

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the annulment proceeding between

**VÍCTOR PEY CASADO AND FOUNDATION “PRESIDENTE ALLENDE”**

Claimants in the arbitration  
Defendants in the annulment

and

**REPUBLIC OF CHILE**

Respondent in the arbitration  
Applicant in the annulment

ICSID Case No. ARB/98/2

**DECISION ON THE APPLICATION FOR  
ANNULMENT OF THE REPUBLIC OF CHILE**

*Members of the ad hoc Committee*

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Professor Piero Bernardini  
Professor Ahmed El-Kosheri

*Secretary of the ad hoc Committee*

Ms. Eloïse Obadia

*Assistant to the ad hoc Committee*

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Date of Dispatch to the Parties: 18 December 2012

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award of Arbitral Tribunal rendered on 8 May 2008
BIT	The Investment Treaty Between the Kingdom of Spain and the Republic of Chile, entered into force on 29 March 1994
Cl. Anc. Req.	Claimants' Ancillary Request dated 4 November 2002 [Arbitration Proceeding]
Cl. C-Mem. Annulment	Claimants' Counter-Memorial on Annulment
Cl. Pre-H. Skel.	Claimants' Pre-Hearing Skeleton on Annulment
Cl. Rej. Annulment	Claimants' Rejoinder on Annulment
Cl. RfA.	Claimants' Request for Arbitration dated 3 November 1997 [Arbitration Proceeding]
Cl. Rep. Jur. and Merits	Claimants' Reply on Jurisdiction and Merits dated 23 February 2003 [Arbitration Proceeding]
CN	Exhibit Claimants' Counter-Memorial on Annulment
CPP	Consorcio Periodístico y Publicitario S.A.
DP	Exhibit Claimants' Rejoinder on Annulment
EPC	Empresa Periodística Clarín, Ltda.
ICSID or the Centre	International Centre for Settlement of Investment Disputes

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
RA	Exhibit filed by Respondent in Annulment Proceeding
RALA	Legal Authority filed by Respondent in Annulment Proceeding
Resp. Mem. Annulment	Respondent's Memorial on Annulment
Resp. Mem. Jur. Arb.	Respondent's Memorial on Jurisdiction dated 20 July 1999 [Arbitration Proceeding]
Resp. Pre-H. Skel.	Respondent's Pre-Hearing Skeleton on Annulment
Resp. Rep. Annulment	Respondent's Reply on Annulment
Tr. Annulment [day] [page: line] (Eng.), (Fr.), or (Spa.)	Transcript of the hearing on Annulment held: 7 and 8 June 2011[English] [French] [Spanish]
Tr. Arb. [day] [page: line] (Spa.) or (Fr.)	Transcript of the hearing on jurisdiction and merits held: 5 to 7 May 2003 [Spanish] [French] [Arbitration Proceeding]
Tr. Jur. [day] [page: line] (Spa.) or (Fr.)	Transcript of the hearing on jurisdictional questions held: 15 and 16 January 2007 [Spanish] [French] [Arbitration Proceeding]

## I. THE ANNULMENT PROCEEDINGS

1. On 5 September 2008, the Republic of Chile (the “**Republic**” or “**Respondent**” or “**Chile**”) filed with the then Acting Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) an application (the “**Application**”) requesting the annulment of an award rendered on 8 May 2008 in ICSID Case No. ARB/98/2 (the “**Award**”) between Víctor Pey Casado and the Foundation “Presidente Allende” on one side (the “**Claimants**”) and the Republic on the other side. The Centre acknowledged receipt of the Application and forwarded it to the Claimants on 10 September 2008.
2. The Application was filed while the Award was the subject of a revision proceeding initiated by the Claimants on 2 June 2008. The revision application was registered on 17 June 2008 and the Tribunal, composed of the same arbitrators who had rendered the Award, issued its decision on 18 November 2009 dismissing the application for revision.
3. By letter of 18 September 2008, the Claimants argued that the Application filed by the Republic was inadmissible as it had been filed in English while the languages of the original arbitration proceeding and the pending revision proceeding were French and Spanish. By letters of 8 October and 22 October 2008, the Claimants reiterated their submission that the Application was inadmissible on the additional ground that the Application had not been signed by the agents designated by the Republic of Chile before ICSID.
4. The Secretary-General of ICSID registered the Application on 6 July 2009 and transmitted a Notice of Registration to the parties on that date. In her transmittal letter, the Secretary-General indicated that she would refuse to register an application for annulment only if the conditions set forth in Rule 50 of the Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) were not met and that her registration of the Application was without prejudice to the powers of the *ad hoc* Committee under

Articles 41 and 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”) with respect to jurisdiction and the merits.

5. In the Notice of Registration, the Secretary-General noted that the Application contained a request for a provisional stay of the Award (the “**Request**”) pursuant to Article 52(5) of the ICSID Convention and Rule 54(1) of the Arbitration Rules. The Secretary-General further stated that: “Rule 54(2) of the Arbitration Rules provides that the Secretary-General shall, together with the notice of registration of the application, inform the parties of the provisional stay of the award. I note, however, that in the context of the application for revision of the Arbitral Award, the enforcement of the Arbitral Award was stayed on August 5, 2008 by the Arbitral Tribunal before which the issue is currently pending”.
6. Further to the issuance of the Arbitral Tribunal’s decision on the revision on 18 November 2009, the Republic requested, on 2 December 2009, that the Centre appoint an *ad hoc* Committee and confirm the provisional stay of enforcement of the Award pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the Arbitration Rules. By letter of 8 December 2009, the Claimants argued that the Republic’s request was inadmissible for the same reasons as those raised in connection with the Application.
7. On 4 December 2009, pursuant to Arbitration Rule 54(2), the Acting Secretary-General of ICSID informed the parties of the provisional stay of the Award.
8. The *ad hoc* Committee composed of Professor Piero Bernardini (a national of Italy), Professor Ahmed El-Kosheri (a national of Egypt) and Mr. L. Yves Fortier, C.C., Q.C., (a national of Canada) was constituted on 22 December 2009. The parties were notified that Ms. Eloïse Obadia, Senior Counsel, ICSID, would serve as Secretary of the Committee. By letter of 4 January 2010, the Secretary informed the parties that the Committee had designated Mr. L. Yves Fortier as President of the Committee.



9. The Committee invited the parties to submit further written observations on the issue of admissibility and the stay of enforcement of the Award which stay was continued by the Committee on 21 January 2010 pursuant to Article 52(5) of the ICSID Convention. The parties were also given the opportunity to make oral presentations on these questions during the First Session, held in Paris on 29 January 2010. The parties filed further written observations on the question of admissibility after the First Session.
10. During the First Session, the parties approved the appointment of by Ms. Renée Thériault of Ogilvy Renault (as it then was), an associate of the President, as assistant to the Committee. Ms. Thériault ceased her functions on 24 December 2011. The parties also reached an agreement on the procedural languages: the Claimants would file their submissions in French and submit a Spanish translation within 15 days of the filing whereas the Respondent would file its submissions in English and submit a Spanish translation within 15 days of the filing. The parties agreed that all decisions of the Committee would be issued in the three official languages of the Centre.
11. On 4 May 2010, the *ad hoc* Committee issued a Decision rejecting the Claimants' Request to declare inadmissible the Republic's Application for the Annulment of the Award (the Decision was transmitted to the parties on 6 May 2010).
12. On 5 May 2010, the *ad hoc* Committee issued a Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award continuing the stay of the enforcement of the Award pending its decision on the Application for Annulment (the Decision was transmitted to the parties on 7 May 2010).
13. On 8 June 2010, the *ad hoc* Committee issued Procedural Order N° 1 concerning the procedural calendar for the Parties to file their submissions. In accordance with that calendar, the Republic of Chile filed its memorial on annulment on 10 June 2010 ("**Resp. Mem. Annulment**"). Víctor Pey Casado and Presidente Allende Foundation filed a counter-memorial on 15 October 2010 ("**Cl. C-Mem. Annulment**"). Chile filed its reply

on 22 December 2010 (“**Resp. Rep. Annulment**”). Víctor Pey Casado and Presidente Allende Foundation filed their rejoinder on 28 February 2011 (“**Cl. Rej. Annulment**”).

14. On 18 April 2011, the *ad hoc* Committee issued Procedural Order N° 2 concerning various procedural matters, including the maintenance of the hearing dates and admissibility of evidence and a request to the parties to refrain from publishing or disclosing sensitive documents pertaining to the annulment proceeding.
15. On 5 May 2011, the *ad hoc* Committee issued Procedural Order N° 3 concerning further procedural matters including confirmation of the hearing dates, admissibility of evidence and amending Procedural Order N° 2.
16. On 27 May 2011, the parties filed Pre-Hearing Skeletons (“**Cl. Pre-H. Skel**” and “**Resp. Pre-H. Skel.**”).
17. The hearing was held in Paris on 7 and 8 June 2011.
18. At the conclusion of the hearing, the President closed the oral phase of the proceedings, and indicated that the *ad hoc* Committee would notify the parties through the Secretariat when it had reached its Decision.
19. The *ad hoc* Committee then deliberated by various means of communication, including at meetings in Paris on 8 June 2011 and 29 September 2011. On 23 June 2012, pursuant to Arbitration Rule 28(2), the Committee invited the parties to submit their respective statements of costs by 6 July 2012. The Claimants did so on 6 July 2012 and the Republic, with the approval of the Committee, filed its statement of costs on 13 July 2012.
20. On 23 June 2012, the proceeding was declared closed pursuant to Rules 53 and 38(1) of the ICSID Arbitration Rules. In accordance with Rules 53 and 46 of the ICSID Arbitration Rules, the Committee, by letter of 21 October 2012, extended by 60 days the period to draw up and sign its Decision in the three official languages of the Centre.

## II. THE HISTORICAL BACKGROUND AND THE ARBITRATION PROCEEDINGS

21. As will be seen, this has been a very protracted arbitral proceeding. The factual matrix consists of events which span more than four decades and the procedural history before ICSID commenced in October 1997. The Award of the Tribunal was issued on 8 May 2008.
22. Chile, in its Memorial on Annulment, has presented a summary of what it avers constitutes the relevant matrix to its challenge of the Award, including both the historical background and the procedural history of the case. This summary is characterized by Chile as being undisputed by the parties, except where otherwise noted.<sup>1</sup> The Committee finds this summary very helpful in contextualizing Chile's Application and thus will reproduce it:

### A. Historical Background

23. Chile summarizes the factual matrix of its dispute with the Claimants as follows.<sup>2</sup> The Committee agrees that this summary is accurate.

19. **Mr. Víctor Pey Casado** was born in Spain in 1915. He has been a **Spanish national** from birth and throughout his life. This issue was not in controversy in the arbitration, the principal disagreement between the parties being whether or not he had been a Chilean national on certain critical dates for ICSID jurisdictional purposes.

20. Mr. Pey **moved to Chile** at the age of 24, in 1939, and **resided in Chile** for 34 years until 1973. During that time he married a Chilean and had children in Chile. In 1958 he applied to obtain the **Chilean nationality by nationalization**, which was conferred upon him in December 1958.

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<sup>1</sup> See Resp. Mem. Annulment at para. 18.

<sup>2</sup> *Ibid.* at paras. 19-31.

21. In 1970, **Mr. Salvador Allende**, who was a friend of Mr. Pey, became President of Chile.
22. Throughout his decades of residence in Chile, Mr. Pey had had several different jobs, but in the early 70's he became associated with a **Chilean newspaper called "El Clarín."** This newspaper, which had been created and was owned for many years by a well-known figure in the Chilean media named **Darío Sainte-Marie**, was controlled by a company called **Consortio Periodístico y Publicitario, S.A. ("CPP")**, through a wholly owned subsidiary of CPP called **Empresa Periodística Clarín, Ltda. ("EPC")**.
23. "El Clarín" had a left-leaning political orientation and was one of the principal media supporters of President Allende, who was a socialist. Mr. Pey became a key figure in the **management of "El Clarín"** during the 1972-1973 time frame. (This too was not in dispute; rather, the main area of disagreement between the parties was whether Mr. Pey had ever been an *owner* of CPP).
24. The 1972-1973 time period was one of very intense political and ideological turmoil in Chile. On **11 September 1973**, President Allende was overthrown in a **coup d'état** led by General Augusto Pinochet. That same day, military troops occupied the **physical premises of "El Clarín,"** seizing papers located in Mr. Pey's office there. The property thereafter remained under complete control by the military (and was subsequently **confiscated formally by means of Decree No. 165 in 1975**).
25. Soon after the 1973 coup d'état, **Mr. Pey moved to Venezuela and thereafter to Spain**, where he resided until at least **1989**, which was the year of the **return of democracy in Chile** following 16 years of military government.
26. Upon his return to Chile, Mr. Pey applied for and obtained from the Chilean Government **benefits for returning Chilean political exiles**.
27. In **1991**, the **Chile-Spain bilateral investment treaty ("BIT")** was signed.
28. In **1994**, the **Chile-Spain BIT entered into force**.
29. In 1995, Mr. Pey filed in the First Civil Court in Santiago a request for compensation for the confiscation of a Goss printing machine that was on the "El Clarín" premises when the property was seized by the military. This claim is referred to hereinafter as "**the Goss machine case.**"
30. On 23 July 1998, Chile promulgated **Law No. 19.568**, which was designed to compensate those persons who had suffered confiscations of property at the hands of the military government through an administrative process. After being informed of his right to recover under this law, in a letter dated **24 June 1999**, Mr. Pey expressly **waived his right to seek compensation under Law 19.568** for the expropriation of the CPP and EPC.

31. On **28 April 2000**, the Chilean Ministry of National Assets issued **Decision 43**, in which it authorized compensation to four individuals (or, as applicable, their heirs) for the expropriation of CPP and EPC, as such individuals had proven to the satisfaction of the Ministry to be the genuine owners of those companies. These individuals were: **Darío Sainte-Marie, Ramón Carrasco, Emilio González and Jorge Venegas.**

## **B. Procedural History**

24. Chile's summary of the arbitration proceedings follows.<sup>3</sup> The Committee agrees that this summary is accurate.

33. **Mr. Pey consented to ICSID arbitration** by means of a letter dated **2 October 1997**, addressed to the Chilean Government. This was the first of the two "critical dates" relevant to the ICSID Convention's nationality-related jurisdictional requirements for claimants who are natural persons (set forth in Article 25(2)(a)). Mr. Pey filed his **arbitration request** at ICSID on **7 November 1997. The request was registered on 20 April 1998**, which was the second critical date.

34. The **first Tribunal** was constituted with **Mr. Francisco Rezek** as President, **Mr. Mohammed Bedjaoui** (appointed by the Claimants) and **Mr. Jorge Witker** (appointed by Chile). Following a challenge to Mr. Witker by the Claimants, he resigned, and Chile named **Mr. Galo Leoro Franco** in his place.

35. **Between 1998 and 2000**, the parties held a round of **jurisdictional written pleadings and a jurisdictional hearing**. Only days after the Tribunal's deliberations had concluded, the Claimants submitted a letter dated **12 March 2001**, in which **Claimants asked Mr. Rezek to resign**, on the basis that he had improperly admitted into evidence certain documents submitted by Chile at the jurisdictional hearing (and therefore, according to the Claimants, out of time). **Mr. Rezek resigned the very next day, on 13 March 2001.** In his resignation letter, Mr. Rezek denied the Claimants' allegation but resigned anyway, invoking the "loss of confidence" in him by one of the Parties.

36. Mr. Rezek was succeeded by **Mr. Pierre Lalive**, who asked that an entirely new round of written submissions be made on the jurisdictional issues. This was done in the 2000-2001 timeframe. Also during that timeframe, the Claimants submitted a provisional measures request, asking the Tribunal to stay the execution of Decision 43. The request was rejected by the Tribunal in a

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<sup>3</sup> *Ibid.* at paras. 33-45.

**Provisional Measures Decision** dated **25 September 2001**, in part on the basis that Decision 43 could not affect the Claimants' rights since it did not involve the Claimants but rather third parties.

37. On **8 May 2002**, the Tribunal headed by Mr. Lalive issued its jurisdictional decision, in which it declined to rule on Chile's objections, and instead **joined the jurisdictional issues to the merits**. The merits phase thus was resumed as of that date.

38. Between January and April 2003 the parties exchanged written pleadings on jurisdiction and the merits, culminating in a **hearing on jurisdiction and merits held in Washington in May 2003**.

39. The Tribunal thereafter failed to issue its Award for well over two years. In **August 2005**, following certain reports made by Mr. Leoro Franco to a Chilean official (who was not involved in the arbitration) concerning irregularities in the Tribunal's deliberations, **Chile challenged all three arbitrators** on the Tribunal. On **26 August 2005**, Mr. **Leoro Franco resigned**, citing as a motive only the loss of confidence of one of the parties.

40. On **21 February 2006**, Mr. **Bedjaoui was disqualified** by ICSID (the first and only disqualification in ICSID history). Thereafter, the Claimants named **Mr. Mohammed Chemloul**. **Mr. Emmanuel Gaillard** was named as the third arbitrator (by ICSID, because Mr. Leoro's co-arbitrators had not accepted his resignation, as a result of which under the applicable ICSID rules, the Centre designates the replacement of the resigning arbitrator). Thus, on **14 July 2006**, **the Tribunal was reconstituted**, with Messrs. Lalive (President), Chemloul, and Gaillard.

41. On **16 August 2006**, the Republic sent a letter to the Tribunal in which, in light of the Tribunal's constitution with two new members, it set forth a **request for new written submissions and a hearing on all issues** (both jurisdictional and merits-related). This request was rejected and prompted a series of exchanges between the parties and the Tribunal, the net result of which was a **complete rejection by the Tribunal of Chile's** proposal for new written submissions, and a decision to authorize only a jurisdictional hearing of limited scope, circumscribed to five specific jurisdictional questions circulated by the Tribunal to the parties. The Republic asked that the scope be broadened to other issues, but the Tribunal rejected that request as well. The **jurisdictional hearing** was held on **5-6 January 2007**, in Paris.

42. Almost a year and a half later, on **8 May 2008**, the Tribunal issued its Award.

43. On **2 June 2008**, the Claimants submitted a **Request for Revision** of the 8 May 2008 Award, invoking certain alleged new facts that in the Claimants' view justified having the Tribunal elevate the amount of the damages awarded to US\$ 797 million (up from the figure of over US\$ 500 million they had requested in

their Arbitration Request, and from the revised figure of almost US\$ 400 million cited in their 2003 Counter-Memorial on the Merits and Jurisdiction).

44. On **5 September 2008**, the Republic filed its **Annulment Request**.

45. On **18 November 2009**, the Revision Proceeding Tribunal (composed of the same arbitrators as the panel that issued the Award) issued its **Revision Decision**, in which it denied the Claimants' request in its entirety, and moreover awarded costs to the Republic. [Emphasis in original]

### III. THE TRIBUNAL'S AWARD

#### A. The Tribunal's Findings on Jurisdiction With Regards to Mr. Pey Casado

##### (1) Investment

25. After an extensive review of the oral and documentary evidence as well as the parties' arguments, the Tribunal concluded that Mr. Pey Casado, in 1972, purchased all the shares of Consorcio Periodístico y Publicitario S.A. ("CPP") which owned all the shares of Empresa Periodística Clarín Ltda. ("EPC") and that this acquisition constituted an investment for purposes of Article 25 of the ICSID Convention.
26. The pertinent findings of the Tribunal in respect of Mr. Pey Casado's investment are the following:

180. [...] Après un examen attentif des arguments et des pièces soumises par les parties, le Tribunal, dans l'exercice de son pouvoir d'appréciation des preuves, est parvenu à la conclusion que M. Pey Casado a acheté l'intégralité des actions de la société CPP S.A. au cours de l'année 1972. Cette conclusion repose sur trois éléments principaux que sont la conclusion de ce que les parties appellent les « *Protocoles d'Estoril* », complétés par ce qu'elles appellent le « *Document de Genève* », les versements effectués au profit de M. Darío Sainte Marie pour un montant total de 1,28 million USD et la remise à M. Pey Casado, en plusieurs paquets, des titres de la société accompagnés de leurs formulaires de transfert signés en blanc.

[...]

196. Au vu des éléments qui précèdent, le Tribunal est en mesure de conclure que M. Pey Casado a effectivement fait l'acquisition, pour la somme de 1,28

million USD, de la totalité des titres de la société CPP S.A., qui elle-même possédait l'intégralité du capital de la société EPC Ltda.

[...]

229. Le Tribunal conclut que, au moment où a été effectuée la saisie du journal El Clarín, M. Pey Casado devait être considéré comme le seul propriétaire légitime des actions de la société CPP S.A.

[...]

233. En l'espèce, les trois conditions qui commandent la qualification de l'investissement, 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, sont à l'évidence satisfaites.

a) M. Pey Casado a en effet apporté ses propres capitaux afin d'acquérir les entreprises CPP S.A. et EPC Ltda. Il leur a également apporté son savoir-faire d'ingénieur et s'est impliqué dans la gestion du journal en assumant les fonctions de président du conseil d'administration de la société CPP S.A.

b) M. Pey Casado a effectué son investissement pour une durée indéterminée, au moins pour plusieurs années. Le fait que les titres des sociétés CPP S.A. et EPC Ltda et leurs biens ait été saisis ne saurait sérieusement être invoqué[] pour conclure que la condition de durée n'est pas satisfaite en l'espèce.

c) Enfin, l'acquisition et l'exploitation d'un journal, certes largement diffusé, est une opération présentant certains risques, le secteur d'activité étant marqué[] d'une forte spécificité et le contexte économique et politique de l'époque étant incertain.

[...]

235. Le Tribunal conclut des développements qui précèdent que la condition d'investissement au sens de l'article 25 de la Convention CIRDI est bien satisfaite en l'espèce.

## **(2) Nationality**

27. The Tribunal then inquired whether, for purposes of Article 25(2)(a) of the ICSID Convention, Mr. Pey Casado, on the two "critical dates" of 2 October 1997 and 20 April 1998, had dual nationalities, that of Spain and that of Chile since, if he did, he would be expressly excluded from the scope of the ICSID Convention.



28. After having summarized the debated questions which it had to determine, the Tribunal said:

252. [...] Les seules questions décisives en l'espèce sont celles de savoir si, aux dates critiques, il avait conservé la nationalité chilienne, comme le prétend la défenderesse dans son exception d'incompétence, ou si, comme l'opposent les parties demanderesses, il en avait été privé ou y avait renoncé valablement.

29. The Tribunal then proceeded to analyze the law applicable to the question of nationality and concluded :

260 [...] c'est en appliquant le droit chilien que doit être examinée la question de savoir si en l'espèce les autorités chiliennes ont, comme il est allégué par l'intéressé, privé M. Pey Casado de sa nationalité chilienne, ou bien, s'il s'avère que tel n'a pas été le cas, si M. Pey Casado a valablement renoncé à la nationalité chilienne.

30. The Tribunal then proceeded to inquire whether Mr. Pey Casado was deprived of or renounced his Chilean nationality prior to the two critical dates. The Tribunal concluded that Mr. Pey Casado was not deprived of his Chilean nationality.<sup>4</sup>

31. After having found that Mr. Pey Casado “demeurait double national espagnol/chilien jusqu'en 1997”<sup>5</sup> the Tribunal addressed the crucial question whether “comme il l'a allégué, M. Pey Casado a valablement renoncé à sa nationalité chilienne par ses déclarations faites en 1997, ce qui est contesté par l'État défendeur.”<sup>6</sup>

32. After an exhaustive review of Chilean law on this question and an analysis of the expert evidence adduced by the parties, the Tribunal concluded:

307. De l'avis du Tribunal arbitral, la défenderesse n'est pas parvenue à apporter une démonstration convaincante de l'impossibilité ou l'illégalité, en droit chilien,

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<sup>4</sup> See Award at para. 274.

<sup>5</sup> *Ibid.* at para. 285.

<sup>6</sup> *Ibid.* at para. 286 (emphasis in Award).

d'une renonciation volontaire à la nationalité chilienne, en l'absence de textes précis et de jurisprudence pertinente. [...]

322. Il revient donc au Tribunal arbitral d'apprécier le contenu et les effets du droit chilien sur la nationalité et de l'appliquer au cas d'espèce. Ce faisant, le Tribunal est conduit à conclure de ce qui précède la validité d'une renonciation volontaire à la nationalité chilienne lorsque la partie renonçant est double nationale, renonciation dont la réalité a été prouvée par la première partie demanderesse.

323. Aussi pour les raisons indiquées ci-dessus, le Tribunal arbitral estime n'être pas en mesure d'admettre l'exception d'incompétence fondée sur l'allégation selon laquelle la première partie demanderesse posséderait, à la date pertinente, la nationalité chilienne.

### **(3) Consent**

#### *(i) Investment Under the BIT*

33. Finally, the Tribunal sought to determine whether, under the terms of the Spain/Chile BIT, Chile had consented to the arbitration of its dispute with Mr. Pey Casado.

34. There ensued a lengthy dissertation by the Tribunal with respect to the relevant Articles of the BIT, particularly Articles 1(2) and 2. It then opined as follows:

368. La formulation de l'article 1(2) reflète une conception large de la notion d'investissement. Le Tribunal constate d'emblée que l'achat des titres de CPP S.A. et d'EPC Ltda est couvert par la définition de l'investissement établie par l'article 1(2) qui considère comme un investissement les « *actions et autres formes de participation dans les sociétés* ». La seule condition posée par cet article est celle de l'acquisition en conformité au droit de l'Etat d'accueil.

369. L'article 2(2) précise que les investissements effectués antérieurement à l'entrée en vigueur de l'API ne bénéficieront de la protection de l'API que s'ils peuvent être qualifiés d'investissements étrangers au sens de la législation de l'Etat d'accueil. Le Tribunal estime que la législation à laquelle fait référence l'API est la législation chilienne en vigueur au moment auquel l'investissement est réalisé, c'est-à-dire en 1972.

370. Pour que l'API soit applicable à une opération réalisée en 1972, il est nécessaire que l'opération litigieuse corresponde à la définition de l'investissement établie par l'article 1(2) de l'API et qu'elle ait la qualité d'investissement étranger au sens de la législation chilienne appliquée à l'époque.

35. The Tribunal then found:

375. En l'espèce, les articles 1(2) et 2(2) ne posent pas de difficultés particulières d'interprétation. Le préambule, composé de trois brefs paragraphes et rédigés en termes très généraux, reflète essentiellement le souhait de créer des conditions favorables à l'investissement entre les deux Etats parties. Il est clair que ces trois paragraphes ne contiennent aucune disposition de fond susceptible de créer des conditions supplémentaires à l'octroi de la protection offerte par l'API. Si le Tribunal acceptait l'interprétation de la défenderesse, il consacrerait une interprétation particulièrement restrictive du terme investissement au sens des articles 1(2) et 2(2) de l'API allant contre la lettre et l'esprit du préambule. Une telle démarche serait de toute évidence contraire à l'article 31 de la Convention de Vienne sur le droit des traités.

[...]

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

36. The Tribunal then set out Chile's last argument on this issue:

380. La défenderesse a concentré son argumentation sur la Décision n°24 dont elle affirme qu'elle est entrée en vigueur au Chili le 30 juin 1971, qu'elle était applicable et effectivement appliquée et qu'elle n'a pas été respectée par l'investissement étranger que M. Pey Casado prétend avoir réalisé en 1972.

37. The Tribunal dismissed Chile's argument and concluded categorically that Mr. Pey Casado's investment met the criteria of the BIT. It stated:

411. Au vu de l'ensemble des développements qui précèdent, le Tribunal conclut qu'il n'existait pas, dans le droit chilien en vigueur en 1972, de définition établie de l'investissement étranger et que l'opération réalisée par M. Pey Casado s'est conformée au droit chilien qui lui était applicable. En conséquence, le Tribunal considère que l'investissement de M. Pey Casado, l'achat d'actions d'une société chilienne du secteur de la presse au moyen de paiements en devises étrangères effectués sur des comptes bancaires en Europe, satisfait les conditions posées par l'API et plus particulièrement par ses articles 1(2) et 2(2).

(ii) *Nationality Under the BIT*

38. After referring to the definition of “investor” in Article 1 of the BIT, the Tribunal had no difficulty in concluding that Mr. Pey Casado “remplit la condition de la nationalité au sens de l’API”.<sup>7</sup>

39. Previously, the Tribunal had concluded:

416. Dans le cas d’espèce, il suffit pour M. Pey Casado de démontrer qu’il possédait la nationalité espagnole au moment de l’acceptation de la compétence du tribunal arbitral sur le fondement de l’API et, pour bénéficier de la protection de fond du traité, au moment de la ou des violations alléguées de l’API. Comme on l’a vu dans les développements qui précèdent, cette condition est satisfaite.

(iii) *Jurisdiction “Ratione Temporis” under the BIT*

40. The Tribunal established that the investor’s 1972 investment in Chile “est couvert par l’API”<sup>8</sup> under Article 2(2).

41. The Tribunal then inquired whether the three disputes arose after the entry into force of the BIT on 29 March 1994. According to the investor, the first one occurred in 1995, the second in 2000 and the third in 2002.

42. In turn, the Tribunal, after having reviewed the evidence and made reference to prior ICSID cases dealing with the issue of how to determine the date on which a dispute crystallizes for purposes of assessing whether it falls under a BIT providing consent to ICSID jurisdiction, ruled affirmatively that the three disputes crystallized after the entry into force of the BIT and that it was thus competent “*ratione temporis*”. It found:

446. Le Tribunal en conclut que le différend est né après l’entrée [en] vigueur du Traité, les parties n’ayant pas exprimé et opposé leurs différences de vues avant

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<sup>7</sup> *Ibid.* at para. 418.

<sup>8</sup> *Ibid.* at para. 432.

l'année 1995. Les demanderesses ont précisé à plusieurs reprises qu'il fallait distinguer le différend et les faits à l'origine du différend. Le Tribunal partage cette analyse. Comme l'a récemment rappelé le tribunal arbitral constitué dans l'affaire *Duke Energy*, « *What is decisive of the Tribunal's jurisdiction ratione temporis is the point in time at which the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place.*

[...]

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

[...]

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

(iv) *Fork-in-the-Road Provision in the BIT*

43. With respect to its jurisdiction over Mr. Pey Casado, it then remained for the Tribunal to determine whether the investor, in the light of Article 10 of the BIT, had breached that fork-in-the-road provision by instituting a claim before the courts of Chile.
44. The Tribunal then recalled the triple identity test and concluded categorically:

486. Si l'un des trois éléments de la triple identité rappelée ci-dessus fait défaut, la clause d'option irrévocable ne peut être appliquée. Or, cette triple identité n'a jamais existé dans la présente affaire.

(v) *Conclusion*

45. The Tribunal thus dismissed the challenge of Chile to its jurisdiction over Mr. Pey Casado. It said, in conclusion:

500. Dès lors, le Tribunal arbitral ne peut que rejeter l'exception qui a été soulevée par la défenderesse et admettre sa compétence pour statuer sur le fond du litige pour ce qui concerne la première partie demanderesse, M. Pey Casado.

**B. The Tribunal's Findings on Jurisdiction With Regards to the Foundation**

**(1) Investment**

46. The Tribunal first recalled that the “*Fundación Presidente Allende*” was constituted under Spanish law with its head-office in Spain by Mr. Pey Casado on 6 October 1989.
47. After having examined the evidence, the Tribunal concluded that:

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

48. The Foundation had thus acquired the status of investor under the BIT.<sup>9</sup>

**(2) Nationality**

49. The Tribunal had no hesitation in concluding that “... la Fondation Presidente Allende, étant incorporée et ayant son siège en Espagne, remplit à l'évidence la condition de la nationalité au sens de l'article 25 de la Convention CIRDI”.<sup>10</sup>

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<sup>9</sup> See Award at para. 543.

<sup>10</sup> *Ibid.* at para. 550.

### **(3) Consent**

50. The Tribunal also found that “... il est clair que la Fondation Presidente Allende a consenti à l’arbitrage (à l’exclusion de ce qui concernait la rotative Goss) le 6 octobre 1997.”<sup>11</sup>

## **C. The BIT**

### **(1) Investment**

51. After referring to Article 1(2) of the BIT and calling in aid the Award of the Tribunal in the *CME Czech Republic B.V. v. The Czech Republic*,<sup>12</sup> the Tribunal found that the Foundation “satisfait la condition d’investissement au sens de l’API”.<sup>13</sup>

### **(2) Nationality**

52. The Tribunal referred to the definition of “investor” in Article 1(1) of the BIT and concluded that the Foundation had the Spanish nationality.

### **(3) Jurisdiction *Ratione Temporis* under the BIT**

53. The Tribunal reasoned that the conclusion it had reached in respect of its jurisdiction *ratione temporis* over Mr. Pey Casado’s disputes also applied to its jurisdiction over the Foundation. It said:

567. Pour ces raisons, le Tribunal estime que les conclusions auxquelles il est arrivé quant à sa compétence *ratione temporis* pour connaître des demandes de M. Pey Casado s’appliquent également aux demandes faites par la Fondation Presidente Allende et qu’il est donc compétent *ratione temporis* pour connaître des trois différends invoqués par la Fondation Presidente Allende.

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<sup>11</sup> *Ibid.* at para. 553.

<sup>12</sup> *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Award, dated 14 March 2003.

<sup>13</sup> See Award at para. 560.

#### (4) Conclusion

54. The Tribunal thus dismissed Chile's challenge to its jurisdiction over the "*Fundación Presidente Allende*" in the following words:

568. 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 en 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 Presidente Allende.

#### D. The Tribunal's Findings on the Violations of the BIT

##### (1) Application of the BIT *Ratione Temporis*

55. The Claimants submitted to the Tribunal that: "L'application combinée des paragraphes 2.2 et 2.3 permettrait de conclure que '*le Traité [l'API] peut s'appliquer à des faits antérieurs à l'entrée en vigueur du Traité*' car l'API ne contient '*aucune date butoir excluant de son champ d'application des faits (actes de dépossession) à l'origine d'une controverse*'. Dès lors qu'une controverse est née entre les parties en 1995, postérieurement à l'entrée en vigueur du traité, les dispositions de fond de ce dernier sont applicables à des faits antérieurs à son entrée en vigueur."<sup>14</sup>
56. After a thorough review of the pertinent facts, various Chilean decrees and ministerial decisions as well as the parties arguments, the Tribunal concluded as follows:

600. Après examen des faits et des prétentions des parties, le Tribunal est parvenu à la conclusion que l'expropriation résultant du Décret n°165 ne peut être analysée comme un fait illicite continu et ne peut se voir appliquer les dispositions de fond de l'API. En revanche, les dispositions de fond de l'API sont applicables *ratione temporis* à la violation résultant de la Décision n°43 et au déni de justice allégué par les demanderesse, ces actes étant postérieurs à l'entrée en vigueur du traité.

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<sup>14</sup> *Ibid.* at para. 578.



## (2) Denial of Justice and Fair and Equitable Treatment

57. The Tribunal's reasoning and finding in respect of the breach by Chile of Article 4 of the BIT are well illustrated in the following paragraphs of the Award. The Committee will quote them *in extenso*:

653. La question se pose en particulier de savoir si le comportement des autorités chiliennes, législatives, administratives et judiciaires, peut ou non être considéré comme constituant un « *déni de justice* » et une violation du devoir d'accorder à l'investissement étranger une protection suffisante, soit plus précisément, un « *traitement juste et équitable* » au sens de l'article 4 (1) de l'API ainsi conçu :

*« Chaque Partie garantira dans son territoire, en accord avec sa législation nationale, un traitement juste et équitable aux investissements réalisés par des investisseurs de l'autre Partie, sous des conditions non moins favorables que pour ses investisseurs nationaux ».*

[...]

658. Dans le contexte spécifique du présent litige, tel qu'il a été résumé dans la présente sentence dans sa partie Faits et dans les considérations juridiques qui précèdent, l'application de la notion de « *déni de justice* » et celle de l'obligation de « *traitement juste et équitable* » n'appellent pas de longue analyse. Elles se laissent résumer à deux questions relativement simples :

- La première est celle de savoir si l'absence de toute décision par les juridictions chiliennes pendant une période de sept années (1995-2002), d'une part, et l'absence de réponse de la Présidence aux requêtes de M. Pey Casado, d'autre part, sont constitutives d'un déni de justice.
- La seconde est celle de savoir si les investissements reconnus par le Tribunal arbitral comme ayant été faits par M. Pey Casado ont bénéficiés du « *traitement juste et équitable* » prescrit par l'API.

659. Sur la première question, la réponse ne peut être que positive, au regard des faits établis et déjà retenus par le Tribunal arbitral, l'absence de toute décision par les tribunaux civils chiliens sur les prétentions de M. Pey Casado s'analysant en un déni de justice. [...]

665. Sur la seconde question, celle de savoir si les investissements des demandereses ont bénéficié d'un traitement juste et équitable, une réponse négative s'impose de l'avis du Tribunal arbitral, compte tenu des conclusions auxquelles il est parvenu précédemment aux termes de son appréciation des preuves et de son analyse juridique. En bref, il s'agit de la conclusion selon laquelle M. Pey Casado a bien démontré avoir procédé à des investissements et

être propriétaire de biens meubles ou immeubles qui ont été confisqués par l'autorité militaire chilienne.

[...]

674. Dans le cas d'espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexpliquées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués, en même temps qu'elle paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesse de façon juste et équitable.

### **E. The Tribunal's Assessment of Damages**

58. With respect to the Tribunal's assessment of the damages suffered by the Claimants, the Tribunal starts from the premise that, since in its Decision No. 43 Chile had already fixed the amount of damages which it owed to those persons whose property it had expropriated, "l'existence même de dommages résultant de la confiscation n'appelle aucune analyse particulière".<sup>15</sup>
59. The Tribunal then recalled that the Claimants were seeking from the Respondent US\$ 52,842,081 as "*damnum emergens*" and US\$ 344,505,593 as "*lucrum cessans*" plus unquantified moral damages for Mr. Pey Casado.<sup>16</sup>
60. There then followed seven paragraphs which the Committee considers it should quote *in extenso* because, as will be seen later, of the conclusion which it has reached in respect of the breach by the Tribunal in its assessment of damages of two of the grounds set out in Article 52 of the ICSID Convention:

689. Dans l'exercice de son droit et pouvoir d'appréciation des preuves, le Tribunal arbitral ne peut que constater que les demanderesse n'ont pas apporté

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<sup>15</sup> *Ibid.* at para. 680.

<sup>16</sup> *Ibid.* at para. 683.

de preuve, ou de preuve convaincante, ni par pièces, ni par témoignage, ni par expertise, des importants dommages allégués et causés par les faits relevant de la compétence *ratione temporis* du Tribunal arbitral, et cela qu'il s'agisse du *damnum emergens*, du *lucrum cessans*, ou encore d'un dommage moral - la simple vraisemblance d'un dommage dans les circonstances concrètes de l'espèce ne suffisant évidemment pas.

[...]

691. Il est clair aussi, quoi qu'il en soit, que tout recours à une expertise, l'expérience arbitrale le montre, est en soi généralement de nature à augmenter, parfois fortement, la durée et les coûts d'un arbitrage. En tout état de cause, le Tribunal arbitral est conscient de son devoir de mettre un terme, dès que l'état du dossier le permet, à une procédure d'une durée qui, dépassant la moyenne, a été allongée, ainsi qu'on l'a vu, pour des raisons diverses, dont la complexité inhabituelle des questions litigieuses et l'attitude même des parties.

692. En l'absence de preuves convaincantes apportées par les demanderesses et le recours à une ou plusieurs expertises devant être exclu, le Tribunal arbitral est cependant en mesure de procéder à une évaluation du dommage à l'aide d'éléments objectifs dès lors que, selon les données incontestées résultant du dossier, les autorités chiliennes elles-mêmes, à la suite de la Décision n° 43, ont fixé le montant de la réparation due aux personnes ayant, selon elles, droit à une indemnisation.

693. Il convient de rappeler dans ce contexte que le préjudice à indemniser n'est pas celui souffert à la suite de l'expropriation (demande qui n'est pas couverte par les dispositions de fond de l'API), mais celui souffert en raison des violations de l'API que le Tribunal arbitral a constatées et à propos desquelles il est compétent pour rendre une décision. Notamment, l'indemnisation doit servir à mettre les demanderesses dans la position dans laquelle elles seraient si les violations en question n'avaient pas eu lieu, c'est-à-dire si, dans la Décision n°43, les autorités chiliennes avaient indemnisé les demanderesses, et non pas des tierces personnes non-propriétaires des biens en question. Dans cette hypothèse, les autorités chiliennes auraient accordé le montant d'indemnisation qu'elles ont accordé en vertu de la Décision n°43 aux demanderesses dans la présente instance, celles-ci étant, le Tribunal arbitral l'a constaté, les véritables propriétaires des actions des sociétés CPP S.A. et EPC Ltda. Par conséquent, c'est le montant payé comme indemnisation en vertu de la Décision n°43 qui correspond au préjudice souffert par les demanderesses.

694. L'indemnisation décidée par la Décision n°43 du 28 avril 2000 a été alloué[e] par le Ministère des Biens Nationaux en vertu des décrets d'indemnisation n° 76-79, en date du 11 avril 2002. Il s'agit d'un montant global d'indemnisation de USD 10 millions, bien que le montant exact soit contesté entre les parties.

695. La demanderesse a communiqué, par une lettre en date du 19 juillet 2007, au Tribunal les documents qui, selon elle[], lui permettent de connaître les montants précis alloués aux bénéficiaires de la Décision n°43 adoptée par [le] Ministère chilien des biens nationaux le 28 avril 2000 et des décrets n°76-79.

61. In conclusion, the Tribunal fixed the damages owed by the Respondent to the Claimants at US\$ 10,132,690.18.<sup>17</sup>

62. In its *dispositif*, the Tribunal decided, as follows:

1. décide qu'il est compétent pour connaître du litige entre les demanderessees et la République du Chili ;

2. constate que la défenderesse a violé son obligation de faire bénéficier les demanderessees d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice ;

3. constate que les demanderessees ont droit à compensation ;

4. ordonne à la République du Chili de payer aux demanderessees le montant de USD 10.132.690,18, portant intérêt au taux de 5%, composé annuellement, à compter du 11 avril 2002 jusqu'à la date d'envoi de la présente sentence ;

5. met à la charge de la défenderesse une contribution aux frais et dépens exposés par les demanderessees, d'un montant de USD 2.000.000,- (deux millions) ;

6. décide que les frais de procédure seront supportés par les parties dans la proportion de : 3/4 du montant total (soit USD 3.136.893,34) pour la défenderesse et 1/4 du montant total (soit 1.045.631,11) pour les demanderessees ; ordonne en conséquence à la défenderesse de payer aux demanderessees la somme de USD 1.045.579,35 ;

7. ordonne à la République du Chili de procéder au paiement dans un délai de 90 jours à compter de la date d'envoi de la présente sentence, des sommes figurant dans le présent dispositif (points 4, 5 et 6), faute de quoi le montant

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<sup>17</sup> *Ibid.* at para. 702.

portera intérêts composés annuellement au taux de 5%, à compter de la date d'envoi de la présente sentence jusqu'à celle du parfait paiement ;

8. rejette toutes autres ou plus amples conclusions.

#### IV. LEGAL STANDARD

63. The three specific grounds upon which Chile requests the annulment of the Award under Article 52(1) of the ICSID Convention are the following:

##### Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) [...]
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) [...]
- (d) that there has been a serious departure from a fundamental rule of procedure;
- or
- (e) that the award has failed to state the reasons on which it is based.

64. The Committee will now review these standards briefly as they have been interpreted by a series of *ad hoc* committees which can be said to be mostly “*ad idem*”. The Committee will then review and analyze each one of the grounds for annulment invoked by Chile<sup>18</sup> in respect of the eleven areas which it has identified.

##### **B. Manifest Excess of Powers**

65. The ground for annulment for manifest excess of powers is embodied in Article 52(1)(b) of the ICSID Convention. As explained by Commentators, this ground is meant to ensure, *inter alia*, that tribunals do not exceed their jurisdiction or fail to apply the law

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<sup>18</sup> The Committee notes that it is also seized of an application by the Claimants for annulment of paragraph 8 of the *dispositif* of the Award.

agreed upon by the parties.<sup>19</sup> Independently of the methodology which will be followed, an annulment committee must inquire whether the tribunal exceeded the scope of its authority and whether this excess is manifest. As, the committee in *CDC v. Seychelles* stated:<sup>20</sup>

A tribunal (1) must do something in excess of its powers and (2) that excess must be “manifest.” It is a dual requirement.

66. With respect to the excess of powers, both parties agree that a tribunal can exceed its power in two ways: (i) by inappropriately exercising its jurisdiction (or failing to exercise jurisdiction); and (ii) by failing to apply the proper law.<sup>21</sup> As regards the failure to apply the proper law, the parties agree that there is an important distinction between a failure to apply the proper law which is a ground for annulment, and an incorrect or erroneous application of that law, which is not a ground for annulment. The Committee agrees. As the *ad hoc* committee in *Amco I* explained:<sup>22</sup>

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

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<sup>19</sup> See Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) Art. 52 at paras. 132 – 133 (hereinafter “*Schreuer Commentary Art. 52*”).

<sup>20</sup> *CDC Group PLC v. Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment dated 29 June 2005 at para. 39 (hereinafter “*CDC Decision*”).

<sup>21</sup> See Resp. Mem. Annulment at paras. 400-402; Cl. C-Mem. Annulment at paras. 216 and 389.

<sup>22</sup> *Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment dated 16 May 1986 at para. 23 (hereinafter “*Amco I Decision*”).

law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.

67. The Committee notes that Chile also contends that under certain circumstances a misapplication of the law, even though the proper law was identified, can be so egregious as to constitute, in practice, the non-application of the proper law.<sup>23</sup> In support of its submission, Chile refers to the decisions of several committees, including *Soufraki*, *Amco II*, *Vivendi II*, *MTD* and *Sempra*.<sup>24</sup>
68. The Respondent also submits that the proper application of a national law requires a tribunal to interpret that law as it is interpreted by the nation's courts, as well as its legal scholars, and authorities.<sup>25</sup> In this respect, the Committee agrees with the nuance introduced by the *ad hoc* Committee in *Soufraki*:<sup>26</sup>

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

69. The parties disagree as to the meaning and scope of "manifest". According to Claimants, the tribunal's excess of its powers must be obvious simply on the face of the award,

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<sup>23</sup> See Tr. Annulment [1] [38:2-16] (Eng.); [16:31-37] (Fr.); [40:22-41:5] (Spa.).

<sup>24</sup> See Resp. Rep. Annulment at paras. 253-255; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment dated 5 June 2007 (hereinafter "*Soufraki Decision*"); *Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Second Decision on Annulment dated 17 December 1992 (hereinafter "*Amco II Decision*"); *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment dated 21 March 2007 (hereinafter "*MTD Decision*"); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment dated 29 June 2010; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Second Decision on Annulment dated 10 August 2010.

<sup>25</sup> See Resp. Mem. Annulment at paras. 415-418.

<sup>26</sup> *Soufraki Decision* at para. 97.

without any need for further analysis.<sup>27</sup> For the Respondent, “manifest” can mean either “obvious” or “substantial” and establishing the existence of an excess of power may require a detailed analysis of complex factual and legal issues. This process does not *per se* mean that an excess is not manifest.<sup>28</sup>

70. The Committee agrees with the Respondent that an extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious. In addition, the Committee is of the view that it has to follow a tenable standard of review of the tribunal’s approach. It agrees with the committee in *Klöckner I*:<sup>29</sup>

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

### C. Serious Departure From a Fundamental Rule of Procedure

71. The second ground for annulment of the Award invoked by Chile in its Annulment application is that there has been a serious departure from fundamental rules of procedure as provided for in Article 52(1)(d) of the ICSID Convention. The Committee notes that the parties agree on the meaning of this provision but disagree on the consequences of its application to the present case.

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<sup>27</sup> See Cl. C-Mem. Annulment at paras. 224-225.

<sup>28</sup> See Resp. Mem. Annulment at para. 412; Resp. Rep. Annulment at para. 252.

<sup>29</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A.*, ICSID Case No. ARB/81/2, Decision on Annulment dated 3 May 1985 at para. 52(e) (hereinafter “*Klöckner I Decision*”).



72. The Committee agrees with Chile that this ground involves a three-part test: (i) the procedural rule must be fundamental; (ii) the Tribunal must have departed from it; and (iii) the departure must have been serious.<sup>30</sup>
73. Fundamental rules of procedure are procedural rules that are essential to the integrity of the arbitral process and must be observed by all ICSID tribunals. The parties agree that such rules include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias.
74. The second part of the test requires that the Committee examine the full record, including the Transcripts and the Award to determine whether or not the Tribunal violated the rule in question.
75. The third part of the test relates to the seriousness of the departure. Here the Committee notes that there is significant disagreement between the parties as to how the seriousness of the violation can be ascertained.
76. The Committee observes that there are two series of precedents relating to this important requirement. They were well summarized by the Respondent at the Hearing on Annulment:<sup>31</sup>
- Some committees have looked at the importance of the right involved. If the right is fundamental or substantial, its deprivation could jeopardize the legitimacy or integrity of the arbitral process. Therefore, in the view of those committees, the violation of such right deserves a remedy. As described by commentators and certain committees, “the departure must be

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<sup>30</sup> See Tr. Annulment [1] [pp. 22-23] (Eng.); [pp. 10-11] (Fr.); [pp. 25-26] (Spa.).

<sup>31</sup> See Tr. Annulment [1] [35:1-19] (Eng.); [15:26-37] (Fr.); [38:1-18] (Spa.).

more than minimal”<sup>32</sup> or “must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.”<sup>33</sup>

- Other committees have opined that the fundamental rule must relate to an outcome-determinative issue. In the *Wena* case, the committee held that “the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.”<sup>34</sup>

77. The parties disagree on the nature of the impact of the departure on the award. Claimants argue that an applicant must prove that the denial of a fundamental rule of procedure did lead the Tribunal to a result different than it otherwise would have reached if the rule had been observed. The Respondent disagrees and argues that proving beyond the shadow of a doubt that the Tribunal would have changed its award imposes an insurmountable hurdle that ignores the inherent value of the rule itself.<sup>35</sup> It concludes that the remit of the Committee is to enquire whether, if the rule had been observed, there is a distinct possibility (a “chance”) that it may have made a difference on a critical issue.

78. The Committee subscribes to the Respondent’s view. The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected. The Committee notes in fact that, in *Wena*, the committee stated that the applicant must demonstrate “the impact that the issue may have had on the

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<sup>32</sup> See *Schreuer Commentary Art. 52* at para. 287.

<sup>33</sup> See *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment dated 2 December 1989 at para. 5.05 (hereinafter “*MINE Decision*”); *Amco II Decision* at paras. 9.09 - 9.10; *CDC Decision* at para. 49.

<sup>34</sup> See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment dated 5 February 2002 at para. 58 (hereinafter “*Wena Decision*”); *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/01/10, Decision on Annulment dated 8 January 2007 at para. 81; *CDC Decision* at para. 49.

<sup>35</sup> See Tr. Annulment [1] [30:11-31:7] (Eng.); [14:9-19] (Fr.); [33:11-34:4] (Spa.).

award.”<sup>36</sup> The Committee agrees that this is precisely how the seriousness of the departure must be analyzed.

79. The parties also addressed the question of whether a committee has the discretion not to annul an award even where it finds that the tribunal seriously departed from a fundamental rule of procedure.<sup>37</sup> A review by the Committee of recent decisions of other *ad hoc* committees reveals that many of them have concluded that they had some discretion not to annul an award even where a ground for annulment is found, provided that such ground has no practical consequences.<sup>38</sup> Some committees, however, have expressed the view that this reasoning does not apply to Article 52(1)(d) as the requirement of a “serious” departure already incorporates the substantiality of the impact. Therefore, if such ground is established, it requires annulment *ipso facto*.<sup>39</sup>
80. In the Committee’s view, it has no discretion not to annul an award if a serious departure from a fundamental rule is established. The Committee exercises its discretion when it determines whether or not the departure was serious. Examining the seriousness of the departure implies a review of seriousness of the act concerned, *i.e.*, the deprivation of the legal right protected by the rule and a review of the seriousness of the consequence or impact of the departure. The discretion of the Committee lies in the evaluation of the impact. The impact will most likely be material and require an annulment if the departure affects the legal right of the parties with respect to an outcome-determinative

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<sup>36</sup> See *Wena Decision* at para. 61.

<sup>37</sup> See Resp. Mem. Annulment at para 86; Resp. Rep. Annulment at paras. 41-42; Cl. Rej. Annulment at para. 33.

<sup>38</sup> See *Wena Decision*; *CDC Decision*; *Soufraki Decision*; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (hereinafter “*Vivendi I Decision*”); *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment dated 1 November 2006 (hereinafter “*Mitchell Decision*”).

<sup>39</sup> See *CDC Decision*; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment dated 25 March 2010 (hereinafter “*Rumeli Decision*”).

issue. In other words, a finding that if the rule had been observed the tribunal could have reached a different conclusion. As indicated earlier, the Committee does not consider, however, that an applicant is required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed. This requires a committee to enter into the realm of speculation which it should not do. The Committee will therefore first seek to determine if there is a departure from a fundamental rule of procedure and, if so, then examine the impact of the violation to decide whether or not it is serious.

81. It remains for the Committee to address the question of the possible waiver of claims which both parties have argued.<sup>40</sup>
82. Pursuant to ICSID Arbitration Rules 27 and 53, a party may lose its right to object on the ground of a serious departure from a fundamental rule of procedure if it has failed to raise its objection to the tribunal's procedure upon becoming aware of it, or "promptly" as mentioned in Rule 27. Clearly, this "waiver" can only be triggered if the applicant knew that the tribunal by its conduct had not complied with the rule and thus had a reasonable opportunity to raise its objection. If the objecting party acquired actual or constructive knowledge of a rule violation only after the award has become available, it cannot be considered as having waived its right to object.

#### **D. Failure to State Reasons**

83. The first annulment committee in the *Vivendi* case discussed this ground in the following terms:

[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons [...] Provided that the reasons

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<sup>40</sup> See Resp. Rep. Annulment at paras. 38-40; Claimants' remarks at the Hearing on Annulment, Tr. Annulment [1] [199:16-200:20] (Eng.); [82:38-83:20] (Fr.); [216:14-217:21] (Spa.).

given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.

In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.<sup>41</sup>

84. Committees in other annulment cases have expressed similar views.<sup>42</sup>
85. The Committee subscribes to the interpretation of this standard enunciated by the first annulment committee in the *Vivendi* case. Furthermore, the parties appeared to accept this test. However, the parties disagree on how to address inconsistent or contradictory reasons. While the Respondent contends that incoherent, inconsistent or frivolous explanations on outcome-determinative points would constitute a failure to state reasons, the Claimants submit that only a failure to state reasons that is manifest can lead to the annulment of an award. In other words, only (i) a complete failure to provide any reason or (ii) manifestly frivolous or contradictory reasons could be an annullable error.<sup>43</sup>
86. The Committee believes that as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow,

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<sup>41</sup> See *Vivendi I Decision* at paras. 64-65.

<sup>42</sup> See *Amco I Decision* at paras. 38-44; *MINE Decision* at paras. 5.07-5.13; *Amco II Decision* at paras. 7.55-7.57; *Wena Decision* at paras. 77-82; *CDC Decision* at paras. 66-72; *Mitchell Decision* at para. 21.

<sup>43</sup> See Tr. Annulment [1] for the Respondent: [pp. 45-46] (Eng.), [pp. 18-19] (Fr.), and [pp. 44-47] (Spa.); for the Claimants: [pp. 184-185] (Eng.), [p. 76] (Fr.), and [pp. 200-202] (Spa.).

whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations.

#### **E. Scope of Annulment**

87. As stated by several committees annulment is distinct from an appeal. The power for review is limited to the grounds of annulment set out in Article 52(1) of the ICSID Convention.<sup>44</sup> The committee in the *Soufraki* case pointed out that:<sup>45</sup>

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

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

88. The Committee endorses these statements without any reservation.

#### **V. GROUND FOR ANNULMENT**

89. Article 52(1) of the ICSID Convention sets out the five grounds on the basis of which a party may request annulment of an award. This is an exhaustive list. The Article reads as follows:

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<sup>44</sup> See *Wena Decision* at para. 18 (citing to *Klöckner I* at paras. 3, 62, 119 and *MINE Decision* at para. 4.05).

<sup>45</sup> See *Soufraki Decision* at para. 20.

## Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

90. As noted earlier, in the present case Chile has invoked three of those specific grounds, manifest excess of powers, a serious departure from a fundamental rule of procedure and the failure of the Tribunal to state the reasons on which its award is based.
91. In the course of this annulment proceeding, the parties have made extensive written submissions. These submissions include:
- Chile's Annulment Application (130 pages);
  - Chile's Memorial on Annulment dated 10 June 2010 (369 pages, English version);
  - Claimants' Counter-Memorial on Annulment dated 15 October 2010 (158 pages, French version);
  - Chile's Reply on Annulment dated 22 December 2010 (287 pages, English version);
  - Claimants' Rejoinder on Annulment dated 28 February 2011 (74 pages, French version).
92. The parties also filed "pre-hearing skeletons" on 27 May 2011. Finally, the parties made lengthy and detailed oral submissions during the hearing on 7 and 8 June 2011.
93. At this juncture of its Decision, the Committee will distil the massive record which it has considered carefully and identify the eleven specific areas which Chile has well

summarized in its skeleton. For each one of these areas, the Committee will attempt to present, succinctly, the parties' respective arguments in respect of the three grounds for annulment, which it has invoked. The Committee will then deal with the Claimants' application for annulment of paragraph 8 of the Tribunal's *dispositif*.

94. The eleven areas are:

- 1) Nationality
- 2) Investment
- 3) Denial of Justice
- 4) Discrimination
- 5) The Tribunal's Decision on Provisional Measures
- 6) Damages
- 7) The May 2003 Hearing
- 8) The January 2007 Hearing
- 9) Document Requests
- 10) Bias by Arbitrator Bedjaoui
- 11) The Tribunal's *Ex Aequo et Bono* Decision.

**B. Nationality**

95. The parties agree that Mr. Pey Casado was at all times a Spanish national and also that he became a Chilean national by nationalization in 1958. The issue in dispute was whether Mr. Pey Casado thereafter ceased to be a Chilean national, prior to the two critical dates contemplated in Article 25(2)(a) of the ICSID Convention, which are (1) the date of consent (2 October 1997), and (2) the date of registration (20 April 1998). Claimants argued that Mr. Pey Casado voluntarily renounced his Chilean citizenship prior to those two dates, and submitted three documents as evidence of that renunciation. Chile argued that none of those documents, on its face, could be considered a renunciation and that, in any event, any attempted renunciation would not have had any legal effect because



voluntary renunciation of citizenship was not permitted at the time under the Chilean Constitution and did not become part of Chilean law until an explicit Constitutional amendment to that effect was approved in 2005. Chile also asserted that even if it were assumed, *arguendo*, that renunciation was legally possible in Chile at the time, the “declaration” that Mr. Pey Casado made to a Spanish consulate in Argentina manifesting his intent to renounce his Chilean citizenship could not have become effective until it was formally notified to Chilean authorities — which it submitted did not occur until well after the critical dates.

**(1) Manifest Excess of Powers**

96. The main issues raised by Chile regarding nationality in connection with Article 52(1)(b) are:

- whether the Tribunal’s application of Article 11 of the Chilean Constitution amounts to a manifest failure to apply the proper law;
- whether the Tribunal improperly asserted jurisdiction by failing to assess and then determine whether Mr. Pey Casado’s actions had in fact been sufficient to effect a renunciation of his Chilean nationality;
- if so, whether such renunciation occurred prior to the two critical ICSID Convention dates; and
- whether or not, in light of the foregoing, the Tribunal manifestly failed to apply Article 25(2)(a) of the ICSID Convention.

## **Parties' Positions**

### **Chile's Position**

97. Chile argues that the Tribunal failed to apply the proper law<sup>46</sup> by finding Article 11 of the Constitution ambiguous and the decisions of Chilean courts which it submitted inapposite. According to Chile, the Tribunal adopted an interpretation of the Chilean Constitution that was fundamentally at odds with the plain text of the relevant constitutional provision. Chile contends that it was not possible to renounce Chilean nationality voluntarily prior to 2005 when the Chilean Constitution was amended. Article 11 (“Bases for Loss of Chilean Nationality”) of the Chilean Constitution provides as follows:<sup>47</sup>

Article 11. la nationalité chilienne se perd :

1°. Par la naturalisation dans un pays étranger, sauf dans le cas des Chiliens visés aux incises numéros 1, 2 et 3 de l’article précédent qui auraient obtenu une autre nationalité sans renoncer à leur nationalité chilienne et conformément aux dispositions du N° 4 de ce même article.

La raison de la perte de la nationalité chilienne indiquée ci-dessus n’affectera pas les Chiliens qui, en vertu de dispositions constitutionnelles, légales ou administratives de l’État du territoire duquel ils résident, adoptent la nationalité étrangère comme condition de leur permanence dans ce pays ou comme condition d’égalité juridique des ressortissants du pays respectif dans l’exercice des droits civils ;

2°. Par décret suprême, dans le cas de services rendus au cours d’une guerre aux ennemis du Chili ou à leurs alliés ;

3°. Par un arrêt condamnant les délits allant à l’encontre de la dignité de la patrie ou des intérêts fondamentaux et permanents de l’État, et considérés comme tels par loi approuvée au quorum qualifié. Lors de ces procédures, les faits seront toujours évalués en toute conscience ;

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<sup>46</sup> See Award at para. 307 *et seq.*

<sup>47</sup> See Resp. Mem. Annulment at para. 436. Footnotes omitted.

4°. Par l'annulation de la lettre de naturalisation, et

5°. Par loi révoquant la naturalisation concédée à titre gracieux. Ceux qui auraient perdu la nationalité chilienne pour n'importe laquelle des raisons prévues au présent article, ne pourront être réhabilités que par la loi.

98. Chile avers that this list does not include “unilateral voluntary renunciation”.<sup>48</sup> Chile submits:<sup>49</sup>

437. [...] Chile presented abundant jurisprudential and doctrinal evidence establishing that, under Chilean law, (a) the list of five grounds for losing Chilean nationality in Article 11 — which was the only Article of the Chilean Constitution that addressed this issue — was intended by the constitutional drafters to be an exhaustive one; (b) the list in Article 11 had subsequently been interpreted as exhaustive by courts and commentators; and (c) voluntary renunciation therefore did not exist at the time of the critical dates. As described below, Chile further noted at the 2007 jurisdictional hearing that this interpretation was roundly and unequivocally confirmed by the fact that a constitutional amendment was approved in Chile in 2005 that for the first time established voluntary renunciation as a basis for loss of Chilean nationality.

99. Chile argues that the Tribunal completely ignored its argument. It says:<sup>50</sup>

451. Given the plain text of the relevant Constitutional article before and after the amendment, the situation was quite simple: before the amendment, there was no voluntary renunciation under Chilean law; after the amendment — which came into effect eight years after the initiation of the *Pey Casado* arbitration — voluntary renunciation became possible for the first time. Despite the Tribunal's explicit recognition that its task was to ascertain and apply Chilean law on this point, and despite the overwhelming evidence presented by Chile pointing to a widespread (and uniform) understanding of the relevant principles of Chilean law, it chose not to accept this uncontroverted legal truth. In doing so, it impermissibly ignored the fact that the settled law in Chile at the time of Mr. Pey's three alleged renunciations (which according to Mr. Pey took place in December 1996, January 1997, and September 1997, respectively) was that a Chilean national could not lose his Chilean nationality simply by attempting to voluntarily renounce it. This rule of law was plain, simple, unqualified, and

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<sup>48</sup> *Ibid.* at para. 437.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* at paras. 451-454. Footnotes omitted.

uncontroversial, and no legitimate source of Chilean law had ever stated otherwise.

452. In sum, even though the Tribunal (a) had expressly asserted in the Award that it deemed Chilean law to be exclusively the applicable law for purposes of its determination on Mr. Pey's nationality; (b) had accepted in its Award that Mr. Pey had not been deprived of his nationality by the Chilean State; and (c) had itself explicitly conceded in the Award that "the Chilean Constitution does not expressly contemplate renunciation as a ground[] for loss of the Chilean nationality," the Tribunal nevertheless imposed its own, unsupported, interpretation of Chilean law on the subject. More specifically, it ruled: (a) that the list of bases for loss of nationality in Article 11 was not exhaustive (despite the conjunction "and" at the end of the list in Article 11, and the overwhelming jurisprudential and scholarly evidence showing that such list was indeed exhaustive and had consistently been interpreted as such); (b) that it was in fact possible under Chilean law to voluntarily renounce the Chilean nationality; (c) what is more, that it had always been possible to do so; (d) that the 2005 Constitutional Amendment had not created a new ground for loss of nationality; and (e) that the only new aspect of the 2005 constitutional amendment was that it had created a new requirement that formal renunciations had to be effected before a competent authority.

453. In light of the foregoing, it is patently clear that the Tribunal failed to apply the unquestionably applicable principles of Chilean law, and by doing so, it failed to apply the law that it had itself characterized as the exclusive applicable law to the issue of nationality.

454. In reaching these conclusions, and as further explained below, the Tribunal undertook two impermissible lines of analysis that justify annulment: First, it interpreted Chilean nationality law in terms of what it thought such law *ought to be* (to render it in the Tribunal's view more sensible or logical), rather than in terms of what that law *actually was*, according to both the plain text of the relevant norms of Chilean law, and of the Chilean jurisprudence and doctrinal literature. Second, the Tribunal tried to justify its conclusions — on an issue that, by its own admission, required a determination solely under Chilean law — by reference to a comparative international analysis that also demonstrates that the Tribunal did not apply the proper law, which was Chilean law, and Chilean law alone. [Emphasis in original]

100. Chile contends as follows in its Reply: <sup>51</sup>

299. In sum, the Tribunal was obligated to determine not only whether Chilean law permitted Mr. Pey to renounce his nationality, but also: (a) whether any of the documents Mr. Pey presented were in fact sufficient for him to effectively renounce his Chilean nationality; and (b) whether any such renunciation had in fact been effected *before* the critical dates contemplated in Article 25(2)(a) of the ICSID Convention. Had the Tribunal properly applied Chilean law; drawn the conclusions that flowed logically—and necessarily—from the record; and applied Article 25(2)(a) to those facts, its jurisdictional determination would have been entirely different. This failure to apply the proper law (Chilean law of nationality and Article 25(2)(a) of the Convention) and the Tribunal's improper assertion of jurisdiction *ratione personae* constitute a manifest excess of power, which requires annulment of the Award under Article 52 (1)(b) of the ICSID Convention. [Emphasis added.]

#### Claimants' Position

101. The Claimants submit that the Tribunal had discretion in interpreting Chilean law and that, in any event, it applied Chilean law correctly.<sup>52</sup> They further assert that Chilean law did in fact contemplate voluntary renunciation of Chilean nationality, and that Mr. Pey Casado did in fact take the necessary steps to effect such a renunciation. In the words of the Claimants: <sup>53</sup>

317. Selon la République du Chili, le Tribunal aurait ignoré le droit chilien, et en particulier la Constitution chilienne, en décidant que Monsieur Pey avait valablement renoncé à sa nationalité chilienne.

318. Cette affirmation est inexacte.

319. Tout d'abord, comme le souligne la Défenderesse, le Tribunal a expressément indiqué que la question de la nationalité de Monsieur Pey était régie par le droit chilien. Ainsi, le paragraphe 260 de la Sentence précise :

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<sup>51</sup> See Resp. Rep. Annulment at para. 299.

<sup>52</sup> See Cl. C-Mem. Annulment at paras. 280-281.

<sup>53</sup> This is a long citation but the Committee considers that it should be reproduced in full. See Cl. C-Mem. Annulment at paras. 317-341; 357-360. Footnotes omitted.

*Suivant ces règles bien établies en droit international, le Tribunal arbitral considère que c'est en appliquant le droit chilien que doit être examinée la question de savoir si en l'espèce les autorités chiliennes ont, comme il est allégué par l'intéressé, privé M. Pey Casado de sa nationalité chilienne, ou bien, s'il s'avère que tel n'est pas le cas, si M. Pey Casado a valablement renoncé à la nationalité chilienne. (soulignement ajouté)*

320. C'est ce que le Tribunal arbitral a fait comme le démontre la lecture des paragraphes 307 à 320 de la Sentence.

321. Ainsi, le Tribunal arbitral a d'abord analysé la Constitution chilienne de 1980 en vigueur à la date de la renonciation volontaire de Monsieur Pey. Sur ce point, il indique « *le texte même de l'article 11 de la Constitution chilienne est ambigu sur la question et ne permet nullement d'affirmer ou de postuler un prétendu caractère limitatif des cas énumérés de perte de nationalité* ».

322. Cependant, comme l'a reconnu le Tribunal arbitral, la Constitution chilienne de 1980 prévoyait déjà des cas de renonciation à la nationalité chilienne. En effet, son article 11(1) disposait jusqu'à sa modification le 25 août 2005: « *la nationalité chilienne se perd par le fait d'avoir acquis la nationalité d'un pays étranger, excepté dans le cas des chiliens entr[a]nt dans le cadre des paragraphes 1, 2 et 3 de l'article précédent qui auraient obtenu une autre nationalité sans avoir renoncé à leur nationalité chilienne et ce en concordance avec ce qui est stipulé au paragraphe 4 de ce même article* » (soulignement ajouté).

323. C'est d'ailleurs ce qu'a admis le Professeur Cea lors de son intervention à l'audience de janvier 2007 par ces termes : « *si un chilien obtenait la nationalisation dans un pays étranger, la Constitution [de 1980] lui permettait de conserver sa nationalité chilienne, si bien sûr un traité international de réciprocité était en vigueur et s'il décidait de ne pas renoncer à sa nationalité chilienne* » (soulignement ajouté).

324. La possibilité de renoncer à la nationalité chilienne avait d'ailleurs été démontrée par les Demanderesses dans leur Mémoire complémentaire sur la compétence du 11 septembre 2002 citant plusieurs décisions de la Cour suprême chilienne ou arrêts de Cours d'appel chiliennes.

325. A cet égard, il convient également de relever que l'argument de la République du Chili selon lequel le Tribunal arbitral aurait interprété la Constitution chilienne en contradiction avec l'interprétation retenue par les juridictions chiliennes est dénué de fondement.

326. Cela résulte de la lecture des jurisprudences citées par les Demanderesses dans leurs différentes écritures. En tout état de cause, le Tribunal arbitral a indiqué « *quant aux quelques décisions des tribunaux chiliens en la matière qui ont été évoqués, aucune d'entre elles ne concerne une situation identique à celle*

*du présent litige, si bien qu'il est difficile ou même impossible d'y trouver la preuve du bien fondé de l'une ou l'autre des thèses contraires qui ont été développées sur la renonciation à la nationalité ».*

327. Ayant constaté l'existence de la renonciation volontaire dans le cas de l'acquisition de la nationalité d'un Etat étranger, le Tribunal a alors indiqué : *« Rien n'a été établi, aucun texte légal ni aucune décision n'ont été produits ni aucun argument allégué qui soit susceptible de justifier, de l'avis du Tribunal arbitral, un régime qui, en matière de renonciation volontaire, serait discriminatoire : permissif en cas d'acquisition d'une autre nationalité, prohibitif en cas d'autre nationalité déjà acquise, soit de double nationalité ».*

328. Aux yeux du Tribunal, l'ensemble des éléments de droit chilien soumis par les Parties s'opposait à l'interprétation de la République du Chili, à savoir que la Constitution chilienne interdisait la renonciation volontaire à la nationalité chilienne.

329. La conclusion à laquelle le Tribunal est parvenu est confortée par le fait que certaines conventions internationales en vigueur au Chili prévoient la possibilité de renoncer volontairement à la nationalité. C'est ainsi le cas de la Conven[tion] Américaine des Droits de l'Homme dont l'art. 20.3 reconnaît le droit à changer de nationalité ; de la Convention panaméricaine de Rio de Janeiro de 1906, comme l'a souligné le Tribunal dans sa Sentence. Ces conventions sont d'application immédiate au Chili en vertu des articles 5 et 10.4 de la Constitution chilienne.

330. Rappelons, s'agissant de la Convention Américaine des Droits de l'Homme, qu'un Arrêt du 2 avril 2001 de la Cour d'Appel de Valparaiso, confirmé par la Cour suprême le 13 juin suivant, a indiqué que, selon les termes de cette Convention, les autorités chiliennes ne pouvaient pas empêcher un chilien de changer de nationalité en lui interdisant de renoncer à sa nationalité chilienne. Or, la Conven[tion] Américaine des Droits de l'Homme a été incorporée au système juridique chilien en 1991, soit bien avant que Monsieur Pey ait renoncé à sa nationalité.

331. C'est également le cas de la Convention Bilatérale sur la Double Nationalité signée entre l'Espagne et le Chili en 1958 (CDN), applicable à Monsieur Pey, auquel renvoi l'article 10.4 de la Constitution de 1980 dans sa version en vigueur entre 1989 et 2005. En effet, l'article 6 de la CDN dispose : *« Les espagnols et les chiliens qui auraient acquis la nationalité chilienne ou espagnole en renonçant préalablement à leur nationalité d'origine, pourront récupérer cette dernière, en déclarant qu'ils en ont la volonté devant le Préposé au Registre correspondant »* (soulignement ajouté).

332. En réalité, la République du Chili n'admet pas que le Tribunal arbitral soit parvenu à cette conclusion en dépit de l'intervention de Monsieur Cea, Président de la Cour Constitutionnelle chilienne, qui était venu affirmer, lors de l'audience

du 15 janvier 2007, qu'il n'était pas possible de renoncer à la nationalité chilienne avant la réforme constitutionnelle de 2005.

333. A cet égard, il convient tout d'abord de rappeler que Monsieur Cea est intervenu en tant que représentant de la délégation chilienne et non en qualité d'expert, en dépit de ce que la République du Chili tente de faire croire aux membres du Comité *ad hoc*.

334. En second lieu, le Tribunal arbitral dispose d'un large pouvoir d'appréciation concernant la force probante des éléments qui lui sont soumis et ce, même s'agissant de la nationalité, comme rappelé dans l'affaire *Soufraki*.

335. Enfin, les propos de Monsieur Cea ont été immédiatement contredits par les Demanderesses lors de l'audience du 15 janvier 2007.

336. En réalité, c'est bien en application du droit chilien que le Tribunal arbitral a reconnu à Monsieur Pey le droit de renoncer volontairement à sa nationalité chilienne. Tout au plus, le Tribunal a pu commettre une erreur de droit, *quod non*, ce qui ne serait de toute façon pas suffisant pour fonder l'annulation de la Sentence, quand bien même cette erreur serait manifeste.

337. Le recours formé par la République du Chili sur ce fondement n'est autre qu'un appel au fond et ne saurait, en conséquence, être admis par le Comité *ad hoc*. La demande d'annulation du Chili sur ce fondement devra être rejetée.

338. L'argument de la République du Chili consistant à soutenir que le Tribunal arbitral aurait violé l'article 52(1)(b) en reconnaissant que Monsieur Pey avait effectivement renoncé à sa nationalité chilienne est tout aussi mal fondé.

339. Ainsi le Tribunal arbitral indique au paragraphe 322 de la Sentence :

*Il revient donc au Tribunal arbitral d'apprécier le contenu et les effets du droit chilien sur la nationalité et de l'appliquer au cas d'espèce. Ce faisant, le Tribunal est conduit à conclure de ce qui précède la validité d'une renonciation volontaire à la nationalité chilienne lorsque la partie renonçant est double nationale, renonciation dont la réalité a été prouvée par la première partie demanderesse (soulignement ajouté).*

340. Cette conclusion du Tribunal arbitral est suffisante pour rejeter la prétention de la Défenderesse. Néanmoins, dans un souci de clarté pour le Comité *ad hoc*, les Demanderesses procéderont ci-dessous à l'analyse de la Sentence concernant la réalité de la renonciation à sa nationalité chilienne par Monsieur Pey.

341. Pour les besoins de la démonstration, il convient tout d'abord de rappeler les actes effectués par Monsieur Pey en renonçant à sa nationalité chilienne tels que résumés par le Tribunal arbitral dans sa Sentence aux paragraphes 288 à 292.



[...]

357. S'agissant de la date de la déclaration, le Tribunal arbitral fait référence à la date du 16 septembre 1997 lorsque Monsieur Pey a expressément indiqué au Consulat d'Espagne que sa lettre du 10 décembre 1996 au Département Etranger et Immigration du Ministère de l'Intérieur chilien devait être entendue comme une déclaration solennelle de sa renonciation à la nationalité chilienne.

358. Ainsi, la déclaration de renonciation à la nationalité est intervenue le 10 décembre 1996, réitérée au plus tard le 16 septembre 1997, en tout état de cause avant les dates pertinentes de l'article 25 de la Convention de Washington.

359. L'allégation de la République du Chili selon laquelle la déclaration ne serait intervenue que le 10 juillet 1998, date à laquelle l'Ambassade d'Espagne à Santiago du Chili a informé le Ministère des Relations Extérieures chilien de la renonciation à sa nationalité chilienne par Monsieur Pey est donc erronée. En réalité, avec cet argument, la République du Chili tente de former un appel au fond de la décision du Tribunal, celui-ci ayant clairement indiqué que la déclaration de renonciation était intervenue avant cette date en application de la loi.

360. Il résulte des développements ci-dessus que le Comité *ad hoc* devra rejeter la demande d'annulation de la République du Chili sur ce fondement. [Emphasis in original]

### **Committee's Analysis**

102. The Committee, after a thorough review of this part of the Award – wherein it concludes that Mr. Pey Casado had validly renounced his Chilean nationality prior to the two critical dates – and careful consideration of the parties' arguments, finds that the Tribunal did apply and interpret the proper Chilean law of nationality. The Tribunal referred not only to the Chilean Constitution but also to international conventions such as the Spain - Chile Dual Nationality Convention, the Rio de Janeiro Pan-American Convention of 1906, as well as the Inter-American Convention of Human rights in order to reach its conclusion. The Committee agrees with the Claimants that its remit is not to examine whether or not the Tribunal's interpretation complies with Chilean law but whether the Tribunal's interpretation is manifestly contrary to the principles of Chilean law. In the light, *inter alia*, of the introductory paragraph of the Tribunal's analysis on the question

of nationality, the Committee is satisfied that the Tribunal reached its conclusion on the basis of its interpretation of the proper Chilean law:<sup>54</sup>

De l'avis du Tribunal arbitral, la défenderesse n'est pas parvenue à apporter une démonstration convaincante de l'impossibilité ou l'illégalité, en droit chilien, d'une renonciation volontaire à la nationalité chilienne, en l'absence de textes précis et de jurisprudence pertinente. Ainsi, quant aux quelques décisions des tribunaux chiliens en la matière qui ont été évoquées, aucune d'entre elles ne concerne une situation identique à celle du présent litige, si bien qu'il est difficile ou même impossible d'y trouver la preuve du bien fondé de l'une ou l'autre des thèses contraires qui ont été développées sur la renonciation à la nationalité.

103. Chile may not agree with the Tribunal's interpretation and may have wished that the Tribunal had adopted its thesis but it cannot say that the Tribunal's assertion of jurisdiction *ratione personae* rises to the level of a manifest excess of power. Chile's challenge is accordingly dismissed.

## **(2) Failure to State Reasons**

104. Chile argues that the Tribunal failed to state reasons for its finding in respect of nationality and thus breached Article 52(1)(e) of the ICSID Convention. Specifically, says Chile, the Tribunal failed to state reasons:

- for its determination that Mr. Pey Casado was no longer a Chilean national at the time of the critical dates for purposes of Article 25 of the ICSID Convention;
- for its conclusion that voluntary renunciation of nationality was permissible under Chilean law (in particular under Article 11 of the Chilean Constitution);
- for its conclusion that Mr. Pey Casado – as a matter of fact – renounced his Chilean nationality;

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<sup>54</sup> See Award at para. 307.

- for its conclusion that any such renunciation occurred prior the critical dates under Article 25(2)(a) of the ICSID Convention;
- for placing the burden on Chile – after Chile had proven that Mr. Pey Casado had become a Chilean national in 1958 – of further proving that thereafter Mr. Pey Casado had not renounced his Chilean nationality (*probatio diabolica*), rather than placing the burden on the Claimants to prove that he had renounced it; and
- for its conclusions that the Chile-Spain BIT's nationality-based jurisdictional requirements did not bar the Claimants' claims.

### **Parties' Positions**

#### Chile's Position

105. Chile submits as follows:<sup>55</sup>

454. [...] In particular, it is impossible to discern how it reached the conclusion that voluntary unilateral renunciation was permissible under Chilean law in 1996-7 (which is the time period during which Mr. Pey allegedly renounced his Chilean nationality). Such conclusion is particularly implausible given: (a) the directly contrary textual content of the relevant Constitutional provision; (b) the universally consistent Chilean jurisprudence and doctrine on this point; (c) the fact that it was not until the Constitution was amended in 2005 that voluntary renunciation became—for the first time—a basis for loss of nationality under Chilean constitutional law.

[...]

462. In attempting to address this issue in their Counter-Memorial, Claimants quote paragraphs 317 *et seq.* of the Award. However, those paragraphs merely discuss the issue of the power of appreciation of the Tribunal; they do not address the central point raised by Chile, which is the absence of any reasons for the Tribunal's conclusion that effective renunciation can occur without any notice to the State concerned and/or for the Tribunal's conclusion that Mr. Pey had in fact

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<sup>55</sup> See Resp. Rep. Annulment at paras. 454; 462. Footnote omitted.

renounced his Chilean nationality prior to the critical dates under Article 25(2)(a). [Emphasis added]

### Claimants' Position

106. The Claimants assert that the Tribunal, in its Award, did provide ample reasons. They write:<sup>56</sup>

361. La République du Chili soutient également que la Sentence doit être annulée pour défaut de motivation en application de l'article 52(1)(e). Selon elle, le Tribunal n'aurait pas motivé sa décision reconnaissant la possibilité de renoncer à la nationalité chilienne en droit chilien. Il n'aurait pas non plus expliqué quels actes de Monsieur Pey étaient constitutifs d'une renonciation à la nationalité chilienne. A cet égard, la République du Chili prétend que la conclusion du Tribunal selon laquelle Monsieur Pey avait réitéré sa renonciation à la nationalité par sa déclaration devant le Consulat d'Espagne à Mendoza (Argentine), serait en contradiction avec sa conclusion précédente selon laquelle la lettre de 1996 ne constituerait pas une renonciation à sa nationalité.

362. En premier lieu, les développements ci-dessus démontrent que le Tribunal n'a pas renversé la charge de la preuve, a effectivement appliqué le droit chilien pour trancher la question de la nationalité de Monsieur Pey aux dates pertinentes de l'article 25 de la Convention CIRDI et que la Sentence est suffisamment motivée.

363. On rappellera que le contrôle du Comité ad hoc doit se limiter à vérifier que le Tribunal a motivé sa décision sans qu'il ait besoin de se prononcer sur le bien fondé de son raisonnement ou sur son caractère convaincant, sauf à admettre un appel au fond. [Emphasis added]

364. S'agissant du point de savoir si les actes de Monsieur Pey étaient constitutifs d'une renonciation à la nationalité chilienne, le Tribunal arbitral a exposé sa position aux paragraphes 317 et suivants de la Sentence. Il indique « *le 16 septembre 1997, Monsieur Pey Casado a procédé expressément auprès du Consulat d'Espagne à Mendoza (Argentine) à une déclaration de renonciation au cas où serait requise par l'Administration chilienne une renonciation formelle* ».

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<sup>56</sup> See Cl. C-Mem. Annulment at paras. 364 - 371. Footnotes omitted.

365. Cette affirmation doit se lire à la lumière des paragraphes précédents de la Sentence, et en particulier des paragraphes 288 et suivants, ce que fait d'ailleurs la République du Chili.

366. Ceci étant, contrairement à l'allégation de la Défenderesse, le Tribunal ne se contredit pas. En effet, lorsque le Tribunal indique que « *la déclaration de Monsieur Pey Casado de son changement de résidence vers l'Espagne a pour conséquence un changement de la loi qui lui est applicable mais ne le prive nullement de ses deux nationalités* » (Sentence §294), c'est en tenant compte des termes de la lettre du 10 décembre 1996 qui sont ambigus.

367. Dans cette lettre, Monsieur Pey indiquait :

*J'accomplis [la formalité consistant à] vous informer que depuis 1974 ma résidence habituelle a été transférée en Espagne où elle se situe actuellement Ronda Granero n°13, 28043 Madrid. Par conséquent, ma nationalité étant l'espagnole, durant mon séjour au Chili, je n'ai pas recours aux bénéfices de la Convention bilatérale du 24 mai 1958.*

368. Cependant, le Tribunal poursuit en précisant « *la seule question est donc de savoir si la déclaration et les autres actes de Monsieur Pey Casado équivalent à une renonciation à la nationalité chilienne* » (Sentence §295).

369. Or, l'un des autres actes émis par Monsieur Pey et retenu par le Tribunal arbitral est la déclaration de Monsieur Pey du 16 septembre 1997 dans laquelle il précise « *pour ne laisser place à aucun doute à cet égard, je déclare que la communication du 10 décembre 1996 (...) doit s'entendre de la façon qui convienne le mieux en Droit aux fins desquelles elle a été présentée, y compris comme preuve de ma renonciation expresse et solennelle à la nationalité chilienne au cas où serait requise par l'Administration chilienne une renonciation formelle à la nationalité chilienne, ce que j'affirme et à quoi je souscris de nouveau par la présente* » (soulignement ajouté).

370. Dès lors, si la lecture de la seule lettre du 10 décembre 1996 pouvait laisser subsister une ambiguïté sur les intentions de Monsieur Pey, cette même lettre, lue à la lumière de la déclaration faite par Monsieur Pey en 1997, ne laisse plus de place au doute. Or, dans la déclaration de 1997, c'est bien la lettre de 1996 qui constitue une renonciation.

371. Dès lors, comme pour les autres fondements relatifs à la nationalité de Monsieur Pey, la demande d'annulation de la Sentence sur ce fondement sera rejetée par le Comité *ad hoc*. [Emphasis in original]

### Committee's Analysis

107. The Committee has no hesitation in endorsing the submission of the Claimants. Even if the Committee were to disagree with the Tribunal's interpretation of the Chilean Constitution and its analysis of Mr. Pey Casado's effective renunciation of his Chilean nationality (which we do not), by no stretch of the imagination can the Committee conclude that the Tribunal failed to state reasons to support its conclusions. In fact, the Tribunal provided ample reasons which (although this is not a question which the Committee is called upon or empowered to decide) the Committee finds quite compelling.
108. With respect to the interpretation of the 1980 Chilean Constitution, it is the Committee's view that the Tribunal articulated sufficient and, indeed, convincing reasons for concluding that voluntary unilateral renunciation is permissible under the Constitution. The Tribunal first determined that there is no case law forbidding voluntary unilateral renunciation. The Tribunal then found that none of the court decisions submitted and relied upon by the parties involves a situation similar to the present case.<sup>57</sup> It is not the role of the Committee to review these decisions.
109. The Tribunal then focused on the text of Article 11 of the Chilean Constitution. It first determined that the text is ambiguous as to whether it contains an exhaustive or non-exhaustive list of the bases for loss of Chilean nationality. It then explained why, in its view, the Article could not be interpreted as containing an exhaustive list of such bases.<sup>58</sup>
110. The Tribunal explained why, in its opinion, it would be illogical to conclude that the text of the Constitution allows renunciation in the case of acquisition of a new nationality but

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<sup>57</sup> See Award at para. 307.

<sup>58</sup> *Ibid.* at paras. 308-310.

does not allow such renunciation in the case of a nationality already acquired (*e.g.*, dual nationality), or condition such renunciation on the acquisition of a third nationality.<sup>59</sup>

111. The Tribunal concluded that voluntary unilateral renunciation existed before the 2005 amendment to the Constitution.<sup>60</sup> The Committee notes in this regard the reference by the Claimants to the testimony of Dr. Cea, President of the Chilean Constitutional Court, who, during the January 2007 Hearing, acknowledged that it is possible to renounce voluntarily one's Chilean nationality under the 1980 Constitution, thus corroborating the Tribunal's conclusion:<sup>61</sup>

si un chilien obtenait la nationalisation dans un pays étranger, la Constitution [de 1980] lui permettait de conserver sa nationalité chilienne, si bien sûr un traité international de réciprocité était en vigueur et s'il décidait de ne pas renoncer à sa nationalité chilienne. [Emphasis in original]

112. Finally, the Committee notes that the Tribunal referred at length in its Award to international conventions and principles of international law regarding nationality to support its conclusion.<sup>62</sup>
113. Chile argues that even if one were to accept that voluntary renunciation was legally possible before 2005, Mr. Pey Casado did not effect a valid renunciation before the two critical dates of the ICSID Convention. The Tribunal according to Chile, failed to state reasons for rejecting this argument and for its conclusion that Mr. Pey Casado did in fact renounce his Chilean nationality before the critical dates.
114. The Committee disagrees and refers to paragraphs 288 to 292 of the Award where the Tribunal summarized what it ultimately found to be the Claimants' convincing arguments

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<sup>59</sup> *Ibid.* at para. 311.

<sup>60</sup> *Ibid.* at para. 312.

<sup>61</sup> See Cl. C-Mem. Annulment at para. 323 (referring to Tr. Jur. [1] [20:24-28] (Fr.) submitted as CN-213).

<sup>62</sup> See Award at paras. 313-315; 319-322.

on this question. As described in the Award, the Claimants argued that Mr. Pey Casado renounced his Chilean nationality in three documents dated 10 December 1996, 7 January 1997, and 16 September 1997, respectively. The Claimants also submitted that Chile was notified of Mr. Pey Casado's renunciation on 10 July 1998 and that the renunciation was formally registered by a Chilean official on 4 August 1998.<sup>63</sup> Chile replied that the 10 December 1996 and 7 January 1997 documents could not be construed as expressing a wish to renounce one's nationality<sup>64</sup> and that the 16 September 1997 document was not presented to any Chilean official and was only received by Chile on 10 July 1998, *i.e.* after the two critical dates. In response, the Claimants argued that the effective date of renunciation is in any case the date when such renunciation is declared, which was clearly prior to the critical dates, rather than the date on which it is registered.<sup>65</sup>

115. In its analysis of the parties' respective positions on this issue, the Tribunal found that Mr. Pey Casado expressly renounced his Chilean nationality in the third document, namely, the document of 16 September 1997. The renunciation was thus effected as of that date. The Tribunal further found that this renunciation was formally registered by a Chilean official on 4 August 1998.<sup>66</sup>
116. While the Award does not address the point raised by the Respondent regarding the date of presentation of the 16 September 1997 document to the Chilean authorities, it is clear, and the Committee so finds, that this is because the Tribunal evidently considered that this point was not critical to its determination of whether or not Mr. Pey Casado validly renounced his Chilean nationality, which the Tribunal found occurred with the document

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<sup>63</sup> See Resp. Mem. Annulment at para. 660.

<sup>64</sup> *Ibid.* at para. 661.

<sup>65</sup> See Cl. C-Mem. Annulment at para. 350.

<sup>66</sup> See Award at para. 317.



of 16 September 1997. The Committee notes in this regard that the Tribunal relied in particular on the *Soufraki* award, in which it was held that while a tribunal “[...] will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities [...] it will in the end decide for itself whether [...] the person whose nationality is at issue was not a national of the State in question [...]”.<sup>67</sup> Thus once the Tribunal concluded that the renunciation validly occurred with the 16 September 1997 document, prior to the critical dates, the entire question of notification to the Chilean authorities, including whether such notification was or was not made prior to the critical dates, became superfluous.

117. In sum, on the issue of nationality, the Committee finds the Tribunal’s reasoning to be comprehensive. This ground is accordingly dismissed.

### **(3) Serious Departure from a Fundamental Rule of Procedure**

118. The main issue raised by Chile regarding nationality in connection with Article 52(1)(d) is whether the Tribunal’s imposition of the burden of proof upon Chile on this issue was proper. As noted earlier, the parties agreed that Mr. Pey Casado has been at all times a Spanish national and also that he became a Chilean national by nationalization in 1958. As we saw above, the parties disputed whether Mr. Pey Casado had ceased to be a Chilean national before the two “critical dates”. Chile emphasizes that this issue was central to the Tribunal’s jurisdiction, because if the Tribunal had found that Mr. Pey Casado had still been a dual Chilean-Spanish national on at least one of the critical dates, it would have lacked jurisdiction under the ICSID Convention to hear Claimants’ claim.

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<sup>67</sup> *Ibid.* at paras. 318-319 (quoting *Soufraki Decision* at para. 55).

## Parties' Positions

### Chile's Position

119. Chile contends that “[s]ince it was accepted even by the Claimants that Mr. Pey Casado had been a Chilean national, the burden of proof should have been on Mr. Pey Casado to prove that he had in fact renounced his Chilean nationality at some point prior to the critical dates for purposes of Article 25(2)(a), as he claimed”.<sup>68</sup> Chile submits:<sup>69</sup>

350. Despite the fact that proof of Mr. Pey’s valid renunciation of his Chilean citizenship was a necessary element for him to establish that he satisfied ICSID’s jurisdictional requirements relating to nationality, and the fact that “[t]he investor must evidence all the necessary conditions for the Arbitral Tribunal to affirm its jurisdiction,” the Tribunal instead placed the burden of proof upon the Republic. And it did so by imposing on Chile a *probatio diabolica*, requiring that it prove that Mr. Pey had *not* renounced his Chilean nationality. Given that Mr. Pey was the proponent of the assertion that he *had* renounced, the burden should have been on him to prove that he had in fact validly done so. However in the Award, the Tribunal found that the Republic “n’est pas parvenue à apporter une démonstration convaincante de l’impossibilité ou l’illégalité, en droit chilien, d’une renonciation volontaire à la nationalité chilienne, en l’absence de textes précis et de jurisprudence pertinente.” Because it used this statement to explain its jurisdictional decision in favor of the Claimants, it is evident that the Tribunal placed the burden of proof upon the Respondent on this issue.

[...]

354. Here, if the Tribunal had not improperly placed the burden of proof upon the Respondent on the issue of Mr. Pey’s Chilean nationality, it is clear that a “substantially different” award might have been reached, as Mr. Pey would not have survived the Republic’s nationality-based jurisdictional challenge. The fact that the Tribunal’s reversal of the burden of proof on nationality was outcome-determinative is nowhere more evident than in the May 2002 jurisdictional ruling: had the Tribunal there imposed on Mr. Pey the burden of proving that he had renounced Chilean nationality, instead of placing it on the Republic to prove that Mr. Pey had *not* validly renounced such nationality, the Tribunal would have had to uphold Chile’s jurisdictional challenge and dismiss Mr. Pey’s claim. This

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<sup>68</sup> See Resp. Mem. Annulment at para. 348.

<sup>69</sup> *Ibid.* at paras. 350; 354. Footnotes omitted.

conclusion is compelled by the fact that the Tribunal explicitly indicated that neither party had managed to prove its respective assertions, which a *fortiori* means that if the burden of proof had been inverted, Chile rather than the Claimants would have prevailed on the jurisdiction challenge. [Emphasis in original]

### Claimants' Position

120. The Claimants submit that, after they had adduced evidence that Mr. Pey Casado had renounced his Chilean nationality prior to the “critical dates”, the Tribunal rightly concluded that the burden of proof shifted to Chile which had to demonstrate that the renunciation was not valid. They write: <sup>70</sup>

296. En l'espèce, les Demanderesses ont démontré que Monsieur Pey avait renoncé à sa nationalité chilienne antérieurement à la date pertinente pour l'article 25 de la Convention CIRDI. Tant les autorités espagnoles que les autorités chiliennes avaient reconnu et accepté cette renonciation. Ce faisant, les Demanderesses ont satisfait aux exigences de l'article 25 de la Convention CIRDI en démontrant que Monsieur Pey avait la nationalité exclusive espagnole aux dates pertinentes.

297. Il appartenait donc à la Défenderesse de démontrer que la renonciation de Monsieur Pey à sa nationalité chilienne, reconnue par l'Espagne et le Chili, était contraire à la Constitution chilienne pour que son exception d'incompétence prospère.

298. En outre, quelle que soit la partie sur laquelle repose le fardeau de la preuve, le Tribunal ne s'est pas appuyé sur les règles relatives à la preuve pour fonder sa décision. Le Tribunal a considéré que la thèse soutenue par les Demanderesses était bien fondée en dépit de l'exception soulevée par la République du Chili.

### Committee's Analysis

121. The Committee agrees with the Claimants. The Tribunal's approach was proper. Looking to Chile to prove that the Claimants' renunciation was invalid after it had concluded that the Claimants had discharged their burden of proving that Mr. Pey

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<sup>70</sup> See Cl. C-Mem. Annulment at paras 296-298. Footnote omitted.

Casado had renounced his Chilean nationality is not a departure from a fundamental rule of procedure, let alone a serious one. Chile's request is therefore dismissed.

**C. Investment**

**(1) Ownership of the Investment**

122. Chile submits that the question as to whether Mr. Pey Casado was the owner of the investment, the CPP Shares in *El Clarín*, is extremely important since a conclusion by the Tribunal that he was not the owner would have obviously led the Tribunal to conclude that it lacked jurisdiction over the dispute. The Tribunal decided that Mr. Pey Casado was the owner of the shares based on three sets of documents: (1) two documents that Mr. Pey Casado claimed to be contracts for his purchase of the CPP shares (the so-called "Estoril Protocol" and "Geneva Declaration"); (2) certain wire transfers that Mr. Pey Casado claimed to have been payments for the shares; and (3) certain CPP share certificates and blank transfer certificates that Mr. Pey Casado had in his possession.

(i) *Manifest Excess of Powers*

123. The main issues raised by Chile regarding ownership of the investment are:

- whether the Tribunal manifestly exceeded its powers by failing to identify – and therefore, to apply – the proper law to assess the validity of the Estoril and Geneva documents as purchase agreements. To determine whether these documents were valid purchase contracts entered into in Spain, the Tribunal was required to apply the Spanish Civil Code, which is the code that regulates contracts in general, and purchase contracts in particular;
- whether, assuming *arguendo* that the Tribunal identified the proper law, it failed to apply such law by interpreting the Estoril and Geneva documents as purchase contracts; and
- whether the Tribunal failed to apply the proper law by rejecting the application of the Chilean legal norms that governed the transfer of

company shares in Chile at the time of the alleged investment (*viz.*, Article 451 of the Chilean Commercial Code and Article 37 of Corporation Regulations), and deciding instead that the transfer of the CPP shares to Mr. Pey Casado was valid, without identifying the relevant rule on which the Tribunal relied to support such conclusion.

(ii) *Failure to State Reasons*

124. The main issue raised by Chile regarding ownership of the investment in connection with Article 52(1)(e) is whether the Tribunal failed to state reasons for its conclusions on the issues relating to the validity of the transfer of the CPP shares and on Mr. Pey Casado's resulting ownership of the shares.

**Parties' Positions**

Chile's Position

125. Chile summarizes its position as follows:<sup>71</sup>

391. As demonstrated above, contrary to Claimants' contention in their Counter-Memorial, Chile is not arguing merely that the Tribunal misinterpreted or erred in applying the proper law to determine whether Mr. Pey acquired the CPP shares. Rather, it is Chile's position that the Tribunal completely failed to apply the proper law by applying the *wrong set of rules* to reach the various determinations that led to its conclusion concerning Mr. Pey's ownership of the shares. Indeed, the Tribunal failed to apply: (a) the appropriate provisions of the Spanish Civil Code to the issue of the validity of the alleged purchase agreements or contracts (the Estoril Protocol and Geneva Declaration); and (b) the Chilean Commercial Code and Chile's Regulation of National and Foreign Companies to the issue of the validity of the transfer of the CPP shares.

392. By basing key determinations concerning the issue of ownership of the CPP shares on an application of the wrong law, and/or on a non-application of the correct law, the Tribunal manifestly exceeded its powers, which warrants

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<sup>71</sup> See Resp. Rep. Annulment at paras. 391-392. Footnote omitted.

annulment of the Award under Article 52 (1)(b) of the ICSID Convention.  
[Emphasis in original]

126. Chile further contends that there are several facets of the Tribunal's determination concerning the existence of an "investment" covered by the BIT that the Tribunal failed to explain.<sup>72</sup>

### Claimants' Position

127. The Claimants reject Chile's contention, they submit:<sup>73</sup>

239. N'ayant trouvé ni dans les textes, ni dans l'application qu'en avaient fait les cours chiliennes, la confirmation de la thèse de la Défenderesse, le Tribunal a interprété ce silence comme la démonstration que la sanction ne pouvait pas être la nullité absolue, celle-ci ne se présument, en principe, pas. Par cette conclusion, le Tribunal n'a pas refusé, ou omis, d'appliquer le droit chilien pertinent en la matière. Tout au plus, la République du Chili pourrait prétendre que le Tribunal a commis une erreur dans son appréciation, erreur qui n'est pas suffisante pour justifier l'annulation de la Sentence, quand bien même elle serait « *manifestement injustifiée* ».

240. Le Tribunal arbitral poursuit en indiquant que, selon les dispositions de droit chilien, l'accomplissement des formalités n'est enfermé dans aucun délai. Dès lors, Monsieur Pey aurait pu y remédier s'il n'en avait pas été empêché par la confiscation de ses titres et du Livre-registre des actionnaires par les autorités chiliennes.

241. Il en résulte que le Tribunal arbitral n'a pas écarté une norme de droit applicable, il l'a au contraire mise en œuvre dans toute sa portée. Les discussions de la République du Chili sur cette partie de la Sentence ont pour objet de faire infirmer la conclusion du Tribunal arbitral par la voie d'un appel au fond, ce qui est exclu par l'article 53 de la Convention CIRDI.

128. The Claimants also reject Chile's contention that the Tribunal failed to state reasons in this regard.<sup>74</sup>

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<sup>72</sup> See list of sixteen examples at para. 683 and three additional examples at para. 475 of Resp. Mem. Annulment.

<sup>73</sup> See Cl. C-Mem. Annulment at paras. 239-242. Footnotes omitted.

### Committee's Analysis

129. It is clear that Chile is here seeking in effect to appeal the Tribunal's decision and is asking the Committee to substitute its decision for that of the Tribunal. As is well established, this is not the remit of an Annulment Committee. An *ad hoc* committee is not an appeal body. In any case, the Committee finds that the Tribunal has not exceeded its powers and that it has provided ample reasons for its conclusion that Mr. Pey Casado was the owner of all the CPP shares.
130. Chile argues that the Tribunal completely failed to apply the proper law by applying the wrong set of rules to reach its determination that Mr. Pey Casado was the owner of the shares. Chile impugns two facets of the Tribunal's reasoning, concerning: (i) the validity of the share purchase agreements; and (ii) the validity of the transfer of the CPP shares. With respect to the share purchase agreements (the Estoril Protocol and Geneva Declaration), Chile argues that the Tribunal should have applied the Spanish Civil Code rather than the Spanish Commercial Code. With regard to the transfer of the shares, Chile contends that the Tribunal should have applied the Chilean Commercial Code and the Regulation of National and Foreign Companies rather than the Chilean Civil Code.<sup>75</sup>
131. The Committee notes that the Tribunal based its analysis regarding the ownership of the CPP shares on a series of detailed findings of facts.<sup>76</sup> The legal issue of the validity of the contracts is introduced by the Tribunal in the following words:<sup>77</sup>

Dans le souci d'être complet, le Tribunal examinera en dernier lieu l'argument de la défenderesse visant à contester la validité juridique du contrat de vente des actions de CPP S.A.

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<sup>74</sup> *Ibid.* at para. 447.

<sup>75</sup> See Resp. Rep. Annulment at para. 391.

<sup>76</sup> See Award at paras. 202-218.

<sup>77</sup> *Ibid.* at para. 219.

132. The question of “*la validité juridique du contrat de vente des actions*” was not essential to the Tribunal’s reasoning and conclusion concerning ownership of the CPP shares. Therefore, even assuming, for the sake of argument, that the Tribunal applied the wrong law to determine that question (which, to be clear, the Committee does not say was the case), such an error would not amount to a manifest excess of power or a failure to state reasons. In any event, the Committee is persuaded by the Claimants’ arguments that the Tribunal implicitly applied the Spanish Civil Code (Article 1445 in particular) by referring to the Claimants’ analysis made during the May 2003 Hearing and by stating that there was an agreement on the object and the price.<sup>78</sup> Finally, the Committee notes that, as asserted by the Claimants, Chile never argued before the Tribunal that the Spanish Civil Code was applicable to determine the validity of the purchase agreements. Instead, Chile was focusing on the language used in the documents concerned. It goes without saying that the Award cannot be annulled on the basis of an argument introduced for the first time in the annulment proceeding.
133. With respect to the validity of the transfer of the legal title to the CPP shares, the Tribunal recognized that Article 451 of the Chilean Commercial Code and Article 37 of Corporation Regulations require compliance with specific norms; the Tribunal considered that these norms must be observed to obtain a transfer of control with effect *erga omnes*.<sup>79</sup> The Tribunal was not convinced by the Respondent’s arguments, however, and concluded that the absence of registration in the respective Corporate Shareholders’ Registry did not affect the validity of the transfer of control that is at issue here, which concerns a transfer *intra partes*.<sup>80</sup>

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<sup>78</sup> See Cl. Rej. Annulment at para. 74.

<sup>79</sup> See Award at para. 226.

<sup>80</sup> *Ibid.* at para. 227.



134. In its Reply on Annulment, Chile contends that the Tribunal did not state under what rule it analyzed the validity of the *intra partes* transfer of control. In the absence of any specific explanation in this regard in the Award, Chile infers that the Tribunal implicitly accepted the Claimants' arguments and erroneously applied the Chilean Civil Code.<sup>81</sup> The Committee disagrees. The Committee does not see in the Award any reference, explicit or implicit, to the application by the Tribunal of the Chilean Civil Code to this question. The Tribunal analyzed the relevant cases and expert reports and concluded that neither the Commercial Code nor the Corporation Regulations provide for the nullity of the transfer in the event of non-compliance with the formality requirements.<sup>82</sup>
135. The Committee finds no manifest excess of powers by the Tribunal on these issues and, as noted above, finds that the Tribunal provided ample reasons for its findings. Chile's request is accordingly dismissed.

**(2) Investment Made in Accordance with the BIT**

136. The parties disagreed on whether Mr. Pey Casado's investment was in fact an "investment" for purposes of Articles 1(2) and 2(2) of the Chile-Spain BIT. Those articles required the investment to have been made "in accordance with" Chilean legislation and to qualify as a "foreign" investment under the Chilean law applicable at the time.
137. Chile maintains that the Tribunal was required to apply three key legal norms applicable to investments in the newspaper industry in Chile in 1972, which the Tribunal explicitly recognized were in force in Chile at the time: (1) the Chile-Spain Dual Nationality Convention, which established the concept of "effective nationality," which in turn governed which of those two nations' legislations would be applicable at a given time to

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<sup>81</sup> See Resp. Rep. Annulment at para. 378.

<sup>82</sup> See Award at paras. 227-228.

a Chilean-Spanish dual national; (2) Decision 24, which required that a capital contribution be made by a foreign person for an investment to qualify as a “foreign investment” and which barred foreign investment in the Chilean newspaper industry; and (3) Chilean Law No. 16,643, which required that owners of newspapers in Chile be Chilean.

138. Chile contends that these norms presented the Claimants with a “fatal dilemma”. If Mr. Pey Casado was a foreigner at the time of his investment (1972), he could not have invested in the Chilean newspaper industry “in accordance with Chilean law” as required by the BIT, because foreign investment in the media industry was barred in 1972 by both Decision 24 and Law No. 16,643; on the other hand, if he was a Chilean national at the relevant time, then by definition he could not have made a “foreign” investment for purposes of the BIT. According to Chile, the Tribunal could not rationally at the same time deem Mr. Pey Casado to be a Chilean for purposes of Decision 24 and Law No. 16,643, and yet a Spaniard for purposes of the BIT.

(i) *Manifest Excess of Powers*

139. Chile argues that the Tribunal manifestly exceeded its powers by failing to apply Articles 1(2) and 2(2) of the Chile-Spain BIT, which required that it determine whether Mr. Pey Casado’s alleged investment was an investment made “in accordance with” Chilean law, and also whether it was a “foreign” investment.

(ii) *Failure to State Reasons*

140. On this question, Chile also argues that the Tribunal failed to state reasons for its conclusion that Mr. Pey Casado simultaneously was a foreigner for purposes of the BIT, and yet a Chilean for purposes of the Chilean norms restricting foreign investment in the newspaper sector. In other words, the Tribunal should have provided a reasoned solution

to the “fatal dilemma” rather than simply declaring *ex cathedra* that it was not a dilemma at all.<sup>83</sup>

### **Parties’ Positions**

#### **Chile’s Position**

141. Chile summarizes its position in relation to the Tribunal’s conclusion as to the application of Decision 24 as follows:<sup>84</sup>

398. Had the Tribunal applied Articles 1 and 43 of Decision 24, it necessarily would have concluded that Mr. Pey’s alleged investment was not a foreign investment, but rather only a domestic one, and that as such it was not covered by the Chile-Spain BIT. This conclusion in turn would have mandated a finding that Mr. Pey’s claim was barred for failure to meet the jurisdictional requirement of proving the existence of an investment covered by the BIT.

399. Instead, the Tribunal decided to disregard Decision 24, on the asserted basis that, although in force, it was not adequately being enforced in Chile at the time of Mr. Pey’s investment. In their Counter-Memorial, Claimants defend the Tribunal’s decision. However, the fact that the Chilean government might not have established comprehensive mechanisms for enforcing all rules of Decision 24 does not mean that Decision 24 was not the applicable law in Chile at the time. It is not uncommon for new legislation to create new governmental agencies or departments and to establish new requirements that have to be processed by those agencies. It is understood that it takes time to create such governmental offices and to put in place those processes. This does not mean, however, that the whole legislation can be deemed ineffective, or can be set aside as “not really” constituting the governing law, until such time as implementing procedures are fully in place. The Tribunal failed to apply the proper law on this point, in a way that clearly affected the outcome of the case. This requires annulment under Article 52(1)(b).

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<sup>83</sup> See Resp. Pre-H. Skel. at p. 5.

<sup>84</sup> See Resp. Rep. Annulment at paras. 398-399. Footnotes omitted.

142. As to Law 16,643, Chile submits:<sup>85</sup>

404. As the Republic explained in its Memorial, it is illogical to suggest—as Claimants and the Tribunal do—that simply by virtue of Mr. Pey’s dual nationality it was possible, on the one hand, for him to wear his *Spanish* hat when acquiring the newspaper for the purposes of the BIT, and yet at exactly the same time wear his *Chilean* hat when acquiring the newspaper for purposes of the Chilean law relating to acquisition of media companies. The Republic is not suggesting, as Claimants insinuate, that Mr. Pey’s dual nationality in itself would have rendered his investments in Chile unprotected by the BIT. Rather, because of Law 16,643, any investment made specifically in the newspaper industry in 1972 *a fortiori* had to be considered a domestic investment, because foreigners were prohibited from investing in this particular business sector.

405. The Tribunal exceeded its powers by failing to apply Chilean law 16,643 and also by failing to apply Article 2(2) of the BIT. By doing so, it accepted jurisdiction over an investment that as a matter of Chilean law could not benefit from the protection of the Chile-Spain BIT. Consequently, the Award should be annulled under Article 52(1)(b) of the ICSID Convention. [Emphasis in original]

143. Finally, Chile adds:<sup>86</sup>

406. There is an additional aspect of the Tribunal’s finding of a “foreign” investment by Mr. Pey that merits discussion. In addition to all of the problems noted above relating to Mr. Pey’s legal inability at relevant times to renounce Chilean nationality and his failure to take steps to actually do so, it is also relevant that at the time of Mr. Pey’s alleged investment (1972), Mr. Pey was formally domiciled in Chile pursuant to Article 2 of the Dual Nationality Convention. Under that provision, and by the Tribunal’s express terms, Mr. Pey had to be deemed fully Chilean for all legal purposes: “Dès cette inscription, les Chiliens en Espagne et les Espagnols au Chili jouiront de la pleine condition juridique des ressortissants de la façon prévue dans cet accord et dans les lois des deux pays.” Therefore, had the Tribunal applied Article 2 of the Dual Nationality Convention to its analysis of the nature of the investment, it necessarily would have concluded that Mr. Pey’s alleged investment was made as a Chilean national, and therefore could not have qualified as a foreign investment for the purposes of the BIT.

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<sup>85</sup> See Resp. Rep. Annulment at paras. 404-405. Footnotes omitted.

<sup>86</sup> *Ibid.* at paras. 406-408. Footnotes omitted.

407. Further, Article 3 of the Convention makes clear that “[l]es ressortissants des deux parties Contractantes concernées ne seront pas soumis simultanément aux législations des deux parties en leur condition de personne naturelle de ces parties, mais uniquement à celle où ils ont élu domicile.” Therefore, as stated in the Republic’s Memorial, Mr. Pey could not have acquired the newspaper and have been considered a Spanish investor for the purposes of the BIT, and yet at exactly the same time have been considered a Chilean investor for the purposes of the Chilean law relating to the acquisition of media companies. Since Mr. Pey was Chilean for all legal purposes at the time he allegedly made the investment in question, his alleged acquisition could not have constituted a “foreign” investment under Chilean law.

408. The Tribunal’s failure to apply Articles 2 and 3 of the Dual Nationality Convention had a determinative effect on the Tribunal’s conclusions, because as a result [it] improperly asserted jurisdiction over an investment that could not have qualified as a foreign investment under the relevant Chilean law as required by Article 2(2) of the BIT. As a result, it also failed to apply Article 2(2) of the BIT, and it manifestly exceeded its powers, which compels annulment of the Award. [Emphasis in original]

144. As to its contention that the Tribunal failed to state reasons in respect of this issue, Chile submits that the Tribunal’s reasoning in paragraph 410 of the Award<sup>87</sup> cannot explain its conclusion that the posited dilemma was not fatal to Mr. Pey Casado’s ICSID claim.<sup>88</sup>

### Claimants’ Position

145. The Claimants reject Chile’s contention regarding Decision 24 in the following words:<sup>89</sup>

405. Tout au long de la procédure d’arbitrage, la République du Chili a soutenu que les investissements étrangers étaient régis par la Décision 24 du Pacte de Carthagène entrée en vigueur au Chili en 1971, conformément aux décrets n° 482

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<sup>87</sup> See Award at para. 410: « Le Tribunal a déjà conclu que la Décision n°24 n’avait en réalité jamais fait l’objet d’une application effective au Chili. Le dilemme mis en évidence par la défenderesse ne s’est donc jamais réellement posé. En 1972, lorsque M. Pey Casado a effectué son investissement, il était titulaire de la double nationalité hispano-chilienne. Résidant au Chili depuis 1947, M. Pey Casado bénéficiait de la Convention sur la double nationalité depuis 1958. La loi n°16.643 ne contenant pas de disposition spécifique relative aux doubles nationaux, la situation de M. Pey Casado était donc tout à fait compatible avec les dispositions de ce texte. »

<sup>88</sup> See Resp. Rep. Annulment at paras. 478 *et seq.*

<sup>89</sup> See Cl. C-Mem. Annulment at paras. 405-412. Footnotes omitted.

et 488. Dès lors, pour être qualifié d'investissement étranger, il convenait de démontrer l'existence de transferts de capitaux vers le Chili, par une personne n'ayant pas la nationalité chilienne. En outre, l'investissement devait être préalablement autorisé et enregistré auprès des autorités compétentes. Ne remplissant aucune de ces conditions, l'investissement réalisé par Monsieur Pey en 1972 ne pouvait être qualifié d'investissement étranger selon la délégation du Chili.

406. La position des Demanderesses concernant l'application de la Décision 24 du Pacte de Carthagène est résumée aux paragraphes 356 à 360 de la Sentence.

407. De fait, la question de l'entrée en vigueur et de l'application effective de la Décision 24 a été très largement débattue par les Parties.

408. Comme l'indique justement la République du Chili dans son Mémoire en annulation, le Tribunal arbitral, après avoir analysé les arguments des deux Parties, a considéré que la Décision 24 issue du Pacte de Carthagène était entrée en vigueur au Chili.

409. Partant, le Tribunal a continué d'analyser l'argumentaire des Parties sur la Décision 24. Il indique ainsi, « *dans l'hypothèse où la Décision n°24 serait entrée en vigueur, les Demanderesses ont toutefois fait valoir que l'application pratique de la Décision n°24 exigeait l'adoption d'un certain nombre de mesures qui n'ont pas été prises et qu'en conséquence la Décision n°24 n'a jamais été effectivement appliquée* ».

410. Aujourd'hui, pour la première fois, la République du Chili reproche au Tribunal arbitral d'avoir procédé à cet exercice. Selon elle, le Tribunal arbitral aurait dû appliquer les dispositions de la Décision 24 sans rechercher si celle-ci était effectivement appliquée, comme le lui demandaient les Demanderesses.

411. Cet argument est curieux. Il consiste à soutenir que le Tribunal aurait dû appliquer les dispositions de la Décision 24 à l'investissement de Monsieur Pey sans se soucier de savoir si ces dispositions étaient effectivement appliquées à tous les investissements étrangers au Chili à cette époque. En d'autres termes, l'investissement de Monsieur Pey aurait dû recevoir un traitement spécial, discriminatoire, par rapport aux autres investissements étrangers.

412. La République du Chili ne peut sérieusement reprocher au Tribunal arbitral de s'être assuré de l'application concrète et effective des dispositions de la Décision 24. Elle ne peut pas non plus demander au Comité *ad hoc* de sanctionner la Sentence sur ce fondement. [Emphasis in original]

146. As for Chile's contention regarding Law 16,643, the Claimants submit:<sup>90</sup>

417. S'agissant du prétendu dilemme soulevé par la République du Chili, le Tribunal arbitral précise « le Tribunal a déjà conclu que la Décision n°24 n'avait en réalité jamais fait l'objet d'une application effective au Chili. Le dilemme mis en évidence par la défenderesse ne s'est donc jamais réellement posé ».

418. Aujourd'hui, pour la première fois, la République du Chili prétend que le dilemme en question concerne l'incompatibilité du respect des dispositions de la loi 16.643 et la qualité d'investisseur étranger au sens de l'API. Elle soutient que pour être qualifié d'investissement étranger, Monsieur Pey devait avoir effectué son investissement en qualité d'espagnol en 1972.

419. Ce n'est pas ce qu'a retenu le Tribunal dans sa Sentence. En effet, le Tribunal constate que l'API retient une « conception large de la notion d'investissement » la seule condition étant « celle de l'acquisition en conformité au droit de l'Etat d'accueil ».

420. Or, le Tribunal a constaté que le droit chilien ne contenait pas de disposition définissant l'investissement étranger et que celui-ci ne devait pas remplir de condition particulière. La loi 16.643 de 1967 quant à elle ne concerne pas l'investissement. Elle impose simplement aux propriétaires de journaux d'être de nationalité chilienne, condition remplie par Monsieur Pey en raison de sa double nationalité en application de la CDN de 1958. La République du Chili ne peut donc s'appuyer sur la loi 16.643 pour démontrer que l'investissement de Monsieur Pey n'était pas un investissement étranger au sens de l'API.

421. En réalité, la République du Chili entretient volontairement une confusion entre différentes notions, l'application *ratione materiae* et l'application *ratione personae* de l'API. Or, l'argument du Chili ci-dessus mentionné concerne l'application *ratione personae* de l'API. A cet égard, le Tribunal a considéré que l'API ne contenait pas de disposition spécifique aux double-nationaux. Il a également conclu qu' « un double-national n'est pas exclu du champ de l'API, même si sa nationalité 'effective et dominante' est celle de l'Etat de l'investissement (contrairement à ce qui a été soutenu dans l'avis de droit du Professeur Dolzer, produit par la défenderesse) ». En outre, le Tribunal arbitral a considéré que « contrairement à l'article 25 de la Convention CIRDI, l'API ne précise pas le moment de l'appréciation de la nationalité de la partie requérante. De l'avis du Tribunal, la condition de nationalité au sens de l'API doit être établie à la date du consentement de l'investisseur à l'arbitrage ».

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<sup>90</sup> *Ibid.* at paras. 417-423. Footnotes omitted.

422. La position du Tribunal arbitral sur la condition d'application *ratione personae* n'est donc en rien incompatible avec sa décision concernant le respect de la loi chilienne 16.643 relative à l'abus de publicité.

423. Contrairement à l'allégation du Chili, le Tribunal arbitral a bien appliqué le droit chilien pour déterminer si l'investissement de Monsieur Pey avait été effectué en conformité au droit chilien. [Emphasis in original]

147. The Claimants accordingly refute Chile's contention that the Tribunal failed to state reasons in this regard.<sup>91</sup>

### **Committee's Analysis**

148. This is a complex question. It was recognized as such by the Tribunal which analyzed all facets of the question and considered all of the parties' arguments in a very thorough manner. Chile may not agree with the Tribunal's conclusions but once again it bears stating that this is not an appeal but an annulment proceeding, and it is not the role of an annulment committee to act as a court of appeal. As explained below, the Committee can see no manifest excess of power in the Tribunal's conclusions with respect to Decision 24, Law 16,643 or the Dual Nationality Convention. In addition, the Committee finds that the Tribunal provided ample and indeed very detailed reasons to support its conclusions.

149. Contrary to Chile's assertion, the Committee considers that the Tribunal applied the "proper law", *i.e.*, Articles 1(2) and 2(2) of the BIT as well as the Chilean law to which these provisions refer. This is clearly stated by the Tribunal in paragraph 370 of the Award. In the same paragraph, the Tribunal determined that the applicable law was Chilean law in force in 1972, at the time the investment was made.

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<sup>91</sup> *Ibid.* at paras. 439-448.



150. According to Chile, the applicable Chilean law consisted of three norms applicable to the newspaper industry. One of these norms is known as Decision 24.<sup>92</sup> The Tribunal recognized that this Decision was in force in Chile but, on the basis of the evidence submitted by the parties, it found that, by 1972, Decision 24 had not been effectively applied by Chile “...[vu] l’absence d’adoption des mesures nécessaires à cette fin...”.<sup>93</sup> For these reasons, the Tribunal concluded that Decision 24 was ineffective.
151. Chile argues that, by finding that Decision 24 was ineffective because it had not been applied in Chile, the Tribunal added a requirement to Article 2(2) of the BIT and, consequently failed to apply the proper law. It is not within the Committee’s mandate to determine whether or not the Tribunal was justified in taking into account the effectiveness of Decision 24 in order to decide whether it was part of the “*législation de la Partie contractante concernée*” as required by Article 2(2) of the BIT. In any case, the Committee notes that the Tribunal went on to analyse the regulations which Decision 24 was meant to replace and found that they were not applicable to the investment made by Mr. Pey Casado.<sup>94</sup>
152. The second norm discussed by Chile is Law 16,643 which requires that the owners of Chilean newspapers be Chilean nationals. Chile argued that this law is relevant to determine whether the investment was “acquired in accordance with the law” of Chile as required in Article 1(2) of the BIT. As noted earlier in this Decision, Chile claimed that the Claimants faced a “fatal dilemma” at the time the investment was made: acquiring the newspaper as a Spanish investor for the purposes of Decision 24 and, at the same time acquiring the newspaper as a Chilean investor for the purposes of Law 16,643. The

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<sup>92</sup> Document approved in 1970 by the Commission created by the Cartagena Accord (multilateral regional integration treaty to which Chile is a party) regarding common regime for the treatment of foreign capital in the Contracting States to the Accord.

<sup>93</sup> See Award at para. 401; see also paras. 397-398.

<sup>94</sup> *Ibid.* at paras. 402-408.

Tribunal resolved any issue in this regard very simply. No such dilemma existed, said the Tribunal, for the reason that (as noted above) Decision 24 was not applicable. Additionally, the Tribunal stated that, when the investment was made, Mr. Pey Casado was a dual national and, since Law 16,643 did not include any specific provision regarding dual nationals, the investment was perfectly compatible with such law.<sup>95</sup> In the view of the Committee, by thus interpreting Law 16,643, the Tribunal applied the proper law.

153. Chile also contends that a dilemma arises by virtue of the requirement of Law 16,643 that a newspaper owner be Chilean, and the requirement of Article 2(2) of the BIT that an investment be “foreign” (independently of Decision 24). In this connection, Chile submits that the Tribunal failed to apply Articles 2 and 3 of the Dual Nationality Convention, which is the third norm referred to by Chile.
154. Chile submits that, pursuant to the provisions referred to in the preceding paragraph, since Mr. Pey Casado was domiciled in Chile in 1972, he is to be treated as a Chilean national for all legal purposes. Chile asserts that, had the Tribunal applied these provisions, it would necessarily have found that the investment was in fact Chilean and not “foreign” for purposes of the BIT. The Claimants answer that this argument was never raised before the Tribunal.
155. Whether or not Chile raised this argument before the Tribunal, the Committee notes that the Tribunal interpreted Article 2(2) of the BIT as requiring that it determine whether Mr. Pey Casado’s acquisition of the CPP shares constituted a “foreign” investment according to the applicable Chilean law in 1972. In the context of that determination, and as the Committee has already observed above, the Tribunal found that the applicable law did not include Decision 24, that Mr. Pey Casado’s situation did not fall within the scope of

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<sup>95</sup> *Ibid.* at para. 410.

the other decrees that Decision 24 was meant to replace and that Law 16,643 was not incompatible with Mr. Pey Casado's dual nationality. The Tribunal then concluded that there was no specific definition of a "foreign" investment in Chile in 1972 and that, since Mr. Pey Casado had purchased the shares and paid for them using a foreign currency drawn on European bank accounts, his investment could thus be treated as "foreign" and in conformity with Article 1(2) and 2(2) of the BIT.<sup>96</sup> Accordingly, the Tribunal did not need to decide whether Mr. Pey Casado had made the investment as a Spanish national or a Chilean national or a dual national in order for the investment to be considered "foreign".

156. The Committee notes that the Tribunal's conclusion in this respect is consistent with what it decided in the subsequent paragraphs of the Award with respect to the question of nationality under the BIT.<sup>97</sup> The Tribunal determined that the dates on which the nationality requirement of the BIT had to be met were the date on which Mr. Pey Casado gave his consent to arbitration and the date on which the alleged breaches of the BIT occurred, not the date on which the investment was made.<sup>98</sup> The Tribunal also concluded that the BIT, unlike the ICSID Convention, does not bar a dual national from bringing a claim against his or her own State.<sup>99</sup> In these circumstances, the Committee finds that the Tribunal applied the proper law.
157. The Committee sees no manifest excess of powers in the Tribunal's conclusions with respect to Decision 24, Law 16,643 or the Dual Nationality Convention. The Committee finds that the Tribunal provided ample and very detailed reasons to support its conclusions in this respect.

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<sup>96</sup> *Ibid.* at para. 411.

<sup>97</sup> *Ibid.* at paras. 412-418.

<sup>98</sup> *Ibid.* at para. 414.

<sup>99</sup> *Ibid.* at para. 415.

158. Chile's requests are accordingly denied.

**(3) The *Ratione Temporis* Application of the BIT**

159. Chile's starting point in this regard is that the only investment of the Claimants was their investment in *El Clarín*. The Tribunal concluded in the Award that *El Clarín* had been definitively expropriated by no later than 1975: first *de facto*, by means of the physical seizure of the newspaper facilities in 1973, and then *de jure*, by means of an expropriatory decree promulgated in 1975. The Tribunal also concluded that the expropriation had been instantaneous, expressly rejecting Claimants' argument that it constituted a "continuing act" and thus an ongoing violation at the time the BIT entered into force. Further, the Tribunal determined that the post-BIT acts by Chile that it ultimately considered to be treaty violations — namely, the execution of Decision No. 43 and the alleged denial of justice in connection with the Goss printer proceedings — were completely separate and distinct from the 1975 expropriation. Specifically, the Award stated: "The confiscation and transfer to the State of the property of the assets of CPP and EPC constitute a consummated and distinct act from the violations that post-dated the BIT's entry into force [...]".<sup>100</sup>

160. In the words of Chile in its Skeleton (at page 6), "since *El Clarín* had been definitively expropriated by 1975, Claimants had no remaining investment in Chile by the time of the BIT's entry into force (1994) and *a fortiori* no investment by the date of the alleged post-BIT acts for which the Tribunal found Chile responsible".

(i) *Manifest Excess of Powers*

161. In light of the Tribunal's own conclusion that Mr. Pey Casado's investment in *El Clarín* had been fully extinguished upon its expropriation in the 1970s, the main issue raised by

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<sup>100</sup> *Ibid.* at para. 620.

Chile in connection with Article 52(1)(b) is whether the Tribunal failed to apply the proper law (Article 2(2) of the BIT) by not identifying the investment still owned by the Claimants which could have been affected by the acts and omissions deemed to constitute BIT violations.

(ii) *Failure to State Reasons*

162. The main issue raised by Chile in connection with Article 52(1)(e) is whether the Tribunal failed to state reasons for asserting jurisdiction over alleged harm to an investment that, by the Tribunal's own reasoning, had been extinguished more than twenty years prior to the BIT's entry into force, and therefore could not have constituted an "existing investment" either at that time, or at the time of the subsequent State acts that the Tribunal considered to be the basis for liability.

**Parties' Positions**

**Chile's Position**

163. Chile's sets out its submission that the Tribunal failed to apply Articles 1(2) and 2(2) of the BIT in the following words:<sup>101</sup>

416. Here, the Republic asserts that the Tribunal manifestly exceeded its powers because it improperly asserted jurisdiction over alleged post-BIT acts by Chile that could not have affected any investment of Claimants, for the simple reason that Claimants had no investment still existing at the time of the alleged acts. The Tribunal correctly noted at the outset of its analysis in the Award that Articles 1(2) and 2(2) of the BIT permitted claims only for investments that were "already existing at the time of entry into force of the BIT":

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

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<sup>101</sup> See Resp. Rep. Annulment at paras. 416-422. Footnotes omitted.

qui puisse être qualifié d'investissement étranger au sens de cette législation.

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

418. It bears recalling that the investment Mr. Pey allegedly made ceased altogether to exist in 1973, upon the *de facto* confiscation of *El Clarín*, or at the latest in 1975, upon the issuance of Decree No. 165 formally expropriating *El Clarín* and definitively dissolving the relevant corporate entities (CPP and EPC). The Tribunal itself conceded this key point when it concluded that the expropriation of *El Clarín* was an "instantaneous" act that concluded when it happened in the 1970s. This means necessarily that Claimants' investment was extinguished at that time. The Tribunal did not purport to suggest that the "investment" somehow continued to exist independently of the property that was expropriated, or that every subsequent disposition by the Government of the expropriated property constituted a new "expropriation" affecting the original owners. To the contrary, the Tribunal's conclusion was precisely the opposite: that the expropriation of *El Clarín* was not a "continuing" act.

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

420. The Tribunal assumed jurisdiction despite the fundamental logical and legal flaws identified above, eliding the absence of an investment and then ruling in Claimants' favor. The Republic could not have foreseen this outcome during the underlying proceedings, as no acts other than the expropriation itself had been the subject of a claim in the arbitration. Claimants had argued that the expropriation of their original investment should be deemed a "continuing" one that for that reason should be deemed to exist past the date of the BIT's entry into force, but they had never argued either (a) that the investment *itself* was somehow a "continuing" one; or (b) that they had made some other (different)

investment that was covered by the BIT and that was harmed by Chile's purported post-BIT acts.

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

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

164. In connection with its contention that the Tribunal failed to state reasons in this regard, Chile states:<sup>102</sup>

485. The Tribunal also failed to state reasons on what the "existing investment" was; *i.e.* what investment Mr. Pey still had in Chile at the time the BIT entered into force and/or at the time the Republic undertook the challenged post-BIT acts. On this issue, the Tribunal reached the following conclusions in the Award: (1) Articles 1(2) and 2(2) of the BIT required that there be an *existing investment*

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<sup>102</sup> *Ibid.* at paras. 485-487. Footnotes omitted.

by Mr. Pey in 1994, when the BIT entered into force; and (2) the *El Clarín* newspaper had been completely expropriated—and thus the relevant investment had become extinguished—by 1975 at the latest; (3) the expropriation was instantaneous, and thus contrary to Claimants’ argument, it did not constitute a violation that was still continuing at the time the BIT entered into force; and (4) the post-BIT acts by Chile that the Tribunal ultimately found to be treaty violations—Decision 43 and the alleged delay in local court proceedings regarding the Goss Machine—were completely different, and distinct from, the 1975 expropriation.

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

487. The Tribunal seemingly contented itself with noting that it had the authority to take into consideration pre-BIT events in order to give context to the post-BIT acts. However, this did not give the Tribunal the authority to elevate to the status of an “existing” investment one that, by the Tribunal’s own finding, had been clearly extinguished long before the BIT’s entry into force. [Emphasis in original]



## Claimants' Position

165. The Claimants do not agree with Chile's reasoning. They explain: <sup>103</sup>

425. Par cet argument, la République du Chili entend enfermer le Tribunal arbitral - et partant le Comité *ad hoc* - dans un syllogisme simpliste qui peut se résumer ainsi : l'acte instantané et achevé qu'est le Décret n°165 de 1975 édictant la dissolution de CPP S.A. et EPC Ltée et le passage de tous leurs biens à l'État équivaut à l'extinction pure et simple de tous les droits afférents à ces biens, et en particulier de la protection conférée par l'API.

[...]

433. S'agissant du point de savoir si l'investissement effectué par Monsieur Pey en 1972 était couvert par l'API, le Tribunal fonde sa décision sur l'article 2.2 de l'API qui prévoit :

*Le présent Traité s'appliquera aux investissements qui seraient réalisés à partir de son entrée en vigueur par des investisseurs de l'une des Parties contractantes dans le territoire de l'autre. Toutefois, il bénéficiera également aux investissements réalisés antérieurement à son entrée en vigueur et qui, selon la législation de la Partie contractante concernée, auraient la qualité d'investissement étranger. (Emphasis added)*

434. Or, rien dans cet article [de l'API] n'impose que l'investissement réalisé existe encore à la date de la violation par l'Etat d'accueil. Il impose seulement que l'investissement réalisé antérieurement à l'entrée en vigueur ait été réalisé conformément à la législation en vigueur dans l'Etat d'accueil à la date de l'investissement. Le Tribunal a conclu que tel était le cas.

435. L'argument de la Défenderesse consiste à imposer un critère supplémentaire dans la définition des investissements protégés par l'API. Or, comme l'a indiqué le Tribunal arbitral à propos de la définition du terme « investissement » « *une telle démarche serait de toute évidence contraire à l'article 31 de la Convention de Vienne sur le droit des traités* ».

436. En outre, l'imposition d'une telle condition supplémentaire contrevient à l'objet même du droit international de protection des investissements. En effet, suivre l'argument de la République du Chili équivaudrait à vider de son sens tout traité de protection des investissements.

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<sup>103</sup> See Cl. C-Mem. Annulment at paras. 425; 433-438. Footnotes omitted.

437. Ceci a d'ailleurs été rappelé dans plusieurs affaires portées devant des tribunaux arbitraux CIRDI et encore récemment dans la sentence rendue le 15 avril 2009 dans l'affaire *Phoenix Action Ltd c/ La République Tchèque* qui précise :

*It is true that an investment that has come to a standstill, because of the host State's actions, would still qualify as an investment, otherwise the international protection of foreign investment provided by BITs would be emptied of its purpose.*

438. Il résulte des développements précédents que le Comité *ad hoc* devra rejeter la demande d'annulation de la République du Chili sur ce fondement celle-ci étant irrecevable et à tout le moins mal fondée. [Emphasis in original]

166. In addition, the Claimants refute Chile's contention that the Tribunal failed to state reasons in this regard.<sup>104</sup>

### **Committee's Analysis**

167. The Committee agrees with the Claimants. It is not within the remit of the Committee to state that it agrees with the Tribunal's reasoning and conclusion on any issue (although it does on this particular question). However, it is strictly within its remit to review the Tribunal's reasoning and conclusion on every issue raised by the Respondent, as it has done, and to determine, with respect of these specific grounds, that the Tribunal has not exceeded its powers nor failed to provide reasons.

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.<sup>105</sup> In addition, the Committee agrees with the Claimants that

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<sup>104</sup> *Ibid.* at paras. 439 *et seq.*

<sup>105</sup> See Award at paras. 431-432.

one could have made the argument that the duty to provide redress for violation of rights persists even if the rights as such have come to an end,<sup>106</sup> as long as the relevant treaty obligation was in force for the State concerned at the time of the alleged breach.<sup>107</sup> These principles were followed by the Tribunal in the section of the Award dedicated to the application of the BIT *ratione temporis*.<sup>108</sup> 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. The Respondent's request for annulment on the basis of this challenge is accordingly dismissed.

#### **(4) The Investment by the Foundation – Manifest Excess of Powers**

169. The main issue raised by Chile in this connection is whether the Tribunal manifestly exceeded its powers by failing to apply the proper law — Article 1(2) of the BIT and Article 25 of the ICSID Convention — to determine whether the cession to the Fundación of Mr. Pey Casado's claim rights constituted a qualifying "investment" for purposes of the BIT and the ICSID Convention.

### **Parties' Positions**

#### **Chile's Position**

170. Chile states its position as follows:<sup>109</sup>

411. The Republic could not have anticipated during the arbitral proceeding that in its Award, the Tribunal would confuse a transfer of shares for ownership

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<sup>106</sup> See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction dated 16 June 2006, at para. 135.

<sup>107</sup> See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2002, at para. 68 (hereinafter "*Mondev Award*").

<sup>108</sup> See Award at paras. 419-466.

<sup>109</sup> See Resp. Rep. Annulment at paras. 411; 413-414. Footnotes omitted.

purposes with the mere transfer of litigation rights, and that in doing so, it would fail to analyze the real nature of the Foundation's alleged investment as a matter of Chilean law. This, like other annulable errors, became evident to the Republic only upon review of the Tribunal's Award.

[...]

413. Chile's analysis in the Memorial of whether the claim rights received by the Foundation from Mr. Pey could qualify as an investment was based on the Tribunal's reasoning in the Award regarding Mr. Pey's alleged investment. As Claimants concede, the Tribunal itself acknowledged a requirement of analyzing whether the Foundation fulfilled the jurisdictional requirements established by the ICSID Convention and the Chile-Spain BIT. However, the Tribunal failed to assess whether the claim rights received by Foundation could in and of themselves qualify as an investment. In its Memorial, the Republic applied to the Foundation the *same* standard that the Tribunal used to determine whether Mr. Pey's alleged acquisition qualified as an investment, and demonstrated that the Tribunal had not applied to the Foundation its own standard to determine whether the Foundation held an "investment" covered by the BIT. Claimants have not responded to the Republic's arguments on this issue. For example, Claimants did not meaningfully controvert the Republic's assertion that the Tribunal failed to analyze whether the Foundation's alleged investment fulfilled the requirements established by the ICSID Convention and the Chile-Spain BIT.

414. Had the Tribunal performed with respect to the Foundation's alleged investment the same analysis that it had applied to Mr. Pey's alleged investment, it necessarily would have concluded that the litigation rights transferred by Mr. Pey to the Foundation did not qualify as an investment, either under the provisions of the Chile-Spain BIT—Article 1(2)—or under Article 25 of the ICSID Convention. Accordingly, the Tribunal manifestly exceeded its powers by asserting jurisdiction over an alleged "investment" by the Foundation that clearly did not arise out of any activity that could be considered an "investment" under either the ICSID Convention or the BIT. The Award must therefore be annulled under Article 52(1)(b) of the ICSID Convention for this reason. [Emphasis in original]

### Claimants' Position

171. The Claimants dispute Chile's submission in this regard in the following words:<sup>110</sup>

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<sup>110</sup> See Cl. C-Mem. Annulment at paras. 454; 458. Footnotes omitted.

454. Au contraire, le Tribunal a indiqué "*la cession des actions n'a transmis que la qualité d'investisseur à la Fondation, et non pas de ce fait et nécessairement le droit de réclamation. Pour décider du sort des objections d'incompétence soulevées par la défenderesse à l'égard de la Fondation Président Allende, le Tribunal arbitral doit donc analyser la question de savoir si la Fondation Président Allende remplit toutes les autres conditions posées tant par la Convention CIRDI que par l'API quant à la compétence du Tribunal arbitral. En l'espèce ceci concerne notamment les conditions de nationalité au sens de la Convention CIRDI ainsi que le consentement des Parties à recourir à l'arbitrage CIRDI pour résoudre leur litige*".

[...]

458. De fait, la République du Chili tente une fois de plus d'interjeter appel de la décision du Tribunal arbitral devant le Comité *ad hoc* en vue de son infirmation. Le Comité *ad hoc* rejettera donc la demande d'annulation du Chili sur ce fondement. [Emphasis in original]

### **Committee's Analysis**

172. Here again, the Committee agrees with the Claimants. In the view of the Committee, this is yet another attempt by the Respondent to appeal to the Committee that it should overturn the decision of the Tribunal and rule, in its stead, that the rights received by the Foundation from Mr. Pey Casado do not qualify as an investment. This, the Committee will not do. The Respondent attempts to challenge the Tribunal's conclusion that there was a transfer of shares by Mr. Pey Casado to the Foundation that gave the latter the status of investor. Respondent argues that the shares had ceased to exist and, therefore, could not have been transferred. It concludes that Mr. Pey Casado could only have transferred litigation or claims rights that would not qualify as an investment. After having reviewed the parties' arguments, the Tribunal came to a different conclusion, namely that the Foundation had acquired the status of an investor.<sup>111</sup> This meant that the investment remained the same and accordingly, there was no need for the Tribunal to re-examine whether the rights transferred to the Foundation

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<sup>111</sup> See Award at para. 543.

qualified as an investment under the BIT's provisions and the ICSID Convention. The Tribunal summarizes its position at paragraph 558 of the Award:

558. Cette conclusion est renforcée par le fait que, en tout état de cause, la Fondation Allende a obtenu la qualité d'investisseur par la cession de la part de l'investisseur initial, M. Pey Casado, d'une grande partie de son investissement. A ce propos, les mêmes règles que le Tribunal arbitral a énoncées quant à la notion d'investissement au sens de l'article 25 de la Convention CIRDI s'appliquent. Compte tenu de la rédaction très large de l'API, une interprétation plus stricte ne se justifierait pas. En particulier, l'API ne requiert pas que l'investisseur ait fait l'investissement lui-même, ce qui laisse ouverte la possibilité qu'un investissement (et la qualité d'investisseur) puisse résulter d'une cession de la part de l'investisseur initial.

173. The Tribunal did not exceed its powers and the Award will not be annulled on this ground. The Respondent's request is accordingly denied.

#### **D. Denial of Justice**

##### **(1) Serious Departure from a Fundamental Rule of Procedure**

###### *(i) Denial of the Right to be Heard*

174. Chile contends that, contrary to Article 52(1)(d), the Tribunal denied it the right to be heard on the Claimants' alleged denial of justice which ultimately gave rise to responsibility under the Award. Thus, as a threshold matter, Chile's challenge in this regard raises the issue of whether the Claimants asserted the denial of justice claim for which the Tribunal found Chile responsible. It is recalled that the Tribunal found that Chile "a violé son obligation de faire bénéficier les demanderessees d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice". The Tribunal's conclusion in this regard is further set forth at paragraph 674 of the Award:

674. Dans le cas d'espèce, en résumé, en accordant des compensations – pour des raisons qui lui sont propres et sont restées inexplicées – à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués, en même temps qu'elle paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderessees de façon juste et équitable.

## Parties' Positions

### Chile's Position

175. Chile argues that Claimants never alleged post-entry into force BIT violations related to denial of justice (Article 4 of the BIT). Consequently, the Republic was not afforded the opportunity to present defenses, evidence, or witnesses in respect of these claims.<sup>112</sup>

176. Chile contends as follows:<sup>113</sup>

64. Claimants do not dispute that in the May 2008 Award, the Tribunal concluded that the BIT's substantive provisions could not apply to the confiscation of *El Clarín* because the relevant expropriatory actions had predated the BIT's entry into force in 1994. However, the Tribunal also concluded that the BIT could in fact be applied to certain alleged BIT violations by Chile that occurred *after* the Chile-Spain BIT entered into force.

65. The Tribunal found Chile liable to Mr. Pey under the fair and equitable treatment provision of the Chile-Spain BIT (Article 4) as a result of two such alleged post-entry-into-force violations. The first was an alleged procedural denial of justice due to an "undue delay" by the First Civil Court of Santiago in deciding Mr. Pey's claim for the 1973 confiscation of a Goss printing press that belonged to *El Clarín*. The second related to an administrative decision—known as "Decision 43"—that was rendered in Chile by the Ministry of National Assets following an administrative proceeding pursuant to a law enacted to compensate victims of Pinochet-era expropriations. In the particular proceeding that resulted in Decision 43—which was distinct and unrelated to the judicial proceeding concerning the Goss machine—the successors of the four registered shareholders of *El Clarín* had sought compensation from the State for the confiscation of *El Clarín*. It is important to recall in this regard that Chilean authorities had specifically invited Mr. Pey—in writing—to take part in this proceeding. However, Mr. Pey had voluntarily and expressly declined to participate (so as to not run afoul of the fork-in-the-road provision of the Chile-Spain BIT and thereby prejudice his ICSID claim).

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<sup>112</sup> See Resp. Mem. Annulment at para. 88. Footnote omitted.

<sup>113</sup> See Resp. Rep. Annulment at paras. 64-68. Footnotes omitted.

66. At the conclusion of the relevant administrative process, the Chilean Ministry of National Assets issued “Decision 43,” in which it authorized compensation to the successors of the registered shareholders of *El Clarín* (a determination that the Republic continues to consider was correct, because the relevant beneficiaries were able to prove ownership of the CPP shares under Chilean law). Shortly after the issuance of Decision 43, Mr. Pey asked the ICSID Tribunal for provisional measures enjoining its execution. However, the Tribunal rejected this request, explaining that “*la Décision Ministérielle n° 43 et son exécution au Chili n’ont pas des conséquences telles qu’elles puissent affecter ou la compétence du Tribunal Arbitral CIRDI, ou les droits allégués par les Parties demanderesses . . .*” Later, however, and wholly inconsistently with its Provisional Measures decision, the Tribunal was to hold in the Award that the execution of Decision 43—that is, the compensation of persons other than Mr. Pey for the confiscation of *El Clarín*—had discriminated against Mr. Pey on the basis of his nationality, in violation of the fair and equitable treatment provision of the Chile-Spain BIT.

67. Claimants in their Counter-Memorial seek to sow confusion by blurring the lines between the alleged claims relating to the Goss printer and Decision 43 (*i.e.*, the “denial of justice” claim and the “discrimination” claim, respectively). The truth is that these two issues are—and were found by the Tribunal to be—completely distinct. While Claimants complained in the arbitration that Decision 43 was unfair by calling it a “denial of justice,” the basis for the Tribunal’s finding of “denial of justice” in the Award (as opposed to its finding of “discrimination”) was wholly unrelated to Decision 43. Rather, such finding related solely to the *length* of the Goss machine proceeding. Accordingly, it is important that the Committee members examine carefully—and in context—the passages that Claimants cite as evidence that they in fact asserted the alleged denial of justice claim for which the Tribunal found Chile liable. The Committee needs to determine what exactly it is that Claimants were referring to in those instances in which they used the term “denial of justice” at various times in the arbitration, and then to determine whether the intended meaning in such instances matches the alleged claim upon which the Award actually was based.

68. As Chile explained in its Request for Annulment and in its Memorial, it was not afforded an opportunity to be heard regarding either of the two alleged claims on which the Tribunal based its Award. It was precluded from responding to the denial of justice “claim” because: (1) Claimants at no point asserted any denial of justice claim specifically relating to the delay in the Goss machine proceeding (which was the sole basis of the Tribunal’s finding of responsibility due to “denial of justice”); and (2) Claimants purported to assert a vague “denial of justice” claim concerning the Goss Machine proceedings only on the final day of the final hearing. Moreover, the vague denial of justice “claim” was purportedly raised at a hearing that Claimants concede had been convened to address “questions portant exclusivement sur la compétence,” and which therefore was an inappropriate context for raising any new merit claim. [...] [Emphasis in original]



177. According to Chile, the denial of justice claim was introduced as a free-standing claim for the first time upon prompting from the Tribunal at the hearing held in January 2007.<sup>114</sup> However, the parties were never afforded the opportunity to submit their arguments in respect of this claim.
178. Examining the earlier pleadings, Chile notes that the term denial of justice was used in the Claimants' Supplemental Memorial on the Merits dated 11 September 2002, but it was then used in reference to Decision No. 43 rather than in reference to the Goss machine.<sup>115</sup> Although the Claimants' Ancillary Request of 4 November 2002 related to the Goss machine, Chile argues that the claim asserted was solely for restitution or compensation of the machine's confiscation.<sup>116</sup> At the May 2003 Hearing, the Claimants expressly confirmed that the entirety of the claims in their Request for Arbitration and Ancillary Request were confiscation claims.<sup>117</sup> At the Hearing on Annulment, counsel for Chile summarized the argument as follows: "it [Claimants' Ancillary Request] does refer to the denial of justice, it does refer to the Goss machine, but it does not refer to the basis on which the Tribunal ruled against Chile, which was the delay [...]. [T]hey never articulated any denial of justice claim under international law as a free-standing claim."<sup>118</sup>
179. In sum, according to Chile, when the Claimants referred to a denial of justice claim for the Goss machine in subsequent submissions, it always was in the context of the *confiscation* claims.

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<sup>114</sup> See Resp. Mem. Annulment at para. 218. Footnote omitted.

<sup>115</sup> *Ibid.* at para. 133. Footnote omitted.

<sup>116</sup> *Ibid.* at para. 146. Footnote omitted.

<sup>117</sup> *Ibid.* at para. 194, footnote omitted; Tr. Annulment [1] [114:21-115:15] (Eng.); [46:21-33] (Fr.); [121:6-22] (Spa.); Tr. Arb. [1][159:23-160:6] (Fr.) submitted as RA-24.

<sup>118</sup> See Tr. Annulment [2] [329:9-330:1] (Eng.); [137:30-138:1] (Fr.); [357:13-358:12] (Spa.).

## Claimants' Position

180. It is the Claimants' position that they presented their claims in a proper and timely manner in the arbitral proceeding, including their denial of justice claim.<sup>119</sup> They argue that: (1) "les Demanderesses ont toujours soutenu que les actes du gouvernement chilien à l'encontre de Monsieur Pey étaient constitutifs d'un déni de justice"<sup>120</sup>; and (2) they specifically asserted a denial of justice claim in the 4 November 2002 Ancillary Request and 23 February 2003 Reply on Jurisdiction and Merits. In this regard, the Claimants point out the various instances in their pleadings in which they used the term "denial of justice" and conclude as follows:<sup>121</sup>

509. Il résulte des développements précédents que les Demanderesses ont bien, contrairement aux allégations du Chili, formulé une demande sur le fondement du déni de justice commis par la République du Chili dans le cadre de procédures engagées par les Demanderesses devant les juridictions locales en vue d'obtenir réparation pour la confiscation des presses GOSS. La position des Demanderesses n'a pas évolué depuis leur demande complémentaire du 4 novembre 2002.

510. Là encore, les prétentions de la Défenderesse sont dénuées de fondement. Il suffit pour s'en convaincre de relire les écritures des Demanderesses. Afin de faciliter la tâche du Comité *ad hoc*, les Demanderesses ont extrait de leurs écritures et des transcriptions des audiences les passages pertinents.

[...]

514. En substance, les Demanderesses soutenaient que les actes pris par la République du Chili pour tenter de s'opposer à la compétence du Tribunal arbitral – en particulier la demande du Chili au Secrétaire Général du CIRDI d'annuler sa décision d'enregistrer la requête d'arbitrage déposée par les Demanderesses, les démarches de la République du Chili auprès du gouvernement espagnol pour parvenir à une interprétation commune des termes de l'API permettant au Chili de soutenir l'incompétence du Tribunal – ainsi que les mesures d'intimidation à l'égard de Monsieur Pey afin qu'il retire sa demande

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<sup>119</sup> See Cl. C-Mem. Annulment at paras. 490-527 and 541-547.

<sup>120</sup> *Ibid.* at para. 511.

<sup>121</sup> *Ibid.* at paras. 509-510, 514 and 527.

auprès du CIRDI, étaient constitutifs d'un déni de justice au sens du droit international public, constituant une violation supplémentaire de la République du Chili au titre de l'API.

[...]

527. Il résulte des développements précédents que les Demanderesses ont bien présenté des demandes pour déni de justice et pour violation du traitement juste et équitable et cela, en ce qui concerne la Décision n°43, depuis 2002, date des premiers échanges qui ont suivi l'invocation par le Chili de cette Décision Ministérielle au cours de l'audience de mai 2000. Pourtant, la République du Chili n'a pas hésité à consacrer presque 150 pages de son Mémoire en annulation à cette question. Par la longueur de ses développements la Défenderesse a vraisemblablement voulu conférer à sa demande, une apparence de sérieux, qui ne saurait tromper le Comité *ad hoc*.

181. More specifically, the Claimants say that they introduced the Goss machine in their Ancillary Request of 4 November 2002:<sup>122</sup>

Monsieur Pey Casado est donc actuellement confronté au Chili à un déni de justice en ce qui concerne les presses GOSS.

D'une part, la possibilité de faire valoir ses droits devant les juridictions de l'ordre judiciaire lui a été refusée *in limine litis*. Ainsi ses recours ont été systématiquement rejetés *in limine litis* alors qu'ils étaient légalement et constitutionnellement recevables. M. Pey Casado et la Fondation espagnole ont donc été privés du droit fondamental d'accéder à la justice. En outre, la décision du Contralor du 14 octobre 2002 constitue un déni de justice par mauvaise application de la loi, détournement et abus de pouvoir.

D'autre part, sur un plan purement pratique, Monsieur Pey Casado et la Fondation espagnole ne pourront plus obtenir une indemnisation au Chili pour la valeur de remplacement des presses GOSS. [...]

La demande aujourd'hui portée devant le Tribunal arbitral met en cause d'une part la violation par la République du Chili de son obligation de protection envers les Demanderesses (article 3.1 de l'API Espagne-Chili), et de son obligation de traitement juste et équitable (article 4.1), et d'autre part la violation de l'article 5 de l'API. [Emphasis in original]

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<sup>122</sup> *Ibid.* at para. 494 quoting Cl. Anc. Req. pp. 6, 13; see also Tr. Annulment [1] [203:13-204:18] (Eng.); [84:25-85:10] (Fr.); [221:1-222:3] (Spa.).

182. The Claimants also refer to their Reply on Jurisdiction and the Merits dated 23 February 2003 in which they claimed that the denial of justice related to the Goss machine triggered the international responsibility of Chile. The Reply contains a section entitled “Le déni de justice dans l’affaire GOSS entraîne la responsabilité internationale de l’État chilien.” It reads as follows:

Les faits additionnels exposés le 4 novembre 2002 consistent dans :

1. Le retard exorbitant de la 1<sup>ère</sup> Chambre Civile de Santiago à statuer sur le fond: dans la procédure commencée en octobre 1995, il n’y a pas eu de sentence ;
2. Le rejet *in limine litis* par la 1<sup>ère</sup> Chambre Civile de Santiago, le 2 octobre 2001, de la demande de mesures conservatoires à l’égard de la « Décision N°43 », pour ce qui concerne les presses GOSS, rejet assorti d’un renvoi à la compétence de la Cour Suprême, s’agissant en l’occurrence de résoudre un éventuel conflit de compétences entre cette 1<sup>ère</sup> Chambre et le Ministère des Biens Nationaux ;
3. Le rejet *in limine litis* par la Cour Suprême du Chili, le 2 juillet 2002, du conflit de compétence entre ladite autorité administrative et la 1<sup>ère</sup> Chambre Civile de Santiago, formé le 5 juin 2002 par les investisseurs espagnols [...]

Notons que tous ces rejets sont ostensiblement dépourvus du plus élémentaire souci de justifier leurs positions, et vont même jusqu’à se montrer en contradiction directe avec les données en jeu, ou à alléguer une absence de fondements, alors que la demande correspondante s’appuie méticuleusement sur les faits et les dispositions pertinentes.

Ces faits ont mis en place une situation de **déni de justice** à l’égard des droits de la Fondation espagnole et de M. Pey sur les presses GOSS.

Le **déni de justice** est en lui-même susceptible de recours à l’arbitrage (indépendamment du sort de la procédure interne ouverte en 1995), car le différend entre les investisseurs espagnols et l’Etat du Chili porte sur la restitution des presses GOSS, ou sa valeur de remplacement. Pour l’API Chili-Espagne, le fait d’avoir porté le différend devant la juridiction nationale n’est pas incompatible avec le recours à l’arbitrage du CIRDI lorsqu’on se trouve face à une situation de **déni de justice**.

En d’autres termes, dans les circonstances **de déni de justice consommé** le 14 octobre 2002 (décision du Contralor Général, Pièce C216), le recours à l’arbitrage du CIRDI peut trouver son fondement dans le seul API Espagne-Chili. L’expert de la défenderesse, M. Dolzer, ne semble pas s’être rendu compte de ce fait ni, par conséquent, de ses conséquences. [Emphasis in original]

183. In their Reply of 2003, the Claimants point out that they referred specifically to cases where denial of justice claims were analyzed such as *Azinian v. United Mexican States*<sup>123</sup> and *Mondev International Ltd. v. United States of America*.<sup>124</sup> They also recall that denial of justice was specifically addressed during the January 2007 Hearing.

### **Committee's Analysis**

184. The Committee agrees with Chile that there is a departure from the right to be heard, which is a fundamental rule of procedure, when a party is not given a full, fair, or comparatively equal opportunity to state its case, present its defense, or produce evidence regarding every claim and issue at every stage of the arbitral proceeding.<sup>125</sup> Chile adds that, for a defending party, the right to be heard is essentially the right to rebut; however, a meaningful opportunity to rebut a claim requires knowledge of that claim in the first place.

185. While the Claimants also agree that parties should have ample opportunity to consider and present written and oral submissions on all the issues raised, they add that the Tribunal does not have an obligation to draw the parties' attention to an aspect of a legal question that they may have failed to address.<sup>126</sup>

186. In the Award,<sup>127</sup> the Tribunal summarizes fairly the parties' positions. For the Claimants, it refers to their written submissions of 11 September 2002, 4 November 2002, 23 February 2003, and oral submissions at the January 2007 Hearing. As for the

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<sup>123</sup> *Robert Azinian and others v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999.

<sup>124</sup> *Mondev Award*.

<sup>125</sup> See Resp. Mem. Annulment at para. 226.

<sup>126</sup> See Cl. Rej. Annulment at para. 192 quoting *Schreuer Commentary Art. 52* at para. 317.

<sup>127</sup> See Award at paras. 637-649.

Respondent, the Tribunal notes that Chile has not developed a complete analysis of the concepts of denial of justice or fair and equitable treatment but assumes that it was a deliberate choice.<sup>128</sup> The Tribunal mentions only a few remarks made by the Republic's counsel at the 2003 and 2007 Hearings.<sup>129</sup>

187. Having reviewed the parties' submissions and the relevant paragraphs of the Award, the Committee finds that the Claimants did present to the Tribunal a claim for denial of justice in relation to the Goss machine.<sup>130</sup>
188. The Committee recognizes that the claim was not particularly well developed and substantiated at any great length by the Claimants but it was definitely raised and it was raised as a claim distinct from the confiscation claims.
189. Since the denial of justice claim was raised for the first time in the Claimants' Ancillary Claim of 4 November 2002, the Respondent had the opportunity to reply in its written submissions of 3 February 2003 (Counter-Memorial on Jurisdiction and the Merits) and 4 April 2003 (Rejoinder on Jurisdiction and the Merits), as well as during the May 2003 Hearing and, to a certain extent, the January 2007 Hearing.
190. If Chile did not present any defense, it can only be, in the view of the Committee, because it did not realize that it was a specific claim distinct from the *confiscation* claims. However, its failure to address the Claimants' denial of justice claim is not because it was not raised by the Claimants.
191. The issue is not whether the Tribunal granted both parties an equal opportunity to present their arguments but rather a situation where the Respondent, for whatever reason, did not

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<sup>128</sup> *Ibid.* at para. 646.

<sup>129</sup> *Ibid.* at paras. 603-604 (emphasis on n. 570 and n. 571).

<sup>130</sup> The Committee is only addressing liability in this section of its Decision and not damages which it will address later.

avail itself of its right to reply and attempt to refute the Claimants' submissions. In these circumstances, the Respondent cannot blame the Tribunal and argue, as it does, that it never had an opportunity to present its defense.

192. Maybe the Tribunal could have asked the parties to develop further their arguments on the denial of justice claim but it had no obligation to do so. This is not a situation where the Tribunal stepped out of the legal framework established by the Claimants.<sup>131</sup> The Tribunal found liability of Chile on the basis of arguments that had been presented, albeit briefly, by one party.
193. The Committee notes that the Claimants argued that Chile had waived its right to invoke the right to be heard as a defense with respect to the denial of justice claim.<sup>132</sup> Obviously, Chile disagrees with Claimants as it states that it was not until the Award was rendered that it realized that the denial of justice had become one of the two bases for Chile's liability.<sup>133</sup> As just explained, the Committee concluded that the Claimants had advanced the denial of justice claim during the arbitral proceeding. Therefore, it is not a question of a party being deprived of its right or of a right being waived; it is a situation where one party failed to exercise its right.
194. For these reasons, the Committee finds no departure at all from the fundamental rule of procedure regarding the right to be heard on this merits issue, let alone a serious departure, and the Respondent's request is denied.

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<sup>131</sup> See *Klöckner I Decision* at para. 91.

<sup>132</sup> See Cl. C-Mem. Annulment at paras 501-504.

<sup>133</sup> See Resp. Rep. Annulment at paras. 106-109.

(ii) *Burden of Proof*

195. The main issue raised by Chile in connection with this aspect of Article 52(1)(d), on the assumption that the Claimants in fact asserted the relevant denial of justice claim, as the Committee has found, is whether the Claimants actually discharged their burden of proof in respect of this claim since Chile says the Claimants presented no evidence about the duration or handling of the Goss printer proceedings.

**Parties' Positions**

Chile's Position

196. Chile submits that, in the circumstances, the Tribunal improperly allocated the burden of proof on the denial of justice claim (as well as the discrimination claim):<sup>134</sup>

234. [...] [T]he mere unsubstantiated invocation by Claimants of either cause of action could not—without more—have satisfied their burden of proof. Claimants never presented—and therefore now cannot identify—any documentary evidence, legal support, witness testimony, or damages evaluation associated with the purported denial of justice and discrimination “claims.” The Committee should not ignore this important corollary of Claimants’ failure to assert the claims that were the basis of the Award.

197. Chile’s argument is that:<sup>135</sup>

Chile’s argument is that since Claimants did not even attempt to present any evidence on this issue, the only way the Tribunal could have found liability was essentially by relieving Claimants of their burden of proof. Even under the standard articulated by the Tribunal itself, judicial delay does not in and of itself, without more, give rise to a denial of justice under customary international law. Rather, a claimant must prove that the relevant delay was *unreasonable*. In the present case, the Tribunal simply presumed that the seven-year period of duration of the Goss printer proceedings was *ipso facto* unreasonable, without ever analyzing what accounted for the seven year duration, and whether the delay was

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<sup>134</sup> *Ibid.* at para. 234. Footnotes omitted.

<sup>135</sup> See Resp. Pre-H Skel. at p. 8.



in fact attributable to improper handling by the Chilean court. In essence then, the Tribunal relieved Claimants of their burden of proof, thereby improperly placing it on the Respondent.

### Claimants' Position

198. Claimants reply that they have made a proper denial of justice claim and that, as underlined by the Tribunal in the Award, the Respondent decided not to present any arguments on this issue.<sup>136</sup> As a result, the Claimants argue that there can be no improper allocation of the burden of proof.<sup>137</sup>

### Committee's Analysis

199. The Committee has reviewed carefully the Tribunal's reasoning leading to its conclusion that the seven-year duration of the Goss printer proceeding was an undue delay and unreasonable<sup>138</sup> giving rise to a denial of justice claim. Again, the Respondent may disagree with the Tribunal's conclusion but, by no stretch of the imagination, can it be said that there was an improper allocation of the burden of proof which could be characterized as a serious departure from a fundamental rule of procedure. It is very clear from the Award that the Tribunal was satisfied with the evidence which the Claimants adduced. The Respondent's request for annulment on this ground is dismissed.

#### **(2) Manifest Excess of Powers**

200. The main issue raised by Chile in terms of "manifest excess of powers" in respect of Article 52(1)(b) is whether the Tribunal manifestly exceeded its powers by asserting

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<sup>136</sup> See Award at para. 646.

<sup>137</sup> See Cl. C-Mem. Annulment at para. 529.

<sup>138</sup> See Award at paras. 659-663.

jurisdiction over a purported denial of justice claim for undue delay by the First Civil Court of Santiago (the Goss machine proceedings) that had allegedly not been asserted by the Claimants.

### **Parties' Positions**

#### **Chile's Position**

201. Chile's position in this regard is summarized as follows:<sup>139</sup>

428. As discussed above and also in the Memorial, a cause of action for “denial of justice” must include arguments and evidence relating to the factors that establish a denial of justice under customary international law and/or the BIT. In order to state such a claim, Claimants would have been required in their Ancillary Request to present evidence and to examine the relevant law and facts supporting allegations that Chilean authorities had unreasonably delayed an outcome in the Goss printer claim, by acts that were so unjust as to violate international law. They would have had to establish the requisite elements to prove a “denial of justice” under international law. However, they did not do so in the 2002 Ancillary Request, nor at any other stage of the proceeding. Importantly, Claimants do not challenge in their Counter-Memorial the Republic's assertion that Claimants failed to plead—and much less to prove—the elements of a denial of justice. It follows from this that a denial of justice claim was never asserted, and that the Tribunal manifestly exceeded its powers by issuing a merits ruling that was predicated on a claim that was never presented to it by one of the parties.

#### **Claimants' Position**

202. The Claimants reject this request essentially for the same reasons that they invoked above in their response to Chile's allegation of departure from a fundamental rule of procedure, *i.e.* that that: (1) “*les Demanderesses ont toujours soutenu que les actes du gouvernement chilien à l'encontre de Monsieur Pey étaient constitutifs d'un déni de justice;*”<sup>140</sup> and (2)

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<sup>139</sup> See Resp. Rep. Annulment at para. 428. Footnotes omitted.

<sup>140</sup> See Cl. C-Mem. Annulment at para. 511.

they specifically asserted a denial of justice claim in the 4 November 2002 Ancillary Request and 23 February 2003 Reply on Jurisdiction and Merits. The Claimants thus submit:<sup>141</sup>

527. Il résulte des développements précédents que les Demanderesses ont bien présenté des demandes pour déni de justice et pour violation du traitement juste et équitable et cela, en ce qui concerne la Décision n°43, depuis 2002, date des premiers échanges qui ont suivi l’invocation par le Chili de cette Décision Ministérielle au cours de l’audience de mai 2000. Pourtant, la République du Chili n’a pas hésité à consacrer presque 150 pages de son Mémoire en annulation à cette question. Par la longueur de ses développements la Défenderesse a vraisemblablement voulu conférer à sa demande, une apparence de sérieux, qui ne saurait tromper le Comité *ad hoc*.

528. Cette démonstration permet de rejeter intégralement la demande d’annulation de la Sentence fondée sur la prétendue violation grave par le Tribunal d’une règle fondamentale de procédure et sur l’excès de pouvoir manifeste du Tribunal.

529. En effet, il n’y a eu de la part du Tribunal aucune violation du droit d’être entendue, la République du Chili ayant choisi d’ignorer les arguments des Demanderesses concernant les violations de l’API. Il ne peut non plus y avoir un renversement de la charge de la preuve.

530. Ces éléments s’opposent également à la demande de nullité de la Sentence sur le fondement de l’article 52(1)(b) de la Convention CIRDI. En effet, dans son Mémoire en annulation, la République du Chili prétend fonder l’annulation de la Sentence pour excès de pouvoir manifeste du Tribunal sur le seul motif que les Demanderesses n’ont pas présenté de demandes relatives au déni de justice ou à un traitement discriminatoire.

[...]

533. Dès lors, la démonstration que ces demandes ont été présentées par les Demanderesses au cours de la procédure d’arbitrage permet au Comité *ad hoc* de rejeter la demande de nullité du Chili sur ce fondement. [...]

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<sup>141</sup> *Ibid.* at paras. 527-530; 533. Footnote omitted.

### **Committee's Analysis**

203. Essentially for the same reasons which it set out earlier when it concluded that the Tribunal had not violated any fundamental rule of procedure regarding the right to be heard on this issue,<sup>142</sup> the Committee rejects the Respondent's argument that the Tribunal exceeded its powers in finding that the Claimants had indeed asserted their denial of justice claim. This application is denied.

#### **(3) Failure to State Reasons**

204. The main issues raised by Chile in connection with Article 52(1)(e) and the "denial of justice" claim are whether the Tribunal failed to state reasons:

- for its conclusion that the Claimants had asserted the particular "denial of justice" claim for which the Tribunal held Chile responsible (*i.e.*, one based on delay in the progress of the Goss printer proceedings in the First Civil Court of Santiago); and
- for basing its finding of the existence of a "denial of justice" solely on the length of the local judicial proceeding, without inquiring into any of the other factors or elements that the Tribunal itself had alluded to in the Award as essential for a finding of denial of justice.

### **Parties' Positions**

#### **Chile's Position**

205. Chile submits *inter alia* in support of this ground for annulment:<sup>143</sup>

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<sup>142</sup> See *supra* at paras. 184-194.

<sup>143</sup> See Resp. Rep. Annulment at paras. 494-495. Footnote omitted.

494. In the end, and Claimants' protestations notwithstanding, the only real "reason" the Tribunal offered in its Award for its finding of a "denial of justice" was that seven years was too long to wait for a final merits decision. However, having itself recognized in the Award that a finding of "denial of justice" requires an "*unreasonable or undue delay*," the Tribunal was required to explain not only the existence of a delay, but also how or why that delay (in the context and circumstances of the relevant proceeding) was unreasonable or undue, to such an extent as to constitute a violation of international law. The Award stops at the first step (the delay of seven years), but then leaps to the conclusion that the second step is *ipso facto* satisfied, without exploring the factors that are relevant to that assessment under the applicable jurisprudence and doctrine.

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

### Claimants' Position

206. The Claimants reject Chile's contention and submit:<sup>144</sup>

540. En l'espèce, le Tribunal a respecté les exigences de l'article 52(1)(e) de la Convention en ce que ses développements sur la violation de l'API pour déni de justice permett[en]t au lecteur de suivre son raisonnement.

541. En outre, contrairement à l'affirmation de la République du Chili, le Tribunal ne s'est pas contenté de dire qu'une procédure de sept années était extraordinairement longue et équivalait *ipso facto* à un déni de justice.

542. Tout d'abord, le Tribunal, dans son rappel des faits sur la violation pour déni de justice concernant la restitution de la rotative Goss, renvoie à ses développements précédents sur la procédure devant la Première Chambre Civile de Santiago. Même si le Tribunal arbitral n'indique pas expressément à quels paragraphes il fait référence, il n'est pas difficile de comprendre qu'il renvoie aux paragraphes 459 et suivants de la Sentence, c'est-à-dire à ses conclusions à propos de la controverse de 2002 relative au « *différend résultant du déni de justice allégué par les demanderesses* ».

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<sup>144</sup> See Cl. C-Mem. Annulment at paras. 540-548.

543. Or, dans cette partie de la Sentence, le Tribunal fait une analyse précise du déroulement de la procédure devant la Première Chambre civile de Santiago et des décisions rendues par celle-ci dans l'affaire Pey Casado contrairement à l'affirmation de la Défenderesse selon laquelle le Tribunal « *fail[ed] to analyze in any way the nature of the local proceedings or what happened during the time period that such proceedings were pending* ».

544. Le Tribunal constate également que les Demanderesses ont « *tenté en vain de faire reconnaître l'incompatibilité de la Décision n°43 avec cette procédure judiciaire* ». Il décrit alors les différents recours initiés par les Demanderesses devant les juridictions locales à cet égard. Le Tribunal conclut alors :

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

546. Si dans ses conclusions des paragraphes 659 et suivants de la Sentence, le Tribunal ne reprend pas expressément les rejets systématiques par les juridictions chiliennes des recours des Demanderesses sur l'incompatibilité de la Décision n°43 et la procédure devant la Première Chambre Civile de Santiago, il y fait référence en indiquant :

*Sur la première question [déni de justice], la réponse ne peut être que positive, aux regards des faits établis et déjà retenus par le Tribunal arbitral, l'absence de toute décision par les tribunaux civils chiliens sur les prétentions de M. Pey Casado s'analysant en un déni de justice (soulignement ajouté).*

547. Le Tribunal justifie alors sa conclusion en analysant les précédents et la doctrine confirmant que des délais procéduraux particulièrement importants constituent une forme classique de déni de justice.

548. Il en résulte que contrairement à l'allégation de la République du Chili, le Tribunal a respecté sa mission au titre de l'article 48(3) de la Convention. En conséquence, la demande d'annulation des conclusions du Tribunal concernant la condamnation de l'Etat chilien en raison d'un déni de justice dans l'affaire des presses Goss, sur le fondement de l'article 52(1)(e) de la Convention, doit être rejetée. [Emphasis in original]

## Committee's Analysis

207. The Committee agrees with the Claimants. The Tribunal gave extensive reasons to support its conclusion for grounding a denial of justice claim, which it traversed at length in its Award. The Respondent's request for annulment on this ground is accordingly dismissed.

### **E. Discrimination**

#### **(1) Serious Departure from a Fundamental Rule of Procedure**

##### *(i) Right to be Heard*

208. As with the alleged "denial of justice" claim, the main issue raised by Chile for purposes of this facet of Article 52(1)(d) is whether the Claimants in fact asserted the particular discrimination claim for which the Tribunal found Chile responsible – in this case, under Article 4 of the Chile-Spain BIT – due to Chile's execution of Decision 43.

## Parties' Positions

### Chile's Position

209. With respect to the discrimination claim, Chile maintains that since it was never specifically pleaded by the Claimants it was never afforded the right to defend itself. Chile maintains as follows:<sup>145</sup>

110. Although Claimants had asserted a claim for discrimination due to Decision 43 under Article 3 (the specific "discrimination" provision) and Article 5 (the expropriation provision) of the Chile-Spain BIT—all as part of Claimants' theory of a "continuing" expropriation—the Tribunal in the Award explicitly rejected all of Claimants' discrimination claims pursuant to Articles 3 and 5. However—and in direct contrast to the Tribunal's finding in the Decision on Provisional

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<sup>145</sup> See Resp. Rep. Annulment at paras. 110-112. Footnotes omitted.

Measures that the execution of Decision 43 could have *no effect* on Claimants' rights under the BIT—the Tribunal found Chile liable under Article 4 (the fair and equitable treatment provision) for discrimination in connection with Decision 43.

111. This finding of discrimination, which the Tribunal stated was based “aux termes de son appréciation des preuves et de son analyse juridique,” rested on the fact that Chilean authorities had compensated as the owners of *El Clarín* the successors of the four registered shareholders of CPP pursuant to an administrative proceeding in which Mr. Pey had knowingly and voluntarily waived his right to participate.

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

210. Therefore, Chile acknowledges that the Claimants submitted to the Tribunal a Supplemental Memorial on the Merits in which they claimed post-entry in force BIT violations of Articles 3, 4, and 5 due to Decision No. 43. However, Chile argues that the Claimants did not state a claim alleging that the Republic had discriminated against Mr. Pey Casado in violation of Article 4 of the BIT by actually paying the parties found to be owners of *El Clarín* in Decision No. 43, although the Tribunal ruled that it had. According to Chile, this is distinct from what the Claimants argued *i.e.*, that Decision No. 43 constituted an unfair and inequitable treatment because Chile had excluded the Claimants from the recovery scheme.<sup>146</sup> Chile added at the Hearing on Annulment that the only time the Claimants articulated a discrimination claim under Article 4 of the BIT was in their Supplemental Memorial on the Merits dated 11 September 2002, “[b]ut it is

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<sup>146</sup> See Resp. Mem. Annulment at para. 129.



not even articulated as a discrimination claim, it is articulated as a national treatment claim [...].”<sup>147</sup>

211. In brief, Chile avers that whenever the Claimants referred to Decision No. 43 in subsequent submissions, it was always in the context of the *confiscation* claims.

### Claimants’ Position

212. The Claimants, for their part, submit that they did develop their discrimination claim in their written submissions.

213. The Claimants explain that it was introduced at the very outset of the case and was further developed after Decision No. 43 was issued on 28 April 2000. In particular, they refer to their Supplemental Memorial on the Merits dated 11 September 2002 at pp. 1 and 2, pp. 125-127.<sup>148</sup>

L’Etat chilien a enfreint l’obligation de garantir un traitement juste et équitable aux investisseurs espagnols, sous des conditions non moins favorables que pour ses investisseurs nationaux. Alors que l’Etat chilien avait reconnu, dans ladite Loi N° 19.518 de 1998, le droit à une indemnisation des personnes visées par les mesures confiscatoires adoptées en vertu des Décrets-Lois N° 1 et 77 de 1973, il a exclu de ce même traitement les investisseurs espagnols par le truchement de la « Décision N° 43 ». [Emphasis in original]

214. At the Hearing on Annulment,<sup>149</sup> the Claimants also referred to the description of their claim in the Reply on Jurisdiction and the Merits dated 23 February 2003. Finally, they say, that the claim was reiterated at the May 2003 and January 2007 Hearings.

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<sup>147</sup> See Tr. Annulment [2] [334:16] (Eng.); [139:28] (Fr.), [364:8] (Spa.).

<sup>148</sup> See Cl. C-Mem. at paras. 520-523; Tr. Arb. [1] [pp. 87-88] (Fr.).

<sup>149</sup> See Tr. Annulment [1] [212:11-213:13] (Eng.), [88:30-89:10] (Fr.); [229:22-231:3] (Spa.).

### Committee's Analysis

215. The Committee notes that the Tribunal refers in its Award to the parties' positions on the discrimination claim.<sup>150</sup> In the case of the Claimants, the Tribunal refers to their written submissions of 11 September 2002, 23 February 2003, and to oral submissions at the January 2007 Hearing. As for the Respondent, the Tribunal mentions only a few remarks made by the Republic's counsel at the 2003 and 2007 Hearings and a page in both the Respondent's Memorial on Jurisdiction of 20 July 1999 and the Respondent's Counter-Memorial on Jurisdiction and the Merits of 3 February 2003 concerning Decision No. 43.
216. As explained above in the context of the denial of justice claim, the Committee considers that the Claimants presented a discrimination claim based on Decision No. 43. Even though it is not extensively developed by the Claimants, it cannot be said that no such claim was made. Considering that the discrimination claim was raised in the Claimants' Supplemental Memorial on the Merits dated 11 September 2002, the Respondent had the opportunity to reply in its written submissions of 3 February 2003 (Counter-Memorial on Jurisdiction and the Merits) and 4 April 2003 (Rejoinder on Jurisdiction and the Merits) as well as during the May 2003 Hearing and at the January 2007 Hearing.
217. For whatever reason, the Respondent elected not to address this claim. As for the claim for denial of justice, Chile cannot blame the Tribunal for not having given it an opportunity to present its arguments. Additionally, as with the denial of justice claim, Chile rejects the Claimants' contention that it waived the right to be heard in defense of the discrimination claim since the Award was the first time Chile became aware of the discrimination claim related to Decision No. 43.<sup>151</sup> As concluded, Chile's contention that the Tribunal denied it the right to be heard on this claim is rejected because Chile had the

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<sup>150</sup> See Award at paras. 637-638; 647-648.

<sup>151</sup> See Cl. C-Mem. Annulment at 524-529; Resp. Rep. Annulment at paras. 132-133.

opportunity to respond. Therefore, the issue does not relate to a right being waived but to a right not being exercised.

218. The Committee finds that, in these circumstances, there was no denial of the right to be heard and thus no departure from a fundamental rule of procedure. The Respondent's request for annulment on this ground is accordingly denied.

(ii) *Burden of Proof*

219. The main issue raised by Chile in this regard is whether, on the assumption that the Claimants in fact asserted their discrimination claim which the Committee has just found was the case, the Claimants discharged their burden of proof.

**Parties' Positions**

**Chile's Position**

220. Chile explains that discrimination in violation of the standard of fair and equitable treatment exists where:<sup>152</sup>

[...] (1) the conduct is attributable to the State; (2) the conduct is harmful to the claimant or his property; (3) the conduct is discriminatory, which involves a comparison of the treatment of the claimant to the treatment of others who are similarly situated; (4) the conduct is "arbitrary, grossly unfair, unjust or idiosyncratic;" and (5) the conduct "exposes the claimant to sectional or racial prejudice." The burden of proof for each of these five elements should have rested squarely on the Claimants, particularly since this purported claim, like the one for denial of justice, was a *merits* claim.

221. Chile argues that the Claimants did not establish the existence of any of the elements of a discrimination claim, and therefore failed to discharge their burden of proof. Chile submits that since the Tribunal ruled against Chile, it shows that *a fortiori* the Tribunal

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<sup>152</sup> See Resp. Mem. Annulment at para. 362. Footnotes omitted.

placed the burden of proof on Chile. In addition, Chile contends that this allocation of the burden of proof affected the outcome of the case, particularly because discrimination, in the end, was the only basis on which damages were awarded.<sup>153</sup>

### Claimants' Position

222. As for the denial of justice claim, Claimants reply that they have made a proper discrimination claim and that, as underlined by the Tribunal in the Award, it was Respondent's decision not to develop its arguments on this question.<sup>154</sup> As a result, the Claimants argue that there can be no improper allocation of the burden of proof.<sup>155</sup>

### Committee's Analysis

223. The Committee has reviewed carefully the Tribunal's reasoning leading to its conclusion that the Chilean authorities' compensation of four persons, whom the Tribunal did not consider the owners of *El Clarín*, under Decision No. 43, gave rise to a discrimination claim.<sup>156</sup> Again, the Respondent may disagree with the Tribunal's conclusion but, by no stretch of the imagination, can it be said that there was an improper allocation of the burden of proof which could be characterized as a serious departure from a fundamental rule of procedure. It is very clear from the Award that the Tribunal was satisfied with the evidence which the Claimants adduced. The Respondent's request for annulment on this ground is dismissed.

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<sup>153</sup> *Ibid.* at paras. 363-364.

<sup>154</sup> See Award at para. 646.

<sup>155</sup> See Cl. C-Mem. Annulment at para. 529.

<sup>156</sup> See Award at paras. 665-674.

## **(2) Manifest Excess of Powers**

224. The main issue raised by Chile in connection with Article 52(1)(b) is whether the Tribunal manifestly exceeded its powers by improperly asserting jurisdiction over a purported Decision No. 43 related discrimination claim under Article 4 which, the Respondent says, was not asserted by the Claimants.

### **Parties' Positions**

#### **Chile's Position**

225. Chile's position in this regard is summarized as follows:<sup>157</sup>

430. As extensively explained above, Claimants never actually asserted a discrimination claim with respect to Decision 43. In the 2002 Supplemental Memorial, Claimants emphasized their claim for a "continuing expropriation," a theory (rejected by the Tribunal) designed to address the requirement for an act of expropriation that occurred after the BIT entered into force. For this purpose, Claimants seized on Decision 43 as an alleged post-treaty culmination of a composite act of confiscation executed by the Chilean government. In other words, they had invoked Decision 43 merely as a new act of expropriation under Article 5 of the BIT.

431. In this context, Claimants touched upon "discrimination" as one of the constituent elements of expropriation. But they never asserted that absent an agreement by the Tribunal with their "continuing acts" theory of expropriation, they were also asserting a different, stand-alone claim for discrimination under Article 4 based on the execution of Decision 43. Claimants never asserted, in particular, that Decision 43 constituted an act of discrimination against Mr. Pey in violation of Article 4 of the BIT. As explained above, at no point did Claimants define the legal standards of discrimination, apply those standards to the facts, substantiate those facts, or state a particularized claim for relief for discrimination. In sum, they never asserted a separate cause of action for discrimination under Article 4 of the BIT, based on allegedly differential treatment due to Mr. Pey's nationality in connection with Decision 43.

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<sup>157</sup> See Resp. Rep. Annulment at paras. 430-432. Footnotes omitted.

432. And yet, it was precisely under that theory that the Tribunal declared Chile liable. Not only that, but the Tribunal's finding of discrimination became the sole basis for the Tribunal's award of damages to Mr. Pey. By reaching out to decide a claim that Claimants themselves had never presented, the Tribunal manifestly exceeded its powers. The Award therefore must be annulled under Article 52(1)(b).

### Claimants' Position

226. As noted above, the Claimants contend that they did assert their discrimination claim. Their submissions in this regard mirror those advanced in connection with the denial of justice claim.<sup>158</sup>

### **Committee's Analysis**

227. Again, essentially for the same reasons which it set out above,<sup>159</sup> the Committee rejects the Respondent's argument that the Tribunal exceeded its powers in finding that the Claimants had asserted their discrimination claim.

#### **(3) Failure to State Reasons**

228. In respect of Article 52(1)(e) and the Article 4 discrimination claim, Chile argues that the Tribunal failed to state reasons leading to its finding of discrimination based on Decision No. 43 in three instances:

- its conclusion that the Claimants had actually asserted a discrimination claim under Article 4 related to Decision No. 43;
- its determination that the execution of Decision No. 43 had been discriminatory against Mr. Pey Casado considering that Mr. Pey Casado

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<sup>158</sup> See *supra* at para. 202.

<sup>159</sup> See *supra* at paras. 215-218.

had received an explicit written invitation from the Chilean government to participate in the administrative proceeding that led to Decision No. 43, but that he had voluntarily (and in writing) declined; and

- the contradiction between the earlier Decision of the Tribunal on Provisional Measures of 25 September 2001 – which had concluded that execution of Decision No. 43 could not affect the ICSID proceedings or Mr. Pey Casado’s rights therein – and its finding in the Award that Chile’s execution of Decision No. 43 in fact constituted a violation of the BIT.

### **Parties’ Positions**

#### **Chile’s Position**

229. Chile’s position is clearly stated in its Reply:<sup>160</sup>

505. Claimants therefore do not address the Republic’s main argument, which is that the Tribunal provided no explanation whatsoever as to how Mr. Pey possibly could have been compensated through Decision 43, given that he voluntarily excluded himself from the relevant administrative proceedings that were a prerequisite to any such compensation. The references to the possibility of alternate procedures is simply not pertinent here. The Tribunal ruled against Chile not by reference to any alternate procedures, but on the basis that by compensating alleged third parties rather than Mr. Pey through Decision 43, Chile discriminated against Mr. Pey. The necessary implication of this is that the discriminatory act committed by Chile was not declaring *Mr. Pey* to be the rightful beneficiary. But the Tribunal entirely glossed over the logical and necessary component of that conclusion, which is the (incorrect) presumption that Chile could somehow have declared Mr. Pey the beneficiary of Decision 43, notwithstanding his explicit decision, in writing, *not to seek* reparations under that administrative process, and the fact that compensation of non-applicants in fact would have been illegal under Chilean law.

506. As a result, the Award simply provides no information that would enable Chile to apprehend the source of its responsibility for any BIT violation

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<sup>160</sup> See Resp. Rep. Annulment at paras. 505-506. Footnotes omitted.

predicated on discrimination, which is a quintessential failure to state reasons. The Tribunal's failure even to *attempt* to set forth reasons for its finding of discrimination was a clear violation of its obligation to state reasons, which warrants annulment under Article 52(1)(e). Moreover, annulment on this ground is especially compelled by the fact that, in the end, the finding that Decision 43 discriminated against Mr. Pey was the exclusive basis for the Tribunal's award of monetary damages to Claimants. [Emphasis in original]

230. Chile also refers to what it characterizes as a “contradiction”:<sup>161</sup>

508. [...] [T]he contradiction that is not explained in the Award is how the Tribunal could both decline to request suspension of the execution of Decision 43 on the grounds that such execution could not possibly affect the ICSID proceeding, and yet later determine in the ICSID proceeding that the very same act that it had declined to enjoin was the *sole basis* for its finding of discrimination under the BIT, and the sole basis for its award of any damages. [Emphasis in original.]

231. In its Reply, Chile asserts other “failures” in the Award:<sup>162</sup>

514. The Tribunal failed to explain in its Award why it disregarded this critical fact. Instead, it simply announced that although it could not consider any claim for discrimination under Articles 3 or 5, it could do so under Article 4. It did not explain why it was not relevant that Claimants had never raised a discrimination claim under Article 4 and had never alleged discrimination in connection with Decision 43. Indeed, the Award does not explain what Claimant's discrimination claim consisted of, in what pleading it had been asserted, what supporting evidence had been submitted, or what the relevant request for relief had been. The reason for these failures is, of course, that the claim was never asserted by Claimants at all. This fact further supports the conclusion that the Tribunal failed to provide reasons for its determination on the issue of discrimination due to Decision 43, and that the Tribunal's Award is therefore annulable under Article 52(1)(e).

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<sup>161</sup> *Ibid.* at para. 508.

<sup>162</sup> *Ibid.* at para. 514. Footnote omitted.



## Claimants' Position

232. The Claimants reject Chile's contention that the Tribunal failed to state reasons.<sup>163</sup> With respect to Chile's argument that their discrimination claim was never actually formulated, the Claimants reiterate their submissions made in connection with their denial of justice claim.<sup>164</sup> As to the two other prongs of Chile's submission, the Claimants answer:<sup>165</sup>

564. S'agissant du caractère discriminatoire de la Décision n°43, le raisonnement du Tribunal peut être résumé comme suit :

565. Premièrement, le Tribunal indique dans la partie de la Sentence intitulée « *Décision n°43 - Indemnisation de personnes non propriétaires* » « *le 28 avril 2000, le Ministre des biens nationaux adopte la Décision n°43 selon laquelle les dispositions de la loi n°19.568 sont applicables aux biens confisqués aux Sociétés CPP S.A. et EPC Ltda. Cependant, comme le Tribunal l'a expliqué ci-dessus, la Décision n°43 indemnise des requérants autres que les demanderesses pour la confiscation des biens en question et le Ministre des biens nationaux maintiendra cette décision que les demanderesses contesteront en vain* ».

566. Deuxièmement, le Tribunal rappelle la propriété de Monsieur Pey des actions de CPP S.A. et EPC Ltée en indiquant : « *M. Pey Casado a bien démontré avoir procédé à des investissements et être propriétaire des biens meubles ou immeubles qui ont été confisqués par l'autorité militaire chilienne* ». Sur le droit de propriété de Monsieur Pey, le Tribunal rappelle également qu'il avait été reconnu par un jugement chilien et que les autorités chiliennes, exécutives et administratives (comme judiciaires) étaient également informées des demandes de Monsieur Pey devant le CIRDI et de sa revendication du droit de propriété.

567. Troisièmement, le Tribunal constate que la Défenderesse n'a jamais remis en cause le fait que les confiscations intervenues à partir de 1973 étaient illicites et qu'à ce titre, l'Etat du Chili reconnaissait qu'il avait un devoir d'indemnisation. Néanmoins, le Tribunal constate que les Demanderesses n'ont pas bénéficié de ce traitement. Il indique « *Malheureusement, cette politique ne s'est pas traduite dans les faits en ce qui concerne les Demanderesses, pour des*

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<sup>163</sup> See Cl. C-Mem. Annulment at paras. 449 *et seq.*

<sup>164</sup> *Ibid.* at paras. 554-555.

<sup>165</sup> *Ibid.* at paras. 564-572; 579.

*raisons diverses qui, au moins pour partie, n'ont pas été révélées ou clairement expliquées par les témoignages ou autres preuves fournies au Tribunal arbitral* ». Ce faisant, le Tribunal constatait que la République du Chili avait fait subir un traitement différent aux Parties Demanderessees par rapport aux autres investisseurs notamment nationaux.

568. Finalement, après avoir rappelé qu'un traitement discriminatoire est une violation du traitement juste et équitable au sens du droit international de protection des investissements, le Tribunal conclut :

*Dans le cas d'espèce, en résumé, en accordant des compensations - pour des raisons qui lui sont propres et sont restées inexplicées - à des personnages qui, de l'avis du Tribunal arbitral, n'étaient pas propriétaires des biens confisqués, en même temps qu'il paralysait ou rejetait les revendications de M. Pey Casado concernant les biens confisqués, la République du Chili a manifestement commis un déni de justice et refusé de traiter les demanderesses de façon juste et équitable.*

569. L'un des éléments important de cette conclusion et passé sous silence par la Défenderesse dans son Mémoire en annulation, est que le Tribunal a conclu à un traitement discriminatoire des Demanderessees sous la double condition d'une compensation à des tiers pour la confiscation des biens objet de la procédure d'arbitrage, et le refus de la République du Chili d'indemniser de quelque manière que ce soit Monsieur Pey et la Fondation espagnole, en s'opposant par tout moyen à leurs revendications et en paralysant, autant que faire se peut, la procédure arbitrale engagée.

570. Dès lors, contrairement à la prétention de la République du Chili, Monsieur Pey et la Fondation espagnole n'avai[en]t pas nécessairement besoin de porter leur réclamation sur le fondement de la loi 19.568 pour recevoir un traitement discriminatoire. Soulignons à cet égard que contrairement à ce que laisse supposer la République du Chili, la loi 19.568 n'est pas le seul fondement pour obtenir réparation des confiscations intervenues au Chili sous le régime militaire de Pinochet. En effet, comme l'avait fait Monsieur Pey pour les presses Goss en octobre 1995, mais aussi comme l'ont fait nombre d'autres victimes du Décret n°77 de 1973, il est possible d'obtenir réparation devant les cours judiciaires chiliennes sur le fondement du mandat impératif de la Constitution (article 4 de la Constitution de 1925 aux termes duquel les décrets de confiscation édictés en application dudit Décret n°77 sont nuls de nullité *ab initio*, imprescriptibles et *ex officio*). La reconnaissance de cette nullité *ab initio* constitue une jurisprudence constante de la Cour Suprême chilienne permettant d'obtenir réparation non seulement pour la perte subie (*damnum emergens*) mais également pour la perte de profit (*lucrum cessans*).

571. Ainsi, les motifs contenus dans la Sentence permettent sans nul doute de suivre le raisonnement du Tribunal sur ce chef de condamnation. Dès lors, la Sentence répond aux exigences de l'article 52(1)(e) de la Convention quand bien même le tribunal ne répondrait pas de manière exhaustive aux questions soulevées par la Défenderesse dans son Mémoire en annulation.

572. Finalement, concernant la troisième série d'arguments, relative à une contradiction de motifs entre d'une part la condamnation au titre de la violation d'un traitement juste et équitable et, d'autre part, la décision du 25 septembre 2001, celle-ci est contredite par les termes mêmes de la décision du 25 septembre 2001 et plus particulièrement de ses paragraphes 59 à 63.

[...]

579. Dès lors, loin de reconnaître l'impossibilité pour la Décision n°43 de causer un préjudice aux Demanderesses, le Tribunal s'appuyait surtout sur le fait que l'exécution de la Décision n°43 ne rendrait pas impossible la réparation du préjudice subi par les Demanderesses. Il n'y a donc dans cette décision de rejet des mesures conservatoires sollicitées par les Demanderesses aucune contradiction avec la Sentence condamnant la République du Chili sur le fondement d'un traitement discriminatoire à raison notamment de la Décision n°43. [Emphasis in original]

### **Committee's Analysis**

233. The Claimants, in the lengthy citation from their Counter-Memorial reproduced above, have demonstrated, to the entire satisfaction of the Committee, that the Tribunal has stated ample reasons leading to its conclusion that Chile's Decision No. 43 discriminated against the Claimants and was thus in breach of Article 4 of the BIT. The Respondent's request for annulment based on this ground therefore fails.

#### **F. The Tribunal's Decision on Provisional Measures**

234. Chile refers to its invitation to Mr. Pey Casado to participate in the Chilean administrative proceeding that led to Decision No. 43, as well as to Mr. Pey Casado's written waiver to participate in this proceeding. The Claimants, thereafter, requested injunctive relief from the Tribunal alleging that Decision No. 43 required payment to the successors of the registered shareholders of *El Clarín* for the expropriation of the

newspaper and that such payment would, in effect, constitute a new expropriatory act by Chile.

235. The Committee notes that the Tribunal rejected the Claimants' request for provisional measures. It concluded that neither Decision No. 43 itself nor its execution could affect the Claimants' rights in the ICSID arbitration, since Decision No. 43 involved individuals other than Mr. Pey Casado.

### **Parties' Positions**

#### **Chile's Position**

236. Chile contends that the Tribunal's Decision on Provisional Measures amounted to a signal to Chile that it could proceed with the execution of Decision No. 43, confident in the knowledge that doing so would not conflict with the ICSID arbitration or affect it in any way. In the Award, however, submits Chile, the Tribunal held Chile liable for discrimination in violation of Article 4 of the BIT for the act that had been the subject of the Claimants' Request for Provisional Measures that had been rejected by the Tribunal: the execution of Decision No. 43. Chile argues that, in doing so, the Tribunal failed to abide by one of the rules it had set for the proceeding, which was most unfair to it. This, submits Chile, was a serious departure from a fundamental rule of procedure in violation of Article 52(1)(d).

237. Chile recalls that, in paragraph 65 of its Decision on Provisional Measures, the Tribunal stated that "la Décision Ministérielle n° 43 et son exécution au Chili n'ont pas des conséquences telles qu'elles puissent affecter ou la compétence du Tribunal Arbitral CIRDI, ou les droits allégués par les Parties demandereses ..." Chile then concludes:<sup>166</sup>

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<sup>166</sup> See Resp. Rep. Annulment at para. 204. Footnote omitted.

204. [...] In effect, therefore, by this Decision the Tribunal was signalling to Chile that it could go forward with execution of Decision 43, as doing so would not affect the ICSID arbitration. It is for this reason that it is especially unfair that the Award held Chile responsible under the BIT precisely for proceeding with execution of Decision 43. In essence, the Tribunal took away with one hand what it had already given with the other. And this incongruency is rendered even more perverse by the fact that the alleged discrimination relating to Decision 43 was in the end the sole basis for the Tribunal's grant of damages to Claimants.

238. Chile also contends that the Tribunal failed to state reasons because of the inconsistency between the Tribunal's condemnation of Chile under the BIT for issuing Decision No. 43 and the Tribunal's Decision on Provisional Measures. Chile summarizes its position as follows:<sup>167</sup>

510. Thus, the Tribunal reasoned in its Provisional Measures decision that there was no need to stay execution of Decision 43, for such decision *could have no direct effect* on the rights invoked by Claimants. Entirely inconsistently, however, in the Award the Tribunal concluded that Decision 43 *did* have a direct effect on Claimants' rights, and that indeed such effect was so grave as to violate the Spain-Chile BIT's fair and equitable treatment clause. The Award thus left Chile at a loss "to understand the tribunal's motives," for as Professor Schreuer has explained, inconsistent reasons "are as useful as no reasons at all." [Emphasis in Original]

#### Claimants' Position

239. The Claimants reject Chile's interpretation of the Tribunal's Decision on Provisional Measures. They write:<sup>168</sup>

572. Finalement, concernant la troisième série d'arguments, relative à une contradiction de motifs entre d'une part la condamnation au titre de la violation d'un traitement juste et équitable et, d'autre part, la décision du 25 septembre 2001, celle-ci est contredite par les termes mêmes de la décision du 25 septembre 2001 et plus particulièrement de ses paragraphes 59 à 63.

[...]

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<sup>167</sup> *Ibid.* at para. 510. Footnotes omitted.

<sup>168</sup> See Cl. C-Mem. Annulment at paras. 572-581. Footnotes omitted.

579. Dès lors, loin de reconnaître l'impossibilité pour la Décision n°43 de causer un préjudice aux Demanderesses, le Tribunal s'appuyait surtout sur le fait que l'exécution de la Décision n°43 ne rendrait pas impossible la réparation du préjudice subi par les Demanderesses. Il n'y a donc dans cette décision de rejet des mesures conservatoires sollicitées par les Demanderesses aucune contradiction avec la Sentence condamnant la République du Chili sur le fondement d'un traitement discriminatoire à raison notamment de la Décision n°43.

### **Committee's Analysis**

240. The Committee finds the Claimants' arguments persuasive; there is no contradiction between the Decision of 25 September 2001 on Provisional Measures and the Award.

241. It is important to consider the Decision on Provisional Measures in context. The Decision on Provisional Measures was issued after a request by the Claimants on 23 April 2001 for the suspension of the execution of Decision No. 43 by the Ministry of National Assets of Chile.<sup>169</sup> The Claimants alleged that Chile would oppose Decision No. 43 to any ruling by the Tribunal granting damages for the expropriation. The Claimants also argued that Decision No. 43 threatened the jurisdiction of the Arbitral Tribunal. On this question, the Tribunal decided that Decision No. 43 would not affect the Tribunal's ability to rule on the question of the share ownership.

242. While the Tribunal rejected the Claimants' request, it did not rule that Decision No. 43 could never prejudice the Claimants. The Tribunal declared that any reparations granted under Decision No. 43 did not directly prejudice the Claimants. The Committee notes paragraph 63 of the Tribunal's Decision on Provisional Measures:

63. S'agissant d'une décision visant des indemnisations, elle n'est de toute façon, comme indiqué plus haut, pas opposable aux Parties Demanderesses et, par conséquent, ne cause pas (au moins directement) de dommage à ces dernières. En serait-il autrement, ce dommage ne saurait être considéré par le Tribunal Arbitral

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<sup>169</sup> See CN-121.

comme irréparable dès lors que, ainsi que l'a observé avec raison la Partie Défenderesse, dans l'hypothèse « où le Chili serait condamné » sur le fond (par un Tribunal Arbitral CIRDI s'étant reconnu compétent), la conséquence pratique évidente pour le Chili, principale ou exclusive, ne pourrait être que, soit l'obligation de restituer les actions revendiquées à leurs propriétaires légitimes (c'est-à-dire une restitution en nature), soit, en cas d'impossibilité d'une « *restitutio in integrum* », l'obligation d'indemniser.

243. In the opinion of the Committee, this must be read as meaning that it did not create a prejudice that would justify the granting of provisional measures. Clearly, the Tribunal was not ruling on the merits of the case. As it said in paragraph 45 of its Decision on Provisional Measures:

45. L'objection paraît procéder d'un certain malentendu sur la nature même du système des mesures conservatoires établi par la Convention de Washington et sur l'objet et le sens des mesures qu'un Tribunal Arbitral du CIRDI peut être appelé à recommander. Il n'est évidemment pas question pour le Tribunal Arbitral de préjuger en aucune manière de ce que pourrait être (s'il se reconnaissait compétent sur le fond) sa décision quant à la substance du différend. Mais le mécanisme de l'article 47 de la Convention et de l'article 39 du Règlement n'appelle nullement le Tribunal Arbitral à « *préjuger des droits entièrement éventuels* », ou à « *passer à l'analyse de matières hors de sa compétence* » ou encore à « *préjuger sur les résultats éventuels d'un procès qui n'a même pas encore commencé en ce qui concerne le fond* » comme le pense la Partie Défenderesse.

244. As submitted by the Claimants:<sup>170</sup>

579. Dès lors, loin de reconnaître l'impossibilité pour la Décision n°43 de causer un préjudice aux Demanderesses, le Tribunal s'appuyait surtout sur le fait que l'exécution de la Décision n°43 ne rendrait pas impossible la réparation du préjudice subi par les Demanderesses. Il n'y a donc dans cette décision de rejet des mesures conservatoires sollicitées par les Demanderesses aucune contradiction avec la Sentence condamnant la République du Chili sur le fondement d'un traitement discriminatoire à raison notamment de la Décision n°43.

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<sup>170</sup> See Cl. C-Mem. Annulment at para. 579.

245. The Committee agrees with the Claimants. The Tribunal did not contradict itself. Therefore, it did not treat Chile unfairly and it did not fail to state reasons. The Tribunal respected the rules that it had established for the arbitral proceedings with respect to Decision No. 43 and its reasons are not contradictory. The Respondent's requests on these grounds under Article 52(1)(d) and (e) therefore fail.

## **G. Damages**

### **(1) Serious Departure from a Fundamental Rule of Procedure**

#### *(i) Right to be Heard*

246. The main issues raised by Chile in connection with this aspect of Article 52(1)(d) are:

- whether the Claimants at any point prior to the Award asserted their damages claim and the methodology used by the Tribunal; and
- if they did not, whether the Tribunal's introduction of a damage calculation in the Award, without providing an opportunity for Chile to be heard in response, would be consistent with Article 52(1)(d).

## **Parties' Positions**

### **Chile's Position**

247. It is Chile's contention that the Tribunal never afforded it the opportunity to be heard regarding the calculation of damages, which appeared for the first time in the Award.<sup>171</sup> The Claimants, repeats Chile, never alleged breaches of Article 4 of the BIT, and never

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<sup>171</sup> See Resp. Rep. Annulment at para. 137.



submitted any separate damage analysis or calculation of damages resulting from the denial of justice and discrimination claims:<sup>172</sup>

246. The request for damages was framed exclusively in terms of indemnification for rights related to the ownership of the expropriated property — lost profits, value of assets, and intellectual property rights. However, at no point in the proceedings did the parties address the issue of damages for any alleged “denial of justice” or discrimination. Since the Claimants never actually asserted “denial of justice” or discrimination claims with respect to the particular alleged State acts upon which the Tribunal ultimately — and exclusively — predicated its determination of responsibility by Chile under the BIT, it is not surprising that the Claimants also never purported to set forth a valuation or claim for damages for the relevant BIT violations. With no analysis of damages offered, the Respondent[] had nothing to which to reply. The Tribunal for its part had no basis on which to review any theories or proof of damages.

248. The only discussion of damages by the parties in the entire proceeding, pleads Chile, related solely to damages resulting from the expropriation claim.<sup>173</sup> With respect to the denial of justice claim, while the Claimants requested the costs associated with the addition of a new claim they never articulated a specific request for damages resulting from any “denial of justice” claim.<sup>174</sup> As a result, the Respondent never had anything to reply to.

249. Chile notes that the Tribunal itself acknowledged that the submissions on damages made by the parties were limited to the expropriation claim and that there was no debate in respect of damages for denial of justice and discrimination.<sup>175</sup>

248. Furthermore, the Tribunal expressly conceded in the Award that the Claimants had not presented any evidence of damages on the denial of justice-related or discrimination-related BIT violations (as distinguished from the alleged expropriation-related violations):

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<sup>172</sup> See Resp. Mem. Annulment at para. 246.

<sup>173</sup> *Ibid.* at para. 245.

<sup>174</sup> *Ibid.* at paras. 164; 184-185.

<sup>175</sup> *Ibid.* at paras. 248-250.

**Dans l'exercice de son droit et pouvoir d'appréciation des preuves, le Tribunal arbitral ne peut que constater que les demanderesses n'ont pas apporté de preuve, ou de preuve convaincante, ni par pièces, ni par témoignage, ni par expertise, des importants dommages allégués et causés par les faits relevant de la compétence *ratione temporis* du Tribunal arbitral . . . .**

249. Finally, the Tribunal also conceded that, in light of the bases for its conclusion on responsibility, the expropriation-based damages analysis that had been conducted by the parties was irrelevant:

Il y a lieu de relever d'abord que l'argumentation des demanderesses concernant l'évaluation du dommage (ainsi du reste, par voie de conséquence, que la réfutation esquissée par la défenderesse par exemple avec le rapport de l'expert Kaczmarek) se réfère à l'expropriation intervenue au Chili dans la période 1973-1977, notamment en 1975, et confirmée par la suite.

L'expropriation survenue avant l'entrée en vigueur du traité ayant été écartée de l'examen du Tribunal arbitral, il en résulte que, pour cette raison déjà, les allégations, discussions et preuves relatives au dommage subi par **les demanderesses du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui d'une autre cause, de fait et de droit, celle du déni de justice et du refus d'un 'traitement juste et équitable.'**

250. Thus, even the Tribunal itself acknowledged that the damages submissions made by the parties were limited solely to the expropriation context, and there was no relevant argumentation on the issue of damages for denial of justice and discrimination. [Emphasis in original]

250. Chile concludes that the Tribunal never consulted the parties and then produced in the Award its own methodology and calculation.<sup>176</sup>

251. Chile recalls that the Tribunal in its Procedural Orders No. 13 and 14 denied it the opportunity of presenting further written submissions including a post-hearing brief following the January 2007 Hearing. At that hearing, the President of the Tribunal asked

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<sup>176</sup> *Ibid.* at para. 252.

one question on the damages related to a possible breach of the fair and equitable treatment in relation to Decision No. 43:<sup>177</sup>

Il a été dit par Me Malinvaud, me semble-t-il, à propos de la Décision n° 43, sinon ce matin en tout cas hier, que cette Décision 43 constituait une nouvelle violation de la Règle du traitement juste équitable ou, si vous voulez, un nouvel acte illicite. En admettant cette thèse, par hypothèse ou pour les besoins de la discussion, c'est-à-dire si l'on admet qu'il s'agit d'une nouvelle violation, le préjudice ou le dommage serait-il le même ?

252. In the words of the Respondent, the invitation of the Tribunal to answer that question cannot “possibly be deemed a fair opportunity to understand the claim and certainly not a fair opportunity to respond to it. One does not respond to a Bilateral Investment Treaty claim that attaches serious potential responsibility to a sovereign state orally by thinking about it for one minute in the context of a hypothetical question.”<sup>178</sup> Chile acknowledges that, after the January 2007 Hearing, the Tribunal asked the parties for information on the amount of compensation that had been granted to the beneficiaries of Decision No. 43, including inflation and interest rate calculations. Chile notes, however, that:<sup>179</sup>

[i]t is important to clarify that the Tribunal had not indicated for what purpose it was requesting this information, and did not provide the parties with any opportunity to provide any comments, or anything other than the raw data it had asked for. Accordingly, such communications cannot be understood as having granted Chile an opportunity to be heard on the issue of damages relating to the purported Article 4 claims.

253. Chile maintains that a tribunal lacks authority to adopt a calculation of damages that exceeds the boundaries of the parties' arguments, without first affording the parties an opportunity to be heard on that issue.<sup>180</sup> Chile argues that even if a tribunal has broad

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<sup>177</sup> See RA-26c referring to Tr. Jur. [p. 49] (Fr.).

<sup>178</sup> See Tr. Annulment [2] [313:22-321:22] *in particular* [321:8-321:16] (Eng.); [131:24-134:33] *in particular* [134:23-134:28] (Fr.); [339:21-348:22] *in particular* [348:7-15] (Spa.).

<sup>179</sup> See Resp. Rep. Annulment at para. 145.

<sup>180</sup> *Ibid.* at para. 136.

discretion to use a damages calculation not presented by either party, it must nevertheless afford the parties the right to address this calculation before adopting it, especially if the question has not been addressed by the parties during the Hearing.<sup>181</sup> Chile notes that the Tribunal did not proceed as such:<sup>182</sup>

251. To compound the Tribunal's denial of opportunity to be heard, it also decided to forgo the hearing of any independent expert on damages (whose report the parties would have had the right to review and respond to). It did so on the basis that it would have been inexpedient. Specifically, the Tribunal stated in the Award that it was disinclined to name an independent expert to render an assessment on damages, because "que tout recours à une expertise ... est en soi généralement de nature à augmenter, parfois fortement, la durée et les coûts d'un arbitrage" and "que tout recours à une expertise ... est en soi généralement de nature à augmenter, parfois fortement, la durée et les coûts d'un arbitrage . . . ."

252. Thus, concerned about the already unprecedented delay in issuing its Award, the Tribunal essentially decided to dispense with rigor in the damages assessment phase of the case, so as to be able to issue its Award as soon as possible (even so, it did not issue the award until some 16 months after this final hearing). Faced with the practical problem, however, that the Claimants had not presented any claim for damages and that an independent expert would take too long, the Tribunal resorted to devising a damages methodology and calculations of its own, on which it never once consulted with the parties, and of which the parties became aware for the first time in the Award itself:

En l'absence de preuves convaincantes apportées par les demandresses et le recours à une ou plusieurs expertises devant être exclu, le Tribunal arbitral est cependant en mesure de procéder à une évaluation du dommage à l'aide d'éléments objectifs dès lors que, selon les données incontestées résultant du dossier, les autorités chiliennes elles-mêmes, à la suite de la Décision n° 43, ont fixé le montant de la réparation due aux personnes ayant, selon elles, droit à une indemnisation.

253. In other words, without hearing arguments from either of the parties regarding the issue of damages, the Tribunal decided simply to substitute the *confiscation* valuation of "El Clarín" (as determined in the confiscation-specific context of Decision 43) for a valuation of the damages specifically attributable to

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<sup>181</sup> *Ibid.* at para. 139.

<sup>182</sup> See Resp. Mem. Annulment at para. 251-253. Footnotes omitted.

the “denial of justice” and “fair and equitable treatment” violations that the Tribunal alleged Chile had committed. [Emphasis in original]

254. Chile then concludes that this denial by the Tribunal of its right to be heard ultimately affected the outcome of the case and must therefore be characterized as a serious departure from a fundamental rule of procedure:<sup>183</sup>

The *Pey Casado* Award contained three principal broad conclusions: (1) the Tribunal had jurisdiction; (2) the Republic committed a denial of justice and a discriminatory violation of the fair and equitable treatment standard; and (3) the Republic was responsible to the Claimants for US\$10 million worth of damages *resulting from such violations*. [Emphasis in original]

255. Finally, the Respondent argues that it never waived its right to be heard on the issue of damages concerning the discrimination claim relating to Decision No. 43 because it never had actual or constructive knowledge that a response was required.<sup>184</sup>

149. [...] The mere fact that parties may have a certain degree of latitude to express views on almost anything in an arbitration, does not mean they are required to opine on every conceivable issue that could come up, lest they risk waiver. In particular, they are not required to address issues that cannot reasonably be discerned to be at play in the arbitration. Here, as demonstrated above, Chile did not become aware of the discrimination claim or of the damages methodology employed by the Tribunal in connection with such claim until the Award was published. Because the right to defend can only be waived if the respondent has actual or constructive notice that a response is required, and because Chile had no such knowledge, it is apparent that Chile did not waive its right to be heard on the issue of damages concerning the alleged discrimination relating to Decision 43.

### Claimants' Position

256. The Claimants take the position that there was no departure from a fundamental rule of procedure in the circumstances because the Tribunal's introduction of the damages calculation in the Award was justified. In the words of the Claimants, “le quantum du

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<sup>183</sup> *Ibid.* at para. 255.

<sup>184</sup> See Resp. Rep. Annulment at para. 149.

dommage réparable au titre du déni de justice et traitement discriminatoire était le même que celui résultant de la confiscation, les violations du Chili n'ayant eu pour conséquence que de priver les Demanderesses d'obtenir réparation pour les confiscations subies [...].”<sup>185</sup>

257. The Claimants maintain that they did not make requests for specific damages for the breaches of Article 4 since they were included in the compensation claim for the expropriation.<sup>186</sup> As for the denial of justice claim, they refer to their Ancillary Request of 4 November 2002, p. 13:

Enfin cette demande n'a pas d'incidence sur le montant total des dommages et intérêts sollicités dans la procédure principale. En effet, le rapport des experts « Alejandro Arraez et Associés » sur l'évaluation du groupe d'entreprises du journal Clarin (pièce D18) avait conclu que l'indemnisation correspondant aux presses GOSS établie par la 1<sup>ère</sup> Chambre Civile de Santiago devait être déduite de l'évaluation qu'ils avaient faite du montant global des dommages et intérêts. Cette position est confirmée par le rapport complémentaire du 28 octobre 2002 ci-joint (pièce C225).

258. With respect to the discrimination claim, they maintain that the damages were included in their expert report of 19 February 2003.<sup>187</sup> They also refer to the January 2007 Hearing:<sup>188</sup>

L'interprétation des Demanderesses est que si cette Décision 43 constituait une nouvelle violation du traitement équitable, il conviendrait, notamment dans le calcul du dommage, de tenir compte des actes passés du gouvernement et de la République du Chili, qu'il s'agisse des actes de 1995 ou des décrets de 1977 et 1975 et, dès lors, le calcul de l'indemnité ne serait pas différent si ce n'est qu'il serait peut être augmenté, en ce qui concerne le préjudice moral, qui est l'un des chefs de préjudice demandé, puisque le dommage moral qu'il s'agisse de celui de

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<sup>185</sup> See Cl. C-Mem. Annulment at para. 613; see also Cl. Rej. Annulment at paras. 208 *et seq.*

<sup>186</sup> See Cl. C-Mem. Annulment at para. 592.

<sup>187</sup> See Cl. Rej. Annulment at para. 210.

<sup>188</sup> See Cl. C-Mem. Annulment at para. 593 quoting Tr. Jur. [2] [p. 50] (Fr.).

M. Pey ou de celui de la Fondation a été augmenté par cette nouvelle violation de la République du Chili.

259. The Claimants maintain that the Tribunal granted Chile the opportunity to be heard before, during, and after the January 2007 Hearing.<sup>189</sup>

596. [...] [L]es Parties Demanderesses ayant présenté des demandes au cours de la procédure d'arbitrage sur les fondements de déni de justice et de traitement injuste et inéquitable, la République du Chili avait l'opportunité de présenter dans ses écritures les arguments pertinents pour s'opposer non seulement à l'existence d'une telle violation mais également à l'évaluation du préjudice présentée par les Demanderesses.<sup>190</sup>

260. They conclude that tribunals have broad discretion to determine damages, as recognized by *ad hoc* committees, and that even if there was a breach of a fundamental rule of procedure, it would not be a serious one. In this respect, Claimants argue that the Tribunal would not have been in a position to grant a lesser amount of damages, as it awarded the strict minimum equivalent to the amount granted by Chile under Decision No. 43, which was the foundation of the discrimination. Therefore, the Tribunal did not reach a result substantially different from what it would have awarded had the rule been observed.<sup>191</sup>

### **Committee's Analysis**

261. The Committee notes that the Tribunal acknowledged in the Award that:

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<sup>189</sup> See Cl. C-Mem. Annulment at paras. 591-604.

<sup>190</sup> *Ibid.* at 596.

<sup>191</sup> *Ibid.* at paras. 608-615.

- Claimants' damages arguments were strictly limited to their expropriation claims;<sup>192</sup>

686. Il y a lieu de relever d'abord que l'argumentation des demanderessees concernant l'évaluation du dommage (ainsi du reste, par voie de conséquence, que la réfutation esquissée par la défenderesse par exemple avec le rapport de l'expert Kaczmarek) se réfère à l'expropriation intervenue au Chili dans la période 1973-1977, notamment en 1975, et confirmée par la suite.

- The expropriation-based calculation of damages was not relevant to the BIT violations in terms of denial of justice and discrimination forming the basis of the Award;<sup>193</sup>

688. L'expropriation survenue avant l'entrée en vigueur du traité ayant été écartée de l'examen du Tribunal arbitral, il en résulte que, pour cette raison déjà, les allégations, discussions et preuves relatives au dommage subi par les demanderessees du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui d'une autre cause, de fait et de droit, celle du déni de justice et du refus d'un « *traitement juste et équitable* ». [Emphasis in original]

- Claimants presented no convincing evidence of damages on the denial of justice or discrimination claims;<sup>194</sup> and
- The Tribunal would be able to proceed to the evaluation of the damages based on objective elements, the Chilean authorities having themselves fixed the amount of compensation due to persons entitled to be indemnified under Decision No. 43.<sup>195</sup>

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<sup>192</sup> See Award at para. 686.

<sup>193</sup> *Ibid.* at 688.

<sup>194</sup> *Ibid.* at para. 689.

<sup>195</sup> *Ibid.* at para. 692.



262. The Committee is of the view that even if, *arguendo*, the Tribunal had such power, it should have allowed each party the right to present its arguments and to contradict those of the other party. Having reviewed the entire record, including the parties' submissions, the Committee can only conclude that the parties never pleaded the damages claims arising from the breaches of Article 4 of the BIT. The Claimants did mention briefly the damages related to the Goss machine and Decision No. 43 but solely in the context of the expropriation claim. It is significant that the relief requested by the Claimants is limited to damages resulting from the expropriation:<sup>196</sup>

**QU'IL DÉCLARE** illégitime, contraire au Droit interne chilien et international, nulle et de nul effet *ab initio* la saisie par un acte de force et la confiscation des biens, droits et crédits de CPP S.A. et de EPC Ltée., la dissolution de CPP S.A. et EPC Ltée., ainsi que la nouvelle dépossession intervenue le 28 avril 2000 ;

**-QU'IL CONDAMNE** l'Etat défendeur à indemniser en conséquence les parties demanderesses eu égard à la totalité de leurs dommages et préjudices ainsi causés, y compris le *lucrum cessans* à partir de la date de l'acte de force - le 11 septembre 1973- jusqu'à la date de la Sentence -et ce pour un montant minimum estimé provisoirement à la date du 11 septembre 2002, sauf erreur ou omission, à US\$ 397.347.287, auquel s'ajoutent les dommages moraux et non patrimoniaux infligés à M. Victor Pey Casado selon l'estimation que le Tribunal jugera opportune ; [Emphasis added]

En définitive,

**Qu'il CONDAMNE** l'État demandeur à indemniser les demanderesses à hauteur de 515.193.400 US\$ (cinq cent quinze millions cent quatre-vingt-treize mille quatre cent dollars des États-Unis d'Amérique) comme sollicité dans le **Mémoire** présenté le 17 mars 1999. [Emphasis in original]

263. The only time the question of damages for breach of Article 4 of the BIT was raised was at the January 2007 Hearing when the President of the Tribunal asked the parties whether the injury or damages resulting from the hypothetical breach of the fair and equitable treatment provision were the same as or different from those resulting from the

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<sup>196</sup> See RA-20a, Cl. Rep. Jur. and Merits at p. 254 (referring to Supplemental Memorial on the Merits at p. 152, RA-13a).

expropriation claim.<sup>197</sup> However, as the record discloses, the January 2007 Hearing was convened to deal with questions of jurisdiction. It is obvious to the Committee that the Respondent (and the Claimants) had very little time at the hearing to answer the question posed by the President. The Committee agrees with Chile that a party cannot respond to such a question and present its arguments on the consequences of a potential breach of a substantive provision of a Bilateral Investment Treaty “in one minute”.<sup>198</sup>

264. The parties did not have an opportunity to file post-hearing briefs after the January 2007 Hearing as the Tribunal had made it clear in its decision of 13 September 2006 and in its Procedural Order No. 13 of 24 October 2006 that there would not be any reopening of the written phase of the proceedings.

265. The Committee notes that, after the January 2007 Hearing, the Tribunal asked for information from the parties in respect of Decision No. 43. However, it is clear to the Committee that none of these requests related to the principles of compensation for the breach of the fair and equitable treatment standard:

- on 18 July 2007, the Tribunal asked the parties for “les documents qui lui permettraient de prendre connaissance des montants précis concernés” with respect to Decision No. 43.<sup>199</sup> The Claimants replied by letter of 19 July 2007 specifying the amounts awarded under Decision No. 43 but without any discussion on legal arguments related to compensation. Respondent replied by letter of 20 July 2007 and indicated that it was reserving its right to comment on the amount of compensation;<sup>200</sup>

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<sup>197</sup> See *supra* at para. 251.

<sup>198</sup> See *supra* at para. 252.

<sup>199</sup> See CN-215.

<sup>200</sup> See CN-217.

- on 3 October 2007, the Tribunal granted 2 weeks to the Respondent to comment on the Claimants' letter of 19 July 2007 and also allowed for a further exchange of observations;
- Respondent replied on 18 October 2007 and attached the documents requested concerning the amount of Decision No. 43 and relevant inflation and interest rate calculations. The letter commented on the amount paid under Decision No. 43 and explained the contents of the documents;
- Claimants replied on 29 October 2007 and commented on the data produced by Chile; and
- Chile replied on 9 November 2007 (letter incorrectly dated 18 October 2007) commenting on the issuance of promissory notes as the mode of payment.

266. In the Committee's view, these post-hearing exchanges do not constitute a fair opportunity to discuss the remedy for breach of Article 4 of the BIT. Even though the Tribunal did use objective elements for the valuation of damages (the data provided and discussed by the parties), at no time did it refer to arguments pleaded by either party. As explained in their Counter-Memorial on Annulment,<sup>201</sup> the Claimants, at the January 2007 Hearing, argued that the compensation due was equivalent to the one resulting from the confiscation as Chile's breach of the BIT had the consequence of preventing the Claimants from obtaining compensation for the confiscation. The Tribunal, however, adopted another standard. It placed the Claimants in the situation in which they would have been but-for the BIT violations and awarded the amount fixed by Decision No. 43.

267. The Committee notes that the Tribunal considered and rejected the option of naming an independent expert to assess the damages because of the additional delay and the further

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<sup>201</sup> See Cl. C-Mem. Annulment at para. 613.

costs that such a process could entail.<sup>202</sup> However, in the Committee's view, the Tribunal could not consider the evidence and reach such a conclusion without having afforded both parties an opportunity to make submissions on the applicable standard of compensation and evaluation of damages for the breach of Article 4 of the BIT. The committee agrees with the *ad hoc* committee in *Klöckner I* that reopening the proceeding before reaching a decision and allowing the parties to put forward their views on the arbitrators' new thesis was not just a question of expedience but a requirement as the Tribunal was going beyond the legal framework that the parties had established.<sup>203</sup>

268. Finally, the Committee is satisfied that Chile never waived its right to be heard on this issue of damages. The Committee recalls that the Tribunal had expressly stated before the January 2007 Hearing that it would not reopen the written phase of the proceeding. In the circumstances, Chile cannot be considered to have forfeited its right to object to the Tribunal's failure to observe the "*principe du contradictoire*" when it was prevented by the Tribunal from filing further submissions. In addition, a party can only waive an objection if it has actual or constructive knowledge of a procedural violation. As Professor Schreuer observes,<sup>204</sup> some violations of procedural principles may become visible only after the award has become available. Based on the only question posed to the parties at the January 2007 Hearing and the Tribunal's requests of July and October 2007, Chile could not know until it read the Award that the Tribunal would use Decision No. 43 to evaluate the damages resulting from a breach of the fair and equitable treatment.

269. The Committee considers that this departure from the right to be heard which it has found is serious as the issue on which Chile was denied an opportunity to be heard was

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<sup>202</sup> See Award at para. 691.

<sup>203</sup> See *Klöckner I Decision* at para. 91.

<sup>204</sup> See *Schreuer Commentary Art. 52* at para. 334.

substantial and outcome-determinative. Chile was deprived of the right to present its arguments on the standard applicable to the calculation of damages for the breach by Chile of the fair and equitable treatment provision of the BIT. In view of the Tribunal's conclusions, which are part of the *dispositif*, it is evident that this issue was a critical component of the Award and that it materially prejudiced Chile. Therefore, the Committee concludes that it has no discretion not to annul paragraph 4 of the *dispositif* of the Award. Additionally, had Chile been granted the opportunity to be heard on the damages methodology and calculations used by the Tribunal, the Award might have been substantially different. Although, as the Committee decided earlier,<sup>205</sup> the applicant is not required to prove that the end result would have been different had the rule been observed, the Committee agrees with Chile that the Tribunal went beyond the standard it established, *i.e.*, placing the Claimants in the position they would have been but for the breaches of the BIT, because in fact it left them far better off "by granting them over US\$ 10 million rather than the US\$ 2 million they were asking for in Chile."<sup>206</sup> Without entering into an analysis of the applicable standard and the damages calculation, there is no doubt that Chile has demonstrated the impact this significant breach may have had on the Award.

270. In sum, the Committee concludes that section 4 only of the *dispositif* of the Award must be annulled.
271. The Committee will observe before concluding this part of its Decision that its finding does not contradict the conclusions of other *ad hoc* committees that have ruled that

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<sup>205</sup> See *supra* at paras. 78 and 80.

<sup>206</sup> See Resp. Rep. Annulment at para. 522, "Thus, even if Mr. Pey had been granted everything he was asking for in all of the relevant Chilean courts and administrative proceedings, the most he [] would have obtained would have been a suspension of the Decision 43 proceeding, and compensation for the Goss machine. Accordingly, it could be said that ICSID Tribunal did far more than merely 'place Claimants in the position they would have been...' In fact, it left them far better off, by granting them over US\$10 million, rather than the US\$2 million they were asking for in Chile."

tribunals have a wide discretion in determining quantum of damages.<sup>207</sup> The Committee notes that decisions in the *Rumeli* and *Azurix* cases analyzed the question of quantum in the light of Article 52(1)(e), *i.e.*, failure to state reasons. The issue in those cases was not whether the parties had had an opportunity to present and argue damages calculations for the breaches invoked. The applicants were challenging the reasoning in the tribunals' quantification of damages. The Committee in the present section of its Decision has found an annulable error in the process which the Tribunal followed in reaching its conclusion not in the way it calculated the amount of damages.

(ii) *Burden of Proof*

272. The ground raised by Chile in connection with this aspect of Article 52(1)(d) is whether the Claimants satisfied their burden of proving their damages.

**Parties' Positions**

**Chile's Position**

273. Chile lays emphasis on the Tribunal's acknowledgment that the Claimants had the burden of proving their damages and they had not presented any evidence concerning the valuation of damages for the denial of justice and discrimination claims. Notwithstanding this premise, the Tribunal awarded Claimants damages for violation of the fair and equitable treatment.<sup>208</sup>

274. Chile submits the following:<sup>209</sup>

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<sup>207</sup> See Cl. C-Mem. Annulment at para. 606; Resp. Rep. Annulment at paras. 139-142, *referring to Rumeli Decision and Azurix v. Argentine Republic*, ICSID Case No. ARB/1/12, Decision on Annulment dated 1 September 2009 (hereinafter "*Azurix Decision*").

<sup>208</sup> See Resp. Mem. Annulment at para. 365-370.

<sup>209</sup> *Ibid.* at para. 368.

Because the Tribunal rendered such determination on damages against the Respondent despite the fact that it admitted both that the Claimants bore the burden of proof regarding damages, and that the Claimants had in fact provided no arguments or evidence at all in that regard with respect to the two claims that constituted the ultimate bases of responsibility, it is evident that the Tribunal disregarded even its own standards on the issue, and improperly reversed the burden of proof.

275. The Respondent adds that if the burden of proof, had in fact, been placed upon the Claimants, the Award might have been very different. Therefore, concludes Chile, the Tribunal departed from a fundamental rule of procedure.<sup>210</sup>

#### Claimants' Position

276. The Claimants repeat their arguments with respect to the denial of the right to be heard, *i.e.*, that the Tribunal had discretion with respect to damages and therefore could not have departed from a fundamental rule of procedure,<sup>211</sup> that the Claimants satisfied their burden by discussing damages in letters submitted after the January 2007 hearing,<sup>212</sup> and that, even if the Tribunal did depart from a fundamental rule of procedure, such departure was not “serious” within the meaning of Article 52(1)(d).<sup>213</sup>

#### Committee's Analysis

277. In light of the Committee's finding in the previous section of its Decision that the Tribunal denied Chile the right to be heard on the question of the calculation of damages which amounted to a serious departure from a fundamental rule of procedure in breach of Article 52(1)(d) of the ICSID Convention, the Committee considers that this ground for annulment is in fact subsumed in the denial of the right to be heard or has become moot.

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<sup>210</sup> *Ibid.* at para. 369.

<sup>211</sup> See Cl. C-Mem. Annulment at paras. 606-607.

<sup>212</sup> See *Ibid* at paras. 597-605.

<sup>213</sup> See *Ibid* at paras. 607-617.

However, in order to dispel any doubt regarding Chile's Application the Committee decides to deny it.

**(2) Failure to State Reasons**

278. Chile submits that in awarding damages to the Claimants, the Tribunal failed to state reasons with respect to:

- the methodology and calculations that it used in assessing damages relating specifically to the two Article 4 violations for which it found Chile responsible (denial of justice and discrimination); and
- its determination that it was appropriate, for the purpose of assessing damages, to use the expropriation value of *El Clarín* (as quantified in Decision 43), despite the Tribunal's earlier conclusion in the Award that the expropriatory acts relating to *El Clarín* were outside the BIT's temporal scope and therefore outside the Tribunal's jurisdiction.

**Parties' Positions**

**Chile's Position**

279. Chile's annulment challenge in relation to the damages and based on Article 52(1)(e) of the ICSID Convention is summarized as follows:<sup>214</sup>

521. The Tribunal failed to state reasons on several aspects of this conclusion. First, it did not explain why it considered that "placing the Claimants in the situation in which they would have been" but-for the BIT violations was the proper standard for determining the amount of damages suffered by Claimants as a result of the alleged "denial of justice" and failure to provide "fair and equitable treatment." Nor did it explain why, in order to meet that standard, it was appropriate for it to award Claimants an amount that was based on the

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<sup>214</sup> See Resp. Rep. Annulment at paras. 521-527.



*expropriation-based* compensation determined by Decision 43. This is contradictory with the Tribunal's previous conclusion that Claimants had to be compensated for the alleged BIT claims and *not* for the expropriation. It is also contradictory with the Tribunal's overall conclusion that Claimants' expropriation claim was inadmissible; this is so because the Tribunal ended up compensating Claimants—through the back door—for the very expropriation that it had said was outside the *ratione temporis* scope of the BIT.

522. It is important in this context to recall that the only thing that Claimants were demanding before the Chilean courts, in terms of *compensation*, was compensation for the value of the Goss machine (which they claimed to be approximately US\$2 million). All of the other judicial and administrative decisions that formed the basis of the Tribunal's "fair and equitable" determination concerned denial of Claimant's requests that the various Chilean proceedings be suspended pending resolution of the ongoing ICSID arbitration. Thus, even if Mr. Pey had been granted everything he was asking for in all of the relevant Chilean courts and administrative proceedings, the most he [] would have obtained would have been a suspension of the Decision 43 proceeding, and compensation for the Goss machine. Accordingly, it could be said that the ICSID Tribunal did far more than merely "place Claimants in the position they would have been . . . ." In fact, it left them far better off, by granting them over US\$10 million, rather than the US\$2 million they were asking for in Chile.

523. Furthermore, in the end Claimants suffered no harm at all from the Chilean authorities' failure to suspend the execution of Decision 43. Claimants' efforts to stop the execution of Decision 43 were intended to prevent a payment for the confiscation of *El Clarín* to third parties, out of concern that such a payment would render more difficult any later effort by Claimants to collect from Chile on an award by the ICSID Tribunal for the very same confiscation. If such suspension had been granted by the Chilean authorities, it would have allowed the ICSID Tribunal to rule first. But the practical import of this would have been negligible, given the Tribunal's eventual conclusion that Claimants' expropriation-based claim was outside the scope of the BIT. It could therefore be said that, had the execution of Decision 43 in fact been suspended, Mr. Pey would have been no better or worse off than he was without the suspension. Thus, the Tribunal failed to explain how Mr. Pey would have received US\$10 million but for the alleged BIT violations.

524. In sum, the restitution standard used by the Tribunal made no sense in the context of the particular BIT violations that it found. The Tribunal's failure to explain why it chose that standard, and its failure to explain why, having chosen that standard, it deemed that the expropriation amount calculated in connection with Decision 43 was the appropriate figure to use to meet the restitution standard, render the Award annulable under Article 52(1)(e) of the ICSID Convention.

525. In the end, it could reasonably be speculated that the real motivation for the Tribunal's decision was its legal inability—due to the *ratione temporis* constraints mentioned above—to compensate Claimants *under the BIT* for the expropriation of *El Clarín*. Hence the Tribunal's strained effort to find some sort of BIT violation by Chile in connection with Decision 43, and the implausibility of its conclusion on that point, particularly given that it would have in fact been illegal for the Chilean authorities to compensate Mr. Pey given his status as a nonparticipant in the relevant administrative proceeding. (On this point it bears noting that even if Mr. Pey had in fact applied for compensation under this administrative process for the confiscation of *El Clarín*, the result would have been no different, as Chile concluded that the registered shareholders of *El Clarín*—whose heirs ended up being the beneficiaries of Decision 43—were in fact the genuine owners of *El Clarín*).

526. The ICSID annulment jurisprudence would support a finding of annulment for the reasons articulated above. As discussed in Chile's Memorial, the *ad hoc* committees in *Amco I* and *MINE* annulled awards for "failure to state reasons" precisely because of the existence of inconsistent or contradictory reasons. Particularly relevant is *MINE*, where the committee annulled precisely on the basis of a failure by the tribunal to state reasons for its damages determination, noting in that regard that "to the extent that the Tribunal purported to state the reasons for its decisions" on damages, such reasons were "inconsistent and in contradiction with its analysis of damages theories" that had been presented by the parties in the case. The *MINE* committee further stated:

Having concluded that [the analysis of damages] theories "Y" and "Z" were unusable because of their speculative character, the Tribunal could not, without contradicting itself, adopt a "damages theory" which disregarded the real situation and relied on hypotheses which the Tribunal itself had rejected as a basis for the calculation of damages. As the Committee stated . . . , the requirement that the Award must state the reasons on which it is based is in particular not satisfied by contradictory reasons.

527. The foregoing analysis by the *MINE* committee is directly applicable in the present case. For that and all of the other reasons articulated above, the *Pey Casado* Tribunal's failure to state reasons for its handling of the damages aspects of its decision warrant annulment of the Award. [Emphasis in original]

### Claimants' Position

280. The Claimants do not expressly address this ground in their written submissions. They describe the reasoning of the Tribunal with respect to the assessment of damages<sup>215</sup> and conclude generally that Chile cannot request the annulment of the Award on the grounds it invoked with respect to the Tribunal's decision on the amount of damages.<sup>216</sup>

### Committee's Analysis

281. As is well established by decisions of numerous ICSID *ad hoc* committees, the "failure to state reasons" may consist of contradictory reasons.<sup>217</sup> The purpose of this ground for annulment – put differently, the purpose of the requirement to state reasons - is to permit the parties to understand the decisions of ICSID tribunals.

282. The Committee agrees with Chile that the Tribunal's adoption of the expropriation-based calculation of damages under Decision No. 43 contradicts its determination that this basis of calculation was irrelevant since the Claimants' claim for expropriation was outside the temporal scope of the BIT.

283. In paragraph 688 of the Award, the Tribunal expressly stated that an evaluation of the damages allegedly suffered by the Claimants as a result of the expropriation was irrelevant and that all the allegations, discussion and evidence related to such damages could not be considered by the Tribunal ("*ne peuvent pas être retenues*") because the expropriation in 1975 had occurred prior to the entry into force of the BIT and was thus outside the temporal scope of the BIT. In the words of the Tribunal:

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<sup>215</sup> See Cl. C-Mem. Annulment at paras. 610-615.

<sup>216</sup> *Ibid.* at para. 616; Cl. Rej. Annulment at para. 217.

<sup>217</sup> See *supra* at para. 85.

L'expropriation survenue avant l'entrée en vigueur du traité ayant été écartée de l'examen du Tribunal arbitral, il en résulte que, pour cette raison déjà, les allégations, discussions et preuves relatives au dommage subi par les demanderesse du fait de l'expropriation, manquent de pertinence et ne peuvent pas être retenues s'agissant d'établir un préjudice, résultant lui d'une autre cause, de fait et de droit, celle du déni de justice et du refus d'un « traitement juste et équitable ».

284. However, the Tribunal then proceeded to determine the calculation of the Claimants' damages on the basis of the evaluation made by the Chilean Ministry of Assets in accordance with Decision No. 43 for the purpose of compensating the persons it considered to be the owners of *El Clarín* for the expropriation of the newspaper.<sup>218</sup> Again, in the words of the Tribunal:

En l'absence de preuves convaincantes apportées par les demanderesse et le recours à une ou plusieurs expertises devant être exclu, le Tribunal arbitral est cependant en mesure de procéder à une évaluation du dommage à l'aide d'éléments objectifs dès lors que, selon les données incontestées résultant du dossier, les autorités chiliennes elles-mêmes, à la suite de la Décision n° 43, ont fixé le montant de la réparation due aux personnes ayant, selon elles, droit à une indemnisation.

285. The Tribunal's use of the expropriation-based damage calculation is manifestly inconsistent with its decision a few paragraphs earlier that such an expropriation-based damage calculation is irrelevant and that all evidence and submissions relevant to such a calculation could not be considered.
286. While the Committee recognizes that arbitral tribunals are generally allowed a considerable measure of discretion in determining quantum of damages,<sup>219</sup> the issue in the present case is not *per se* the quantum of damages determined by the Tribunal. Nor does the problem lie *per se* in the Tribunal's chosen method of calculating the damages suffered by the Claimants. The issue lies precisely in the reasoning followed by the

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<sup>218</sup> See Award at para.692.

<sup>219</sup> See *Wena Decision* at para. 91; *Rumeli Decision* at para. 146; *Azurix Decision* at para. 351.

Tribunal to determine the appropriate method of calculation, which, as demonstrated above, is plainly contradictory.

287. On this basis, the Committee finds that the Tribunal failed to state reasons for its determination of damages which is a ground for annulment under Article 52(1)(e) of the ICSID Convention. The Committee therefore grants the Respondent's request in this regard and annuls section 4 of the *dispositif* of the Award.

#### **H. The May 2003 Hearing**

##### **(1) Right to Be Heard**

#### **Parties' Positions**

##### **Chile's Position**

288. Chile contends that the Tribunal denied it a "full and fair" opportunity to be heard within the meaning of Article 52(1)(d) by: (a) denying Chile the opportunity to present its witnesses and experts; (b) but nevertheless permitting Mr. Pey Casado to address factual issues in oral testimony during the May 2003 Hearing; (c) at the same time denying Chile the right to cross-examine Mr. Pey Casado in that same hearing; and (d) after having expressly assured Chile at the hearing that it would not treat Mr. Pey Casado's statements as factual evidence, referring in its Award to Mr. Pey Casado's testimony at that hearing as if it were factual evidence, and invoking such testimony in the Award as the only evidence on certain key factual findings related to the existence of an "investment" and to the issue of whether Mr. Pey Casado was the owner of that investment.<sup>220</sup>

289. The main issue raised by Chile in connection with the right to be heard is therefore whether, notwithstanding the Tribunal's assurances and the absence of any opportunity

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<sup>220</sup> See Resp. Mem. Annulment at paras. 256-268.

by Chile to cross-examine Mr. Pey Casado at the May 2003 Hearing, the Tribunal in the Award ultimately assigned probative value to such testimony. This issue also raised the question of the Claimants' waiver argument in light of the Tribunal's assurances that Mr. Pey Casado would not be treated as a fact witness.

290. Chile submits that, pursuant to ICSID Arbitration Rule 32(1), the parties have an absolute right to present witnesses and experts at a hearing where the parties present their arguments. While Chile acknowledges that a tribunal may have some discretion in this regard, the exercise of this discretion, it says, is limited by the requirement that a tribunal treat the parties equally.<sup>221</sup> It further argues that pursuant to ICSID Arbitration Rule 35(1), a party has a right to cross-examine adverse witnesses.<sup>222</sup>
291. Chile's contention that the Tribunal denied it the right to be heard by not allowing its counsel to cross-examine Mr. Pey Casado at the May 2003 Hearing is set forth as follows:<sup>223</sup>

264. Pursuant to the test articulated in *Wena Hotels*, a departure is serious where a petitioning party demonstrates "the impact that the issue may have had on the award." Here, the Tribunal's actions may have had a dramatic impact on the Award. The Tribunal permitted Mr. Pey to testify, without being examined by the opposing party, accepted his statements as true, and cited to them as facts in the Award. Indeed, one of the key underpinnings of the Tribunal's conclusion that there was an "investment" under the BIT was its determination that no formal, written contract or transfer was necessary under Chilean law for the transfer of the CPP shares because of the close relationship between Mr. Pey and Darío Sainte Marie and that Mr. Pey was thus the sole owner of the CPP shares; information that comes directly and uniquely from Mr. Pey's May 2003 testimony. According to the Award,

Il est allégué que M. Sainte-Marie, en 1972, pour « *des raisons strictement personnelles* » et semble-t-il d'ordre familial<sup>34</sup> a décidé de

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<sup>221</sup> See Resp. Rep. Annulment at paras. 160-162.

<sup>222</sup> See Resp. Mem. Annulment at para. 258.

<sup>223</sup> *Ibid.* at paras. 264-266. Footnotes omitted.

vendre la société CPP S.A. à son ami M. Pey Casado, lequel, depuis bien des années, 1957-58<sup>35</sup> l'avait assisté en tant que collaborateur et conseiller technique, notamment pour le développement et l'orientation de l'entreprise et était devenu « *son collaborateur le plus étroit*, » le vendeur souhaitait en effet « *quitter le pays pour toujours et de façon totale.* » C'est la raison pour laquelle, **selon M. Pey Casado**, le « *mécanisme de transfert de l'entreprise* » se serait déroulé de façon rapide et moins formelle qu'il est d'usage sur le plan commercial.

265. The footnotes from this paragraph cite directly to Mr. Pey's testimony from the May 2003 hearing, in which he stated:

Les raisons pour lesquelles M. Sainte-Marie a eu cette idée étaient des raisons **strictement personnelles** et, à mon avis, ce sont des raisons qui doivent faire l'objet du respect quant aux commentaires qu'on pourrait faire.

A ce moment-là j'étais son **collaborateur le plus étroit**. Je n'ai pas perçu pas un sous pendant tous mes travaux de nombreuses années de collaboration en dépit de son instance pour que je sois payé, que je l'accepte en tant que professionnel, mais j'ai toujours travaillé en tant qu'ami avec lui. Il est devenu évident, naturel par conséquent que, étant la personne qui connaissait le mieux l'entreprise et en même temps qui connaissait le mieux de la situation particulière, de la situation personnelle de M. Sainte-Marie, c'était naturellement moi auquel s'est adressé en plus que j'étais entrepreneur.

Donc il s'est adressé à moi, disais-je, pour que je lui achète le journal étant donné qu'il **avait la proposition définitive de quitter le pays pour toujours.**

Mon activité était tout à fait différente et j'ai dû prendre une décision assez rapidement, en quelques jours. **C'est ainsi que le mécanisme du transfert de l'entreprise** s'est déroulé. Nous ne sommes pas passés par les processus minutieux qui sont utilisés sur le plan commercial. En fait, ce qui a compté c'était la bonne foi et la relation d'amitié que nous avions entre nous approfondie tout au long des dernières années.

266. Had the Tribunal barred Mr. Pey from offering oral testimony over and above his prior written testimony, or had it given Chile the opportunity to cross-examine him on both his written and oral testimony, it might have reached a different conclusion on the issue of whether Mr. Pey was the owner of the CPP and EPC shares. Thus, the Tribunal's departure from the rule caused it to render an award that might have been "substantially different from what it would have awarded had such a rule been observed." As stated above, an applicant for annulment need only demonstrate that it was denied the right to be heard on an issue that was part of the Tribunal's decision. Because Mr. Pey's ownership of

the CPP and EPC shares was an element of the Tribunal's decision upholding jurisdiction, the denial of the right to be heard may have caused the Tribunal to render an award "substantially different from what it would have awarded had such a rule been observed." Thus, the Tribunal's actions would constitute a serious departure from a fundamental rule of procedure under the *Wena Hotels* test. [Emphasis in original]

292. Chile adds that, regardless of the Tribunal's statements about Mr. Pey Casado's status as a party prior to allowing him to speak at the May 2003 Hearing, in its Award it treated his statements at that hearing as factual evidence on certain key issues. In the circumstances Chile submits, the Tribunal's denial of any opportunity for Chile to cross-examine Mr. Pey Casado on those statements amounts to a serious departure from a fundamental rule of procedure. Chile further contends that, regardless of whether there was other evidence in the record, the fact that the Tribunal only cited as a source Mr. Pey Casado's statements demonstrates that the Tribunal gave them a lot of weight. Chile concludes that it is obvious that the statements had significant, if not determinative, influence on the Tribunal's reasoning on key issues and that fact in itself creates a prejudice to the Respondent under circumstances in which it was assured that Mr. Pey Casado's testimony would not be given any probative value.<sup>224</sup>
293. Finally, Chile denies the Claimants' contention that it waived any claim for annulment on these grounds since it only discovered the departure from this fundamental rule of procedure after the Award was issued.<sup>225</sup>

#### Claimants' Position

294. The Claimants argue that not all the rules of procedure are fundamental rules. There is no fundamental rule requiring the Tribunal to hear all the witnesses and experts who have

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<sup>224</sup> See Tr. Annulment [2] [341:23-342:12] (Eng.); [142:33-40] (Fr.); [373:17-374:10] (Spa.).

<sup>225</sup> See Resp. Rep. Annulment at paras. 164; 176.



submitted statements and reports. Similarly, there is no fundamental rule of procedure guaranteeing a right to cross-examine witnesses at a hearing.<sup>226</sup> In the words of the Claimants:<sup>227</sup>

101. Il résulte de ce qui précède que l'impossibilité de contre-interroger un témoin, comme le refus du Tribunal arbitral d'entendre les témoins et/ou experts au cours d'une audience orale, ne sauraient être considérés comme une violation d'une règle fondamentale de procédure.

102. En tout état de cause, il ne saurait s'agir d'une violation grave dès lors que le tribunal avait à sa disposition les attestations écrites et les rapports d'experts lui permettant de se forger une opinion. Dès lors, l'absence de témoignages oraux n'a pu manifestement conduire le Tribunal à rendre une décision substantiellement différente.

295. In addition, the Claimants maintain that Mr. Pey Casado was not a fact witness and that Chile in any event waived its right to claim for annulment based on this issue.<sup>228</sup> The Claimants further deny Chile's contention that the presentation (in French, "l'exposé") made by Mr. Pey Casado was treated as evidence by the Tribunal.<sup>229</sup>

### **Committee's Analysis**

296. The Committee considers that the parties' arguments in respect of this ground raise three questions: (i) is there an obligation for tribunals to hear witnesses and experts; (ii) should there have been an opportunity for Chile to cross-examine Mr. Pey Casado; and (iii) how did the Tribunal treat Mr. Pey Casado's statements in the Award?
297. On the first question, the Committee notes that the ICSID Arbitration Rules foresee the possibility to examine and cross-examine witnesses and experts, but do not require a

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<sup>226</sup> See Cl. C-Mem. Annulment at paras. 85-99.

<sup>227</sup> *Ibid.* at paras. 101-102.

<sup>228</sup> *Ibid.* at paras. 105 *et seq.*

<sup>229</sup> *Ibid.* at paras. 132 *et seq.*

tribunal to hear all of the parties' witnesses and experts. Arbitration Rule 34(2)(a) provides that the Tribunal may call upon the parties to produce witnesses and experts. Arbitration Rule 35 describes how witnesses and experts are examined once they have been called to testify. The verb shall in Arbitration Rule 35(1) ("Witnesses and experts **shall** be examined before the Tribunal by the parties under the control of its President [...]") cannot be interpreted as requiring all the witnesses and experts having submitted a written statement or report to be examined. Often, at the first procedural meeting, the parties agree on the process which will be adopted if witnesses and experts are asked to testify (e.g., whether each party can call its own witnesses or whether it can only call the other side's witnesses). In the absence of any agreement, the Tribunal is free to decide that it does not need to hear any or all the witnesses or experts and may rely exclusively on their written statements and reports.

298. In the present case, it does not seem that the parties had agreed on a specific process. The Claimants first indicated that they would not present any of their witnesses or experts at the May 2003 Hearing.<sup>230</sup> The Respondent made suggestions as to the possibility of examining witnesses or experts.<sup>231</sup> Then, the Claimants indicated that Mr. Pey Casado, as one of the claimants, would be present as well as Mr. Alejandro Arráez, their damages expert.<sup>232</sup> By letter of 16 April 2003, the Respondent asked that Mr. Pey Casado be present also as a fact witness in order to be cross-examined and stated that it would ask its own damages expert, Mr. Kaczmarek, to be present.<sup>233</sup> The Claimants replied by letter of 18 April 2003 proposing 6 witnesses.<sup>234</sup> As pointed out by the Claimants in that letter, the contents of the parties' correspondence on the organization of

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<sup>230</sup> See RA-68c, Claimants' letter of 13 December 2002 mentioned in Respondent's letter of 8 April 2003.

<sup>231</sup> See RA-68c, Respondent's letter of 8 April 2003.

<sup>232</sup> See RA-69c, Claimants' letter of 11 April 2003.

<sup>233</sup> See RA-70c.

<sup>234</sup> See RA-71a.

the hearing were mere proposals that did not constitute an agreement between the parties that the Tribunal would be required to follow:<sup>235</sup>

Les parties demanderesses tiennent à rendre parfaitement explicite le fait qu'elles n'ont pas donné et ne donnent pas, leur accord à quelque proposition que ce soit venant de la part de l'État du Chili susceptible d'être interprétée, directement ou indirectement, comme un accord entre les parties qui limiterait sous aucune forme la liberté, ou l'initiative *ex officio* du Tribunal arbitral.

299. Finally, the Tribunal indicated by letter of 23 April 2003 that “à ce stade et avant d’entendre les arguments oraux des parties, [le Tribunal arbitral] ne voit pas le besoin d’entendre des témoins ou des experts.” Therefore, the Tribunal made it clear that no witness or expert would be heard, as it was entitled to do.
300. The second question relates to the nature of Mr. Pey Casado’s intervention at the May 2003 Hearing. Prior to his first intervention, Chile sought clarification from the Tribunal as to the capacity in which he would be speaking. At the May 2003 Hearing, the President of the Tribunal confirmed its understanding that Mr. Pey Casado would not be speaking as a fact witness but as a party representative:<sup>236</sup>

J’avais interprété personnellement, mais je réserve, évidemment, de consulter mes collègues s’il y avait un problème, mais j’avais cru dire en introduction que nous n’entendions pas de témoins.

Par conséquent, le problème de la valeur d’un témoignage ne me paraît pas se poser à ce stade. Nous entendons d’un côté comme de l’autre. D’ailleurs toute personne qui fait partie de la délégation va exposer à sa manière le point de vue de cette délégation.

Par conséquent, je crois qu’il n’y a pas... mais je comprends votre souci, qui a d’ailleurs déjà été exprimé dans la correspondance, ça ne nous a pas échappé. En tout cas, le cas de M. Pey est simple. La question pourrait être différente si quelqu’un d’autre que nous n’avons pas entendu prétendait ici témoigner. Pour l’instant nous n’entendons pas de témoins.

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<sup>235</sup> *Ibid.*

<sup>236</sup> See RA-24; Tr. Jur. [1] [96:5-23] (Fr.).

301. In the Committee's view, it is clear that the Tribunal wanted to hear Mr. Pey Casado as a party representative only. The Committee notes that, in the course of the proceeding, Mr. Pey Casado never submitted any written statement. However the question arises as to whether it would not have been opportune for the Tribunal to treat Mr. Pey Casado as a key fact witness and party representative at the same time. By doing so, the other party would have had a chance to ask him questions.
302. This question posed by the Committee relates to the probative weight that the Tribunal eventually accorded to Mr. Pey Casado's statements. The Committee has found in eight parts of the Award references to Mr. Pey Casado's evidence proffered at the May 2003 Hearing. The quotations are, for the most part, in the sections describing the facts related to either the friendship between Messrs. Pey Casado and Sainte Marie<sup>237</sup> or Mr. Pey Casado's nationality.<sup>238</sup> All these facts are supported by exhibits as demonstrated by the Claimants. Certain other references relate to the description of the Claimants' arguments on the investment.<sup>239</sup>
303. Only two extracts of Mr. Pey Casado's statements are included in the Tribunal's conclusions on the investment: para. 186 (footnote 133) and para. 233 (footnote 190). The first citation relates to the circumstances leading to the Geneva Document and the Estoril Protocol, and whether the latter should be considered as a sale contract (as asserted by the Claimants) or as a contract concluded by Mr. Pey Casado as agent for Mr. Sainte Marie (as asserted by the Respondent). In paragraph 186, the Tribunal notes that the Estoril Protocol sets forth complementary obligations. The reference to Mr. Pey Casado's statement is used by the Tribunal to illustrate how the Protocol was drafted. As for paragraph 233 of the Award, it relates to the Tribunal's conclusions on whether or not

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<sup>237</sup> See Award at paras. 61; 63; n. 31 and n. 34.

<sup>238</sup> *Ibid.* at paras. 88; 101.

<sup>239</sup> *Ibid.* at paras. 157; 194; n. 109 and n.146.

there was an investment but the quotation refers to the wide distribution of the newspaper. Clearly, neither reference is determinative of the Tribunal's conclusion.

304. Chile also argues that Mr. Pey Casado's statements were taken into account by the Tribunal in order to reach its conclusion in paragraphs 228-229 that Mr. Pey Casado was the sole owner of the shares of CPP. Chile contends that the Tribunal concluded that there was an investment under the BIT because it determined that no formal, written contract or transfer was necessary under Chilean law for the transfer of the CPP shares due to the close relationship between Mr. Pey Casado and Mr. Darío Sainte Marie. This information came directly and uniquely from Mr. Pey Casado's statement.<sup>240</sup> However, the Claimants stressed that the friendship between these two men was established in various testimonies and letters which are part of the file.<sup>241</sup> The Committee does not consider that the Tribunal relied exclusively on Mr. Pey Casado's statements to make that particular determination. His testimony was just one of several factual and legal elements in the record considered by the Tribunal leading to its decisions regarding Mr. Pey Casado's ownership of CCP's share capital.
305. Rather, as in the case of the other conclusions reached by the Tribunal, the Committee is convinced that the Tribunal based its determination on a number of documents and factual elements in the file and not only on Mr. Pey Casado's testimony at the May 2003 Hearing. As explained by the Tribunal itself:<sup>242</sup>

L'époque à laquelle se sont déroulés les faits de la présente affaire est à la fois lointaine et marquée par une situation politique et économique très particulière. Aussi l'établissement des faits s'est-il avéré une tâche difficile et chaque partie s'est employée à défendre une version des faits au moyen de la documentation dont elle pouvait disposer. Après un examen attentif des arguments et des pièces

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<sup>240</sup> See Resp. Mem. Annulment at para. 295.

<sup>241</sup> See Cl. C-Mem. Annulment at para. 138.

<sup>242</sup> See Award at para. 180.

soumises par les parties, le Tribunal, dans l'exercice de son pouvoir d'appréciation des preuves, est parvenu à la conclusion que M. Pey Casado a acheté l'intégralité des actions de la société CPP S.A. au cours de l'année 1972. Cette conclusion repose sur trois éléments principaux que sont la conclusion de ce que les parties appellent les « *Protocoles d'Estoril* », complétés par ce qu'elles appellent le « *Document de Genève* », les versements effectués au profit de M. Darío Sainte Marie pour un montant total de 1,28 million USD et la remise à M. Pey Casado, en plusieurs paquets, des titres de la société accompagnés de leurs formulaires de transfert signés en blanc.

306. As summarized by the Claimants:<sup>243</sup>

141. En réalité, chaque référence par le Tribunal à la déclaration de Monsieur Pey, visait soit à replacer les faits dans leur contexte, soit à confirmer sa compréhension des faits, déjà acquise de l'analyse des pièces du dossier. [...]

307. In the Committee's opinion, Mr. Pey Casado's statements were not determinative of the Tribunal's conclusion. Therefore, even if it could be considered that Chile was entitled to cross-examine Mr. Pey Casado, the departure from that rule of procedure is not serious as the failure to allow his cross-examination does not lead the Committee to conclude that if Chile had been allowed to cross-examine him, the Tribunal's decision may have been different.

308. For these reasons, the Committee finds no serious departure from the fundamental rule of procedure regarding the right to hear witnesses and experts and to cross-examine Mr. Pey Casado at the May 2003 Hearing and Chile's challenge is dismissed.

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<sup>243</sup> See Cl. C-Mem. Annulment at para. 141.

## (2) Unfair / Unequal Treatment of the Parties

### Parties' Positions

#### Chile's Position

309. Chile contends that there is unequal treatment when a tribunal grants an opportunity or advantage to one party that is not also afforded to the opposite party and unfair treatment when a tribunal fails to respect the rules that it itself establishes for the proceedings.<sup>244</sup>
310. Chile argues the Tribunal treated the parties unfairly and unequally with respect to Mr. Pey Casado's testimony at the May 2003 Hearing. The main issue raised by Chile in this regard is whether the appearance by Mr. Pey Casado at the hearing as the sole fact witness for either party, combined with the Tribunal's refusal to allow his cross-examination and the reliance in the Award on his testimony – was inherently prejudicial and unfair to Chile, and thus constituted an unequal treatment of the parties that warrants annulment under Article 52(1)(d).
311. More specifically, Chile contends that the Tribunal was unfair as it stated that it would not hear any witnesses or experts at the May 2003 Hearing, but then, ultimately and without notice to the parties, allowed the Claimants' main witness to speak at length at that hearing. Chile also argues that it is unfair because of the Tribunal's extensive reliance in the Award on Mr. Pey Casado's statements, which the Tribunal accepted as true. Chile submits that this constituted an egregious procedural inequality.<sup>245</sup>

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<sup>244</sup> See Resp. Mem. Annulment at paras. 277-278; Resp. Rep. Annulment at para. 182.

<sup>245</sup> See Resp. Mem. Annulment at paras. 281; 291; 292.

### Claimants' Position

312. The Claimants respond that the Tribunal did not act unfairly because (i) Mr. Pey Casado did not speak as a fact witness, (ii) the Tribunal permitted Dr. Cea, the President of the Chilean Constitutional Court, to speak at the January 2007 Hearing without allowing Claimants to cross-examine him; (iii) the Tribunal's actions do not rise to the requisite level of "seriousness" to allow annulment; and (iv) Chile waived its right to annulment by failing to object to the alleged irregularities of the May 2003 Hearing.<sup>246</sup>

### **Committee's Analysis**

313. The Committee shares Chile's analysis of what could constitute an unfair and unequal treatment of the parties. However, as explained above in relation to the right to be heard with respect to Mr. Pey Casado's testimony, the Committee considers that the reliance of the Tribunal on Mr. Pey Casado's statements was not outcome-determinative. Therefore, even if it can be considered that the Tribunal treated Chile unfairly and unequally by not allowing Chile to cross-examine Mr. Pey Casado at the May 2003 Hearing, the departure from this fundamental rule of procedure cannot be characterized as serious. Chile's challenge is accordingly dismissed.

#### **I. The January 2007 Hearing**

### **Parties' Positions**

#### Chile's Position

314. Chile argues the Tribunal treated the parties unfairly and unequally when it allowed the introduction of a new merits claim at the 2007 Hearing. The main issue raised by Chile

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<sup>246</sup> See Cl. C-Mem. Annulment at paras. 106-111, 114-124, 129-141, and 146-149.



in this regard is whether the Tribunal acted unfairly in violation of Article 52(1)(d) when, having limited the scope of the January 2007 Hearing to purely jurisdictional issues, it then disregarded that rule of procedure by permitting the Claimants to address merits issues at that hearing, and then relying explicitly on that submission for its merits-related determinations in its Award.

315. Chile contends that the Tribunal seriously departed from a fundamental rule of procedure by permitting the Claimants not only to discuss merits issues but also to introduce a new merits claim in a purely jurisdictional hearing. This contention is based on Chile's earlier-described argument that the Claimants' denial of justice claim was first introduced at the January 2007 Hearing, *i.e.*, that it was not asserted as a substantive treaty claim for a violation of Article 4 until the last day of the January 2007 Hearing. Chile emphasizes that this claim was introduced only in response to a question from Mr. Gaillard that expressly asked: (1) if Claimants were asserting a substantive claim based on a "denial of justice;" and (2) if so, whether it would fall "notamment sur l'article 4".

#### Claimants' Position

316. As noted earlier, the Claimants disagree that the denial of justice claim was first introduced at the January 2007 Hearing.<sup>247</sup> The Claimants concede, however, that the January 2007 Hearing was meant to be dedicated to jurisdictional issues only.<sup>248</sup>

#### Committee's Analysis

317. The Committee finds that by allowing the Claimants to bolster this denial of justice claim and by posing questions on that very subject at the January 2007 Hearing, the Tribunal

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<sup>247</sup> See Cl. C-Mem. Annulment at para. 506.

<sup>248</sup> See Cl. C-Mem. Annulment at para. 58.

did not treat the parties unfairly or unequally. The Committee notes that, as recognized by the Tribunal itself, both parties exceeded the limited scope of that hearing:<sup>249</sup>

J'observerai simplement que les deux parties, à l'occasion, ont toutes deux quelque peu débordé le cadre strict de la question. Mais bien évidemment, on peut toujours dire que tout est lié.

[...]

Je crois que nous pouvons dire que le Tribunal était là pour veiller au respect du cadre stricte qu'il avait fixé et il l'a fait avec une certaine flexibilité, dont les deux parties ont bénéficié. Il y a eu, plus ou moins inévitablement, certains dépassements du cadre stricte qui non seulement n'ont pas eu de conséquences dommageables, mais qui se sont avérés plutôt utiles. A cet égard, ce qui vient de se passer me paraît le démontrer, au même titre que ce qui s'est passé hier.

318. If Claimants exceeded the boundaries of the Hearing by addressing their denial of justice claims, the Claimants noted that Chile also went beyond the scope of the questions raised by the Tribunal when its representatives developed the subject of the burden of proof.<sup>250</sup>
319. This flexibility allowed by the Tribunal does not constitute in itself an unfair or unequal treatment of the parties. In any event, the fact that the Claimants addressed the denial of justice claim was not prejudicial to Chile. The Committee has already found that the denial of justice claim was not introduced for the first time at the January 2007 Hearing.<sup>251</sup> Claimants had presented a claim for denial of justice in relation to the Goss machine and a discrimination claim based on Decision No. 43 in their written pleadings, before that hearing. In its Award, the Tribunal relies principally on the Claimants' pleadings<sup>252</sup> and adds references to the January 2007 Hearing to confirm its understanding of the Claimants' arguments. Thus, Chile has failed to show the impact

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<sup>249</sup> See RA-26c, referring to Mr. Lalive's comments Tr. Jur. [2] [pp. 46, 65] (Fr.).

<sup>250</sup> See Tr. Annulment [1] [198:21] (Eng.); [82:24] (Fr.); [215:16] (Spa.) referring to Tr. Jur., CN-213 at pp. 36-44.

<sup>251</sup> See *supra* at para. 187.

<sup>252</sup> See Award at paras. 637 - 645; 650-674.

that this treatment by the Tribunal had on the Award. The Respondent's challenge on this ground is dismissed.

**J. Document Requests**

**Parties' Positions**

**Chile's Position**

320. Chile argues the Tribunal treated the parties unfairly and unequally when it denied all of the discovery requests made by Chile. The main issue raised by Chile in this regard is whether the Tribunal's allegedly different treatment of the parties in the discovery process could be justified by reference to an arbitral tribunal's general "evidentiary discretion," or whether, to the contrary, such treatment was so extreme – and ultimately prejudicial to one of the parties – as to constitute an abuse of any such discretion.
321. Chile contends that the Tribunal seriously departed from a fundamental rule of procedure by denying the totality of its discovery requests and later using the lack of evidence on those very issues as a basis for findings against Chile. The Republic's position is explained as follows:<sup>253</sup>

305. The *Pey Casado* Tribunal treated the parties unfairly and unequally by: (1) requiring the Respondent to go to great lengths to obtain obscure documents while imposing no document production burden whatsoever upon the Claimants; and (2) denying the Republic's requests and then using the lack of evidence against it. Specifically, the Tribunal imposed an unequal burden on the parties by requiring the Respondent to produce what ultimately amounted to 2630 documents, while the Claimants were not required to produce any. The Republic was given only a short period of time — three weeks — to produce all of the documents. Furthermore, it was required to produce documents from several decades before, during a tumultuous period in Chilean political history, and in response to overbroad requests, when much of the requested information was part

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<sup>253</sup> See Resp. Mem. at paras. 305, 311. Footnotes omitted.

of the public record and could have been obtained by other means. Although the Tribunal acknowledged in the Award that “l'établissement des faits s'est-il avéré une tâche difficile et chaque partie s'est employée à défendre une version des faits au moyen de la documentation dont elle pouvait disposer,” because the Claimants had no duty to produce documents, only the Respondent, in fact, was charged with this “difficult task.”

[...]

311. [...] The Tribunal's actions with respect to the Republic's evidentiary requests create a substantial departure from the principle of fairness because the departure clearly deprived Chile of the benefit that the rule was intended to provide, which in the context of a discovery request, is to give a party the opportunity to substantiate its claim or its defense with relevant documentation in the possession of the other party. Had the Republic succeeded in obtaining evidence that the funds in question did not belong to Mr. Pey Casado, this evidence could have served to prove that Mr. Pey was a mere intermediary rather than the owner of the CPP and EPC shares. As an intermediary rather than owner, Mr. Pey would not have been permitted to recover under the BIT, and the claims would have been dismissed. Therefore, the Tribunal seriously departed from a fundamental rule of procedure by first denying the entirety of the Respondent's evidentiary requests and later faulting the Republic for the lack of the very evidence the Republic had sought through discovery.

### Claimants' Position

322. In response, the Claimants submit that, “[s]’agissant de la production de documents, là encore, le Tribunal arbitral jouit d’une grande discrétion pour les ordonner ou les rejeter”.<sup>254</sup> The Claimants consider that the Tribunal treated the parties fairly and equally.<sup>255</sup>

103. De la même manière, l’obligation de traitement juste et équitable d’une partie pendant la procédure, requiert du Tribunal qu’il traite les Parties de manière impartiale et égalitaire. En d’autres termes, selon ce principe, un Tribunal arbitral ne doit pas favoriser une partie au détriment d’une autre dans ses décisions procédurales ou lui accorder un avantage procédural. Cela ne

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<sup>254</sup> See Cl. C-Mem. Annulment at para. 153.

<sup>255</sup> *Ibid.* at paras. 103-104.

signifie pas pour autant que le Tribunal doit rendre des décisions à tout point de vue égal concernant les différentes demandes des Parties. En particulier, le Tribunal n'est pas tenu d'ordonner la production de documents sollicités par une partie dès lors qu'il aurait accédé à la demande de l'autre partie. En l'espèce, tel n'a pas été le cas.

104. En tout état de cause, ainsi qu'il le sera démontré ci-dessous, le Tribunal a permis aux deux Parties de présenter leurs arguments sur l'ensemble du dossier et a toujours accordé une grande attention au respect du principe d'égalité entre les Parties.

323. The Claimants also contend that they were entitled to greater access to documents than Chile because all the relevant documents were in Chile's possession.<sup>256</sup> In the words of the Claimants:<sup>257</sup>

169. Il résulte de ce qui précède que, contrairement aux allégations du Chili, le Tribunal n'a pas agi de manière inéquitable à l'égard de la République du Chili. Ses décisions concernant la communication de documents ont été guidées instamment par l'attitude de la Défenderesse qui, tout au long de la procédure, n'a eu de cesse d'empêcher les Demanderesses d'accéder aux preuves qu'elle détenait à la suite de leur confiscation illicite par les autorités chiliennes.

### **Committee's Analysis**

324. The Committee finds the *ad hoc* Committee's decision in *Azurix Corp v. Argentine Republic* apposite in the present case and adopts it:

210. Because the power is discretionary, a decision by a tribunal not to accede to a party's request to exercise that power can never, in and of itself, be a departure from a fundamental rule of procedure. A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an *exercise* of that rule of procedure, and not a *departure from* that rule of procedure. It is only where the exercise of that discretion, in all of the circumstances of the case, amounts to a serious departure from another rule of procedure of a fundamental nature that there will be grounds for annulment under Article 52(1)(e) of the ICSID Convention.

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<sup>256</sup> *Ibid.* at paras. 162-168.

<sup>257</sup> *Ibid.* at para. 169.

233. [...] the Committee observes that the fact that a request by one party is allowed while a request by another party is denied does not mean that there has been an inequality in the treatment of the parties. Each request by each party must be considered and determined by the tribunal on its own individual merits. It is only where it can be shown that a tribunal has applied inconsistent standards in the way that it has treated the requests of the different parties that there can be said to be inequality of treatment. [Emphasis in original]

325. While it is true that the Respondent had to produce a large number of documents<sup>258</sup> as opposed to the Claimants who were not asked to produce any, this inequality in numbers does not imply an unequal treatment by the Tribunal. In order to make a determination, one has to look at the way the Tribunal treated the requests.
326. Further to the 20 May 2002 request from the Claimants,<sup>259</sup> the Tribunal issued a Procedural Order on 22 July 2002 ordering the Republic of Chile to produce the documents requested.<sup>260</sup> The Tribunal based its decision on “la nécessité manifeste pour le Tribunal Arbitral de disposer du maximum d’informations relatives au litige”. The documents to be produced also included the ones which had been seized by the Chilean Authorities after 11 September 1973.
327. Chile filed its first document production request on 3 October 2002.<sup>261</sup> The request was supplemented on 30 October 2002<sup>262</sup> further to the Claimants’ observations of 11 October 2002.<sup>263</sup> Chile’s request contained a list of 17 items corresponding to 21 documents to be produced. The requested documents notably concerned the questions of

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<sup>258</sup> See Resp. Mem. Annulment at para. 305 (2630 documents).

<sup>259</sup> See RA-62a.

<sup>260</sup> See RA-63a.

<sup>261</sup> See RA-65a.

<sup>262</sup> See RA-66a.

<sup>263</sup> See Cl. C-Mem. Annulment at para. 164.

the nationality of Mr. Pey Casado as well as his standing as an investor.<sup>264</sup> By letter of 11 November 2002, the Tribunal rejected Chile's request:<sup>265</sup>

[Le Président du Tribunal] m'a également demandé de vous indiquer que la requête concernant la production de documents n'est pas approuvée. Une décision motivée concernant ces deux questions vous sera notifiée dans la semaine du 18 novembre 2002.

328. The decision of the Tribunal on this evidentiary request was issued in the form of Procedural Order No. 10 dated 3 December 2002.<sup>266</sup> The Tribunal indicated that it could not at that stage of the procedure decide on the arguments between the parties regarding document production:

Constatant qu'il n'appartient pas au Tribunal arbitral, en tous les cas en l'état actuel de la procédure, de statuer sur le bien-fondé de ces requêtes, sur la pertinence de tel document particulier, les conditions de sa production ou les conséquences de l'absence de cette dernière [...]

329. The Tribunal then reminded the parties of the general principles applicable in the context of document production requests:

[...] tout document [...] qui est prima facie en relation avec l'objet du litige peut et doit être produit, sur requête de l'autre Partie ou du Tribunal, s'il est en la possession de la Partie sollicitée ou accessible par elle ; [...]

Il appartient dans chaque cas au Tribunal Arbitral d'apprécier, à la lumière des explications fournies par les Parties, les circonstances d'un éventuel défaut de production, et d'en tirer le cas échéant les conséquences qui en découlent [...]

330. The Committee is of the view that in those cases where the property of the requesting party has been seized and there is limited or no access to the documents that can support the request, it is reasonable for a tribunal to request more efforts and more documents

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<sup>264</sup> See Resp. Mem. Annulment at para. 301; Resp. Rep. Annulment at paras. 194, 196.

<sup>265</sup> See RA-67a.

<sup>266</sup> See CN-149.

from the Respondent State. Notwithstanding this approach, a tribunal should adopt similar standards *vis-à-vis* each party when making its determinations. In this case, the Committee notes that the Tribunal gave some justifications as to why it was granting all of the Claimants' discovery requests. However, Respondent's request was denied without any explanation or mention of the relevance or materiality of the requested documents. Procedural Order No. 10 contains in fact language which contradicts the outright denial of Chile's request (by letter of 11 November 2002) as the Tribunal indicated that it could not decide on the merits of parties' requests.

331. However, the Committee considers that even if there may be some justification for finding that there might have been an inequality in the treatment of the parties in this instance, the Committee is not convinced that had the Tribunal proceeded differently it could have reached a result substantially different. First, even if the Tribunal had motivated its decision to deny Chile's request, there is no reason to conclude that it would have granted it. Second, the Committee does not find that the Tribunal used the absence of evidence on the issues dealt with in Chile's denied evidentiary requests to conclude that Mr. Pey Casado was the owner of the CPP shares. As stated by the Claimants in their Rejoinder:<sup>267</sup>

52. La décision du Tribunal était motivée par d'autres éléments, à savoir : la preuve de la signature d'un accord (les Protocoles d'Estoril et l'Accord complémentaire de Genève), et le paiement du prix, mais aussi par la détention des titres par Monsieur Pey ainsi qu'en raison de la reconnaissance par les autorités chiliennes de la qualité de propriétaire à Monsieur Pey.

332. In the circumstances, the Respondent's request based on this ground is denied.

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<sup>267</sup> See Cl. Rej. Annulment at para. 52. Footnotes omitted.



## **K. Bias by Arbitrator Bedjaoui**

333. The main issue in this regard is whether any bias by Mr. Bedjaoui against Chile ultimately affected the outcome of the case and thus amounted to a serious departure from a fundamental rule of procedure in violation of Article 52(1)(d).

### **Parties' Positions**

#### **Chile's Position**

334. In advancing its bias contention, Chile refers to the resignation of Mr. Rezek as President of the Tribunal and, in particular, Mr. Rezek's resignation letter dated 13 March 2001<sup>268</sup> which states in part as follows:

Je regrette profondément que ce manque de confiance de la partie demanderesse dans l'arbitre président ne soit exprimé qu'à ce stade de la procédure, à savoir quelques jours après la dernière réunion réalisée à huis clos entre les arbitres pour discuter de leurs opinions finales.

335. In this regard, Chile surmises:<sup>269</sup>

388. This statement strongly suggests: (1) that a decision had already been taken by the Tribunal; (2) that the Claimants had been apprised of this decision, likely by means of a breach of confidentiality by the Claimants' party-appointed arbitrator; and (3) that the Claimants' request for Mr. Rezek's resignation was an attempt to thwart a decision in favor of the Republic.

389. The likelihood that the Claimants were acting based on confidential information concerning the inner workings of the Tribunal is heightened by the following revelation by Arbitrator Leoro Franco, made during the disqualification proceedings in 2005:

[O]n peut déduire de ses notes [de M. Garcés], **sait méticuleusement ce qui se passe à l'intérieur du Tribunal, ce que le Tribunal doit faire ou non à une prochaine**

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<sup>268</sup> See RA-54a.

<sup>269</sup> See Resp. Mem. Annulment at paras. 388-391.

**session, ce que le Secrétariat général du CIRDI doit faire, démontrant ainsi autant de connaissances que celles que peut avoir un arbitre participant de la procédure.**

390. The only conclusion that can be drawn from this is that the Claimants' chosen arbitrator, Mr. Bedjaoui, had systematically been breaching his duty of confidentiality, including by informing the Claimants of the result of the 2001 deliberations, and of an imminent decision adverse to the Claimants, which immediately prompted their implausible and unfounded challenge.

391. The *Wena Hotels* test requires that an alleged departure from a fundamental rule of procedure must have potentially "caused the tribunal to render an award 'substantially different from what it would have awarded had the rule been observed,'" and provides that "the petitioning party must show the impact that the issue may have had on the award." Mr. Bedjaoui's bias in favor of the Claimants and his evident breach of confidentiality led to the Claimants' challenge to resignation of Mr. Rezek, which in turn evidently derailed a jurisdictional ruling in favor of Chile. Mr. Bedjaoui's bias thus clearly affected the outcome of the case in a very concrete and discernible way. [Emphasis in original]

**Claimants' Position**

336. It is the Claimants' position that the Committee cannot declare "la nullité d'une sentence sur une simple apparence de partialité"<sup>270</sup> and that, furthermore, "l'accusation de partialité du Tribunal ou d'un de ses membres ne doit pas être fondée sur de simples spéculations."<sup>271</sup> The Claimants add:<sup>272</sup>

181. De plus, en l'espèce, la récusation de l'arbitre sur lequel porte toutes les accusations de l'Etat chilien, Monsieur le Juge Bedjaoui, a été acceptée par le Centre. Or, l'annulation sur le fondement de défaut d'impartialité du Tribunal ne peut être une sanction appropriée que si la cause de récusation est apparue après le prononcé de la Sentence ou lorsque la récusation pour prétendue partialité a été refusée par le Centre d'arbitrage.

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<sup>270</sup> See Cl. C-Mem. Annulment at para. 175.

<sup>271</sup> *Ibid.* at para. 180.

<sup>272</sup> *Ibid.* at paras. 181-183.

182. En l'espèce, seule la demande de récusation de Monsieur le juge Bedjaoui était fondée sur une prétendue partialité. Dès lors, le rejet de la récusation du Professeur Lalive ne peut fonder l'annulation de la Sentence. Or, après février 2006, c'est-à-dire après l'acceptation de la récusation de Monsieur Bedjaoui, la République du Chili n'a pas émis de réserve sur le fait que le Tribunal nouvellement constitué allait continuer sa mission. Elle n'a jamais indiqué que la prétendue partialité de Monsieur Bedjaoui avait conduit le Tribunal arbitral à rouvrir les débats en 2001, après la démission du Président Rezek. Pourtant, au vu de l'argument aujourd'hui soutenu, rien ne l'empêchait de formuler une telle objection, ou en tout état de cause, de formuler des réserves quant à l'intégrité de la procédure, si elle pouvait les fonder. La République du Chili ne peut légitimement attendre de constater que la Sentence lui est défavorable pour soulever cet argument pour la première fois devant un Comité *ad hoc*.

183. Pour cette raison, la demande de la République du Chili doit être rejetée.

### **Committee's Analysis**

337. The Committee agrees with the Claimants. The Committee will not annul an Award on the basis of arguments based on pure speculation. In any event, the Committee has been presented with no evidence at all that Mr. Bedjaoui's behaviour affected in any way the outcome of this case. The Respondent's request is accordingly dismissed.

#### **L. The Tribunal's *Ex Aequo et Bono* Decision**

338. The main issue in this regard is whether the Tribunal manifestly exceeded its powers in violation of Article 52(1)(b), by issuing a ruling that, in the submission of Chile, is in effect an *ex aequo et bono* decision, thereby failing to abide by (and therefore apply) ICSID Convention Article 42(3), which forbids tribunals from ruling *ex aequo et bono* without the parties' consent.

## **Parties' Positions**

### **Chile's Position**

339. Chile's position in this regard is stated as follows:<sup>273</sup>

433. Claimants mischaracterize the Republic's request for annulment based on the Tribunal's adoption of a decision *ex aequo et bono*. Contrary to what Claimants contend, this request is not predicated on the fact that the Republic did not have the opportunity to be heard on the denial of justice and discrimination issues (although the latter procedural flaw is in fact invoked—separately—as a ground for annulment under article 52(1)(d), as explained above). Rather, as explained in the Memorial, the Republic's *ex aequo et bono* argument is based on the fact that the Tribunal manifestly exceeded its powers by reaching a decision that is so illogical, and so strained, that it can only plausibly be explained by a desire by the Tribunal to achieve a Solomonic solution designed to satisfy both parties.

434. The unlikely and often wholly unsupported determinations that the Tribunal was required to make, on so many different issues, to reach its final decision, combined with its contorted justifications for many of its conclusions, powerfully suggest an effort by the Tribunal to reverse-engineer its ruling, using a preordained result as its starting point. However, it was not open to the Tribunal to make an equity-based decision without the parties' approval. In the present case, the record strongly indicates that this is precisely what the Tribunal did. This constitutes a manifest excess of powers that renders the Award annulable under Article 52(1)(b).

### **Claimants' Position**

340. The Claimants refer to Chile's *ex aequo et bono* contention as follows:<sup>274</sup>

485. Partant du principe que les Parties n'ont jamais débattu de l'existence d'un déni de justice ou d'un traitement discriminatoire de la part du Chili, la Défenderesse allègue que le Tribunal arbitral a rendu une décision *ex aequo et bono*, sans l'accord préalable des Parties, ce qui constitue un excès manifeste de pouvoir de la part du Tribunal rendant la Sentence annulable en application de

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<sup>273</sup> See Resp. Rep. Annulment at paras. 433-434.

<sup>274</sup> See Cl. C-Mem. Annulment at para. 485.

l'article 52(1)(b) de la Convention CIRDI. La République du Chili tente d'expliquer une violation aussi flagrante des règles du CIRDI par un Tribunal arbitral aussi expérimenté que celui qui a rendu la Sentence par le fait que celui-ci ne pouvait sérieusement rejeter les demandes des Demanderesses après dix années de procédure.

### **Committee's Analysis**

341. This ground for annulment must fail. There is not a scintilla of evidence that allows Chile, confronted with an Award of 233 pages (in the French version) and a detailed analysis by the Tribunal of the many complex factual and legal issues of which it was seized by the parties, to argue that the Tribunal issued an *ex aequo et bono* decision. The Award is not an *ex aequo et bono* decision and the Respondent's request is dismissed.

#### **M. The Claimants' Annulment Challenge**

342. With respect to the Claimants' annulment challenge, the Committee must first determine whether the Claimants' request for annulment is time-barred, having been raised for the first time in their Counter-Memorial on Annulment. If the Committee finds that the request is not time-barred, it would then be required to determine, first, whether the claim is not an impermissible attempt to appeal on the merits a twice-rejected substantive argument; and only then, whether the Tribunal in fact failed to apply the proper law on the nullity *ab initio* issue.

## Parties' Positions

### Claimants' Position

343. The Committee recalls that the Claimants request that point 8 only of the *dispositif* of the Award be annulled on the following grounds:<sup>275</sup>

28. En l'espèce :

i. le Chili soutient que la Sentence doit être annulée dans son intégralité, en ce inclus le 8<sup>ème</sup> point du Dispositif. Les Demanderesses sollicitent du Comité *ad hoc* qu'il rejette la demande d'annulation de la Sentence sauf sur le 8<sup>ème</sup> point du Dispositif.

ii. La demande d'annulation du Chili se fonde notamment sur excès de pouvoir manifeste, pour défaut d'application de la norme applicable. C'est également sur ce fondement que les Demanderesses considèrent que le 8<sup>ème</sup> point du Dispositif doit partiellement être annulé.

iii. La République du Chili soutient que le Tribunal arbitral a manifestement excédé son pouvoir en se reconnaissant compétent alors que l'investissement avait prétendument disparu sur la base de la prémisse suivante : « *that such investment had been completely and definitively extinguished long before the BIT's entry into force* ». Le Chili fonde son affirmation sur le fait que le Tribunal arbitral a indiqué que le Décret n°165 était toujours en vigueur dans l'ordre juridique chilien et que, dès lors, l'expropriation était un acte instantané. Les Demanderesses considèrent que cette contradiction existe réellement dans la Sentence.

iv. Mais la raison d'être de cette contradiction ne se trouve pas là où le Chili la situe mais ailleurs, dans l'ignorance absolue de la norme interne impérativement et directement applicable, *ex officio*, au différend né en 1995, à savoir l'article 7 de la Constitution du Chili. Les demanderesses considèrent que le Tribunal arbitral a effectivement commis un excès de pouvoir manifeste en ignorant l'article 7 de la Constitution.

v. Cette contradiction n'affecte en aucune manière, en conséquence, les points 1 à 7 du Dispositif de la Sentence -portant sur les différends nés en 2000 et

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<sup>275</sup> See Cl. Pre-H Skel. at paras. 28-29.

2002- mais le seul différend né en 1995 et la partie corrélative du seul 8<sup>ème</sup> point du Dispositif.

29. Au-delà de l'irrecevabilité et du mal fondé de l'argument du Chili tendant à affirmer que l'investissement a disparu, les demanderesse admettent que le Tribunal a commis un excès de pouvoir manifeste en ayant omis d'appliquer de manière absolue l'article 7 de la Constitution au différend né en 1995. [Emphasis in original]

### Chile's Position

344. Chile summarizes its response as follows:<sup>276</sup>

534. By submitting their annulment claim more than two years after publication of the 8 May 2008 Award, Claimants have utterly failed to comply with the 120-day time limit set forth in Article 52(2). (It bears noting in this regard that Claimants also did not attempt to file any annulment request within 120 days of the 18 November 2009 Decision on Revision). For these reasons, Claimants have waived any and all rights to present an annulment claim in this arbitration, and the Committee must therefore summarily reject their purported counterclaim for annulment.

[...]

543. In sum, in its Decision on Revision, the Tribunal rejected for the second time Claimants' arguments about the nullity *ab initio* of the 1975 decree, and in particular the relevance of that issue for the Tribunal's jurisdiction. Notably, and likely due to the disingenuousness of the Revision petition and the rather transparent intent by Claimants to reargue the merits of the nullity *ab initio* issue, the Tribunal imposed on Claimants responsibility for covering the totality of the costs of the Revision proceeding.

544. Given this background, it is nothing short of remarkable—and indeed, rather abusive—that Claimants now seek yet another bite at the apple, this time disguising their appeal as an annulment claim. The Committee should not permit Claimants to do this yet again.

[...]

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<sup>276</sup> See Resp. Rep. Annulment at paras. 534; 543-545.

545. Even if Claimants' counterclaim for annulment were not time-barred, and even if it did not constitute merely a brazen attempt to appeal an already twice-rejected substantive argument, it still would fail, because it does not even remotely raise a valid ground for annulment. In particular, the Tribunal did not fail to apply Chilean law to the relevant issue.

### **Committee's Analysis**

345. Article 52(2) of the ICSID Convention is very clear. It provides that:

The application shall be made within 120 days after the date on which the award was rendered... [Emphasis added]

346. Arbitration Rule 50(3)(b)(i) is to the same effect. The Award was rendered on 8 May 2008. The Claimants had to file their claim for annulment by 5 September 2008. However, the Claimants asserted for the first time their request for partial annulment of paragraph 8 of the *dispositif* of the Award in their Counter-Memorial on Annulment which was filed with ICSID on 15 October 2010. The Committee has no hesitation in ruling that it cannot entertain the Claimants' application which is time-barred.

347. The Committee also notes that the Claimants argue that their request, in fact, concerns one of the grounds for annulment pleaded by Chile, *i.e.*, manifest excess of powers under Article 52(1)(b) of the ICSID Convention in relation to a section of the Award that is included in Chile's Application since Chile requested the annulment of the Award as a whole. The Claimants rely on the decision in *Vivendi I* where the committee stated that the respondent in the annulment may present "its own arguments on questions of annulment, provided that those arguments concern specific matters pleaded by the party requesting annulment" and "where a ground for annulment is established, it is for the *ad*



*hoc* committee, and not the requesting party, to determine the extent of the annulment.”<sup>277</sup>

348. The Committee, in the present case, is of the view that the situation is different. While the Claimants base their request on a ground raised by Chile, they invoke a matter that was not debated by Chile, namely the effect of Article 7 of the 1980 Chilean Constitution. As stated by the *Vivendi I* committee as well as by Professor Schreuer “if one party has requested annulment, the other party should not be allowed to ask for annulment for different reasons outside the time limits of Art. 52(2)”.<sup>278</sup>
349. Finally, the Committee does not agree with the Claimants’ interpretation of Professor Schreuer’s Commentary as presented during the hearing on annulment.<sup>279</sup> The Claimants relied on the following sentences in paragraphs 536 and 537 of the Commentary:<sup>280</sup>

536. [...] If additional grounds for annulment come to light during annulment proceedings, they may be relied upon by the parties and used as a basis for annulment by the *ad hoc* committee provided that it is clear that there was no waiver in relation to them through failure to rely on them in a timely fashion. [...]

537. This solution is not contradicted by the time limits contained in Art. 52(2). These time limits relate to an application by a party directed at the institution of annulment proceedings. They do not preclude the *ad hoc* committee from taking cognizance of additional facts once the proceedings are under way. [...]

350. The Committee understands that the additional grounds for annulment can only be raised if new facts, which were not known to the parties, come to light during the annulment proceeding as mentioned specifically by Professor Schreuer at the beginning of paragraph 536. The Committee notes that this is not the case here.

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<sup>277</sup> See *Vivendi I* Decision at paras. 68-69.

<sup>278</sup> See *Schreuer Commentary Art. 52* at para. 535.

<sup>279</sup> See Tr. Annulment [1] [278:16-281:1] (Eng.); [115:25-116:17] (Fr.); [299:4-301:6] (Spa.).

<sup>280</sup> See *Schreuer Commentary Art. 52* at paras 536-537.

351. The Committee finds that the Claimants' request is based on totally different premises than that of the Applicant in the annulment (the Republic of Chile) and is therefore inadmissible because time-barred. The Claimants' application is therefore dismissed.

## VI. COSTS

352. It remains for the Committee to deal with the question of the costs of these annulment proceedings, as to which the Committee has a discretion. In most of the decisions of annulment committees,<sup>281</sup> the committees have decided that each party should bear its own litigation costs and that the costs of the proceeding should be borne equally by the parties.

353. In the present case, the Committee notes that the Tribunal, both on the basis of its conclusions in favour of the Claimants and what it characterized as "... *la politique adoptée par la défenderesse consistant, au-delà des exceptions usuelles ou 'normales' à la compétence, à multiplier objections et incidents parfois incompatibles avec les usages de l'arbitrage international*",<sup>282</sup> condemned the Respondent to contribute US\$ 2,000,000 to the costs of representation of the Claimants and to bear  $\frac{3}{4}$  of the ICSID costs.

354. The Committee, in the present case, has only annulled that part of the Award dealing with damages. Thus, the pertinent paragraphs of the *dispositif* which deal with costs and which are not annulled by the Decision of the Committee remain in effect. They read as follows:

5. met à la charge de la défenderesse une contribution aux frais et dépens exposés par les demanderessees, d'un montant de USD 2.000.000, - (deux millions);

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<sup>281</sup> In 21 of the 35 published Decisions on Annulment and Discontinuance Orders containing decisions on costs published as of August 10, 2012. See Background Paper on Annulment for the Administrative Council of ICSID, dated August 10, 2012, and available at <http://www.worldbank.org/icsid>.

<sup>282</sup> See Award at para. 729.

6. décide que les frais de procédure seront supportés par les parties dans la proportion de :  $\frac{3}{4}$  du montant total (soit USD 3.136.893,34) pour la défenderesse et  $\frac{1}{4}$  du montant total (soit 1.045.631,11) pour les demanderesse ; ordonne en conséquence à la défenderesse de payer aux demanderesse la somme de USD 1.045.579,35.

355. With respect to the annulment proceedings, the Committee notes that Chile has raised different grounds for annulment set out in Article 52(1) of the ICSID Convention in respect of eleven specific areas which it has identified. In the view of the Committee, with two exceptions,<sup>283</sup> Chile's claims were, *prima facie*, serious. At the end of the day, the Committee has found only two of the claims to be meritorious, the ones relating to damages.
356. On the other hand, the Claimants raised one claim for annulment in their Counter-Memorial on Annulment which the Committee dismissed "without any hesitation" because it was clearly time-barred.
357. In the circumstances, the Committee will not depart from the prevailing practice.
358. Accordingly, the Committee decides that each party will bear its own litigation costs and the costs of the proceeding will be shared equally by each party.

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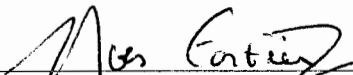
<sup>283</sup> Bias by Arbitrator Bedjaoui and the Tribunal's *ex aequo et bono* Decision.

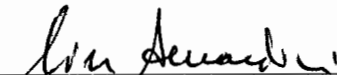
## VII. DECISION

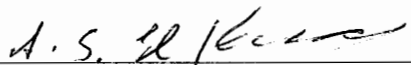
359. For the reasons set forth above, the Committee renders the following decisions:

1. Pursuant to Article 52(1)(d) and (e), decides to annul 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);
2. Rejects the other grounds of the Republic's Application for annulment;
3. Rejects the Claimants' request for the partial annulment of paragraph 8 of the *dispositif* of the Award;
4. Finds that paragraphs 1 to 3 and 5 to 8 of the *dispositif* as well as the body of the Award but for Section VIII are *res judicata*;
5. Decides that there is no need to order the temporary stay of enforcement of the un-annulled portion of the Award.
6. Decides that each party shall bear one half of the ICSID costs incurred in connection with this annulment proceeding; and
7. Decides that each party shall bear its own litigation costs and expenses incurred with respect to this annulment proceeding.

Done in English, French and Spanish, all versions being equally authoritative.

  
Maître L. Yves Fortier, C.C., Q.C.  
President of the *ad hoc* Committee  
Date: 19 September 2012

  
Professor Piero Bernardini  
Member of the *ad hoc* Committee  
Date: 4 October 2012

  
Professor Ahmed El-Kosheri  
Member of the *ad hoc* Committee  
Date: 27 Sept. 2012