's entry into force, in 2000 and 2002, respectively. According to Claimants, the First Tribunal “a considéré hors sa compétence *ratione temporis* la question surgie entre les parties après le 6 novembre 1995 relative à la violation continue de l'article 5 de l'API en vertu de la nullité de droit public, *ab initio*, imprescriptible du Décret n° 165” [emphasis in original].³⁰ In Claimants' submission, this conclusion was based on the finding that, to the First Tribunal's knowledge, the validity of Decree No. 165 had not been put in issue before the Chilean courts.³¹
152. Claimants maintain that the First Tribunal's decision on jurisdiction *ratione temporis* is in line with prior ICSID awards and decisions, which establish that a treaty does not require an investment to continue to exist at the time when a dispute arises. As support for their position, Claimants quote from *Jan de Nul v. Egypt*,³² noting that both the First Tribunal and the First Committee referred to it with approval. Claimants further submit that the Treaty does not include any language that conditions the exercise of an investor's rights under Article 10 on the prior satisfaction of a temporal condition regarding the existence of the investment.³³
153. Claimants argue that, in any event, the First Tribunal concluded with *res judicata* effect that their investment in CPP continued to exist after the Treaty's entry into force. As support for this contention, Claimants refer to paragraphs 379, 411, 431 and 432 of the First Award as well as, generally, its findings on liability. Claimants also contend that Chile admitted this before the First Tribunal and accepted that the confiscations during

²⁸ First Award, at 411.

²⁹ *Id.*, at 568.

³⁰ Rejoinder on Jurisdiction, at 117.

³¹ Memorial, at 268, 269; Counter-Memorial on Jurisdiction, pp. 105, 134, 135; Rejoinder on Jurisdiction, at 23, 24, 26, 112.

³² *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, at 134-136 (Exhibit C-403) (“Jan de Nul v. Egypt”).

³³ Counter-Memorial on Jurisdiction, at 251-254; Tr. (En.), 117: 17-25; 118: 1-13; 182: 2-18.

the military dictatorship were invalid. As support for this latter contention, Claimants refer to three documents. The first is a letter from the Chilean Ministry of Economy to the ICSID Secretary-General, dated 30 November 1998, wherein, according to Claimants, Chile did not question the existence of the investment, but only its foreign nature.³⁴ The second document is a declaration made in June 2001 before the First Tribunal by Chile's representative, to the effect that Chile committed to comply with a possible First Tribunal award on the merits, ordering it to either return the shares to the legitimate owners of CPP or to pay damages.³⁵ Claimants note that, at the time, Chile qualified the claim for damages as pertaining to an "obligation de genre" in an attempt to obtain the dismissal of the claimants' request for provisional measures. The third document is the First Award itself, which, at paragraphs 667 and 677, as well as in footnote 617, records Chile's statements that the nationalization of CPP's and EPC's assets was "invalid", "illegal" and "illegitimate", respectively.³⁶

154. Claimants add that the Resubmission Award, in its paragraphs 144 and 216, "n'a pu que confirmer l'existence de l'investissement dans CPP S.A. après l'entrée en vigueur de l'API"³⁷ and admitted that it was possible that the investment remained in the property of Mr. Pey Casado and/or of the Foundation. These conclusions were based on the First Tribunal's and the Resubmission Tribunal's determination that they were not competent to rule on the status of Decree No. 165 under Chilean law and that, to their knowledge, its validity had not been questioned. According to Claimants, the Santiago Civil Court Judgment of 24 July 2008 "n'a pu que mettre en cause la validité du Décret 165" and thus "il a mis un terme à l'indétermination cruciale"³⁸ present in the ICSID proceedings with respect to the status under Chilean law of Decree No. 165. Claimants maintain that the Santiago Civil Court Judgment established that their constitutional rights over the investment in CPP had not been annulled or rendered ineffective by operation of Decree No. 165. In Claimants' view, the fact that the Santiago Civil Court Judgment was rendered on 24 July 2008, after the First Award, is dispositive. Since the ICSID tribunals and committee declined to exercise jurisdiction over events post-dating the initiation of ICSID proceedings, this Tribunal is not bound by the ICSID tribunals' findings with respect to the issue of Decree No. 165's validity. The First Award and the Resubmission Award do not produce *res judicata* effects in this matter, which is for this Tribunal to determine in this arbitration. Moreover, according to Claimants, this arbitration is based on a different cause of action and has a different object than the ICSID proceedings. It is based on events post-dating the issuance of the Santiago Civil Court Judgment. The First Tribunal and the

³⁴ Lettre du Ministre de l'Économie du Chili au Secrétaire Général du CIRDI, in affaire CIRDI N° ARB/98/2, V. *Pey Casado et FPA c. la République du Chili*, 30 November 1998 (Exhibit C-609(en)).

³⁵ Décision du Tribunal arbitral initial du 25 septembre 2001 sur les Mesures Conservatoires sollicitées par les Parties, 25 September 2001 (Exhibit C-520).

³⁶ Counter-Memorial on Jurisdiction, at 261, 262, 265, 266; Rejoinder on Jurisdiction, at 106, 151, 152.

³⁷ Counter-Memorial on Jurisdiction, p. 142.

³⁸ *Id.*, at 276.

Resubmission Tribunal have both declined to exercise jurisdiction over events post-dating the initiation of ICSID proceedings.³⁹

155. Claimants add that, in any event, the First Committee rejected, in paragraph 168 of the First Annulment Decision, Chile's argument that no investment existed at the time of the alleged Treaty breaches. In Claimants' view, this conclusion is binding on this Tribunal.⁴⁰
156. Claimants further submit that the First Tribunal also established with *res judicata* effect that Respondent breached the Treaty through conduct pertaining to Decision No. 43 and the denial of justice arising thereafter. This was then re-confirmed in the Resubmission Award, in paragraph 244. According to Claimants, the Resubmission Award also established therein that Respondent's BIT violation persists and that the corresponding obligation remains incumbent upon Respondent. According to Claimants, in light of the continuing nature of Respondent's violation of the Treaty, the fact that the First Tribunal ordered the payment of damages does not release Respondent from its obligation to respect the Treaty and to put an end to the violation.⁴¹
157. Claimants further submit that the argument of the existing investment "nécessite d'être précisé" and that, "dès lors que l'API attache des droits spécifiques au fait qu'il y ait eu un investissement, ces droits constituent en eux-mêmes un investissement, dont seul, par définition, un Tribunal compétent peut édicter les modalités de mise en œuvre, ou, au contraire, l'extinction".⁴² Claimants explain that all investments change with time and that their investment was no exception, particularly considering the major changes that intervened in Chile, the entry into force of the BIT and of Law No. 19,568. In this respect, Claimants submit that "les droits créés par l'API constituent un investissement en ce qu'ils participent de façon incontournable à la définition du statut d'un investissement qui ne peut ressortir que de leur libre et plein exercice par les investisseurs".⁴³
158. Claimants add that "[l]e droit à l'arbitrage et la Sentence arbitrale du 8 mai 2008 sont constitutifs d'un investissement au sens de l'API".⁴⁴ In their view, an interpretation of Article 1(2) of the Treaty in accordance with Article 31 of the VCLT supports the conclusion that the First Award represents an investment, that "le droit que la SI reconnaît aux Demanderesses est relatif à l'investissement, que ce droit fait partie de l'investissement original, que le droit à l'arbitrage constitue un investissement distinct, que la SI et la Décision du 1er Comité *ad hoc* – qui établissent des demandes et des droits des Demanderesses – constituent une continuation de l'investissement original, 'd'avoirs' au sens de l'article 1(2) de l'API, et que 'toute controverse' y relative surgie

³⁹ *Id.*, at 255-260, 272-278; Rejoinder on Jurisdiction, at 106, 117-128.

⁴⁰ Rejoinder on Jurisdiction, at 113, 114, 153.

⁴¹ Counter-Memorial on Jurisdiction, at 263, 264, 267-271; Rejoinder on Jurisdiction, at 24, 25, 27.

⁴² Memorial, fn. 24.

⁴³ Counter-Memorial on Jurisdiction, at 254.

⁴⁴ *Id.*, p. 107.

entre les parties après le 8 mai 2008 entre dans le champ de compétence du présent Tribunal arbitral”.⁴⁵ Claimants refer *inter alia* to *Chevron v. Ecuador*,⁴⁶ *Saipem v. Bangladesh*,⁴⁷ *White Industries v. India*⁴⁸ and *ATA Construction v. Jordan*⁴⁹ as support for their contention that an arbitral award may constitute an investment under an investment treaty. Claimants argue that, in the case before the Tribunal, the rights deriving from their investment in CPP crystallized in the ICSID arbitral proceedings and that the First Award, the First Annulment Decision and the Resubmission Award represent an integral part of their investment.⁵⁰

C. The Tribunal’s Analysis

159. After carefully analyzing the Parties’ submissions and the record before it, the Tribunal finds that it does not have jurisdiction to hear any of Claimants’ claims in these proceedings.
160. As explained in more detail below, the Tribunal has reached this conclusion after first finding that it does not have jurisdiction to hear Claimants’ claims that are based on Chilean law (Section **VII.C.1**).
161. Subsequently, the Tribunal has concluded that the following issues are not consubstantial and must be carefully distinguished from each other: (i) whether Claimants have made an investment cognizable under the Treaty; (ii) whether the Treaty contains temporal limitations to an investor’s right to initiate international arbitration; and (iii) whether the Treaty requires the existence of an investment at the time of each alleged violation in order for the Treaty standards to be applicable (the “existing investment” issue) (Section **VII.C.2**).
162. The Tribunal has then examined the First Award, the First Annulment Decision and the Resubmission Award in order to identify the findings therein that are binding in these proceedings (Section **VII.C.3**). Having determined that no binding determination on the question of the “existing investment” exists, and after analyzing the provisions of the Treaty, the Tribunal has concluded that an investment is required to exist at the time of the challenged measures in order for a Treaty violation to be possible (Section **VII.C.4**).

⁴⁵ Rejoinder on Jurisdiction, at 28.

⁴⁶ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (PCA Case No. 2007-02), Interim Award, 1 December 2008, at 184, 185 (Exhibit C-275bis) (“*Chevron v. Ecuador*”).

⁴⁷ *S.p.A Saipem v. Bangladesh* (ICSID Case No ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, at 110, 114 (Exhibit C-545) (“*Saipem v. Bangladesh*”).

⁴⁸ *White Industries Australia Ltd v. India*, Final Award, 30 November 2011, at 7.6.10 (Exhibit C-31) (“*White Industries v. India*”).

⁴⁹ *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan* (ICSID Case No ARB/08/2), Award, 18 May 2010, at 115, 117, 120, 130 (Exhibit C-546) (“*ATA Construction v. Jordan*”).

⁵⁰ Counter-Memorial on Jurisdiction, at 175-177; Rejoinder on Jurisdiction, at 27-32.

163. Finally, the Tribunal has analyzed the arguments raised by Claimants as support for their position that they satisfy the “existing investment” requirement. The Tribunal has determined that Claimants had no investment at the time of the violations alleged in this arbitration (Section **VII.C.5**). The Tribunal has also concluded that it does not have jurisdiction over Claimants’ claims based on Article 10(5) of the Treaty (Section **VII.C.6**).
164. Consequently, the Tribunal holds that the BIT did not apply to Claimants’ claims in this arbitration and dismisses the case for lack of jurisdiction.

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165. The Tribunal will first explain why it has reached the conclusion that it does not have jurisdiction over Claimants’ claims that are not based on the Treaty itself.

1. The Tribunal does not have jurisdiction to hear Claimants’ claims that are based on Chilean law

166. It is Claimants’ position in this arbitration that Article 10 of the Treaty allows them to assert claims based on causes of action other than the Treaty itself. Relying upon this reading of Article 10, Claimants have raised claims based not only on the standards of protection in the BIT itself, but also on other causes of action, such as the Chilean Constitution or other sources of law. For its part, Respondent has maintained that Claimants are only relying upon arguments based on national law or on other sources of international law but are asserting claims based exclusively on the Treaty. Respondent adds that, to the extent the Tribunal were to consider otherwise, this would amount to an inadmissible amendment of Claimants’ claims during the arbitration. Finally, Respondent submits that, in any event, Claimants are misconstruing Article 10 of the Treaty, which is an applicable law clause and does not allow an investor to bring before an international tribunal constituted in accordance with the terms of the Treaty claims based on other causes of action.

167. In the paragraphs below, the Tribunal determines: whether Claimants have brought claims based on causes of action other than under the Treaty; whether Claimants have sought to amend their claims during the arbitration; and whether the Treaty allows an investor to bring forward claims that are based on Chilean law.

(i) The causes of action underpinning Claimants’ claims

168. As noted above, Claimants argue that their claims in these proceedings are based not only on the Treaty itself, but also on other causes of action:

“308. Conformément à l’article 10(4) de l’API et au principe de la hiérarchie des normes, le présent Tribunal arbitral a la compétence et l’obligation d’appliquer

directement les articles 4 et 7 de la Constitution du Chili de 1925 et 1980, respectivement, à la solution de la controverse au cas où le Tribunal considérait que depuis le 24 juillet 2008 les juridictions internes ne les ont pas appliquées, ou qu'il existe une contradiction entre la loi suprême et son application en l'espèce.

309. Le Tribunal arbitral doit appliquer directement la Constitution du Chili en l'espèce conformément à l'interprétation des juridictions internes relative à la nullité de droit public des décrets confiscatoires édictés en vertu du Décret-loi n° 77 de 1973 et de son Décret réglementaire n° 1726 [...].”⁵¹ [emphasis added]

“96. ‘La cause réelle’, la source des différends soumis au présent Tribunal arbitral sont des situations, des droits et des actes survenus après l’entrée en vigueur au Chili de l’API, du PIDCP et son Protocole facultatif, de la CADH, postérieures à la date à laquelle le TI a établi sa compétence à leur égard, a pris acte de la reconnaissance devant lui par l’Etat de l’invalidité des confiscations et, en vertu des articles 2(2), 10(1) et 10(4) de l’API, la SI a condamné l’Etat à indemniser les Demanderesses pour avoir enfreint l’art. 4 de l’API.”⁵² [emphasis added]

“PROF HOWSE: [...] [I]n this particular instance it is common ground [...] that the events of seizure and confiscation in and of themselves were not actionable as a violation of the treaty because those events occurred before the treaty came into force. I think we all agree about that actionability. But that does not dispose of all the legal effects that arose from those events. For one thing, it is entirely possible that – and I think likely, although you know, this is not the basis of this particular proceeding – that these events would have constituted a violation of customary international law, that this would have been an illegal expropriation not in accord for example with due process of law. But many of the legal effects that we are concerned with here are legal effects under Chilean law and the law of Chile is applicable law under the treaty and it is law that the tribunal must apply.”⁵³ [emphasis added]

169. Respondent disputes this and counters that Claimants’ request for relief is not in fact based on a cause of action other than under the Treaty itself. Respondent adds that, in any event, any claims based on a different cause of action would be new claims that are not properly asserted in these proceedings, *i.e.*, they would be inadmissible:

“MR DI ROSA: [...] The fifth point. Claimants’ counsel today referred to the redress for violation of municipal law versus a violation of international law. First of all, it is not true that they are claiming here for redress of a municipal law violation. They are making a claim under the BIT for these acts that supposedly happened after entry into force, but all of which relate ultimately back to the confiscation. Even if it were true, these are new claims. They have not asserted them as claims in this proceeding. If you look at their request for relief, they do not say anywhere ‘We are claiming for some sort of municipal law violation.’”⁵⁴ [emphasis added]

⁵¹ Memorial, at 308, 309.

⁵² Counter-Memorial on Jurisdiction, at 96.

⁵³ Tr. (En.), 119 : 11, 15-25 ; 120 : 1-5.

⁵⁴ Tr. (En.), 157: 16-25; 158: 1-3.

170. The Tribunal must therefore determine whether Claimants have brought claims based on causes of action other than under the Treaty and whether Claimants have sought to amend their claims during the arbitration.
171. The Tribunal considers that the answer to the first question lies in an examination of Claimants' request for relief, as included in their Memorial. This reads as follows:

“En conséquence des développements précédents, les parties Demanderesses sollicitent du Tribunal arbitral :

(1) Qu'il condamne la République du Chili à payer aux Demanderesses une somme comprise entre 315,7 et 385,9 millions USD, valeur au 31 août 2017, à actualiser au jour de la Sentence à intervenir, au titre de la réparation intégrale du préjudice matériel subi du fait des violations des articles 3(1), 4, 5 et 10(5) de l'API par la République du Chili.

(2) Qu'il condamne également l'État du Chili à restituer aux Demanderesses la valeur de tous les fruits naturels et civils de la chose possédée de mauvaise foi, avec les intérêts correspondants, actualisée au jour de la Sentence à intervenir.

(3) Qu'il condamne la République du Chili à restituer aux investisseurs demandeurs la valeur des dommages consécutifs, en particulier tous les frais encourus dans la défense des droits au titre de l'API relatifs à leur investissement auprès des cours de justice et des Tribunaux d'arbitrage relatifs aux procédures arbitrales, celle où a été prononcé la Sentence arbitrale du 8 mai 2008 et celle requise pour l'exécution forcée des paras. 5 à 7 du Dispositif de cette dernière, de même qu'à la procédure arbitrale initiée en juin 2013 en vue de l'exécution des paras. 2 et 3 du Dispositif (cfr §530 *supra*);

(4) A titre subsidiaire, qu'il condamne l'État du Chili à payer aux Demanderesses la somme de 75,6 millions USD, valeur 31 août 2017, à actualiser au jour de la Sentence à intervenir, au titre de l'enrichissement sans cause de l'État du Chili à leur détriment ;

(5) A titre très subsidiaire, qu'il condamne l'État du Chili à payer aux Demanderesses la somme indiquée au §540 *supra*, au titre d'indemnisation des préjudices résultant du manquement à l'obligation pour laquelle il a été condamné dans la Sentence arbitrale du 8 mai 2008 en rapport avec le 3ème alinéa de l'article 1553 du Code civil chilien; subsidiairement, la somme indiquée au §545 *supra*, au titre d'indemnisation des préjudices causés pour son manquement continu à l'obligation de mettre fin au traitement des investisseurs demandeurs de manière injuste et inéquitable, en ce compris le déni de justice, établis dans la Sentence arbitrale du 8 mai 2008, en rapport avec les 2ème et 3ème alinéas de l'article 1555 du Code civil chilien;

(6) Qu'il condamne l'État du Chili à payer à Mme. Coral Pey Grebe et à la Fondation espagnole Président Allende une somme non inférieure à US\$5.000.000 et US\$500.000, respectivement, au titre de la réparation intégrale du préjudice moral subi par M. Victor Pey Casado et la Fondation espagnole du fait des violations de l'API par l'État du Chili ;

(7) A titre subsidiaire, dans le cas où le Tribunal ne serait pas prêt à accorder un dédommagement au titre de la réparation intégrale du préjudice moral, le Tribunal est prié de tenir compte des faits allégués comme dommage moral pour accroître le montant destiné à compenser les dommages matériels et financiers subis par les Demanderesses.

(8) Qu'il dise que le montant alloué sera majoré à hauteur de l'éventuelle différence entre l'impôt payé, le cas échéant, sur l'indemnisation reçue par l'une ou l'autre des Demanderesses, et tout autre impôt qui étant légalement exigible aurait été versé si, en l'absence de manquement aux obligations établies dans l'API Espagne-Chili, les biens saisis avaient fait l'objet d'une indemnisation, afin que, après la taxe applicable, le patrimoine des Demanderesses soit effectivement rétabli ;

(9) Qu'il dise que l'État du Chili devra effectuer le paiement des sommes dues aux parties Demanderesses à la banque indiquée par celles-ci dans un délai de 60 jours au plus tard à compter de la réception de la Sentence à intervenir ; à défaut, dire que le montant de la réparation alloué aux parties Demanderesses portera intérêts capitalisés mensuellement à un taux au moins égal à 5% à partir de la Sentence jusqu'à complet paiement ;

(10) Qu'il condamne l'État du Chili à supporter l'intégralité des frais de la présente procédure, y compris les frais et honoraires des Membres du Tribunal, les frais de procédure (utilisation des installations, frais de traduction, etc.) et, en conséquence, qu'il condamne l'État du Chili à rembourser, dans les 90 jours qui suivent l'envoi de la Sentence à intervenir, les parties Demanderesses les frais et coûts de procédure avancés par elles, et qu'il rembourse aux parties Demanderesses l'ensemble des frais et honoraires des avocats, experts, témoins et autres personnes dont elles ont sollicité l'intervention pour la défense de leurs intérêts, portant, en cas de non remboursement dans ce délai, intérêts capitalisés mensuellement à un taux de 5% à compter de la date de la Sentence à intervenir jusqu'à complet paiement, ou à toutes autres sommes que le Tribunal arbitral estimera justes et équitables."⁵⁵ [emphasis added]

172. The Tribunal considers that requests for relief numbers (1), (3), (5), (6), (7), (8), (9) and (10) are based on the BIT, while requests for relief numbers (2), (4), (5), (8), (9) and (10) are (also) based on Chilean law. Consequently, the Tribunal finds that, from the outset of this arbitration, Claimants brought forward claims based both on the Treaty and on Chilean law.
173. Following the submission of their Memorial, Claimants have made several references to several sources of international law other than the Treaty. Indeed, in their Counter-Memorial on Jurisdiction, Claimants argued that their claims were based on such other sources of international law:

“124. Or, comme il est développé dans les sections III, IV et VII dans le **Mémoire** et dans le §139 *infra*, les différends soumis dans la présente affaire sous la juridiction CNUDCI sont nés entre les parties après le 8 mai 2008 -et n'ont jamais été soumis à la juridiction du CIRDI ou sont hors la compétence de celui-ci -, à savoir

I. les questions et les prétentions relatives à la violation du droit des Demanderesses à l'accès à un procès arbitral juste et équitable, au *due process*, à un recours effectif, à la pleine reconnaissance de la propriété, à une réparation intégrale, enfournant

i. les articles 5, 7, 19(3) et 19(24) de la Constitution chilienne,

⁵⁵ Memorial, at 717.

ii. les articles 1(1), 8(1), 13, 24, 25, 21 et 63(1) de la Convention Américaine relative aux DD.HH.,

iii. les articles 2(3) et 14(1) du Pacte international relatif aux droits civils et politiques, du 16 décembre 1966,

iv. les articles 33 et 147 de la IVème Convention de Genève du 12 août 1959.”⁵⁶ [internal citations omitted] [emphasis added]

174. At the Hearing, Claimants reiterated their submission that their claims are also based on conventional and customary international law, as it applied in Chile after the entry into force of the BIT:

“Dr Juan Garcés. [...] [N]ous avons indiqué, d'une manière contextuelle, que plusieurs normes de droit international coutumier et de droit international conventionnel ont été enfreintes depuis 2008 par l'État du Chili.”⁵⁷ [emphasis added]

175. However, the Tribunal notes that at no time after the Tribunal’s Decision on Bifurcation did Claimants amend their request for relief so as to introduce new claims, based on international law sources other than the Treaty. In their Rejoinder on Jurisdiction, despite raising *arguments* based on these international law sources, Claimants made no reference to them in their request for relief at paragraph 196:

« 1. Qu’il prenne acte du décès de M. Victor Pey Casado le 5 octobre 2018 et accepte Mme. Coral Pey Grebe en qualité de successeur en droit et de cessionnaire de 10% des actions de CPP S.A.

2. Qu’il tienne compte des observations/rectifications concernant les faits retenus dans l’“Historique de la Procédure” de la Décision du 26 juin 2018, en vue de leur correction en conformité avec les faits et les arguments correspondants tels qu’établis dans la Sentence arbitrale du 8 mai 2008, la Décision du 1^e Comité *ad hoc* du 18 décembre 2012, la Sentence du 13 septembre 2016 et la Décision du 2^{ème} Comité *ad hoc* du 15 mars 2018.

3. Que sans limiter son écoute ou abdiquer sa faculté de juger sur aucun des points soumis à l’arbitrage – car tel point spécifique peut conditionner la solution du litige qui lui a été confié – il déclare inadmissibles les exceptions 1, 2, 3 et 4 sur la compétence bifurquées que soulève L’Etat Défendeur, et déclare sa compétence constatant que ces exceptions enfreignent a) les principes et les normes de droit international et de droit interne citées et/ou b) les articles 1(2), 2(2), 10(1), 10(3), 10(5) de l’API, ou c) qu’elles constituent un abus de procès et de manque de bonne foi, d) ne respectant pas l’effet positif et négatif de l’autorité de chose jugée de la Sentence arbitrale du 8 mai 2008, de la Décision du 1^{er} Comité *ad hoc* du 18 décembre 2012, de la Sentence de réexamen du 13 septembre 2016 et de la Décision du 2nd [sic] Comité *ad hoc* du 15 mars 2018, et e) replaident des exceptions qui avaient préalablement été explicitement rejetées du fait qu’elles entraient dans le champ de compétence du Tribunal arbitral respectif et/ou du Comité *ad hoc*.

⁵⁶ Counter-Memorial on Jurisdiction, at 124. *See also*, Counter-Memorial on Jurisdiction, at 139.

⁵⁷ Tr. (Fr.), 39: 46-48.

4. Que, subsidiairement, il joigne au fond toute exception qui ne serait pas exclusivement préliminaire et qu'il apparaîtrait difficile de séparer de la substance factuelle et/ou légale des demandes des Demanderesses ;

5. Qu'il condamne l'Etat Défendeur à supporter l'intégralité des frais du présent incident, y compris des audiences, de même qu'à rembourser aux parties Demanderesses l'ensemble des frais et honoraires des avocats et des personnes dont elles ont sollicité l'intervention pour la défense de leurs intérêts, portant, en cas de non remboursement, intérêts capitalisés jusqu'à complet paiement, ainsi qu'à toute autre somme que le Tribunal arbitral estimerait juste et équitable.

6. Qu'il dispose le calendrier en vue de la poursuite de la procédure.»⁵⁸ [internal citations omitted]

176. Consequently, the Tribunal is of the view that Claimants' references to sources of international law other than the Treaty (*i.e.*, the claims based on the breach of the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention and customary international law) were framed in the form of arguments, but do not constitute new claims, *i.e.*, new requests for relief.

177. Even if it were to consider that Claimants' references to international law sources other than the Treaty were new claims (*quod non*), the Tribunal would dismiss such claims as inadmissible, as explained in the paragraphs below.

178. In particular, the Tribunal recalls that, while Article 20 of the UNCITRAL Rules allows the parties to amend their claims during the course of the proceedings, such an amendment remains subject to the tribunal's decision:

“During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.” [emphasis added]

179. In the present proceedings, the Tribunal considers it inappropriate to allow such new claims for the following reasons.

180. First, the Tribunal recalls that, in Procedural Order No. 2, it postponed its decision on Respondent's request for the bifurcation of these proceedings based on the fact that – at the time – it only had limited information about Claimants' claims and Respondent's jurisdictional objections on which to make an informed decision. For this reason, the Tribunal clearly and unequivocally put both Parties on notice to submit their full case on both jurisdiction and the merits in the first round of submissions (*i.e.*, the Memorial and the Counter-Memorial):

⁵⁸ Rejoinder on Jurisdiction, at 196.

“68. At this initial stage of the arbitration proceedings and with the limited information before it, the Tribunal cannot make an informed decision as to whether bifurcation would assist in, or effectively hamper, the efficient conduct of this arbitration. In addition, the Tribunal is reluctant to decide on Respondent’s Request for Bifurcation now, considering that any decision risks being only a partial solution if further jurisdictional objections are raised and a second request for bifurcation is filed.

69. The Tribunal considers that postponing a decision on Respondent’s Request for Bifurcation until after the Parties have filed their first round of memorials would better guarantee the efficient administration of these proceedings. By that time, the Tribunal will have more information before it with regard to the substance of Claimants’ claims and Respondent will have set out all of its jurisdictional objections, not just the two it has raised thus far.

70. For these reasons, the Tribunal hereby postpones rendering a decision on Respondent’s Request for Bifurcation until after the Parties have filed their first round of submissions. The Parties are directed to confer and agree on a calendar for their first round of memorials, bearing in mind that they are instructed to set out their complete case on both the merits and jurisdiction.”⁵⁹ [emphasis added]

181. Consequently, Claimants were or should have been fully aware that they were expected to set out their complete case on the merits, *i.e.*, the entirety of their claims and arguments, in the Memorial. The Tribunal’s Decision on Bifurcation was rendered on the basis of the claims and jurisdictional objections that were contained in the Memorial and the Counter-Memorial.⁶⁰
182. Second, the Tribunal considers that allowing Claimants to amend their claims after the submission of their Memorial and the bifurcation of these proceedings (on the basis of the objections in the Counter-Memorial) would deprive the bifurcation of any purpose and would unfairly prejudice Respondent. Indeed, in such a scenario, having seen the jurisdictional objections filed by the respondent, a claimant could potentially amend its claims *ad infinitum* so as to avoid jurisdictional hurdles. This would render any decision bifurcating arbitration proceedings entirely futile. Moreover, if a respondent could not rely on the completeness of a claimant’s claims, as identified in its memorial/statement of claim, a respondent could potentially be deprived of the right to assert all of its jurisdictional objections.
183. Third, and equally as importantly, the Tribunal considers that Claimants have offered no reasonable explanation why they could not have raised these claims at the outset of the arbitration.
184. For all these reasons, even if the Tribunal were to consider that Claimants have raised new claims based on international law sources other than the Treaty after the filing of their Memorial (*quod non*), the Tribunal would dismiss these claims as inadmissible based on its authority under Article 20 of the UNCITRAL Rules.

⁵⁹ Procedural Order No. 2, at 68-70.

⁶⁰ The Tribunal recalls that, after receiving the Memorial and Counter-Memorial, it requested further submissions from the Parties in support of, or against, the request for bifurcation.

185. Consequently, the Tribunal finds that Claimants' claims that are properly before it are the claims listed in the Memorial. The causes of action of these claims derive from the Treaty and Chilean law.

186. The Tribunal must now determine whether Article 10 of the BIT allows Claimants to assert claims based on Chilean law. For the reasons that are developed below, the Tribunal finds that it does not.

(ii) *The Treaty does not allow Claimants to assert claims based on Chilean law*

187. At the Hearing, Claimants argued that, as long as the dispute pertains to an "investment" as defined in the Treaty, Article 10(4) of that same Treaty allows an investor to bring a claim based on causes of action other than the Treaty itself:

“Dr Juan Garcés. [...] Mais l'article 10, qui est l'article qui s'applique dans notre cas, ne permet pas l'interprétation, n'est-ce pas ? Il y a une différence majeure.

L'article 10, paragraphe 1, indique que :

« *Tout différend relatif aux investissements au sein du présent Traité, entre l'une des Parties et un investisseur d'un autre Partie, sera...* », etc.

Donc, c'est « tout différend ». C'est une définition large des différends qui a été également retenue par les sentences initiales. Et ce différend, pourvu qu'il porte sur... qu'il soit relatif à l'investissement au sens du présent Traité, est sous la compétence du présent Tribunal. « Tout différend... » ! Que ce soit une question substantielle dans le Traité lui-même ou que ce soit une question qui n'est pas l'objet du Traité en lui-même. Et nous avons indiqué, d'une manière contextuelle, que plusieurs normes de droit international coutumier et de droit international conventionnel ont été enfreintes depuis 2008 par l'État du Chili.”⁶¹ [emphasis added]

188. For its part, Respondent has taken the position that Article 10(4) of the Treaty is an applicable law clause, which allows the Tribunal to apply a law that is different from the Treaty in order to decide discrete issues, but which does not permit an investor to bring claims based on a cause of action different from the Treaty. According to Respondent, the Tribunal does not have jurisdiction to hear claims based on other causes of action than the Treaty:

“PROF RUIZ FABRI: Just a quick question, a clarification, because according to my reading, Article 10, paragraph 4 of the BIT, states that Chilean law is part of applicable law. So it is just to understand your contention that you cannot have a claim under Chilean law in the case. So if you can clarify this point, please.

MR DI ROSA: Sure.

There are any number of issues in these international investment arbitrations that do depend on local law, but they are not – the nature of the claims are [sic] not based on local law.

So, for example, in this case, just to take a couple of illustrations in this case, the claims were asserted under the investment treaty for expropriation under international law

⁶¹ Tr. (Fr.), 39: 35-48.

under the treaty, but there was an issue of the nationality of Mr Pey. That was an issue that was governed by domestic law. So that was part of the applicable law.

As was, for example, the issue of the ownership of the newspaper enterprise. There was a big debate about what Chilean law in the 1970s required in terms of ownership of shares for example; and that was all governed by Chilean law.

But these are discrete issues. So, for example, what that means is, in the context of nationality, what would govern, at least in part, would be the Chilean law of nationality. It doesn't mean that if you did not have that clause that you would apply only international law of nationality as such.

So this clause is intended to enable the parties and the tribunal to rely on national law, on domestic law, when it is appropriate, as in these instances that I showed you. But the claim is ultimately a claim under international law, and that is why it is brought under an international law – an international treaty to an international tribunal.⁶² [emphasis added]

“Third, in any event it would be irrelevant, because we are in an international law proceeding and they are claiming under the BIT, and whether they had rights or not under domestic law for the compensation of the confiscation, or for any of these other matters, really does not relate at all to this proceeding. It is just not relevant. This tribunal has been constituted potentially to consider alleged violations of the treaty and of international law.”⁶³ [emphasis added]

189. The Tribunal agrees with Respondent that Article 10(4) of the BIT is an applicable law clause which allows a tribunal to apply a law different from the Treaty to the claims asserted.
190. However, as demonstrated below, Article 10 of the BIT, and in particular its paragraphs (1) and (4), does not permit an investor to assert claims based on Chilean law.
191. At the outset, the Tribunal wishes to clarify that its findings below are strictly based on the Treaty that applies to the *present* dispute. The Tribunal takes no view, and makes no findings, on whether claims based on other sources of law (international or domestic) can *in general* be cognizable under investment treaties.
192. The starting point for the Tribunal's analysis in this dispute brought under this Treaty has been the original Spanish version of Article 10, paragraphs (1) and (4) of the Treaty, which reads as follows:⁶⁴

“1. Toda controversia relativa a las inversiones, en el sentido del presente Tratado, entre una Parte Contratante y un inversionista de la otra Parte Contratante será, en la medida de lo posible, solucionada por consultas amistosas entre las dos partes en la controversia.

[...]

⁶² Tr. (En.), 164: 22-25; 165: 1-25; 166: 1-8.

⁶³ Tr. (En.), 158: 4-12.

⁶⁴ According to Article 11(3), second sentence, the BIT was “Done at Santiago in two authentic originals in the Spanish language, on 2 October 1991” [emphasis added].

4. El órgano arbitral decidirá en base a las disposiciones del presente Tratado, al derecho de la Parte Contratante que sea parte en la controversia-incluidas las normas relativas a conflictos de leyes-y a los términos de eventuales acuerdos particulares concluidos con relación a la inversión, como así también los principios del derecho internacional en la materia.” [emphasis added]

193. The French translation of the Spanish original reads:

“1. – Toute controverse relative aux investissements, dans le sens du présent Traité, intervenant entre une Partie contractante et un investisseur de l’autre Parties contractante sera, dans la mesure du possible, solutionnée par consultations amiables entre les deux parties dans la controverse.

[...]

4.- L’organisme arbitral décidera sur les bases des dispositions du présent Traité, au droit de la Partie contractante qui sera partie dans la controverse – includes les normes relatives à conflits de lois- et aux termes d’éventuels accords particuliers conclus relativement à l’investissement, ainsi de même manière aux principes du droit international en la matière.” [emphasis added]

194. The English translation of the Spanish original reads:

“1. Any dispute concerning investments, as defined in this Agreement, which arises between a Contracting Party and an investor of the other Contracting Party shall, to the extent possible, be settled by means of friendly consultations between the two parties to the dispute.

[...]

4. 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.” [emphasis added]

195. The Tribunal considers that there is a difference in meaning between, on the one hand, the Spanish original and the French translation, and, on the other hand, the English translation of Article 10.

196. The Tribunal considers that the Spanish “en el sentido del presente Tratado” is accurately captured by the French translation, “dans le sens du présent Traité.” The Tribunal also considers that this wording better translates to the English “*within the meaning of* the present Treaty” than to “*as defined in* this Agreement”, as proposed in the English translation of the BIT provided by Respondent as part of Exhibit R-0001.

197. The Spanish text, as the only authentic version of the Treaty, is the text that prevails and that contains the actual agreement of the Contracting Parties. The Tribunal considers that a correct English translation of Article 10(1) of the Treaty should be:

“Any dispute concerning investments, within the meaning of the present Treaty, which arises between a Contracting Party and an investor of the other Contracting Party shall, to the extent possible, be settled by means of friendly consultations between the two parties to the dispute.”

198. This distinction is not without a difference. The ordinary meaning of the terms “en el sentido del presente Tratado” (“dans le sens du présent Traité” and “within the meaning of the present Treaty”), as per Article 31(1) of the VCLT is different from the terms “as defined in this Agreement”. The words “en el sentido del presente Tratado”, “dans le sens du présent Traité” and “within the meaning of the present Treaty” do not point to, or require the existence of, a formal definition in the Treaty of any or all of the words contained in the phrase “[a]ny dispute concerning investments”. The Tribunal is simply required to determine to which elements of that phrase the expression “en el sentido del presente Tratado” (“dans le sens du présent Traité”, “within the meaning of the present Treaty”) applies.
199. According to the interpretation propounded by Claimants, “en el sentido del presente Tratado”, “dans le sens du présent Traité” and “within the meaning of the present Treaty” refer solely to the term “investments”. In their view, as long as one has made an “investment”, as that term is to be understood under the Treaty, one may bring “any dispute” concerning such an “investment” before an international tribunal constituted under the Treaty, regardless of the cause of action of said dispute. Respondent strongly objects to such an interpretation. In its view, as an international tribunal constituted under a particular international Treaty, the Tribunal can only hear international law claims based on the Treaty in question. In other words, according to Respondent, the expression “en el sentido del presente Tratado”, “dans le sens du présent Traité” and “within the meaning of the present Treaty” refers to the entirety of the phrase “any dispute concerning investments” including in particular the word “dispute”.
200. The Tribunal agrees with Respondent that the expression “en el sentido del presente Tratado”, “dans le sens du présent Traité” and “within the meaning of the present Treaty” refers to the entirety of the phrase “any dispute concerning investments”, including in particular the word “dispute”. In effect, the term “investment” is already a defined term under the Treaty. The Tribunal considers that it would have been tautological for the Contracting Parties to add “en el sentido del presente Tratado” (“dans le sens du présent Traité” and “within the meaning of the present Treaty”) in order to refer to a term which is already defined in the Treaty. Consequently, the expression must refer to the entirety of the phrase “any dispute concerning investments”.
201. Further, while the Parties’ respective interpretations of Article 10(1) of the Treaty may appear to conform to the words’ ordinary meaning, the Tribunal considers that Claimants’ interpretation, which would allow an investor to bring a claim before an international tribunal regardless of the cause of action does not comply with other strictures of Article 31(1) of the VCLT: namely, that the interpretation must be done

“in good faith”, on the basis of the words’ context and of the object and purpose of the Treaty. In effect, Claimants’ interpretation is so expansive that it could potentially encompass claims based on Chilean tax law (for instance, if taxes were due on an investment), Chilean environmental law (if, for example, an investment consisting of a factory was a polluter), Chilean employment law, Chilean administrative law, to give just a few examples. The only requirement would be for the claim to be based on an “investment”.

202. The Tribunal considers that an interpretation of Article 10 of the Treaty that would allow claims based on Chilean law to be brought to international arbitration, as long as such disputes “concern investments”, is an extraordinary interpretation of the Treaty that is not in good faith and is also not supported by the context in which the words are situated. Claimants’ interpretation does not point to unambiguous Treaty language that could reverse the presumption according to which international responsibility is normally engaged in case of violations of an international obligation.
203. The BIT’s Preamble, which reflects the object and purpose of the Treaty, refers to the Contracting Parties’ intent to “create favourable conditions for investments”, to intensify their economic cooperation through “the promotion and protection of investments under this Agreement” [emphasis added]. Such “favourable conditions” and the conditions under which investments are promoted and protected “under this Agreement [the BIT]” consist of the standards of protection under the BIT. It is these standards that represent the core of Chile’s and Spain’s commitment to protect investments.
204. Further, the Tribunal considers that Claimants’ interpretation of paragraph (1) is not supported by paragraph (2) of the same Article 10, which reads as follows:

“2. 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.”

205. The Tribunal notes that, pursuant to paragraphs (1) and (2) of Article 10, an investor is required to make a request for friendly consultations with the host State and, only after attempting to settle the dispute for six months, can it bring the dispute before either international arbitration or the local courts of the host State. If said dispute were to be based on Chilean law, the corroborated reading of paragraphs (1) and (2) would require the investor wishing to bring the dispute before the Chilean courts to seek to settle the dispute for six months, regardless of the underlying cause of action (*e.g.*, tax law, environmental law, administrative law). The Tribunal considers it unlikely that, in an effort to promote and protect investments, the Contracting Parties would have restricted

an investor's right to bring a claim under the host State's national law, before the national courts of that host State, in the same manner and to the same extent as they subjected a potential claim against a host State brought before an international tribunal.

206. The Tribunal also considers that Article 10(4) of the Treaty does not support Claimants' expansive interpretation of Article 10(1). Article 10(4) of the Treaty is an applicable law clause (“[e]l órgano arbitral decidirá en base a”, “[l]’organisme arbitral décidera sur les bases des”, “[t]he arbitration body shall take its decision on the basis of”). The concepts of “cause of action” and “applicable law” are distinct. While the former represents the *causa petendi*, the source of law for a claim and for an adjudicatory body's ultimate ruling, the latter refers to the law(s) that may come into play at various steps in the adjudicatory body's reasoning. It is not disputed by the Parties, and the Tribunal concurs, that a tribunal may occasionally apply a different law than the Treaty in order to decide some issues in dispute. For instance, a tribunal may look to Chilean law in order to determine whether an individual is a “national” of that State. Such an inquiry, undertaken on the basis of a different law than the Treaty, does not and cannot mean that the Tribunal can hear claims based on Chilean law.
207. For all these reasons, the Tribunal accepts Respondent's argument that Article 10 of the Treaty does not permit an investor to bring claims before an international arbitral tribunal based on Chilean law.
208. The Tribunal therefore dismisses for lack of jurisdiction Claimants' claims based on Chilean law, which are stated in paragraphs (2), (4), and partially in paragraphs (5), (8), (9) and (10) of its request for relief.⁶⁵
209. The Tribunal will now examine whether it has jurisdiction to hear Claimants' claims that are based on the Treaty itself, and in particular, Articles 3(1), 4, 5 and 10(5) thereof. Some preliminary observations regarding Respondent's Objection No. 2 are first in order.

2. Preliminary observations regarding Objection No. 2

210. Respondent argues that, in order for the BIT to apply to Claimants' claims, Claimants must demonstrate that they had an investment at the time of each BIT violation alleged. In raising this objection, Respondent is relying upon the language used in Articles 3, 4 and 5 of the Treaty. Claimants, invoking Article 10, consider that no such requirement exists in the BIT, which does not contain any temporal limitation to an investor's right to initiate arbitration. Claimants also argue that it is *res judicata* that they have an investment as per Article 1 of the Treaty:

⁶⁵ Memorial, at 717.

“[L]a sentence initiale parle de l’ensemble des biens confisqués, que la propriété des actions est quelque chose d’admis par la justice chilienne en 1995 et confirmé par le Tribunal arbitral.

Ceci ayant autorité de la *res judicata*, la théorie de l’inexistence de l’investissement au moment où la sentence arbitrale initiale a été prononcée n’a aucun fondement.

Cela a été également confirmé par le premier Comité *ad hoc*, qui s’est refusé à annuler la Sentence sur la base de l’argument qu’on a entendu ce matin, que les biens étaient saisis et confisqués sous le régime de dictature et que lorsque l’API est entrée en vigueur il n’y avait donc [pas] d’investissement existant. Le Comité *ad hoc* a rejeté cette demande.”⁶⁶

“PROF HOWSE: [...] [A]s I understood one of the arguments of opposing counsel earlier this morning, the treaty contains some kind of condition for bringing a claim, that an investment exists at a certain point in time, and I just want to point out that there is no actual provision of the treaty that says that.

If you turn to the definition of investment we have already cited that. You can see that it does not include a temporal element. Th[e]n if you look at the compromissory clause, Article 10, it also does not have as a condition that an investment would have existed at any particular point in time for bringing a claim. It just says: “(French spoken)”.

INTERPRETER: Reading Article 10.1.

PROF HOWSE: It follows that it can be, under certain conditions, submitted to an international arbitration tribunal. So here also, again, there is no temporal condition and there are treaties that have such conditions. The one that I am most familiar with is the NAFTA, for example, which may soon become the USMCA, and it seems to me that one cannot invent or construct such a temporal condition concerning the existence of an investment because it is not in the treaty and then one would have to figure out what is the time frame? How long before bringing the claim would an investment have to exist or would it have to exist in full or in part at the time, you know, at which the wrongful conduct occurred?

All of these are possibilities that might make certain sense if one were drafting a treaty but the treaty drafters have not turned their minds, it seems, to these possibilities because they did not put any temporal condition concerning when an investment might have had to exist in order for an investor to exercise their rights under the compromissory clause-Article 10.”⁶⁷ [emphasis added]

211. The Tribunal considers that, while the issues raised by the Parties are intertwined, they are distinct and need to be carefully distinguished from each other. Whether an investor must satisfy a temporal condition before initiating arbitration proceedings is an issue that is conceptually distinct from whether an investor has made an “investment” and whether the standards of conduct included in the Treaty are applicable to the challenged measures. Contrary to Claimants’ contention, Respondent is not arguing that an investment must exist at a certain point in time before the *initiation of arbitration proceedings*. Respondent is rather arguing that Articles 3 through 5 of the Treaty require that an investment exist *at the time of each alleged violation*, regardless of the moment in time when a claim is brought and regardless of whether said investment also meets the requirements of Articles 1 and 2 of the BIT.

⁶⁶ Tr. (Fr.), 33: 2-10.

⁶⁷ Tr. (En.), 117: 3-25; 118: 1-12.

212. The Tribunal therefore considers that Respondent's objection, which alleges that the BIT does not apply to the measures challenged by Claimants in this arbitration on account of the fact that Claimants did not have an investment at the time of such measures, requires an analysis that is distinct from determining whether Claimants ever had an investment as per Articles 1 and 2 of the BIT.

3. Previous findings in the First Award, the First Annulment Decision and the Resubmission Award

213. The Parties have devoted a substantial body of argument to the awards and decision of the ICSID adjudicatory bodies that examined previous disputes between them. The Parties draw different conclusions from these rulings, each contending that they impact this Tribunal's examination of its jurisdiction in different ways. The Tribunal therefore considers it useful to examine the First Award, the First Annulment Decision and the Resubmission Award and to identify the effects of their holdings in the present proceedings. Prior to doing so, the Tribunal will analyze the meaning and scope of *res judicata*.

(i) The meaning and scope of *res judicata*

214. The Parties are not in substantial disagreement as regards the meaning and scope of *res judicata*. Both Claimants and Respondent agree that *res judicata* effects attach not only to the dispositive part of a previous tribunal's decision and/or award, but also to the reasoning which informs that dispositive part. Both Parties agree that this is a direct consequence of the principle of finality of ICSID awards.

215. According to Claimants:

“Dr Juan Garcés.- [...] [N]otre interprétation de la *res judicata* est absolument classique. Classique dans quel sens ? Le Dispositif, il ne fait pas de doute que c'est *res judicata* ; donc, n'en parlons pas.

Maintenant, le fondement. Nous partons de la thèse classique du juge Anzilotti dans l'Affaire *Chorzów*, en disant : oui, en effet, c'est la décision - que vous connaissez parfaitement – la décision, c'est la partie *res judicata* ; mais cela n'empêche que pour interpréter la partie dispositive, le Tribunal peut et doit se référer à la motivation de cette partie dispositive. Et cette partie dispositive peut avoir l'autorité de la *res judicata*. Dans le cas présent, il n'y a pas de doute. Le premier Comité *ad hoc*, qui a entendu les arguments qui ont été replaidés ce matin et cette après-midi, a eu le soin d'accorder, de décider, que le corps tout entier de la sentence initiale a l'autorité de la chose jugée.”⁶⁸
[emphasis added]

“PROF HOWSE: So I am going to address myself to this question of the meaning of *res judicata* that is being posed by the president of the tribunal.

Apart from what Dr Garces has already said, I think it is important to recall a comment made by opposing counsel Silberman, which is that, in effect, when we are dealing with

⁶⁸ Tr. (Fr.), 61: 45-48; 62: 1-6.

res judicata, we are dealing with on the one hand a principle of international law that applies in a wide variety of settings, and we are also dealing with the nature of finality in the ICSID system.

And these are overlapping. One might say that in some sense, finality in the ICSID system is a *lex specialis* or a particular expression of *res judicata*. But it goes further than that, because, as the tribunal well knows, the ICSID system was designed with a particular purpose, which was to ensure that an award once final in the ICSID system would be automatically enforceable in municipal courts, without reopening either the motivation or the jurisdiction of the tribunal, or in fact anything else. That contrasts with, of course, the New York Convention, where there is a limited grounds [sic] of judicial review by domestic courts.

[...]

In brief, the whole ICSID system reposes on the notion that all of an award, except that which is annulled, is final. So that is a particular way of thinking about *res judicata* that has to do with some of the systemic goals of the ICSID system.”⁶⁹ [emphasis added]

216. According to Respondent:

“THE CHAIRMAN: [...] How do you interpret *res judicata*? [...] Does it cover also the reasoning? Or what might have been requested?

[...]

MS SILBERMAN: As an initial matter, the objections that Chile has advanced do not depend on any technical interpretation of the term ‘*res judicata*’, whether it is by the Swiss courts or any international court. The objections are based on what we have said is the finality rule, which is set forth both in the BIT and in the ICSID Convention. [...] [T]he way we have interpreted that rule is that the legal and factual conclusion set forth in the awards are binding. So the factual conclusions that the tribunal has made in the section that says the facts, or the tribunal’s finding of facts, those are factual conclusions that are binding. The legal conclusions that the tribunal reaches in respect of the interpretation of a treaty, and also in the application of those principles to the final outcome [are binding].

But it is not every single word of the award that is *res judicata*. For example, if the tribunal was merely explaining some procedural history, that does not mean that it was making binding final conclusions about anything really; it was just describing the procedural history in respect of events that occurred during the course of the arbitration. It would also not extend to implicit implications.”⁷⁰ [emphasis added]

217. The Tribunal agrees. The whole of the previous ICSID awards and decision are final and binding. However, that only answers part of the question. The other side of the coin requires establishing what was effectively determined in these awards and decision. In this respect, the Tribunal agrees with the *Amco v. Indonesia* resubmission tribunal, which held that only issues that were distinctly heard and distinctly determined will produce *res judicata* effects:

“The passage quoted by Professor Reisman at p. 60 of his Opinion (‘The general principle, announced in numerous cases is that a right, question, or fact *distinctly put in issue and distinctly determined* by a court of competent jurisdiction as a ground of

⁶⁹ Tr. (En.), 176: 5-25; 177: 8-12.

⁷⁰ Tr. (En.), 146: 23, 24; 147: 7, 8, 14-20; 148: 2-18.

recovery, cannot be disputed') [...] tells us what matters in the original Award on the merits are *res judicata* as between the parties.”⁷¹ [emphasis in original]

218. This principle was subsequently reaffirmed by the *Grynberg v. Canada* tribunal, which confirmed that issues previously decided in a prior ICSID arbitration may not be re-argued and re-examined in a subsequent arbitration:

“[A] finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.”⁷² [emphasis added]

219. Significantly for purposes of the present proceedings, the *Grynberg v. Canada* tribunal also clarified that only issues the resolution of which was necessary to resolving the claims will produce *res judicata* effects, *i.e.*, not statements made by tribunals *obiter dictum*. This Tribunal agrees.

220. Consequently, in order to determine the extent of the *res judicata* effects of the previous ICSID awards and decision, one must look to the arguments raised by the parties in those proceedings and to the reasoning adopted in the First Award, the First Annulment Decision and the Resubmission Award.

221. An additional observation is warranted in this case, concerning the *res judicata* effects of the First Annulment Decision. The Tribunal agrees with the *Amco v. Indonesia* resubmission tribunal’s conclusion that the only questions distinctly argued and distinctly decided in annulment proceedings pertain to the grounds for annulment under Article 52 of the ICSID Convention. An annulment committee is not empowered to rule on the merits of a case and any observations made in connection with the merits will be *obiter dictum*:

“30. The problem is still to determine whether the *reasons of the nullifying body* are also *res judicata* for a subsequent Tribunal. The *Orinoco Steamship Company Case*, Hague Court Reports (1916) 226; 5 AJIL (1911) 20 does not address that particular question. [...]

31. In so far as the principle is sought to be applied to the effect of the Decision of the Ad Hoc Committee upon the position of the parties before the present Tribunal, the question remains as to exactly what it is that has been ‘distinctly put in issue and distinctly determined.’ The answer to that is clearly not the same, for the Ad Hoc Committee was not an appeal court, rehearing the case on its merits. Rather, what was put in issue, and determined, was whether, in reference to specified matters, the first Tribunal has manifestly exceeded its powers, failed to state the reasons on which the Award was based, or seriously departed from a fundamental rule of procedure. The Ad

⁷¹ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction (Resubmitted), 10 May 1988, at 30 (Exhibit C-495) (“*Amco v. Indonesia*”).

⁷² *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Award, 10 December 2010, at 7.1.1 (“*Grynberg v. Canada*”), quoted in *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, at 7.20 (Exhibit C-496) (“*Apotex v. United States*”).

Hoc Committee's determination on each of these matters that was put in issue is binding." [internal citations omitted] [emphasis in original]

222. Having reached these conclusions, the Tribunal will now identify the issues that were distinctly heard and distinctly determined in the previous ICSID awards and decision – insofar as they are pertinent to these proceedings.

(ii) *The First Award*

223. The First Tribunal found, at paragraph 233 of the First Award, that the acquisition by Mr. Pey Casado of the totality of the shares in CPP, which in turn wholly owned EPC, represented an investment within the meaning of the ICSID Convention: it entailed “l’existence d’un apport, le fait que cet apport porte sur une certaine durée et qu’il comporte, pour celui qui le fait, certains risques”.⁷³

224. Chile argued that Mr. Pey Casado's acquisition of shares in CPP and EPC did not represent a “foreign investment” as per the laws on Chile's books in 1972, since no transfer of funds from Spain to Chile had taken place. In Chile's view, this deprived the First Tribunal of jurisdiction *ratione materiae*, based on Articles 1(2) and 2(2) of the Treaty.⁷⁴ The First Tribunal found that Article 1(2) of the Treaty reflected a broad understanding of the term “investment” and that the acquisition of shares in CPP and EPC fell within the sphere of this definition. The First Tribunal added that the only condition imposed by Article 1(2) of the Treaty was that the acquisition should comply with the laws of the host State. Pursuant to Article 2(2) of the BIT, these were the laws in force at the time the investment was made, *i.e.*, in 1972. The First Tribunal dismissed Chile's contention that the BIT required the existence of a transfer of capital from Spain to Chile, and concluded that, in 1972, Chilean law did not include an established definition of foreign investment. On these bases, the First Tribunal found that Mr. Pey Casado's investment in CPP and EPC qualified as an “investment” under Article 1(2) and 2(2) of the BIT.⁷⁵

225. The First Tribunal then addressed the question of the BIT's application *ratione temporis*. The First Tribunal found that the Treaty's application in time raised two different questions: “celle de la compétence *ratione temporis* du Tribunal arbitral saisi sur le fondement de l'API” and “celle de l'applicabilité *ratione temporis* des obligations de fond de l'API”.⁷⁶ The First Tribunal held that, for Chile's international responsibility to be engaged under the BIT, the First Tribunal had to be competent *ratione temporis* and the BIT's substantive provisions had to apply *ratione temporis* to the alleged violations. The First Tribunal ruled:

⁷³ First Award, at 233.

⁷⁴ *See, id.*, at 327-345.

⁷⁵ *Id.*, at 365-411.

⁷⁶ *Id.*, at 423.

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

429. Les dispositions de fond de l’API ne sont quant à elles applicables que si l’API est en vigueur au moment où sont commises les violations alléguées.”⁷⁷

226. The First Tribunal then determined, at paragraph 432 of the First Award, that Mr. Pey Casado’s investment, made in 1972, which was a “foreign investment”, was covered by Article 2(2) of the Treaty.
227. The First Tribunal, in other words, only examined whether Mr. Pey Casado’s investment, made in 1972, complied with the conditions in Articles 1(1) and 2(2) of the BIT: whether it was an “investment”, whether it was “foreign”, and whether it had been made in compliance with Chilean laws in force in 1972. The First Tribunal did not look into whether the investment continued to exist at the time of the challenged measures. As shown in paragraphs 236 and 237 below, this was also the conclusion of the First Committee.
228. Turning then to the question of its jurisdiction *ratione temporis*, the First Tribunal concluded that it could not declare itself competent unless “il est en présence de ‘controverses’ ou de réclamations’ survenues postérieurement à l’entrée en vigueur de l’API”.⁷⁸ The First Tribunal adopted the definition of “dispute” established by the *Maffezini v. Spain* tribunal, and concluded that the dispute between the parties in connection with the restitution of Mr. Pey Casado’s shares in CPP emerged in 1995. Noting that the facts at the source of a dispute must be distinguished from the dispute itself, the First Tribunal concluded that it had jurisdiction *ratione temporis* as the dispute had arisen after the entry into force of the Treaty. The First Tribunal further concluded that its jurisdiction *ratione temporis* encompassed disputes that arose in 2000 (the dispute concerning Decision No. 43) and 2002 (the dispute concerning the Santiago civil court proceedings).⁷⁹
229. However, the First Tribunal concluded that having jurisdiction *ratione temporis* over all disputes was not sufficient for the Treaty’s provisions to apply to all the challenged measures. It was only if the alleged violation occurred after the entry into force of the Treaty that the Treaty could apply to it:

“Cela ne signifie pas pour autant que les dispositions de fond de l’API sont applicables à l’intégralité des violations alléguées par les demanderesse. En effet, en vertu du principe de non-rétroactivité des traités, l’applicabilité des obligations de fond d’un traité est déterminée, sauf accord contraire des parties que le Tribunal estime ne pas être intervenu en l’espèce, en fonction de la date à laquelle s’est produit le fait illicite et non en fonction du moment où apparaît et se cristallise le différend, critère distinct

⁷⁷ *Id.*, at 428, 429.

⁷⁸ *Id.*, at 434.

⁷⁹ *Id.*, at 419-465.

ne servant qu'à établir la compétence *ratione temporis* du Tribunal. Ce n'est que si la violation alléguée est postérieure à l'entrée en vigueur du traité que les dispositions de fond de ce dernier seront applicables à ladite violation."⁸⁰ [emphasis added]

230. The First Tribunal, examining the question of the application in time of the BIT's substantive provisions, found that Article 2(2) of the BIT "dispose simplement que les investissements antérieurs à l'entrée en vigueur de l'API peuvent être couverts par ce dernier", but that it did not "préjuge ... de l'applicabilité des dispositions de fond de l'API aux violations alléguées et ne peut être interpréter [sic] comme conférant un effet rétroactif à l'API permettant de l'appliquer aux violations antérieures à son entrée en vigueur".⁸¹ In other words, the First Tribunal concluded that, as a rule, it was not sufficient to find that an investment satisfied the conditions of Article 2(2) of the BIT for the standards of protection under the Treaty to be applicable to the challenged measures or for the Treaty to produce retroactive effects. Moreover, according to the First Tribunal, the existence of a dispute that post-dated the entry into force of the BIT could not "à elle seule entraîner l'application rétroactive automatique des dispositions de fond de l'API en question".⁸²
231. After examining the pertinent facts, the First Tribunal concluded that the expropriation of Mr. Pey Casado's investment had not been a continuous act that continued to produce effects after the entry into force of the BIT, as argued by Claimants in these proceedings, but an instantaneous act that had "consummated" in 1975:
- "En l'espèce, l'expropriation litigieuse, qui a débuté avec les saisies effectuées par l'armée en 1973, s'est achevée avec l'entrée en vigueur du décret n°165 du 10 février 1975 qui a prononcé le transfert de propriété des biens des sociétés CPP S.A. et EPC Ltda à l'Etat. A cette date, l'expropriation était consommée, quelle que soit l'appréciation que l'on peut porter sur sa licéité. Aussi le Tribunal considère que l'expropriation dont se plaignent les demanderesse doit être qualifiée d'acte instantané, antérieur à la date d'entrée en vigueur de l'API. Cette analyse est conforme à la position de principe de la Cour européenne des droits de l'homme qui considère l'expropriation comme un acte instantané et qui ne crée pas une situation continue de 'privation d'un droit'."⁸³ [emphasis added]
232. Consequently, the First Tribunal found that the BIT's substantive provisions did not apply *ratione temporis* to the confiscation that had occurred in 1975.⁸⁴ In so ruling, the First Tribunal based its holding on the fact 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".⁸⁵

⁸⁰ *Id.*, at 466.

⁸¹ *Id.*, at 579.

⁸² *Id.*, at 585.

⁸³ *Id.*, at 608.

⁸⁴ *Id.*, at 610.

⁸⁵ *Id.*, at 603.

233. In contrast, the First Tribunal concluded that the BIT's substantive provisions did apply to Decision No. 43 and to the alleged denial of justice in the Santiago civil court proceedings. The First Tribunal found that Chile, through its failure (which lasted for seven years) to resolve Mr. Pey Casado's claim before the Santiago civil court, coupled with its failure to answer Mr. Pey Casado's request for restitution made with the President, had committed a denial of justice. This conduct, together with Chile's decision to award compensation to individuals that the First Tribunal did not consider as the rightful owners of the nationalized assets, was found to be in breach of the Fair and Equitable Treatment standard.⁸⁶
234. Based on the analysis above, the Tribunal concludes that Chile did not argue before the First Tribunal that the BIT's substantive provisions did not apply to Mr. Pey Casado's investment, on account of the fact that that investment was not in existence at the time of the alleged violations. Further, while the First Tribunal made some observations in connection with the temporal application of the Treaty's substantive provisions, it did not at all examine the question of whether an investment had to exist at the time of an alleged violation in order for the Treaty to be applicable. As will be shown in the paragraphs below, this was also the conclusion of the First Committee.

(iii) *The First Annulment Decision*

235. One of the arguments raised by Chile before the First Committee was that the First Tribunal had failed to state reasons and had manifestly exceeded its powers by failing to identify the investment still owned by the claimants at the time of the Treaty breaches. Chile maintained that the claimants' only investment was their shares in *El Clarín*, which the First Tribunal had found to have been definitively expropriated in 1975. Chile argued that, since this investment was expropriated, the claimants had no remaining investment in Chile by the time of the BIT violations.⁸⁷
236. The First Committee confirmed that, indeed, the First Tribunal did not examine the question of whether an investment must exist at the time of an alleged violation in order for the Treaty standards to be applicable. In answer to Chile's argument that the First Tribunal had failed to identify the investment still owned by the claimants at the time of the Treaty breaches, the First Committee held:

“168. The Committee notes that this argument of the ‘existing investment’ had not been raised by Chile before the Tribunal. Nevertheless, the Committee considers that for the purposes of the grounds invoked, the Tribunal applied Article 2(2) of the BIT and the applicable Chilean law to conclude that the investment made by Mr. Pey Casado in 1972 was covered by the BIT. In addition, the Committee agrees with the Claimants that one could have made the argument that the duty to provide redress for violations 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 alleged breach.

⁸⁶ *Id.*, at 650-674.

⁸⁷ First Annulment Decision, at 159-164.

These principles were followed by the Tribunal in the section of the Award dedicated to the application of the BIT *ratione temporis*. The Committee finds that the Tribunal did not expressly deal with the question of the existing investment as it was not raised in these terms by the parties in the arbitral proceeding. Therefore, the Tribunal cannot be considered as having failed to provide reasons.”⁸⁸ [internal citations omitted] [emphasis added]

237. The Tribunal considers that the First Committee’s finding above conclusively establishes that the First Tribunal did not examine, and consequently made no findings, with respect to whether an investment must exist at the time of the challenged conduct in order for a substantive Treaty standard to apply to said conduct. Since this conclusion directly pertains to the First Committee’ inquiry into the presence of a ground for annulment under Article 52 of the ICSID Convention, this finding produces *res judicata* effects and cannot be challenged in these proceedings.

238. In contrast, the First Committee’s observation that “one could have made the argument that the duty to provide redress for violations 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 alleged breach”⁸⁹ is not *res judicata*. First, according to the First Committee itself, this argument had not been raised before the First Tribunal and the First Tribunal did not deal with it. Second, this observation was not necessary in order for the First Committee to determine whether the First Tribunal had failed to state reasons and had manifestly exceeded its powers. Indeed, the First Committee only relies on the fact that the “existing investment” argument had not been raised as a bar to finding a ground for annulment. Consequently, the First Committee’s *obiter* observation that “one could have made the argument that the duty to provide redress for violations 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 alleged breach”⁹⁰ is not binding in these proceedings.

(iv) *The Resubmission Award*

239. The Tribunal finds that, following the partial annulment of the First Award, the Resubmission Tribunal did not, and indeed could not, make any determinations as to whether the application of the standards of protection in the Treaty was conditional upon the existence of an investment at the time of the alleged BIT violation.

240. Pursuant to its very terms, the First Annulment Decision annulled “paragraph 4 of the *dispositif* of the Award of 8 May 2008 and the corresponding paragraphs in the body of the Award related to damages (Section VIII)”.⁹¹ Consequently, the First Committee left intact the First Tribunal’s analysis and findings on jurisdiction and liability. This was

⁸⁸ *Id.*, at 168.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*, at 359.1.

confirmed by the Resubmission Tribunal, which determined that its task was limited to determining the compensation due to the claimants on account of the breach identified by the First Tribunal:

“176. [...] [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’), including, notably, the 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.”

177. Conversely, 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. [...]

178. The conclusion to be drawn from the above – and it is an inescapable one – is that 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. [...] Before this Tribunal, all that remains in ‘dispute’ between the Parties in these resubmission proceedings (in terms of Article 52(6) of the ICSID Convention) is the nature of the compensation due for the breach or breaches already established by the First Tribunal, and, if the present Tribunal should find that that compensation should take a monetary form, the amount thereof.”⁹² [internal citations omitted] [emphasis added]

(v) *Conclusion*

241. The Tribunal therefore finds that:

- (i) the First Tribunal concluded that Mr. Pey Casado’s investment consisted of his ownership of shares in CPP and EPC, which was made in 1972 and was definitively and instantaneously expropriated in 1975;
- (ii) the First Tribunal did not examine whether the application of the standards of treatment in the Treaty was conditional on the existence of an investment at the time of the alleged violations;
- (iii) the First Tribunal likewise did not examine whether an investment continued to exist at the time of the violations post-dating the Treaty;

⁹² Resubmission Award, at 176-178.

- (iv) the First Committee stated in *obiter* that the First Tribunal must have implicitly addressed (and dismissed) the “existing investment” argument; and
 - (v) none of these issues was examined by the Resubmission Tribunal.
242. As the Tribunal has already concluded at paragraph 238 above, no *res judicata* effects attach to the observations made by the First Committee in *obiter*, according to which the First Tribunal must have implicitly addressed (and dismissed) the argument of the “existing investment”. Consequently, the Tribunal dismisses Claimants’ contention in these proceedings, according to which Respondent’s “existing investment” argument, underpinning Objection No. 2, was rejected with finality by the First Committee.
243. The Tribunal further finds that its own examination of the “existing investment” issue is not subject to any previous determination having *res judicata* effects. Indeed, as already determined by the Tribunal, *res judicata* only applies to those determinations made by a previous tribunal to the extent that a matter was distinctly raised by the parties, was distinctly decided by a tribunal and was necessary to the tribunal’s resolution of the claims before it. Considering that, according to the binding conclusion of the First Committee, the argument of the “existing investment” was not raised by Chile before the First Tribunal, so that the First Tribunal “did not expressly deal with [it]”,⁹³ no binding determination on the question of the “existing investment” exists.
244. This Tribunal expresses no views on whether the First Tribunal implicitly dismissed the “existing investment” argument. Quite apart from the conclusion that such an implicit determination cannot produce any *res judicata* effects (as demonstrated in paragraphs 217-220 and 238 above), such determination would in any event not be outcome-determinative. A State’s consent to arbitration under an investment treaty is an exception to the public international law rule that individuals may not bring international claims against States based on norms of public international law. Therefore, the Tribunal has a duty to satisfy itself that it is competent to hear Claimants’ claim based on the Treaty. Further, the Tribunal’s jurisdiction cannot be established by waiver or by implication. The Tribunal’s duty to determine that it has jurisdiction to hear this dispute is of such overarching importance that it overrides any concerns pertaining to the fact that Chile did not raise the “existing investment” argument before the First Tribunal.
245. Moreover, even if the First Tribunal had implicitly dismissed the “existing investment” argument, the reasons which may have led to such a conclusion are nowhere stated in the First Award. The Tribunal would not be in a position to determine – without engaging in a highly speculative exercise and thus exceeding the limits of its authority – whether the First Tribunal considered that some part of the investment remained after

⁹³ First Annulment Decision, at 168.

the entry into force of the Treaty and what that part could be, or whether the First Tribunal may have had a different reason in mind when making such an implicit determination.

246. Finally, this Tribunal must be satisfied that jurisdiction is established at the time of the initiation of these arbitral proceedings, *i.e.*, on 12 April 2017. Any implicit determination the First Tribunal may have made with respect to the “existing investment” argument in May 2008 is not conclusive evidence for this Tribunal’s jurisdiction in April 2017.
247. Having reached the conclusion that no binding determination on the question of the “existing investment” exists, the Tribunal will now analyze whether the Treaty conditions the application of the standards of treatment to an existing investment and, if the answer to that question is in the affirmative, whether Claimants have satisfied such a condition.

4. The application of the standards of protection in the Treaty requires the existence of an “investment” at the time of the challenged conduct

248. As noted earlier, Respondent’s position in this arbitration is that Articles 3 through 5 of the BIT require that an investment exist at the time of each alleged violation. Claimants counter: (i) that the BIT imposes no temporal condition for the exercise of an investor’s rights under Article 10; and (ii) that Claimants’ investment made before the entry into force of the Treaty is protected, and only disputes that arose prior to that moment are outside the Tribunal’s jurisdiction *ratione temporis*. Claimants also argue that, even if Respondent’s interpretation of the Treaty were to be preferred, they would still satisfy the jurisdictional requirements in the Treaty. These latter arguments are addressed in Section **VII.C.5** below.
249. The Tribunal has already concluded, at Section **VII.C.2** above, that the question whether an investor must satisfy a temporal condition before initiating arbitration proceedings is an issue that is conceptually distinct from whether the standards of conduct included in the Treaty are applicable to the challenged measures. The Tribunal does not consider that the absence of a temporal condition for the initiation of arbitral proceedings has any bearing on whether the substantive standards of conduct in the Treaty are applicable to specific conduct.
250. As explained in the paragraphs below, the Tribunal agrees with Respondent that the application of the standards of protection in the Treaty requires the existence of an “investment” at the time of the alleged conduct.
251. The Tribunal notes, at the outset, that its task hereunder is not to interpret the meaning of the term “investment” as defined in Article 1(2) of the Treaty. The Tribunal is asked to interpret Articles 3, 4 and 5 of the Treaty in order to determine whether an

“investment”, as defined in Article 1(2) of the Treaty, must exist at the time of an alleged violation in order for a Treaty breach to be found.

252. The Tribunal recalls that Articles 3 through 5 of the Treaty provide as follows:

“Article 3. Protection

1. Each Party shall protect in its territory the investments made in accordance with its laws by investors of the other Party, and shall not hamper, by means of unjustified or discriminatory measures, the management, maintenance, use, enjoyment, expansion, sale or, as the case may be, liquidation of such investments.

2. Each Party shall grant the necessary permits relating to these investments and shall allow, within the framework of its laws, the execution of contracts relating to manufacturing licences and technical, commercial, financial and administrative assistance.

3. Each Party shall also grant, where necessary and in accordance with its laws, the permits required in connection with the activities of consultants or experts hired by investors of the other Party.”

“Article 4. Treatment

1. Each Party shall guarantee in its territory, in accordance with its domestic laws, fair and equitable treatment of the investments made by investors of the other Party, in conditions which are not less favourable than those enjoyed by its national investors.

2. This treatment shall not be less favourable than that which is extended by each Party to the investments made in its territory by investors of a third country.”

“Article 5. Nationalization and Expropriation

Nationalization, expropriation or any other measure having similar characteristics or effects that may be adopted by the authorities of one Party against the investments in its territory of investors of the other Party 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 Party adopting such measures shall pay to the investor an adequate indemnity in freely convertible currency without unjustified delay. The legality of the expropriation, nationalization or comparable measure and the amount of the indemnity shall be subject to appeal in ordinary judicial proceedings.”
[emphasis added]

253. The Tribunal considers that an interpretation of Articles 3 through 5 that is made “in good faith” and in accordance with “the ordinary meaning to be given to the terms of the treaty” (Article 31(1) VCLT), must be that, in order for Articles 3 through 5 to be applicable, an investment must exist – to which the standards set out in those Articles can apply – while the obligations set out therein are in force. Indeed, Articles 3, 4 and 5 all refer to specific protections being accorded to “investments”, as opposed to “investors”. Article 3 requires Contracting Parties to “protect in [their] territor[ies] the investments made ... by the investors of the other Party” and not to hamper through discriminatory measures the “management, maintenance, use, enjoyment, expansion, sale or, as the case may be, liquidation of such investments”. Article 4 requires Contracting Parties to guarantee free and equitable treatment in their territory to

“investments”. Article 5 protects “investments” against unlawful expropriation. Conversely, in order for a violation of one of these three articles to have taken place, a failure to offer the required protections must concern a particular “investment”. One cannot fail to protect an “investment” against unlawful expropriation if there is no “investment” that can be expropriated. An interpretation to the contrary cannot be considered as an interpretation made “in good faith”.

254. The Tribunal is of the view that this interpretation of Articles 3 through 5 of the Treaty is also supported by the context in which the terms are situated, and results from the object and purpose of the Treaty (Article 31 paragraphs (1) and (2) VCLT). The Tribunal recalls that, according to Article 31(2) of the VCLT, “context” includes, in the context of this Treaty, (i) the Treaty text; (ii) its preamble; and (iii) its annex (the Protocol).
255. The main point of contention for Claimants is that, since their shares in CPP and EPC fulfill the conditions of Articles 1(2) and 2(2) of the Treaty, this is sufficient in order for the Treaty obligations to be applicable. In other words, Claimants are arguing that Respondent’s interpretation of Articles 3 through 5 of the Treaty is contradicted by the context in which these provisions are situated, and that the Tribunal should look only to Articles 1(2) and 2(2) of the Treaty in order to determine whether it has jurisdiction.
256. The Tribunal disagrees. It is not up for debate that Claimants’ ownership of shares in CPP and EPC, acquired in 1972, satisfies the definition of “investment” in Article 1(2) of the Treaty. It is also not disputed that Article 2(2) specifies that the Treaty “shall also apply to investments made prior to its entry into force”. However, that is not the end of the analysis. An “investment” that was “made prior to the [BIT’s] entry into force” but that ceased to exist prior to that same BIT’s entry into force cannot enjoy Treaty protection without the Treaty provisions producing retroactive effects. As conclusively established by the First Tribunal, Article 2(2) of the BIT “ne peut être interpréter [sic] comme conférant un effet rétroactif à l’API permettant de l’appliquer aux violations antérieures à son entrée en vigueur”.⁹⁴ Therefore, in order for a pre-existing “investment” to enjoy Treaty protection as per Article 2(2) of the BIT, said “investment” must continue to exist at the time the Treaty entered into force.
257. Again, that is not the end of the inquiry. A violation of the Treaty, for instance a breach of Articles 3, 4 or 5 thereof, can occur with respect to an “investment” made prior to the Treaty’s entry into force only if such pre-existing “investment” continued to exist at the time of the conduct that is being challenged. If, for any other reason than the conduct being challenged, such pre-existing “investment” were to cease to exist prior to the challenged measures, a State could not be held liable for the effect of such measures on the investment in question, since to hold otherwise would in effect find a State liable for having failed to protect an “investment” that no longer exists.

⁹⁴ First Award, at 579.

258. The Tribunal considers that this interpretation is also supported by the Treaty's Preamble, which sets out the objective of "creat[ing] favourable conditions for investments". A treaty cannot create such favorable conditions if an "investment" has ceased to exist prior to the BIT's entry into force or if the protections afforded have no object to which they can apply. This same conclusion results from Article 2(1) of the BIT, which requires the Contracting Parties to "promote, insofar as possible, the investments made" in their territory by investors from the other Contracting Party.
259. The Tribunal is of the view that this conclusion is not affected by the First Tribunal's finding that jurisdiction *ratione temporis* only exists for *disputes* that arose after the entry into force of a BIT. As the First Tribunal found, a dispute is to be distinguished from the factual matrix upon which it is based, including the measures giving rise to the dispute, and requires "un minimum d'échanges entre les parties, l'une portant le problème à la connaissance de l'autre, cette dernière s'opposant à la position de l'autre partie directement ou indirectement".⁹⁵ A dispute arises in connection with measures only after the measures have taken place. The fact that a dispute arises after the entry into force of the Treaty says nothing about the date when the challenged measures occurred and whether all, or only some of these measures fall under the sphere of application of a Treaty standard. Moreover, when the measures being challenged post-date the entry into force of the Treaty, a dispute concerning such measures will necessarily also arise after the entry into force of the Treaty. Consequently, the only points of reference that are apposite for the Tribunal's analysis under Objection No. 2 remain the dates of the challenged measures, and not the date when the dispute arose.
260. It is for these reasons that the Tribunal considers that *Jan de Nul v. Egypt*, relied upon by Claimants, is not apposite. *Jan de Nul v. Egypt* supports the conclusion that an investment need not exist at the time when the dispute arises in order for a tribunal to have jurisdiction. However, *Jan de Nul v. Egypt* says nothing about whether an investment must exist at the time of the challenged measures, which is the question that the Tribunal must answer in the case *sub judice*.
261. The Tribunal has also taken due note of Claimants' argument, pursuant to which Respondent's interpretation of Articles 3 through 5 of the BIT would be impracticable and subject to undue discretion, as it would require that a tribunal examine whether all, or only part, of an investment must exist at the time of each alleged violation. The Tribunal does not consider it necessary to comment on whether all or only a part of an investment must exist at the time of each alleged violation, in light of its conclusion in Section VII.C.5 below that Claimants had no remaining investment in Chile after the issuance of the First Award.

⁹⁵ *Id.*, at 443.

262. For all the reasons set out above, the Tribunal concludes that, in order for Articles 3, 4 and 5 of the Treaty to be applicable to an “investment” made prior to or after the entry into force of the Treaty, the “investment” must exist at the time of the alleged violations.
263. The Tribunal will now demonstrate why, in its view, Claimants had no remaining investment in Chile after the issuance of the First Award.

5. Claimants had no “investment” in Chile at the time of the conduct challenged in this arbitration

264. At the outset of its analysis, the Tribunal considers it useful to make some preliminary observations concerning burden of proof. As the Party raising an objection to jurisdiction, Respondent bears the burden of demonstrating that its objection has merit and that the Tribunal should decline to hear the case for lack of jurisdiction. However, this does not absolve Claimants from their own burden of demonstrating that the Tribunal has jurisdiction and that, consequently, all the requirements for jurisdiction set out in the Treaty are met. In other words, with respect to this Tribunal’s jurisdiction, the burden of proof is shared by the Parties: it is for Claimants to establish jurisdiction (with evidence), and it is for Respondent to challenge it (with evidence).
265. In concrete terms, this means that Claimants bear the burden of demonstrating that they had an investment at the time of the violations alleged to be in breach of the Treaty and of showing what that investment consisted of, and it is for Respondent to show that Claimants had no such investment. Before examining whether this condition has been met, the Tribunal will first determine what are the dates of the violations alleged by Claimants in these proceedings.
266. According to Claimants’ statement at the hearing, “les demandes que nous avons formulées au présent Tribunal sont résumées dans les pages du Mémoire sur la compétence et le fond n° 22 à 33”.⁹⁶ The Tribunal recalls these claims in summary form in the paragraphs below:

“ii. L’expropriation indirecte des droits reconnus dans la Sentence arbitrale du 8 mai 2008. Violation des articles 3(1), 4 et 5 de l’API depuis le 24 juillet 2008.”⁹⁷ [emphasis added]

“iii. La discrimination à l’endroit des investisseurs demandeurs depuis le 8 mai 2008 a enfreint les articles 10(5), 3(1), 4 et 5 de l’API.”⁹⁸ [emphasis added]

“iv. L’Etat du Chili a enfreint les articles 3 et 4 de l’API en ne respectant pas les obligations de résultat et de comportement qui pèsent sur lui du fait de ce qu’a statué la Sentence arbitrale du 8 mai 2008, res iudicata.”⁹⁹ [emphasis added]

⁹⁶ Tr. (Fr.), 36: 36-38.

⁹⁷ Memorial, p. 22.

⁹⁸ *Id.*, p. 26.

⁹⁹ *Id.*, p. 32.

“v. Les actes de l’Etat du Chili relatifs au groupement d’avocats dont sont membres la majorité des arbitres dans la procédure suivie auprès du CIRDI entre juin 2013 et octobre 2017, enfreignent les articles 3, 4, 10(5) et 10(5) [sic] de l’API.”¹⁰⁰ [emphasis added]

267. The Tribunal considers however that Claimants have inadvertently omitted to refer to another claim made in the Memorial, namely:

“vi. Le refus continu du Gouvernement chilien d’accomplir l’ordre judiciaire du 24 juillet 2017 de produire les informations relatives aux paiements à des membres des Essex Court Chambers a enfreint l’article 4 de l’API.”¹⁰¹ [emphasis added]

268. The Tribunal thus finds that the violations alleged by Claimants in these arbitral proceedings took place from the date of the First Award, *i.e.*, from May 2008 onwards. Consequently, the Tribunal will have to determine whether Claimants had any investment in Chile as of May 2008.

269. Claimants consider that they did and they make the following arguments as support for this contention: (i) their initial investment in CPP and EPC continued to exist after the entry into force of the Treaty; and (ii) they continue to own an investment, consisting of their Treaty rights and the First Award, both of which post-date the entry into force of the Treaty.

270. Claimants’ argument that their investment in CPP and EPC continued to exist after the entry into force of the Treaty is based upon the following subcomponent arguments:

- The First Tribunal confirmed such a finding;
- Chile admitted as much before the First Tribunal;
- The Resubmission Award confirmed that their investment in CPP and EPC continued to exist after the entry into force of the Treaty;
- The First Committee concluded that they had an existing investment at the time of the initial Treaty breaches;
- The Santiago Civil Court Judgment concluded that their rights over the investment in CPP had not been invalidated by operation of Decree No. 165.

271. As explained in the paragraphs below, the Tribunal finds that these arguments do not have merit.

(i) *The First Tribunal did not confirm that Claimants’ investment in CPP and EPC continued to exist after the entry into force of the Treaty*

272. The Tribunal finds that, contrary to Claimants’ contention, the First Award did not conclude that their investment in CPP and EPC continued to exist after the entry into

¹⁰⁰ *Id.*, p. 33.

¹⁰¹ *Id.*, p. 41.

force of the Treaty. To the contrary, and as established above, the First Award decided with *res judicata* effects that Claimants' investment in CPP and EPC had been definitively expropriated in 1975:

“En l’espèce, l’expropriation litigieuse, qui a débuté avec les saisies effectuées par l’armée en 1973, s’est achevée avec l’entrée en vigueur du décret n°165 du 10 février 1975 qui a prononcé le transfert de propriété des biens des sociétés CPP S.A. et EPC Ltda à l’Etat. A cette date, l’expropriation était consommée, quelle que soit l’appréciation que l’on peut porter sur sa licéité. Aussi le Tribunal considère que l’expropriation dont se plaignent les demanderessees doit être qualifiée d’acte instantané, antérieur à la date d’entrée en vigueur de l’API. Cette analyse est conforme à la position de principe de la Cour européenne des droits de l’homme qui considère l’expropriation comme un acte instantané et qui ne crée pas une situation continue de ‘privation d’un droit’.”¹⁰² [emphasis added]

273. Further, contrary to Claimants' contention, paragraphs 379, 411, 431 and 432 of the First Award do not support the conclusion that the First Tribunal found the investment in CPP and EPC to continue to exist after the entry into force of the Treaty. In those paragraphs, the First Tribunal analyzed whether the claimants' investment in CPP and EPC was covered by Articles 1(2) and 2(2) of the Treaty, and concluded that this was indeed the case. However, at paragraph 608, quoted above, the First Tribunal reached the conclusion that this investment was subject to a complete and definitive expropriation in 1975, *i.e.*, prior to the entry into force of the Treaty.
274. Moreover, as the Tribunal has already determined in Section **VII.C.3** above and as conclusively established by the First Committee, the First Award did not examine whether the claimants' investment continued to exist at the time of the Treaty violations it had identified. Whatever the views of the First Tribunal on the issue of the “existing investment” may have been, they are neither binding on this Tribunal which must determine whether the condition was satisfied at a different point in time (post-May 2008), nor are they stated anywhere in the First Award.¹⁰³
- (ii) *Chile did not admit before the First Tribunal that Claimants' investment in CPP and EPC continued to exist after the entry into force of the Treaty*
275. The Tribunal finds that, contrary to Claimants' contention in this arbitration, Chile did not admit before the First Tribunal that the claimants' investment in CPP and EPC continued to exist after the entry into force of the Treaty.
276. The Tribunal notes that, as support for their argument, Claimants refer to three documents: a letter from the Chilean Ministry of Economy to the ICSID Secretary-General, dated 30 November 1998, a declaration made in June 2001 before the First Tribunal by Chile's representative, and several paragraphs in the First Award. After

¹⁰² First Award, at 608.

¹⁰³ See, *supra* at 244-246.

carefully examining these documents, the Tribunal has reached the conclusion that they do not support Claimants' position.

277. First, the Tribunal observes that the letter from the Chilean Ministry of Economy to the ICSID Secretary-General, dated 30 November 1998,¹⁰⁴ contains Chile's objections to the registration with ICSID of a request for arbitration by Mr. Pey Casado and the Foundation based on the following arguments: (i) Mr. Pey Casado had acknowledged that he had made no capital transfers into Chile, a condition which Chile considered as being a prerequisite for the jurisdiction of the Centre; (ii) Mr. Pey Casado had failed to provide information that would demonstrate that his investment could be qualified as "foreign" under the Treaty; and (iii) the Foundation had never made a request for amicable settlement prior to initiating arbitration proceedings. The Tribunal notes that, indeed, in this letter, Chile did not argue that Mr. Pey Casado's investment had ceased to exist by the time of the entry into force of the Treaty. However, this is not dispositive. As the Tribunal has already held at paragraph 244 above, its jurisdiction cannot be established by way of estoppel or implication. The Tribunal must conclusively establish that it has jurisdiction to hear this particular dispute on the basis of the facts and arguments that are before it, and not on the basis of the failure by one of the Parties to raise an argument in different proceedings.
278. This conclusion is equally apposite as regards the second document invoked by Claimants, the declaration made in June 2001 before the First Tribunal by Chile's representative, to the effect that Chile committed to comply with a possible First Tribunal award on the merits, ordering it to either return the shares to the legitimate owners of CPP or to pay damages.¹⁰⁵ The fact that Chile did not raise the "existing investment" argument is not outcome-determinative. Moreover, a commitment of compliance with a possible adverse award on the merits cannot be construed as an admission of a position that is contrary to the position taken by a party in an arbitration.
279. Finally, the Tribunal does not consider that Chile's statements, made before the First Tribunal, according to which the confiscations made during the military dictatorship were generally invalid, can support Claimants' position in this arbitration that they had an investment at the time of the alleged Treaty violations. It is sufficient to recall in this respect that the First Tribunal, despite stating at paragraph 677 of the First Award that "la réalité des violations alléguées – ou, plus précisément, en son principe, l'illégalité des confiscations opérées par l'autorité militaire chilienne sur les biens litigieux, n'est pas contestée par la défenderesse", nevertheless concluded that the claimants' investment in CPP and EPC had been definitively expropriated in 1975 and that Decree No. 165 had not been annulled:

¹⁰⁴ Lettre du Ministre de l'Économie du Chili au Secrétaire Général du CIRDI, in affaire CIRDI N° ARB/98/2, *V. Pey Casado et FPA c. la République du Chili*, 30 November 1998 (Exhibit C-609(en)).

¹⁰⁵ Décision du Tribunal arbitral initial du 25 septembre 2001 sur les Mesures Conservatoires sollicitées par les Parties, 25 September 2001 (Exhibit C-520).

“L’argumentation développée par les demanderesse sur la nullité du décret n° 165 au regard du droit interne ne suffit pas à justifier leur position. En effet, les demanderesse se bornent à inviter le Tribunal à faire une application par analogie de l’arrêt de la Cour suprême du Chili du 14 mai 2002 sans véritablement démontrer en quoi le décret litigieux serait lui-même contraire à l’article 4 de la Constitution de 1925. A la connaissance du Tribunal, la validité du Décret n° 165 n’a pas été remise en cause par les juridictions internes et ce décret fait toujours partie de l’ordre juridique interne chilien.”¹⁰⁶ [emphasis added]

280. In other words, the First Tribunal considered that, regardless of the possible general invalidity under Chilean law of the confiscations made during the military dictatorship, the individual decree that had led to the expropriation of the claimants’ investment in 1975 had not been invalidated by the Chilean courts. Consequently, said decree remained a constituent part of the Chilean legal order and continued to produce legal effects. Put differently, the First Tribunal concluded that the lack of invalidation of Decree No. 165 meant that the title over the claimants’ investment in CPP and EPC had remained with the Chilean State and the expropriation could not be deemed a continuous legal act.
281. The Tribunal therefore considers that the evidence above does not support Claimants’ position that their investment in CPP and EPC continued to exist after the Treaty’s entry into force. Moreover, and in any event, even if this evidence could have supported such a conclusion (*quod non*), this would not have been sufficient in order to establish this Tribunal’s jurisdiction. Claimants would have been required to demonstrate that this purported investment continued to exist not only after the entry into force of the Treaty, but up to the moment of the violations alleged in this arbitration. No such demonstration was made.
- (iii) *The Resubmission Award did not confirm that Claimants’ investment in CPP and EPC continued to exist after the entry into force of the Treaty*
282. The Tribunal recalls its finding in Section **VII.C.3** above, pursuant to which the Resubmission Tribunal concluded with *res judicata* effect that its task was limited to determining the compensation due to the claimants on account of the breach identified by the First Tribunal. The Resubmission Tribunal, in other words, did not re-open the conclusions and findings of the First Tribunal on jurisdiction and liability, which were *res judicata*, and any observation that could be construed otherwise was made *obiter* and does not produce *res judicata* effect.
283. This conclusion notwithstanding, the Tribunal finds that, in any event, paragraphs 144 and 216 of the Resubmission Award, relied upon by Claimants, do not support their position. In paragraph 144, the Resubmission Tribunal summarized an argument raised by the respondent, according to which, under Chilean law, the nullity of an act must be formally stated by the competent body and no such decision had been rendered with

¹⁰⁶ First Award, at 603.

respect to Decree No. 165. At paragraph 216, the Resubmission Tribunal restated its previous conclusion with respect to the scope of its jurisdiction and concluded that events that post-dated the First Award fell “plainly outside [its] jurisdiction”.¹⁰⁷

284. Consequently, the Tribunal finds that the Resubmission Award does not support Claimants’ contention that their investment in CPP and EPC continued to exist after the entry into force of the Treaty.

(iv) *The First Annulment Decision did not find that an investment continued to exist at the time of the breaches identified in the First Award*

285. The Tribunal finds that, contrary to Claimants’ contention, the First Committee did not, and indeed could not, make a finding that an investment continued to exist at the time of the breaches identified in the First Award.

286. As support for their position, Claimants refer to the First Committee’s observation that “one could have made the argument that the duty to provide redress for violations 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 alleged breach”.¹⁰⁸ As clarified in Section **VII.C.3**, this observation was made by the First Committee *obiter dictum* and is not binding in these proceedings.

287. Moreover, and in any event, the First Committee nowhere states that an investment continued to exist at the time of the breaches identified in the First Award, and what that investment might have been. Claimants, for their part, likewise do not clarify what this purported investment could have consisted of.

288. More importantly, even if (*quod non*) the First Committee had made the observation ascribed to it by Claimants, such an observation would have gone beyond the First Committee’s mandate of determining whether a ground for annulment existed, would have involved an assessment of the merits of the underlying dispute and, consequently, would have constituted further *obiter dictum* that would not be binding on this Tribunal.

289. For all these reasons, the Tribunal dismisses Claimants’ contention that the First Committee found that an investment continued to exist at the time of the breaches identified in the First Award.

(v) *The Santiago Civil Court Judgment did not reinstate Claimants’ ownership over their shares in CPP and EPC*

290. An additional argument raised by Claimants in this arbitration is that their rights over CPP and EPC were reinstated after the Santiago Civil Court Judgment of 24 July 2008

¹⁰⁷ Resubmission Award, at 216.

¹⁰⁸ First Annulment Decision, at 168.

questioned the validity, under Chilean law, of Decree No. 165. Respondent disputes that the Santiago court ever made such a finding, arguing that this argument is “made up”,¹⁰⁹ and that there is “no way that any reasonable person can read this 16-page, very short, decision and conclude that it did anything other than reject the nullity ab initio theory”.¹¹⁰

291. After carefully examining this judgment, the Tribunal has reached the conclusion that the Santiago court never made the findings attributed to it by Claimants.
292. The Tribunal considers it useful in this respect to set out in detail the issues raised before the Santiago court, as well as that court’s ultimate findings.
293. According to the judgment, Mr. Pey Casado filed suit against the Chilean tax authority “aux fins de la voir condamnée à restituer une machine rotative dont il est propriétaire qu’elle détient en qualité de dépositaire”.¹¹¹ In other words, the cause of action of Mr. Pey Casado’s claim was contractual, namely a deposit contract. The court summarized Mr. Pey Casado’s factual contentions surrounding the confiscations of 1973-1975. The court noted Mr. Pey Casado’s argument that Decree No. 165 “est absolument vicié, car contraire à la Constitution en vigueur à l’époque où il a été édicté et parce qu’il contredit le Décret-Loi 77 lui-même sur lequel il se fonde, il est entaché de nullité de droit public, imprescriptible [et] incurable, qui provoque son inexistence juridique”.¹¹² Mr. Pey Casado added that, on account of this nullity, the factual situation consisting of a deprivation of rights persisted and that the Chilean State had not acquired any rights over the property. Mr. Pey Casado also claimed that, as a result of the military dictatorship, he had been forced to flee Chile and abandon his property, which gave rise to a contract of “deposit of necessity” between himself and the Chilean State. According to the Santiago judgment, Mr. Pey Casado requested, in the alternative to the restitution of the printing press, that he be awarded damages in the amount of USD 600 million, with interest.
294. The Santiago court then summarized the arguments of the State representative, who raised several objections. According to the judgment, the defendant argued that Mr. Pey Casado did not have *jus standi*, as the property he was seeking was not in his ownership or even in the ownership of EPC, but in the ownership of the State. As an alternative argument, the State representative argued that Decree No. 165 was valid and no deposit by necessity could have arisen since the State was the proper owner and Decree No. 165 had not been annulled:

“Elle indique que, subsidiairement, elle oppose la validité du Décret Suprême N° 165, de 1975, du Ministère de l’Intérieur, pour que soit rejetée la demande, dans la mesure

¹⁰⁹ Tr. (En.), 155: 7.

¹¹⁰ Tr. (En.), 155: 11-14.

¹¹¹ Jugement du 1er Tribunal civil de Santiago du 24 juillet 2008 (fr), 24 July 2008, p. 1 (Exhibit C-1). *See also*, p. 3 of the same document.

¹¹² *Id.*, p. 2.

où il n'existe pas de dépôt nécessaire comme le mentionne le demandeur, car pour se trouver dans ladite situation il serait nécessaire que soit déclarée la nullité du Décret N° 165 du 1975, du Ministère de l'Intérieur, lequel n'est pas en opposition avec l'ordonnancement constitutionnelle [sic] en vigueur à la date où il a été édicté, ni n'enfreint le principe de légalité qui régit l'action des organes publics.”¹¹³ [emphasis added]

295. The State representative also raised the time-bar objection, arguing that the time-limit of five years for bringing an action based on a deposit contract had expired.

296. The court, after addressing some preliminary objections concerning documents in the record, concluded that the below questions were in debate between the parties:

“1. – Si le demandeur se trouve habilité à agir pour introduire la demande figurant au dossier.

2. – Titre en vertu duquel le demandeur sollicite la restitution de la machine rotative de marque Goss.

3. – Existence d'un contrat de dépôt nécessaire concernant la machine rotative ; l'origine et les modalités du contrat.

4. – Titre en vertu duquel le Fisc possède la machine dont la restitution est sollicitée.

5. – Si effectivement en l'espèce se sont écoulés les délais exigés par la loi pour qu'opère la prescription extinctive de l'action.

6. – Si effectivement il a été occasionné des préjudices au demandeur du fait d'actes imputables au défendeur, le cas échéant, nature et montant des préjudices.”¹¹⁴

297. After listing these points of contention, the court first examined the objection based on the plaintiff's lack of *jus standi*. The court reasoned that a lack of standing could arise in three situations: (i) the plaintiff did not have the right to file the claim, as he/she was not the “titulaire de l'action introduite”;¹¹⁵ (ii) the cause of action was equivocal or was not the proper cause of action for the exercise of the asserted right; and (iii) it had not been demonstrated with evidence that a sufficient link existed between the claim and the person bringing the claim. The court then went on to state as follows in a passage that is relied upon by Claimants as evidence that the Santiago court found Decree No. 165 to be invalid:

“NEUVIÈMEMENT : Que, dans le cas de ce dossier, si le demandeur déclare expressément que la chose spécifique, objet du présent litige est la propriété d'un tiers, à savoir la société Entreprise de Presse Clarín Ltée, qu'en conséquence il incombe à cette dernière d'avoir entrepris l'action et non au demandeur qui a comparu au présent procès, car le titulaire des droits est la personne morale et non la personne physique.

¹¹³ *Id.*, p. 4.

¹¹⁴ *Id.*, p. 7.

¹¹⁵ *Id.*

Qu'en l'espèce le demandeur devait comparaître en qualité de représentant de la société et non en son nom, vu qu'il est seulement propriétaire, selon ce qu'il indique, de 99% de la société.

Que, de la sorte on doit accepter l'exception de défaut d'habilitation pour agir soulevée par la défenderesse.”¹¹⁶ [emphasis added]

298. The court thus accepted the objection based on the plaintiff's lack of *jus standi*. The court then went on to examine the time-bar objection, which it also upheld.¹¹⁷
299. The Tribunal considers that, on the face of the passage quoted above, the Santiago court undertook no analysis and made no findings as to the legality of Decree No. 165 under Chilean law and, likewise, did not look into the effects of such a determination on Mr. Pey Casado's ownership of CPP and EPC. What the court did was to accept *pro tem* Mr. Pey Casado's assertion that he was the owner of EPC, which in turn owned the printing press, and then to find that, even on the plaintiff's best case, the action that had been filed could not be received because Mr. Pey Casado would not have been the owner of the printing press.
300. In other words, contrary to Claimants' contention, the court never questioned the validity of Decree No. 165. This is further confirmed if one examines the dispositive section of the judgment which does not contain any wording that would even suggest that Decree No. 165 had been annulled. In fact, the Decree is not mentioned at all:

“CONCERNANT LE FOND :

-Qu'est rejetée en toutes ses parties la demande du feuillet 24, conformément à ce qui a été dit au considérant dix-huitième du présent jugement.”¹¹⁸

301. The Tribunal therefore concludes that, contrary to Claimants' arguments in these proceedings, the Santiago court never examined the question of the alleged nullity of Decree No. 165 under Chilean law and made no findings in this regard. Consequently, as was the case before the First Tribunal and the Resubmission Tribunal,¹¹⁹ Decree No. 165 remains in force in Chile. Therefore, the Tribunal need not examine further the question of whether, if Decree No. 165 had been invalidated, this would have resuscitated Claimants' rights over CPP and EPC and whether, as a result, those rights would have continued to exist after the entry into force of the Treaty. These issues simply do not arise.

¹¹⁶ *Id.*, p. 8.

¹¹⁷ *Id.*, p. 10.

¹¹⁸ *Id.*, p. 11.

¹¹⁹ As regards the Resubmission Tribunal's findings, *see*, Resubmission Award, at 197, 198.

(vi) *Claimants do not own an “investment” consisting of the standards of protection in the Treaty*

302. Claimants argued briefly, in their Memorial, that the standards of protection in the Treaty should themselves be assimilated to an investment:

“Signalons, en passant, que le contexte d’un acte de force du type dont il s’agit ici, le sens même de l’expression « *l’investissement existe encore* » nécessite d’être précisé avant qu’aucune considération puisse être avancée de façon pertinente. En effet, dès lors que l’API attache des droits spécifiques au fait qu’il y ait eu un investissement, ces droits constituent en eux-mêmes un investissement, dont seul, par définition, un Tribunal compétent peut édicter les modalités de mise en œuvre, ou, au contraire, l’extinction.”¹²⁰ [emphasis added]

303. Respondent considers that such an argument is “fanciful”.¹²¹

304. The Tribunal cannot endorse Claimants’ position as it contravenes the express definition included in the Treaty for the term “investment”.

305. The Tribunal considers that, while the definition of the term “investment” in the Treaty is very broad (“any kind of assets, such as goods and rights of all sorts, acquired under the laws of the host country of the investment, including, but not limited to [...]”), it nevertheless is limited to “assets”. The standard of protection under the Treaty cannot, by definition, be qualified as “assets”. They are rights that pertain to “assets” that constitute an “investment”. Moreover, if the Tribunal were to accept the interpretation put forward by Claimants (*quod non*), not only would the Treaty standards themselves be devoid of meaning (it would be contrary to logic to guarantee Fair and Equitable Treatment to an “investment” that consists of “the right to fair and equitable treatment”), but it would also mean that there would be no limitation *ratione materiae* as regards the application of the Treaty. The Tribunal considers that such interpretation cannot be accepted, as it would not be made “in good faith” and in accordance with “the ordinary meaning to be given to the terms of the treaty” (Article 31(1) VCLT).

306. For these same reasons, the Tribunal cannot accept Claimants’ argument that the right to arbitration, which is a right arising from the Treaty provided that all jurisdictional conditions set out therein are met (including that there be a protected “investment”) can constitute an “investment”.

307. For these reasons, the Tribunal holds that the standards of protection in the Treaty cannot be deemed an “investment” under that same Treaty.

¹²⁰ Memorial, fn. 24; *See also*, Counter-Memorial on Jurisdiction, at 254.

¹²¹ Reply on Jurisdiction, at 71.

(vii) *The First Award/ICSID Award cannot be deemed an “investment” within the meaning of the Treaty*

308. This leaves one final issue to examine: whether, as argued by Claimants, the First Award itself can be considered as an “investment” that meets the conditions in Articles 1(2) and 2(2) of the Treaty and also that continued to exist at the time of the alleged breaches. This is an argument that is strongly disputed by Respondent, who argues that an ICSID award does not meet the definition of “investment” in Article 1(2) of the Treaty as it is not acquired in accordance with Chilean law and lacks any connection with the territory of Chile.

309. As explained in the paragraphs below, the Tribunal concludes that the First Award or, perhaps more accurately in the circumstances of the present dispute, the First Award, the First Annulment Decision and the Resubmission Award, whether individually or collectively, do(es) not constitute such an “investment”.

310. As a preliminary matter, the Tribunal notes that Claimants’ arguments are drafted mainly with reference to the First Award, which they contend represents an “investment”. The Tribunal considers that to refer to the First Award in isolation from the First Annulment Decision and the Resubmission Award, is not in conformity with the provisions of the ICSID Convention and with the history of the ICSID arbitration. Indeed, it is not disputed by the Parties that the First Award¹²² was partially annulled by the First Committee and that the Resubmission Tribunal heard and decided anew the issue of the compensation owed the claimants for the breaches identified by the First Tribunal. As a result of the partial annulment of the First Award’s decision and reasoning on damages, that decision and reasoning were retroactively invalidated and effectively replaced by the decision and reasoning of the Resubmission Tribunal on the question of compensation. Unless and until the Resubmission Award is annulled, which has not to date occurred, the Resubmission Award is *res judicata*. This is not disputed by the Parties.¹²³ Consequently, to refer to the First Award only and to ignore the history of its partial annulment and the issuance of the Resubmission Award is in contravention to Articles 52 and 53 of the ICSID Convention. This also means that, contrary to Claimants’ submission, the First Annulment Decision and the Resubmission Award, are not “continuations” of the First Award (or, for that matter, “continuations” of the “investment”). Therefore, for purposes of the present analysis, the Tribunal shall refer to the First Award, the First Annulment Decision and the Resubmission Award jointly as the “**ICSID Award**” and shall consider Claimants’ arguments with reference to this ICSID Award.

311. Prior to examining whether the ICSID Award can be deemed an “investment” under the Treaty, the Tribunal will first ascertain the meaning of the term “investment”.

¹²² See, First Annulment Decision, at 359(1).

¹²³ See, Tr. (En.), 212: 18-22.

312. In so doing, the point of departure of the analysis must be the language of the Treaty, which reflects the agreement of the Contracting Parties. The decisions of other arbitral tribunals, interpreting different treaties, using different language, and between different contracting States, not only are not binding on this Tribunal, but also provide little guidance. Indeed, the term “investment” remains one of the most disputed concepts in investment arbitration to this day. Moreover, there is no consensus on whether an arbitral award, as a matter of principle, can be considered an “investment”, with some tribunals taking the position that the answer is in the negative, while others finding that, in certain situations, an arbitral award could qualify as such, particularly when it is viewed as part of an overall operation that was deemed an investment. The Tribunal has carefully studied these awards, but has reached the conclusion that they are of little assistance in this case, where the answer lies in the language of the Treaty itself. Therefore, for reasons of judicial economy, the Tribunal has decided not to comment on such awards.
313. The Tribunal recalls that Article 1(2) of the Treaty defines the term “investment” as follows:
- “The term ‘investment’ means any kind of assets, such as goods and rights of all sorts, acquired under the laws of the host country of the investment, including, but not limited to, the following:
- Shares and other forms of participation in companies;
 - Claims, securities and rights arising from all types of contributions made for the purpose of creating economic value, expressly including any loans granted for this purpose, whether capitalized or not;
 - Movable and immovable property and rights of any kind related thereto;
 - Any rights in the field of intellectual property, expressly including patents and trademarks, as well as manufacturing licenses and know-how;
 - Rights to engage in economic and commercial activities authorized by law or by virtue of contract, particularly those relating to the prospecting, cultivation, extraction or exploitation of natural resources.”
314. The Tribunal considers that an interpretation of Article 1(2) of the Treaty that is made in good faith, in accordance with “the ordinary meaning to be given to the terms” and in the light of the “object and purpose” of the Treaty (Article 31(1) VCLT) links the concept of “investment”, which is defined broadly (“any kind of ...”), to three elements, which serve as its boundaries, or outer limits. First, the definition of “investment” is asset-based (“[t]he term ‘investment’ means any kind of assets”). Second, according to the Treaty definition, said assets must be acquired “under the laws of the host country of the investment”. Third, the definition of the term “investment” links the concept to a territory (“the host country of the investment”).
315. The Tribunal considers that this interpretation of Article 1(2) of the Treaty is confirmed by the context in which the term “investment” appears and by the object and purpose of the Treaty.

316. In this regard, the Tribunal observes that the substantive standards of treatment in the Treaty are applicable to “investments” that are made in the territory of the host Contracting Party. Article 2 requires each Contracting Party to “promote, insofar as possible, the investments made in its territory”. Article 3 provides that each Contracting Party “shall protect in its territory the investments made in accordance with its laws”. Article 4 likewise stipulates that each Contracting Party “shall guarantee in its territory, in accordance with its domestic laws, fair and equitable treatment of the investments”. Article 5 protects against “[n]ationalization, expropriation or any other measure having similar characteristics or effects[,] ... the investments made in [a Contracting Party’s] territory”. Finally, Article 6 guarantees the free transfer of income “[w]ith regard to the investments made in [a Contracting Party’s] territory”.
317. The Treaty’s Preamble, which not only forms part of the context of Article 1(2), but also illustrates the object and purpose of the Treaty, is likewise clear with respect to the requirement that an “investment” needs to be made in the territory of the host Contracting Party:
- “Seeking to create favourable conditions for investments made by investors of each Party in the territory of the other Party which involve transfers of capital” [emphasis added]
318. On the basis of the above, the Tribunal concludes that the Treaty does not equate all “assets” with an “investment”. The definition of the term “investment”, interpreted on the basis of the principles set out in Article 31 of the VCLT, incorporates all the elements described above, which are cumulative requirements. In other words, in order for an “investment” to be found to exist, an investor must: (i) have an “asset”; (ii) must have acquired the asset under the laws of the host country of the “investment”; and (iii) the “investment” must be of a type that is capable of having a “host country”.
319. Having reached the above conclusion with respect to the meaning of the term “investment” under the Treaty, the Tribunal will now set out the reasons why it has found that the ICSID Award does not meet these criteria.
320. The first reason, which is sufficient in and of itself to dismiss Claimants’ argument, and on the basis of which the Tribunal hereby dismisses Claimants’ argument, is that the ICSID Award does not have a “host country” and cannot be considered as having been made “in the territory” of Chile or, for that matter, of any other country. In contrast to regular arbitrations, arbitration under the ICSID Convention is entirely self-contained, is governed exclusively by the ICSID Convention and its ancillary rules, and, as a result, is entirely insulated from the national laws at the place of arbitration or elsewhere. Indeed, pursuant to Article 53(1) of the ICSID Convention, an ICSID award is “binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”. Therefore, an ICSID award does not have a “host country” as per Article 1(2) of the Treaty, and the Contracting Parties to the Treaty

cannot promote or protect an ICSID award “made in [their] territory” as no ICSID awards are ever made in a State’s territory. The ICSID Award is therefore not an “investment” under Article 1(2) of the Treaty.

321. Moreover, and although this is not determinative of the question, the Tribunal observes that the ICSID Award cannot be considered as an “investment” in light of the fact that it is not an “asset”. Indeed, following the Resubmission Tribunal’s decision that satisfaction was a sufficient remedy for the breaches identified by the First Tribunal, any and all rights that Claimants could have claimed on the basis of the ICSID Award have been exhausted, at least as long as the Resubmission Award stands. Claimants therefore do not have an “asset”, as required under Article 1(2) of the Treaty.
322. The Tribunal concludes that neither the First Award on its own, nor the ICSID Award as a whole (defined as the First Award, the First Annulment Decision and the Resubmission Award jointly) constitutes an “investment” under Article 1(2) of the Treaty. Consequently, *ad fortiori*, they do not comprise an “investment” that existed at the time of the violations alleged by Claimants in this arbitration.

6. Claimants’ other arguments under Objection No. 2 have no merit

323. The Tribunal has concluded above that the application of Articles 3, 4 and 5 in the Treaty requires the existence of an “investment” at the time of each alleged violation. The Tribunal has also concluded that Claimants’ alleged investments do not meet this requirement. However, that is not the end of the analysis. Claimants also base several of their claims on Article 10(5) of the Treaty, which reads as follows:

“The arbitral awards shall be final and binding for the parties to the dispute.”

324. Respondent, for its part, argues that Article 10(5) of the Treaty cannot represent the basis of a new BIT claim.
325. The Tribunal agrees with Respondent.
326. Article 10(5) of the Treaty prescribes the legal effects of an award rendered by an arbitral tribunal constituted on the basis of Article 10. These effects derive automatically and as a matter of law from the Treaty. In other words, the final and binding effects of an award rendered on the basis of Article 10 of the Treaty require no action of recognition (or otherwise) from the parties to the dispute. Simply by being rendered on the basis of Article 10(5), an award is final and binding on the parties. The possible failure by one of the parties to an arbitration to comply with the provisions of the award does and cannot negate that award’s final and binding nature, but may, as the case may be, represent a breach of a different standard of treatment in the Treaty (for instance, the Fair and Equitable Treatment standard).

327. The Tribunal therefore accepts Respondent’s argument that Article 10(5) of the Treaty cannot represent a basis for a Treaty claim.
328. Moreover, and in any event, as the Tribunal’s analysis in Section **VII.C.3** reveals, the prior ICSID Award (*i.e.*, the First Award, the First Annulment Decision and the Resubmission Award) have been recognized as final and binding in their entirety in these proceedings.
329. For all these reasons, the Tribunal finds that it lacks jurisdiction to hear Claimants’ claims based on Article 10(5) of the Treaty.

§

330. For all the reasons developed in this Section **VII.C** of the Award, the Tribunal finds as follows:
- (i) that it lacks jurisdiction to hear Claimants’ claims based on a cause of action other than the Treaty itself; and
 - (ii) that it lacks jurisdiction to hear Claimants’ claims based on Articles 3(1), 4, 5 and 10(5) of the Treaty.
331. Since these findings dispose of all of Claimants’ claims, the Tribunal hereby dismisses Claimants’ claims for lack of jurisdiction.

VIII. COSTS

A. Claimants’ Position

332. Claimants argue that Respondent should be made to bear the entirety of the costs of these bifurcated proceedings for the following reasons: (i) in order to put an end to Respondent’s abuse of Claimants’ rights, which has consisted of Respondent’s persistent denial of Claimants’ rights as investors and of its strategy to make the pursuit of those rights costly for the investors; and (ii) in order to account for the increase in costs resulting from Respondent’s motions (the request to have proceedings in English; the request for bifurcation; the request for a hearing on the bifurcated objections).¹²⁴
333. In particular, Claimants request to be awarded the following amounts, totaling EUR 519,651.21 and USD 16,610.3:
- EUR 252,000: Claimants’ share of the deposit, paid to the PCA¹²⁵;
 - EUR 7,774.82: hearing room rental, interpretation and translation costs;
 - EUR 4,420.22: messaging and stationery costs;
 - EUR 1,516.02 and USD 736.23: travel costs;

¹²⁴ Rejoinder on Jurisdiction, at 194, 195; Tr. (En.), 213: 8-19; C-SC, at 3-6.

¹²⁵ Since the submission of the C-SC, Claimants have paid an additional deposit of EUR 100,000. This has been taken into account by the Tribunal in its decision on costs at Section VIII.C below.

- EUR 236,331.15 (of which 21% is VAT) and USD 15,000: costs of legal representation;
- EUR 15,375 and USD 874: legal expert fees;
- EUR 2,234: translation fees.¹²⁶

334. Claimants also request interest on these amounts, capitalized until full payment.

B. Respondent’s Position

335. Respondent requests that the Tribunal order Claimants to bear the entirety of their costs in these proceedings. Respondent is of the view that such a request is justified by Claimants’ “intent [to] harass[s] the respondent State, or [to] [keep] the case alive simply for the sake of drawing attention to a difficult episode in Chile’s history”.¹²⁷ In Respondent’s opinion, ordering Claimants to bear the costs of the arbitration would be an insufficient deterrent to Claimants pursuing their case “*ad aeternitatem*”.¹²⁸

336. In particular, Respondent requests an award that would compensate them for the below costs, totaling EUR 250,000, USD 1,920,789.92, CLP 36,591,966:

- EUR 250,000: arbitration costs;¹²⁹
- USD 1,920,789.92 and CLP 36,591,966: legal fees and expenses.¹³⁰

337. Respondent also requests interest on these amounts, at a rate of six-month LIBOR plus 2% per annum, starting from the date of the Award until full payment.

C. The Tribunal’s analysis

338. The Tribunal notes that the relevant articles of the UNCITRAL Rules state the following with respect to costs:

“Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term ‘costs’ includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

¹²⁶ C-SC, at 8.

¹²⁷ Reply on Jurisdiction, at 103.

¹²⁸ *Id.*, at 104.

¹²⁹ Since the submission of the R-SC, Respondent has paid an additional deposit of EUR 100,000. This has been taken into account by the Tribunal in its decision on costs at Section VIII.C below.

¹³⁰ R-SC, at 2.

- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at the Hague.

[...]

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

- 339. According to Article 40(1) of the UNCITRAL Rules, the unsuccessful party shall as a rule bear the costs of the arbitration. However, an arbitral tribunal may decide to apportion the costs of the arbitration if it determines that the circumstances of the case so warrant. Moreover, Article 40(2) of the UNCITRAL Rules grants an arbitral tribunal significant discretion with respect to the allocation of the parties’ costs of legal representation and assistance.
- 340. The Tribunal considers that no special circumstances are present in this case that would warrant an allocation of the costs of the arbitration that is different from the default rule provided for in Article 40(1) of the UNCITRAL Rules. Indeed, Claimants are the unsuccessful party in this case, as their claims have been dismissed in their entirety for lack of jurisdiction. The Tribunal is of the view that, as the losing Party, Claimants should bear the entirety of the costs of the arbitration.
- 341. In this respect, the Tribunal notes that the total fees of the members of the Arbitral Tribunal were in the amount of EUR 622,758.44 (EUR 392,383.34 for the President, EUR 64,137.60 for Prof. Dr. Hélène Ruiz Fabri, and EUR 166,237.50 for Mr. Stephen Drymer). In addition, the expenses of the members of the Arbitral Tribunal were in the sum of EUR 8,754.88 (EUR 1,173.76 for the President, EUR 834.80 for Prof. Dr. Hélène Ruiz Fabri, and EUR 6,746.32 for Mr. Stephen Drymer).
- 342. The fees and expenses of the PCA, which was appointed as Registry in these proceedings, were in the amounts of EUR 34,888.14 and EUR 8.78, respectively. The fee of the Secretary-General of the PCA for the designation of an appointing authority was EUR 2,000. In addition, other arbitration expenses (including courier, banking and printing costs) were in the sum of EUR 827.15. Accordingly, the total costs of the arbitration were in the sum of EUR 669,237.39.

343. The Tribunal observes that Claimants paid the EUR 2,000 fee to the Secretary-General of the PCA for the designation of an appointing authority, while all other costs of the arbitration have been fully covered by the advances made by the Parties in equal shares (each Party having made a deposit in the amount of EUR 350,000, for a total of EUR 700,000). Claimants are therefore ordered to reimburse Respondent the amount of EUR 350,000. In accordance with Article 41(5) of the UNCITRAL Rules, the PCA will return the unexpended balance of the deposit to the Parties in equal shares (*i.e.*, EUR 16,381.30 to each Party).
344. The Tribunal is aware of the growing body of jurisprudence in investment arbitration, whereby the costs of legal representation are awarded to the winning party following the application of the principle of *costs follow the event*. The Tribunal, exercising its discretion under Article 40(2) of the UNCITRAL Rules, considers that the *costs follow the event* principle reflects an appropriate allocation of the costs of legal representation in this case as well, but that due consideration has to be given to the complexity of the issues raised by this case. In light of these circumstances, the Tribunal considers that Claimants, as the losing Party, should reimburse Respondent 80% of their costs for legal representation.
345. The Tribunal notes that Respondent has spent USD 1,920,789.92 and CLP 36,591,966 for its legal representation. The Tribunal considers this amount to be reasonable in light of the following circumstances: (i) the fact that these proceedings have been bifurcated only after the submission of a full first round of submissions, covering jurisdiction, liability and damages; (ii) the complexity of the issues present in this case, which was amplified by the length and breadth of the ICSID proceedings between the Parties; and (iii) the costs usually incurred by parties in similar investment arbitration proceedings, where bifurcation was ordered. Claimants are therefore ordered to reimburse Respondent the amounts of USD 1,536,631.94 and CLP 29,273,572.8 (80% of USD 1,920,789.92 and CLP 36,591,966) as costs of Respondent's legal representation.
346. The Tribunal considers that the orders above are sufficient and reflect an appropriate allocation of costs in this arbitration, taking into account all the circumstances of the present case. The Tribunal, exercising its discretion under Article 40 of the UNCITRAL Rules, considers that an order for interest on the above sums is not warranted.

IX. DECISION

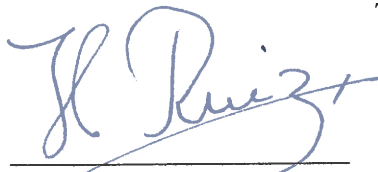
347. For the reasons set out above, the Tribunal decides as follows:

- (i) Finds that the Tribunal does not have jurisdiction to hear any one of Claimants' claims;
- (ii) Orders Claimants to reimburse Respondent the sums of EUR 350,000 (as costs of the arbitration) and USD 1,536,631.94 and CLP 29,273,572.8 (80% of Respondent's legal representation costs);
- (iii) Dismisses all other claims.

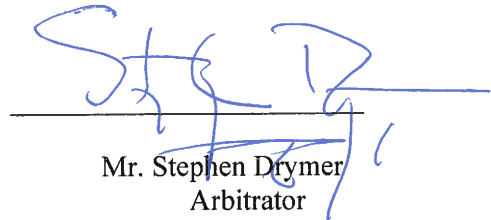
Place of arbitration: Geneva, Switzerland

Date: 28th day of November, 2019

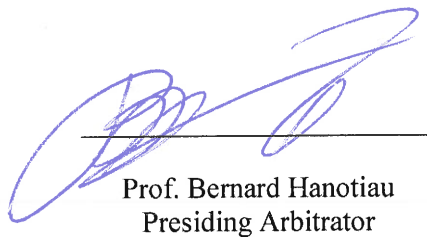
THE ARBITRAL TRIBUNAL:



Prof. Dr. Hélène Ruiz Fabri
Arbitrator



Mr. Stephen Drymer
Arbitrator



Prof. Bernard Hanotiau
Presiding Arbitrator