

18 December 2013

VIA ELECTRONIC MAIL (PDF)

Ms. Meg. Kinnear
Secretary-General
International Centre for Settlement of Investment Disputes
MSN J2-200
1818 H Street, N.W.
Washington, DC 20433

Re: *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) — **Request for Disqualification of Professor Philippe Sands as Arbitrator in the Resubmission Proceeding**

Dear Ms. Kinnear:

1. In accordance with Article 57 of the ICSID Convention,¹ Rule 9 of the ICSID Arbitration Rules,² and the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”),³ the Republic of Chile (“Chile”) respectfully requests the disqualification of Professor Philippe Sands as arbitrator in the above-captioned proceeding. Specifically, this request is based on the past professional activities, and longstanding and publicly-

¹ Article 57 provides: “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.” Article 14 paragraph (1) in turn states: “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”

² In relevant part, Rule 9 reads as follows: “A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.”

³ RA-11, IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2 (2004) (“IBA Guidelines”) (stating that an arbitrator shall “refuse to continue to act as an arbitrator if . . . facts or circumstances exist [that] from a reasonable third person’s point of view having knowledge of the relevant facts give rise to justifiable doubts as to the arbitrator’s impartiality or independence, unless the parties have [waived the conflict]”). The legal authorities submitted in support of this Request for Disqualification are designated by the letters “RA” (for Respondent’s Authority). Exhibit numbers are preceded by the designation “Ex. R.” For the sake of convenience, Chile has restarted the exhibit and authority numbering from the beginning, even though some of the documents referenced herein were assigned different numbers during other phases of the case. Where possible, Chile has cited to and quoted from the English or Spanish version of the exhibits cited herein. Chile will supplement such cites and quotes with their French counterparts — to the extent they exist in the record — upon request.

manifested personal views, of Professor Sands concerning former Chilean President and Senator Augusto Pinochet, and the actions of the dictatorial regime led by Pinochet that ruled Chile from 1973 to 1989. Such activities and views render Professor Sands uniquely unsuited to sit in judgment on a case that was prompted precisely by actions of the Pinochet regime, and that involves a reparations program later established by the Chilean Government to compensate the victims of the Pinochet regime, as well as claims and requests for relief in this arbitration (including the resubmission proceeding) that relate directly to the Pinochet regime's measures. Secondly, Chile reserves the right to present as further grounds for Professor Sands' disqualification his possible prior representation of the Republic of Bolivia in a dispute against Chile that is presently before the International Court of Justice.

2. The following prior procedural correspondence in the resubmission proceeding is relevant to the present request for disqualification: (1) Chile's letter dated 22 July 2013, in which it had sought clarifications from Professor Sands concerning widespread press reports of his representation of Bolivia in the above-referenced dispute with Chile; (2) Professor Sands' 5 August 2013 response (a) indicating that he is not representing Bolivia in such dispute (but failing to clarify whether he represented Bolivia in connection with such dispute at a prior time), and (b) disclosing his prior representation of human rights organizations in proceedings adverse to Pinochet; (3) Chile's request, in a letter dated 22 August 2013, that Professor Sands reconsider his acceptance of the arbitrator appointment, in light of the conflict of interest and/or appearance thereof presented by the matters he disclosed; and (d) Professor Sands' letter dated 11 September 2013, reaffirming his decision to serve as arbitrator in the present case.⁴
3. Chile and its counsel wish to stress from the outset that they have nothing but the highest regard and respect for Professor Sands, who, as a general matter, certainly can be said to fulfill the requirements set forth in Article 14 of the Convention — the standard by which disqualification requests are determined.⁵ Consistent with the foregoing, and with its view of Professor Sands generally as a “person[] of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment,”⁶ Chile's counsel even recently appointed Professor Sands to serve as its client's party-appointed arbitrator in another ICSID arbitration.⁷ The fact that counsel did so, even as it was evaluating a possible challenge to Professor Sands in the present case, confirms that the objection relates exclusively to the circumstances of this particular case, and to Professor Sands' past professional activities and pronouncements on issues of specific relevance to this case, rather than to Professor Sands' qualifications, experience and/or integrity generally.

⁴ This correspondence is summarized below in Section IV.

⁵ ICSID Convention Art. 57 (“A party may propose [disqualification] on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”).

⁶ ICSID Convention Art. 14(1).

⁷ See Ex. R-69, Case Details of *Consolidated Exploration Holdings Ltd. and others v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/13/1).

4. The concrete source of Chile’s concern is Professor Sands’ direct involvement in the Pinochet extradition proceedings in the UK in the late 1990s, and his numerous public statements regarding Pinochet, which suggest that Professor Sands could not “be relied upon to exercise independent judgment” in a case that revolves on actions taken by — or in response to — the Pinochet regime. As described in more detail below, Professor Sands’ pronouncements regarding Pinochet span more than a decade, and he is viewed as one of the world’s foremost authorities on the Pinochet extradition proceedings in the UK, and on the so-called “Pinochet principle” — an international law concept advanced and branded by Professor Sands. Professor Sands has, *inter alia*, referred to the 1998 Pinochet arrest in London as “a JFK or a John Lennon moment”⁸ in international law (*i.e.*, a moment in which everyone remembers where they were when they heard the news); to the Pinochet extradition as “a clarion call for the right of victims and of individuals under the new international legal order”⁹; and to his own participation in the *Ex Parte Pinochet* proceeding and other cases as “a great privilege.”¹⁰ He also has remarked that “Pinochet had fair procedures, and he had his day in court, unlike his victims.”¹¹
5. Chile does not doubt, as Professor Sands stated in his letter to the Centre dated 5 August 2013, that he “take[s] the obligation of independence and impartiality extremely seriously.”¹² But in a case in which Claimants ask the Tribunal — in their 18 June 2013 Request for Resubmission — to award moral damages on the basis of psychological harm suffered as a result of actions of the Pinochet regime,¹³ and the primary claim for compensation requires comparison of the reparations received by different human rights victims,¹⁴ it would be impossible for Professor Sands to maintain the requisite impartiality and objectivity.
6. At a minimum, Professor Sands’ well-known positions regarding Pinochet would create a *perception* of bias sufficient to disqualify him under Article 57 and the IBA Guidelines, as any reasonable external observer would rightly have doubts about his impartiality in sitting in judgment on actions by the Pinochet regime and the efforts Chile later made to compensate Pinochet’s victims. As discussed further below, Article 57 and the IBA Guidelines require only an “appearance” of bias.¹⁵ Professor Sands himself admitted, in a

⁸ Ex. R-42, P. Sands, LAWLESS WORLD 23 (2006).

⁹ Ex. R-57, P. Sands, *A Memory of Justice: The Unexpected Place of Lviv in International Law — A Personal History*, 43 CASE W. RES. J. INT’L L. 739, 742–744 (2011).

¹⁰ *Id.*

¹¹ Ex. R-42, P. Sands, LAWLESS WORLD 44 (2006).

¹² Letter from P. Sands to ICSID, 5 August 2013.

¹³ Claimants’ Request for Resubmission, 18 June 2013, ¶ 130 (describing a similar request from the original arbitration and then asserting that “[c]e dommage moral devra être pris en compte dans l’indemnisation des faits incriminés, même s’il peut difficilement être soulagé par une indemnisation”).

¹⁴ *Id.*, ¶¶ 67–78 (describing the purported discrimination claim that was the sole basis for the original Tribunal’s award of monetary damages).

¹⁵ See RA-2, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20 (Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013), ¶ 59

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book he published in 2006, that audiences expect him to “embrace the [Pinochet extradition] case as a great moment for international law and the cause of human rights,”¹⁶ and that he recalled “[s]urprise or criticism”¹⁷ being directed at him personally by one audience when he described the case in simple factual terms rather than “provide a lecture on the triumph of international law,” as that particular audience had anticipated.¹⁸

7. Moreover, and as further explained below, it would be inconsistent with ICSID’s own prior practice in this very case if Professor Sands were allowed to remain on the Tribunal. As further detailed below, ICSID itself disqualified one arbitrator, and declined to appoint another, who had made comparable statements regarding Pinochet and his regime.
8. To be clear, the Republic of Chile is not defending or condoning the actions of the Pinochet government; indeed, it has condemned the abuses of the military government and established extensive reparation programs (of which one of the beneficiaries was the main Claimant in the case *sub judice*, Mr. Víctor Pey Casado (“Mr. Pey”), in an individual capacity). Further, and insofar as relevant to this particular case, Chile accepted that the expropriation of the *El Clarín* newspaper enterprise (which was the main claim in the original arbitration) was wrongful, and for that reason compensated those whom Chile found — following a reparations program in which Mr. Pey declined to participate — to be the rightful owners of that enterprise.
9. Nor is Chile contending that the Pinochet regime human rights violations are necessarily relevant to this arbitration. As Chile will demonstrate at the appropriate time, the matters still at issue in this resubmission proceeding can and should be determined purely as a matter of international investment law, without any need to evaluate the human rights violations of the Pinochet regime. The problem, however, is that the parties disagree as to the relevance of human rights issues. Chile has argued that because the case involves an *investment* dispute, it must be viewed through that prism alone. However, in significant part because the principal Claimant in the original proceeding, Mr. Pey, was himself a human rights victim of the Pinochet regime, Claimants consistently have cast human rights matters as integral to the disposition of the case. Claimants appear poised to continue this approach in the resubmission proceeding, as illustrated for example by the fact that they are

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(ICSID Administrative Council Chairman Kim) (“*Blue Bank (Challenge)*”); RA-3, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013), ¶ 66 (ICSID Administrative Council Chairman Kim) (“*Burlington Resources (Challenge)*”); RA-11 IBA Guidelines, General Standard 2(b). This standard is developed further below in Section II.A.

¹⁶ Ex. R-42, P. Sands, *LAWLESS WORLD* 225 (2006).

¹⁷ *Id.*

¹⁸ *Id.*, p. 224.

asking that the Tribunal award moral damages on the basis of psychological harm inflicted upon Mr. Pey, in his personal capacity, by the Pinochet regime.¹⁹

10. Given that the relevance of human rights violations remains very much a live issue, it stands to reason that it would be essential for the integrity of the proceeding and a proper constitution of the Tribunal in the *Pey Casado* case, for the arbitrators who conform the Tribunal to be individuals who are sufficiently dispassionate about, and not personally invested in, the Pinochet regime's admittedly despicable human rights violations, so that their personal views about the larger context do not end up coloring their perception of the specific legal issues before them in the investment arbitration.²⁰
11. Because evaluation of this type of "issue conflict" requires some understanding of the history of this 15-year-long dispute, in **Section I**, Chile sets forth the necessary context for this challenge. Understanding that this is neither the time nor forum for debate on jurisdictional or substantive issues, Chile has endeavored to limit this discussion only to the factual and procedural events that may assist in the evaluation of this challenge.²¹ These events are well documented, as demonstrated by the exhibits appended to this Request.
12. With this substantive and procedural context in place, Chile then proceeds to demonstrate that Professor Sands must be disqualified as arbitrator due to a manifest lack of impartiality. **Section II** describes the applicable standard, which is then applied to the facts in **Section III**. **Section IV** summarizes the correspondence previously exchanged, and then addresses the explanations that Professor Sands had provided in his letters to the Centre. In accordance with Arbitration Rule 9(3), Professor Sands will have an opportunity to furnish additional explanations regarding the concerns set forth in this Request, and Chile hereby

¹⁹ Claimants' Request for Resubmission, 18 June 2013, ¶ 130 ("Non seulement les autorités chiliennes ont, par leurs actions, privé M. Pey des outils nécessaires à l'exercice de sa profession et de sa liberté d'expression mais elles l'ont également contraint à fuir son lieu de résidence et s'exiler afin de protéger sa liberté, sa sécurité et sa vie. Ce dommage moral devra être pris en compte dans l'indemnisation des faits incriminés, même s'il peut difficilement être soulagé par une indemnisation").

²⁰ The possibility of bias prompted by personal beliefs is an obvious and elemental basis for doubting the suitability of a judge or arbitrator to hear a particular case. In fact, it should be recalled that, in a somewhat analogous context, the U.K.'s highest court concluded that a judge with close ties to a human rights organization that was involved in the Pinochet extradition proceedings in the UK could not have been impartial vis-à-vis Pinochet in such proceedings. On that basis, the U.K. Law Lords overturned a ruling adverse to Pinochet, reasoning that the "links between Lord Hoffmann — who sat on the original panel that ruled to allow General Pinochet's extradition in November [1998] — and the human rights group Amnesty International were too close to allow the verdict to stand." Ex. R-33, *Pinochet Judge Under Pressure*, BBC NEWS, 15 January 1999. They added that "[Lord Hoffman's] relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause." *Id.* As explained below, Professor Sands participated directly — in his role as counsel to the human rights organization Human Rights Watch — in proceedings before the UK courts in connection with Pinochet's extradition, advocating against Pinochet (as well as the Republic of Chile, which intervened in the proceeding due to the sovereignty and immunity considerations involved). Particularly given his multiple contemporaneous and subsequent public manifestations of personal beliefs concerning the Pinochet regime, such beliefs would inevitably influence Professor Sands' perceptions and decisions in the present case.

²¹ Chile reserves its right to assert other objections to the claims asserted in this resubmission proceeding, as appropriate.

reserves the right to make additional submissions in connection with any such explanations. Finally, in **Section V**, Chile sets forth its request for relief.

I. Relevant Background

13. Whether for the number of unenviable records the case holds at ICSID (longest-running,²² most arbitrators in a single phase,²³ first arbitrator disqualification,²⁴ most individual phases²⁵), or for the factual events underlying Claimants' claims, the *Pey Casado* case has become recognized as one of the most complicated and controversial in ICSID history.²⁶ Through a combination of the events giving rise to Claimants' claims, Claimants' characterization of the case, and their efforts to broadcast their arguments to audiences beyond the Tribunal, the case also is widely recognized as a "Pinochet case."²⁷ Throughout the various stages of the 15-year case, Claimants have consistently presented the dispute, from a rhetorical standpoint, as a "human rights case." The foregoing is also, presumably, the reason why ICSID has precluded from service as arbitrator in the case individuals with documented positions regarding Pinochet.²⁸
14. As discussed below in Section II, Article 57 of the ICSID Convention requires examination of whether, "from a reasonable and informed third person's point of view,"²⁹ there is an

²² The original arbitration spanned a period of 15 years from the time of submission of the request for arbitration in November 1997 through partial annulment of the Tribunal's 8 May 2008 Award in December 2012. By way of comparison, it took approximately 13.5 years for the tribunals and *ad hoc* committees in *Compañía de Aguas del Aconquija and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3 to go through two full arbitrations, with their corresponding annulment phases.

²³ For the original arbitration proceeding alone, the Tribunal was constituted four different times, with seven different arbitrators rotating in and out of its membership.

²⁴ The disqualification of Claimants' original party-appointed arbitrator, Mr. Mohammed Bedjaoui, was the first — and until November 2013, the only — arbitrator disqualification ever under the ICSID Convention.

²⁵ The *Pey Casado* case, which has undergone arbitration, revision, annulment, supplementation, and resubmission phases, shares this distinction with the *Vivendi v. Argentina* and *Amco v. Indonesia* cases.

²⁶ The Tribunal itself acknowledged in the Award that the arbitration proceeding was "exceptionally long and complex." See Ex. R-27, *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 8 May 2008), ¶ 4 (Lalive, Chemloul, Gaillard) ("Award"). The case has received global attention, prompting not only congressional hearings in Chile, but also emotionally-charged discussion in newspapers worldwide. As *IAReporter* noted in 2009, when ICSID registered Chile's request for annulment, "[t]he underlying dispute is a politically sensitive one in Chile, arising as it does out of the 1973 coup that brought General Augusto Pinochet to power." Ex. R-54, L. Peterson, *Chile Moves to Annul Award in Dispute over Pinochet-Era Expropriation of Newspaper; Separate Revision Process Also Running*, INVESTMENT ARBITRATION REPORTER, 17 July 2009.

²⁷ Ex. R-54, L. Peterson, *Chile Moves to Annul Award in Dispute over Pinochet-Era Expropriation of Newspaper; Separate Revision Process Also Running*, INVESTMENT ARBITRATION REPORTER, 17 July 2009.

²⁸ See Section I.C, below.

²⁹ RA-8, *Urbaser S.A. and others v. Argentina*, ICSID Case No. ARB/07/26 (Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010), ¶ 43 (Bucher, Martinez-Fraga) ("*Urbaser (Challenge)*").

“appearance of bias.”³⁰ To assist in the process of becoming so “informed,” without needing to parse the entirety of the voluminous record in this case, set forth below are: (A) a brief summary of the factual events giving rise to the original arbitration, including the historical context in which such events took place — to provide context for the references in this Request to the parties’ arguments; (B) a representative sampling of the parties’ arguments during the arbitration, demonstrating the divide between the parties regarding the relevance of Pinochet’s human rights violations for purposes of the ICSID case; (C) ICSID’s conclusion on at least one occasion, and possibly two, that, given this historical and procedural background, an individual who had made statements in writing regarding Pinochet could not serve as an arbitrator in this arbitration; and (D) a summary of the status of the case following the May 2008 Award, the *ad hoc* Committee’s partial annulment thereof in December 2012, and Claimants’ Request for Resubmission.

A. Factual Background and Historical Context

15. Mr. Víctor Pey Casado was the principal Claimant in the original arbitration, and is the father of one of the two co-Claimants in the resubmission proceeding, Ms. Coral Pey Grebe (“Ms. Pey”). Mr. Pey was born in Spain in 1915. Although he has been a Spanish national from birth and throughout his life, Mr. Pey moved to Chile in 1939, at the age of 24, and resided in Chile for 34 years, until 1973. During that time, he married a Chilean and had children in Chile, including Ms. Pey.³¹ In 1958, Mr. Pey applied to obtain Chilean nationality by nationalization, which was conferred upon him in December 1958. In 1970, Mr. Salvador Allende, who was a friend of Mr. Pey, became President of Chile.
16. Throughout his decades of residence in Chile, Mr. Pey had had several different jobs, but in the early 1970s, 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 Consorcio Periodístico y Publicitario, S.A. (“CPP”), through a wholly-owned subsidiary of CPP called Empresa Periodística Clarín, Ltda. (“EPC”). *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 1972–73 time frame, which was one of very intense political and ideological turmoil in Chile.
17. On 11 September 1973, President Allende was overthrown in a coup d’état led by then-General Augusto Pinochet. Claimants’ counsel, Mr. Garcés was an adviser to President Allende, and reportedly was with President Allende on the day of the coup.³² 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

³⁰ *Id.*; see also RA-2, *Blue Bank (Challenge)*, ¶ 59; RA-3, *Burlington Resources (Challenge)*, ¶ 66.

³¹ See Ex. ND-2, Spanish Passport of Ms. Coral Pey Grebe (appended to Claimants’ Request for Resubmission and listing Santiago, Chile as her place of birth).

³² Ex. R-66, DEMOCRACY NOW, Interview with Juan Garcés.

military (and subsequently was confiscated formally, in 1975, by means of a decree known as “Decree No. 165”).

18. Soon after the 1973 coup d'état, Mr. Pey moved to Venezuela and thereafter to Spain, where he resided until at least 1989 — the year of the return of democracy in Chile following 16 years of military government. Upon his return to Chile, Mr. Pey applied for — and obtained — benefits that the Chilean Government had offered to returning Chilean political exiles.
19. In 1995, Mr. Pey began to seek restitution of property belonging to *El Clarín* that had been confiscated by the Pinochet regime, claiming to have acquired full ownership in the newspaper as a result of a transfer from the above-referenced Darío Sainte-Marie. In October 1995, Mr. Pey filed a request in the First Civil Court in Santiago for compensation or restitution of a Goss printing machine that was on the *El Clarín* premises when the property was seized by the military. In September 1995, Mr. Pey sent a letter to Chile's President, requesting restitution of other *El Clarín* property that had been confiscated during the Pinochet coup.
20. Chile's Minister of National Assets responded to Mr. Pey's letter in November 1995, informing Mr. Pey of imminent legislation pursuant to which he would be able to claim for any confiscation by the Pinochet regime. However, rather than wait for the law to enter into force, Mr. Pey decided to resort to international arbitration under the bilateral investment treaty between Spain and Chile that had entered into force in 1994, filing his Request for Arbitration at ICSID on 7 November 1997. Understanding that his dual Chilean-Spanish nationality would be a bar to jurisdiction under the ICSID Convention, shortly before filing his Request for Arbitration at ICSID, Mr. Pey submitted a signed document to the Spanish Consulate in Mendoza, Argentina, purporting to renounce his Chilean citizenship.
21. 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 Pinochet's military government. The compensation was to be effected pursuant to an administrative process to be conducted by the Ministry of National Assets of Chile. By letter dated 24 June 1999, Mr. Pey expressly declined to participate in that compensation program, asserting that instead he was pursuing international arbitration.³³ Explaining that the BIT provides that “[u]na vez que un inversionista haya sometido la controversia al (. . .) arbitraje internacional, la elección de uno y otro de esos procedimientos será definitiva,”³⁴ and that Mr. Pey had chosen to “someterla al arbitraje internacional,”³⁵ Claimants' counsel affirmed that “*en atención a lo expuesto, pongo de manifiesto que esta parte no se acogerá a la Ley N° 19.568.*”³⁶

³³ Ex. R-1, Letter from Mr. Garcés to Chilean Minister of National Assets, 24 June 1999, p.4.

³⁴ *Id.*, pp. 3–4.

³⁵ *Id.*, p. 2.

³⁶ *Id.*, p. 4 (emphasis added).

22. Subsequently, the successors of several individuals who were the registered shareholders of *El Clarín* at the time of the 1973 coup d'état — Darío Sainte-Marie, Ramón Carrasco Peña, Emilio González and Jorge Venegas — presented claims under the new law for the confiscation by Pinochet of *El Clarín* assets. After review and investigation of the claims filed by the above-named individuals, on 28 April 2000, the Chilean Ministry of National Assets issued an administrative ruling known as “Decision 43,” in which it authorized compensation to the four above-named individuals (or, as applicable, their heirs), as such individuals had proven to the satisfaction of the Ministry to be the genuine owners of *El Clarín*. Decision 43 also partially denied the applications of two other applicants. Since Mr. Pey had affirmatively elected *not* to file any application, Decision 43 did not address any claim by him or otherwise mention him.

B. The ICSID Arbitration

23. Throughout the course of the original arbitration, Claimants sought to put the Pinochet regime on trial. The links between the case and the Pinochet era were obvious: not only was the principal Claimant in the original arbitration (Mr. Pey Casado) clearly a victim — on a personal level — of the Pinochet regime, but the principal claim he asserted was for an expropriation of assets that took place during the 1973 coup d'état that brought Pinochet to power. Additional alleged claims (including the two at issue in the resubmission proceeding) arose out of efforts to obtain compensation for Pinochet-era expropriations — one relating to the domestic court proceeding initiated by Mr. Pey in 1995 for recovery of a printing press that was taken from the premises of *El Clarín* during the coup, and the other arising out of the reparations program established by Chile following the return to democracy in 1990 (pursuant to which payments were made by Chile to persons who, unlike Mr. Pey, had actually participated in that program by filing an application for compensation). As Claimants themselves emphasized at the 2003 merits hearing (which was the only merits hearing to take place in the entire case), all of their claims stemmed, in one way or another, from the confiscation of *El Clarín* assets during the coup d'état led by then-General Pinochet in September 1973, subsequently formalized with an expropriatory decree issued by the Pinochet regime in February 1975.³⁷
24. Chile has never disputed that Mr. Pey was one of the thousands of Chileans who were forced into exile by the repressive military regime led by Pinochet. As Claimants readily admitted,³⁸ Mr. Pey obtained restitution of personal property that had been confiscated by

³⁷ See Ex. R-25, 5 May 2003 Hearing (Spanish), at Tr. 111:9–13 (Mr. Garcés) (“Hablamos exclusivamente de confiscación y además hemos añadido la solicitud complementaria del 4 de noviembre de 2002, que en la página de coberturas indica que se refiere a la indemnización de los perjuicios que se desprenden del embargo por parte de las autoridades chilenas sobre la base del Decreto N° 165 de 1975”).

³⁸ See, e.g., Ex. R-22, Chile’s Counter-Memorial on Jurisdiction and Merits (Spanish), 3 February 2003, pp. 32–34 (describing certain benefits, made available to Chilean exiles, of which Mr. Pey availed himself); Ex. R-23, Claimants’ Reply on Jurisdiction and Merits (Spanish), 23 February 2003, § VIII.10 (acknowledging these facts but arguing that they did not demonstrate that Mr. Pey should be considered a Chilean national under the Dual Nationality Convention between Chile and Spain); see also Ex. R-17, Claimants’ Memorial on the Merits (Spanish), 17 March 1999, pp. 35, 38 (mentioning a “demanda interpuesta por el inversor español contra el Fisco por confiscación de propiedades personales (distintas de las que son objeto de la presente solicitud),” and noting that “por medio de la sentencia del Juzgado No. 21 de lo Civil de Santiago, de fecha 13 de enero de 1997, ha declarado

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the Pinochet regime and availed himself of the special legal benefits that were provided by the Government of Chile to Chileans who had suffered exile during the military period. Nor did Chile dispute that the *El Clarín* newspaper was in fact confiscated by the Chilean government, and that this had been done by the Pinochet regime for political and ideological reasons.

25. Rather, what Chile *did* question was whether Claimants' grievance could properly be addressed by a tribunal constituted pursuant to the ICSID Convention to hear a dispute under the 1994 bilateral investment treaty between Chile and Spain (the "BIT"). In Chile's view, both the actions and the ramifications of the Pinochet regime were plainly outside the jurisdiction of an investment tribunal — not only because the BIT could not be applied retroactively to an expropriation that took place, at the latest, in 1975 (which the Tribunal accepted), but also due to Mr. Pey's dual Chilean-Spanish nationality and Claimants' inability to prove ownership of a "foreign" investment made "in accordance with Chilean law," as required by the BIT (points on which the Tribunal sided with Claimants). Chile also challenged Mr. Pey's ownership of *El Clarín* (on this point the Tribunal also sided with Claimants). These issues could be decided purely as a matter of law, and, in Chile's view, were divorced entirely from the political and ideological circumstances surrounding the 1973 confiscation.
26. Had Claimants agreed, there might have been no need for the present Request for Disqualification. Yet, throughout the arbitral proceedings, Claimants sought to have the Tribunal view the matter through a human rights prism,³⁹ as a case in which the Tribunal should sit in judgment on the actions of the former military government of Chile. Thus, expropriation was portrayed by Claimants not only as a violation of rights afforded pursuant to Article 5 of the BIT but mainly as "una infracción de los derechos fundamentales de la persona del inversor,"⁴⁰ and moreover one that was specifically ordered by Pinochet: "Todos los Decretos confiscatorios de los bienes del Sr. Pey llevan la

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que los Decretos Ministeriales que confiscaron los bienes personales de Don Víctor PEY CASADO en 1974 y 1975 'adolecen de nulidad de derecho público,' ordenando '(...) la restitución al actor de los bienes que le fueron incautados.'" (emphasis in original)).

³⁹ See, e.g., Ex. R-20, Hearing Transcript (Spanish), 29 October 2001, pp. 63–64 (Mr. Garcés) (stating that "la aplicación de la legislación, la lucha por la ejecución del derecho tiene lugar en un contexto histórico determinado, en un contexto factual que condiciona la aplicación de la norma," before proceeding to describe the "acontecimiento terrorista" that led to "una sistemática violación del derecho a la vida, en el que más de tres mil personas han sido arrestadas de forma extra-judicial y asesinadas mediante tortura"); Ex. R-23, Claimants' Reply on Jurisdiction and Merits (Spanish), 23 February 2003, § II.III, p. 239 ("Esta violación continua y compuesta incluye la negación de los derechos fundamentales del Sr. Pey, en particular su derecho a la propiedad en un contexto en que ha sido víctima de un crimen contra la Humanidad . . ."); Ex. R-18, Claimants' Counter-Memorial on Jurisdiction (Spanish), 18 September 1999, ¶ 1.1 ("La confiscación tuvo lugar en un contexto de violación sistemática por el Estado de Chile de principios básicos del orden público internacional: del derecho a la vida, a la libertad, a no ser torturado y a la propiedad privada").

⁴⁰ Ex. R-23, Claimants' Reply on Jurisdiction and Merits (Spanish), 23 February 2003, § III; see also Ex. R-21, Claimants' Supplemental Memorial on Jurisdiction (Spanish), 11 September 2002, § II.1 ("El inversor Sr. Pey es víctima de una violación de sus derechos humanos").

firma de Augusto Pinochet.”⁴¹ According to Claimants, “[l]a negación del derecho de propiedad del inversor español forma parte de la política de violación grave, sistemática y planificada de los derechos fundamentales por parte del Estado de Chile.”⁴² Claimants argued that “[l]os derechos invocados por los inversores españoles basados en el API y el Convenio de Washington *no pueden ser contemplados sin tener en cuenta la evolución reciente de los derechos humanos*, y en particular la calificación de genocidio de la política practicada por el Estado de Chile contra los empresarios y otros líderes por ser partidarios de una forma representativa de gobierno y de valores democráticos, incluidos los periodistas. *En efecto, el presente es un caso que guarda directa relación con ello.*”⁴³

27. Claimants also argued that “Chile ha infringido la obligación de respetar reglas de fondo que prohíben comportamientos considerados como intolerables en virtud de la amenaza que representan para valores fundamentales. *Así, la prohibición de genocidio, su carácter imperativo, está apoyada en diversas decisiones judiciales nacionales e internacionales. Y es del delito de genocidio que Pinochet está procesado.*”⁴⁴ Thus, “[e]n el presente caso los derechos lesionados son los que dimanen de una inversión, *y también de los derechos humanos del inversor en tanto que ser humano.*”⁴⁵
28. Even the issue of Mr. Pey’s dual Chilean-Spanish nationality (which formed the basis of a jurisdictional objection by Chile) was cast by the Claimants as a human rights matter, arguing that the Pinochet regime had stripped him of his Chilean nationality, in violation of human rights treaties: “[E]s el Estado de Chile quien desde 1973 ha privado al Sr. Pey, de modo unilateral, brutal, sin considerar sus derechos básicos de ser humano, de los beneficios del Convenio bilateral [de Doble Nacionalidad entre Chile y España] de 1958.”⁴⁶
29. Similarly, and to the extent actually addressed by the parties, the issue of damages was not only a matter of determining the proper measure of quantum for the expropriation of *El*

⁴¹ Ex. R-23, Claimants’ Reply on Jurisdiction and Merits (Spanish), 23 February 2003, p. 93; *see also* Ex. R-24, Claimants’ Incidental Claim (Spanish), 23 February 2003, p. 17; Ex. R-21, Claimants’ Supplemental Memorial on Jurisdiction (Spanish), 11 September 2002, p. 14.

⁴² Ex. R-23, Claimants’ Reply on Jurisdiction and Merits (Spanish), 23 February 2003, p. 21.

⁴³ *Id.*, p. 70 (emphasis added).

⁴⁴ *Id.*, p. 22 (emphasis added).

⁴⁵ *Id.*, p. 70 (emphasis added); *see also* Ex. R-21, Claimants’ Supplemental Memorial on Jurisdiction (Spanish), 11 September 2002, p. 14 (“El carácter sistemático y generalizado, la motivación política, la voluntad de destruir al grupo nacional chileno, en particular al liderazgo favorable a la forma representativa de Gobierno con el cual era identificado el Sr. Pey, el hecho de desear el Régimen de facto privarle de su derecho a la vida, a la libertad y a la propiedad de sus bienes por ser visto como perteneciente a aquel grupo nacional, hacen del presente un caso, también, de violación de los derechos humanos de un inversor de capitales internacionales.” (emphasis in original)).

⁴⁶ Ex. R-18, Claimants’ Counter-Memorial on Jurisdiction (Spanish), 18 September 1999, ¶ 2.2.3; *see also* Ex. R-17, Claimants’ Memorial on the Merits (Spanish), 17 March 1999, ¶ 4.3.16.2 (“[C]ómo sostener que la privación, unilateralmente impuesta por el Estado de Chile a D. Victor Pey Casado, no solo de todas las prerrogativas inherentes al Convenio bilateral de 24 de mayo de 1958, sino aún más, de los derechos humanos más elementales, podría acompañarse del mantenimiento — también unilateralmente impuesto — de un componente particular de aquel Convenio, cuando hemos visto que ha sido violado, pisoteado y anulado en lo que a la persona del inversor español se refiere”).

Clarín, but also, for Claimants, an opportunity to request moral damages on the basis of human rights violations.⁴⁷ An entire section of Claimants’ Memorial on the Merits in the original arbitral proceeding was devoted to claiming that “la indemnización debe incluir el daño moral,”⁴⁸ because “[e]l inversor español ha sufrido muy graves perjuicios humanos como consecuencia de la ilegal confiscación de los bienes, derechos, y créditos dimanantes de su inversión”⁴⁹

30. Claimants also devoted a significant amount of time at the hearings to discussing human rights issues. At the October 2001 jurisdictional hearing, for example, Claimants’ counsel began by stating that “la aplicación de la legislación, la lucha por la ejecución del derecho tiene lugar en un contexto histórico determinado, en un contexto factual que condiciona la aplicación de la norma.”⁵⁰ Counsel also referred to “un acontecimiento terrorista”⁵¹ that led to “una sistemática violación del derecho a la vida, en el que más de tres mil personas han sido arrestadas de forma extra-judicial y asesinadas mediante tortura.”⁵² In an earlier hearing, repeating points that had been stressed in their pleadings, Claimants’ counsel had emphasized that the confiscation of *El Clarín* assets had been done “**con la firma de Augusto Pinochet**,”⁵³ and that “la privación del estatus de doble nacional es una decisión unilateral, brutal del gobierno de Chile en un contexto en que le priva de todos los derechos que tiene que ser humano.”⁵⁴
31. Thereafter, during the revision and annulment proceedings, Claimants similarly sought to substantiate their pleadings with references to the Pinochet regime and its human rights violations. In their Reply on Revision, for example, Claimants adverted to “la requisita *de facto* de los bienes de [CPP y EPC], realizada en 1973 por **la violencia de las tropas amotinadas del general Pinochet . . .**”⁵⁵ And in their Counter-Memorial on Annulment, Claimants contended that “[e]n efecto, para condenar al Estado de Chile el Tribunal ha constatado, primero, que Chile desde 1990 había reconocido, por una parte, que **las confiscaciones que tuvieron lugar bajo el régimen militar del general Pinochet** no eran válidas y, por otra parte, que tenía el deber de indemnizar a las víctimas del régimen.”⁵⁶
32. Importantly, in their Request for Resubmission, Claimants ask that the new Tribunal consider “du dommage moral résultant de la manière dont le Chili a traité M. Pey Casado,

⁴⁷ See, e.g., Ex. R-17, Claimants’ Memorial on the Merits (Spanish), 17 March 1999, p. 57.

⁴⁸ *Id.*, § 4.6.6.

⁴⁹ *Id.*, p. 57.

⁵⁰ Ex. R-20, Hearing Transcript (Spanish), 29 October 2001, p. 63 (Mr. Garcés).

⁵¹ *Id.*, p. 64 (Mr. Garcés).

⁵² *Id.* (Mr. Garcés).

⁵³ Ex. R-19, Hearing Transcript (Spanish), 4 May 2000, p. 5 (Mr. Garcés) (emphasis added).

⁵⁴ *Id.*, p. 26 (Mr. Garcés).

⁵⁵ Ex. R-28, Claimants’ Reply on Revision (Spanish), 3 November 2008, pp. 29–30 (emphasis added).

⁵⁶ Ex. R-29, Claimants’ Counter-Memorial on Annulment (Spanish), 15 October 2010, ¶ 610 (emphasis added).

en particulier compte tenu de la violence psychologique exercée à son encontre. Non seulement les autorités chiliennes ont, par leurs actions, privé M. Pey des outils nécessaires à l'exercice de sa profession et de sa liberté d'expression mais elles l'ont également contraint à fuir son lieu de résidence et s'exiler afin de protéger sa liberté, sa sécurité et sa vie."⁵⁷ Claimants contend that "[c]e dommage moral devra être pris en compte dans l'indemnisation des faits incriminés, même s'il peut difficilement être soulagé par une indemnisation."⁵⁸

33. With both party⁵⁹ and counsel⁶⁰ pledged to preserve the memory of Salvador Allende — the socialist Chilean President whose administration Pinochet had overthrown — Claimants also sought to ensure that their efforts to cast the arbitration as an emblematic human rights case would play out on a world stage.
34. Accordingly, and as part of a carefully planned public relations campaign, throughout the original arbitration and subsequent phases of the case, Claimants published their pleadings and correspondence on the *El Clarín* website, <http://elclarin.cl/fpa/index.html>. Next to links for the “Caso Pinochet,” and a collection of newspaper articles covering the *El Clarín* case, is a link to a page on the “Procedimiento de Arbitraje.” That page houses practically the totality of Claimants’ correspondence and pleadings, as well as the relevant panel’s procedural decisions, in the arbitration, revision, annulment, and supplementation proceedings of the ICSID case.
35. In light of the foregoing, and of the likelihood that Claimants’ one-sided publication of documents in the ongoing proceeding would further fuel public debate and exacerbate the dispute, Chile on multiple occasions objected to Claimants’ further publication of documentation from the proceeding.⁶¹ However, the Tribunal refused each time. In Procedural Order No. 13, for example, the Tribunal stated that “[d]ado, en particular que . . . ninguna Regula de Arbitraje CIADI ni ningún principio general de derecho del arbitraje prohíbe la publicación por una de las partes de los documentos del proceso . . . la

⁵⁷ Claimants’ Request for Resubmission, 18 June 2013, ¶ 130.

⁵⁸ *Id.*

⁵⁹ See Ex. R-68, Fundación Salvador Allende: Mission Statement; see also Ex. R-27, Award, ¶ 509 (stating that the “Fundación pone de presente asimismo las múltiples actividades, judiciales, políticas y culturales que lleva a cabo desde su creación” and citing the following “[i]ntervención ante el Parlamento Europeo en relación con las confiscaciones bajo el régimen militar con ocasión del acuerdo marco suscrito entre la CEE y Chile; asignación de becas a los estudiantes chilenos residentes en España; defensa de las víctimas de cualquier nacionalidad del régimen instaurado a raíz del golpe de Estado; acciones judiciales en Europa en el “*caso Pinochet*”; actuaciones ante el Parlamento español con vistas a la restitución de los bienes confiscados; etc”).

⁶⁰ See Ex. R-43, Democracy Now, Interview with Juan Garcés (introducing Mr. Garcés as follows: “A personal adviser to Allende, Garcés was with him on the day of the coup. Allende walked him to the palace exist before it was bombed and *told him to tell the world what he had seen*. Mr. Garcés went on to lead the efforts for Pinochet to be arrested and tried.” (emphasis added). Later in the interview, Mr. Garcés confirms that “*one of the things that he told me is what you said a few moments ago*, that given my very close, unique cooperation with him, I was in the measure of explaining what was the government doing during the three years in government, why we were doing what we have done, and which goal, object.” (emphasis added)).

⁶¹ See, e.g., Ex. R-6, Letter from Chile to G. Álvarez Ávila, 27 September 2006, pp. 6–7.

Demandada fundamenta erróneamente su argumento al invocar la conducta de las Demandantes en materia de confidencialidad”⁶²

36. Claimants continued with this practice throughout the revision and annulment proceedings.⁶³ They expressly admit that the intention behind publication is to play to a public audience,⁶⁴ contending that “ne justifie d’imposer une quelconque opacité sur la présente procédure sauf à vouloir dissimuler une fraude processuelle.”⁶⁵ To this day, Claimants continue to publish their correspondence and pleadings, as illustrated by their publication of their letter of 23 August 2013 concerning Chile’s request to Professor Sands to reconsider the acceptance of his appointment as an arbitrator for this case. As explained in further detail below, and in a concrete manifestation of the subtle biases that would operate to Chile’s detriment in this arbitration should Professor Sands not be disqualified, Professor Sands simply assumed (in his letter of 11 September 2013) that Chile was responsible for the relevant disclosure to the press, when in fact the responsible party had incontrovertibly been Claimants.

C. Other Individuals with Pinochet-Related Preconceptions Have Been Precluded From Serving as Arbitrator in this Case

37. As demonstrated by the foregoing, for Claimants, the human rights violations of the Pinochet regime were the lens through which the investment dispute should be viewed; the arbitration itself was a mechanism by which Claimants sought to keep alive the memory of the Pinochet regime’s coup and excesses. Given the foregoing, strongly-held views concerning Pinochet and his regime seem inherently incompatible with impartial arbitrator service in this matter, and on two separate occasions, ICSID affirmatively precluded the service as arbitrator in the case of individuals who had made written statements regarding Pinochet.
38. First, in 2006, in consultation with the Secretary-General of the Permanent Court of Arbitration, the Chairman of the Administrative Council of the World Bank disqualified the arbitrator who had been appointed by Claimants — Mr. Mohammed Bedjaoui — after he made the following assertion in a letter to the parties in 2005, in the context of an arbitrator challenge mounted by Chile: *“El Tribunal de Arbitraje no estaría menos orgulloso, por su parte, de sancionar con todo el peso de la ley la corrupción y la dictadura de Pinochet*

⁶² Ex. R-26, Procedural Order No. 13, 24 October 2006, p. 3.

⁶³ See Ex. R-7, Letter from Chile to E. Obadia, 31 March 2009, p. 3 (objecting to Claimants’ publication of an “amended” version of the transcript from the revision proceeding hearing — which was later republished by the arbitration media — that contained embellished versions of the oral argument Claimants had presented); Ex. R-8, Letter from Chile to E. Obadia, 30 March 2011, pp. 6–7 (objecting, during the annulment proceeding, to Claimants’ publication of case documents containing sensitive information).

⁶⁴ Ex. R-9, Letter from Claimants to E. Obadia, 8 April 2011, p. 10 (“Finalement, les Demanderses souhaitent rappeler que donner un accès vierge de commentaires aux documents de la procédure est nécessaire compte tenu des formidables moyens, médiatiques et autres, organisés par la Défenderesse pour discréditer le présent arbitrage et les arbitres et pour continuer à diffamer M. Victor Pey”).

⁶⁵ Ex. R-9, Letter from Claimants to E. Obadia, 8 April 2011, p. 9.

en Chile, intentando llevarle a justicia a uno de los tantos que sufrieron bajo ese régimen.”⁶⁶ Following inclusion of this statement (among other issues) as an additional basis for Chile’s challenge to Mr. Bedjaoui, ICSID ultimately disqualified Mr. Bedjaoui.⁶⁷ Until very recently (November 2013), this was the only arbitrator disqualification ever under the ICSID Convention.

39. The issue of manifested personal views on Pinochet and his regime also became relevant in a subsequent instance in the arbitration. In May 2006, following the resignation of arbitrator Galo Leoro Franco and the rejection of his resignation by the other two arbitrators, the responsibility of naming a replacement arbitrator fell upon ICSID. In a letter to the parties, the Centre had informed them of its intention to appoint Professor Brigitte Stern, and requested the parties’ comments in that regard. Chile objected to the appointment of Professor Stern on the basis of articles that she had written concerning Pinochet.⁶⁸ Over an objection from Mr. Garcés that Professor Stern’s articles were irrelevant to the proceeding and that Chile’s objection was unfounded, ICSID declined to appoint Professor Stern, and proceeded instead to propose a different candidate, explaining that “[e]n virtud de las observaciones de la parte demandada y de conformidad con la práctica del CIADI, procederemos a identificar a la mayor brevedad posible un nuevo candidato para llenar la vacante en el seno del Tribunal.”⁶⁹
40. Thus, on at least one occasion and likely on two, ICSID itself concluded — after being presented with evidence of written statements regarding Pinochet by the relevant arbitrator or arbitrator candidate — that it would be inappropriate for such person to serve on the *Pey Casado* Tribunal. As demonstrated further below, Professor Sands’ statements concerning the Pinochet regime are not materially dissimilar from those that prompted ICSID’s conclusion in those prior instances.

D. State of Affairs Following Partial Annulment of the May 2008 Award and Claimants’ Request for Resubmission

41. In May 2008, the Tribunal (then composed of Pierre Lalive, Mohammed Chemloul, and Emmanuel Gaillard) rendered an Award dismissing the majority of the claims against Chile. While the Tribunal agreed with Claimants’ contention that Mr. Pey was the owner of *El Clarín*,⁷⁰ and that Mr. Pey’s Chilean citizenship did not provide a basis for declining jurisdiction,⁷¹ the Tribunal agreed with Chile that the BIT’s substantive provisions did not

⁶⁶ Ex. R-3, Letter from M. Bedjaoui to ICSID (Spanish), 7 October 2005, p. 5 (emphasis added).

⁶⁷ See Ex. R-2, Letter from S. White to the Parties, 21 February 2006. It seems likely that this reference to the Pinochet regime was the basis for the disqualification of Mr. Bedjaoui; however, at that time it was not ICSID’s practice to explain its disqualification decisions, so the basis for the disqualification was not articulated.

⁶⁸ See Ex. R-4, Letter from Chile to ICSID, 24 May 2006.

⁶⁹ Ex. R-5, Letter from G. Alvarez Avila to the Parties (Spanish), 26 May 2006 (emphasis added). The Centre subsequently named Professor Emmanuel Gaillard as the replacement arbitrator.

⁷⁰ Ex. R-27, Award, ¶ 179.

⁷¹ *Id.*, ¶ 322.

apply retroactively to acts or disputes that pre-dated the BIT's entry into force.⁷² Rejecting the “continuing acts” argument proffered by Claimants with respect to their claims under Articles 3 and 5 of the BIT (discrimination and expropriation, respectively),⁷³ the Tribunal declined jurisdiction over such claims.⁷⁴

42. However, the Tribunal exercised jurisdiction over — and found liability for — two post-entry-into-force violations of the fair and equitable treatment clause of Article 4 of the BIT. The first was based on what the Tribunal deemed to be the undue delay in the Goss printer proceeding before the First Civil Court of Santiago.⁷⁵ The Tribunal concluded in that regard that “la ausencia de una decisión de primera instancia en cuanto al fondo de las demandas de las partes demandantes durante siete años . . . debe calificarse como una denegación de justicia por parte de los tribunales chilenos.”⁷⁶ The second violation related to Decision 43, and specifically the alleged discrimination effected upon Mr. Pey by Chile's compensation of those who had participated in the reparations program and had been found, through that process, to be the owners of *El Clarín*. The Tribunal held that Chile had violated its Article 4 obligations by compensating those persons, but not compensating Mr. Pey⁷⁷ (who, as noted above, had specifically waived his right to participate in the program, so that he could pursue ICSID arbitration instead).⁷⁸ The Tribunal imposed damages on the basis of the second violation only,⁷⁹ in an amount of USD 10.132 million plus interest.⁸⁰ This amount, in turn, was based on the expropriation value of *El Clarín* as determined by the Chilean Government in the context of the reparations program.⁸¹
43. In the subsequent annulment proceeding, however, the *ad hoc* Committee concluded that Chile had never had an opportunity to be heard on the issue of damages resulting from the two violations for which Chile had been found liable. The Committee noted that the only damages arguments that Claimants had presented had been “strictly limited to their expropriation claims,”⁸² and that the Tribunal had held that “[t]he expropriation-based

⁷² *Id.*, ¶ 428.

⁷³ *Id.*, ¶ 652.

⁷⁴ *Id.*, ¶ 652.

⁷⁵ *Id.*, ¶ 659.

⁷⁶ Ex. R-27, Award, ¶ 659.

⁷⁷ *Id.*, ¶ 674.

⁷⁸ Ex. R-1, Letter from Mr. Garcés to Chilean Minister of National Assets, 24 June 1999, p. 4.

⁷⁹ Ex. R-27, Award, ¶ 703 (explaining that “[l]a denegación de justicia reconocida por el Tribunal de arbitraje en la cuestión de la rotativa Goss no da lugar a ninguna indemnización adicional”).

⁸⁰ *Id.*, § X.4.

⁸¹ *Id.*, ¶ 692; see also Ex. R-30, *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Decision on Annulment, 18 December 2012), ¶ 285 (Fortier, Bernardini, El-Kosheri) (“Annulment Decision”).

⁸² Ex. R-30, Annulment Decision, ¶ 261.

calculation of damages was not relevant to the BIT violations [found].”⁸³ The Committee also held that the Tribunal provided contradictory reasons, when, despite having dismissed the expropriation claim because it was beyond the temporal reach of the BIT, it nevertheless went on to adopt an expropriation-based damages calculation for the discrimination claim.⁸⁴

44. Ms. Pey and the President Allende Foundation submitted these damages-related issues for decision by a new tribunal by means of their Request for Resubmission. Claimants insist that human rights matters are relevant even to these issues, urging the new Tribunal to consider “du dommage moral résultant de la manière dont le Chili a traité M. Pey Casado, en particulier compte tenu de la violence psychologique exercée à son encontre”⁸⁵ and claiming that “[c]e dommage moral devra être pris en compte dans l’indemnisation des faits incriminés, même s’il peut difficilement être soulagé par une indemnisation.”⁸⁶ Moreover, to be able to make a determination on the damages issues in the resubmission proceeding, the Tribunal will necessarily need to undertake an analysis of — and reach certain conclusions about — the alleged discrimination against Mr. Pey, and what such discrimination consisted of. It would be difficult in this context for an arbitrator with ingrained personal views on the Pinochet regime, and on the treatment and deservedness of its victims, to maintain the requisite objectivity and impartiality to assess those issues fairly and without any bias.

II. Standard for Disqualification Under Article 57 of the ICSID Convention

45. As stated above, Article 57 permits disqualification of an arbitrator “on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.”⁸⁷ This is a two-part standard. First, an arbitrator must lack the qualities required by Article 14(1), and, second, such lack must be “manifest.” Each of these elements is described in turn below.

A. Lack of the Qualities Required by Article 14(1)

46. Article 14(1) of the Convention mandates that arbitrators “be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment.*”⁸⁸ As Professor Schreuer has

⁸³ *Id.*

⁸⁴ *Id.*, ¶ 285.

⁸⁵ Claimants’ Request for Resubmission, 18 June 2013, ¶ 130.

⁸⁶ *Id.*

⁸⁷ ICSID Convention, Art. 57.

⁸⁸ ICSID Convention, Art. 14(1) (emphasis added).

noted, of the three qualities listed in Article 14(1), “only the requirement of reliability to exercise independent judgment has played a role in practice.”⁸⁹

47. Although the English version of the Convention states that an arbitrator must be a person “who may be relied upon to exercise *independent* judgment,”⁹⁰ ICSID tribunals — as well as the Centre itself — repeatedly have recognized that an arbitrator must also be relied upon to be *impartial*.⁹¹ The requirement of independence *and* impartiality not only is an approach that “accords with that found in many arbitration rules,”⁹² but is also one that is mandated by the terms of the ICSID Convention. As many tribunals have acknowledged, the Spanish version of Article 14(1) refers to an arbitrator’s “impartiality”⁹³ rather than independence. “Since the [ICSID Convention] by its terms makes both language versions equally authentic, [both] the standards of independence and impartiality [apply] in making our decisions.”⁹⁴ The President of the World Bank, in his capacity as Chairman of the Administrative Council, recently confirmed this understanding in the context of the disqualification of claimant-appointed arbitrators in two separate ICSID arbitrations: *Blue Bank v. Venezuela* and *Burlington Resources v. Ecuador*.⁹⁵
48. While “the precise nature of the distinction [between independence and impartiality] is not always easy to grasp[,] [g]enerally speaking independence relates to the lack of relations with a party that might influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.”⁹⁶
49. As the Chairman of the Administrative Council recently emphasized in his decisions to disqualify arbitrators in the *Blue Bank v. Venezuela* and *Burlington Resources v. Ecuador*

⁸⁹ RA-10, CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, Art. 57 ¶ 18 (2d. ed. 2009) (“Schreuer, *Commentary*, Art. 57”).

⁹⁰ ICSID Convention, Art. 14(1) (emphasis added).

⁹¹ RA-7, *Suez, Sociedad General de Aguas de Barcelona and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007), ¶ 28 (Salacuse, Nikken) (“*Suez (Challenge)*”); *see also* RA-4, *ConocoPhillips Company et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 27 February 2012), ¶ 54 (Keith, Abi-Saab) (“*ConocoPhillips (Challenge)*”); RA-8, *Urbaser (Challenge)*, ¶ 36.

⁹² RA-7, *Suez (Challenge)*, ¶ 28.

⁹³ ICSID Convention, Art. 14(1) (Spanish) (stating that arbitrators “deberán . . . inspirar plena confianza en su imparcialidad de juicio”).

⁹⁴ RA-7, *Suez (Challenge)*, ¶ 28; *see also* RA-4, *ConocoPhillips (Challenge)*, ¶ 54; RA-8, *Urbaser (Challenge)*, ¶ 36.

⁹⁵ RA-2, *Blue Bank (Challenge)*, ¶ 58 (“Given that both versions [of the Convention] are equally authentic, it is accepted that arbitrators must be both impartial and independent”); RA-3, *Burlington Resources (Challenge)*, ¶ 65 (same). The *Blue Bank* decision involved disqualification of the claimant’s arbitrator due to his position as partner in a law firm that shared a name and some connections with a law firm opposing the respondent State in another ICSID case. The *Burlington Resources* decision involved disqualification of the claimant’s arbitrator based on comments he made regarding the respondent’s counsel, in response to their request for his disqualification.

⁹⁶ RA-7, *Suez (Challenge)*, ¶ 29.

arbitrations, to prove that an arbitrator lacks independence or impartiality, the party requesting disqualification need not demonstrate *actual* bias. In both cases, the Chairman of the Administrative Council made the following (identical) statement: “Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, *it is sufficient to establish the appearance of dependence or bias*.”⁹⁷ The *Urbaser v. Argentina* tribunal, which the Chairman of the Administrative Council cited in support of his rulings in *Blue Bank* and *Burlington Resources*,⁹⁸ explained: “The requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case. In order to be effective this protection does not require that actual bias demonstrate a lack of independence or impartiality.”⁹⁹ Instead, “[a]n *appearance* of such bias from a reasonable and informed third person’s point of view is sufficient to justify doubts about an arbitrator’s independence or impartiality.”¹⁰⁰ As Professor Sands himself noted in the context of challenges based on arbitrators who serve simultaneously as counsel, “the test is not what we think, but what a reasonable observer would think.”¹⁰¹

50. Although many claims of partiality have been based on relationships between arbitrators and the parties (or arbitrators and counsel), other circumstances may be “sufficient to justify doubts about an arbitrator’s independence or impartiality.”¹⁰² As the *ConocoPhillips* tribunal recently held, justifiable doubts can arise out of any circumstances leading a reasonable person to conclude that an arbitrator might be “influenced by factors other than those related to the merits of the case.”¹⁰³ Parties have requested disqualification of arbitrators in a variety of circumstances, ranging from simultaneous service as counsel and arbitrator in cases involving the same subject matter, to public statements demonstrating a view of one of the parties or key issues in dispute.¹⁰⁴

⁹⁷ RA-2 *Blue Bank (Challenge)*, ¶ 59 (emphasis added); RA-3, *Burlington Resources (Challenge)*, ¶ 66 (ICSID Administrative Council Chairman Kim).

⁹⁸ RA-2, *Blue Bank (Challenge)*, ¶ 59; RA-3, *Burlington Resources (Challenge)*, ¶ 66 (citing RA-8, *Urbaser (Challenge)*, ¶ 43).

⁹⁹ RA-8, *Urbaser (Challenge)*, ¶ 43.

¹⁰⁰ *Id.*

¹⁰¹ Ex. R-55, U. Balkiss Sulaiman, *London barrister opposes arbitrators acting as counsel*, GLOBAL ARBITRATION REVIEW, 7 October 2009.

¹⁰² RA-8, *Urbaser (Challenge)*, ¶ 43.

¹⁰³ RA-4, *ConocoPhillips (Challenge)*, ¶ 55. As Professor Schreuer has noted, one example of issue conflict “arises in investment arbitrations when an arbitrator is also involved as counsel in another pending case. Challenging parties in those types of situations argue that if an arbitrator also acts as counsel in another investment case, involving similar legal issues, an unbiased approach cannot be maintained.” RA-10, Schreuer, *Commentary*, Art. 57, ¶ 34.

¹⁰⁴ See RA-11, IBA Guidelines, § 3.5.2 “The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise”); § 4.1.1 “The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)”. As Professor Schreuer has noted, one example of issue conflict “arises in investment arbitrations when an arbitrator is also

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51. The latter situation led to a recommendation by the Permanent Court of Arbitration for the disqualification of Judge Charles Brower as arbitrator in the *Perenco v. Ecuador* case, which in turn led to Judge Brower's resignation from the tribunal. In *Perenco*, nearly a year into the arbitration, Judge Brower gave an interview in which he responded to a variety of questions on the subject of international arbitration. In response to a question about "the most pressing issues in international arbitration,"¹⁰⁵ Judge Brower gave the following answer:

There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don't make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.¹⁰⁶

52. The Secretary-General of the Permanent Court of Arbitration ("PCA"), which decided the challenge to Judge Brower pursuant to a pre-existing agreement between the parties, concluded that "the combination of the words chosen by Judge Brower and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality."¹⁰⁷ The PCA recommended Judge Brower's disqualification even though the foregoing was "of course not the *only* interpretation of Judge Brower's comments [or] *in fact* what Judge Brower subjectively intended by his comments, as he explained in his Statement."¹⁰⁸
53. Even though the *Perenco v. Ecuador* case proceeded under the ICSID Convention, a pre-existing agreement between the parties mandated that the challenge to Judge Brower be

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involved as counsel in another pending case. Challenging parties in those types of situations argue that if an arbitrator also acts as counsel in another investment case, involving similar legal issues, an unbiased approach cannot be maintained." RA-10, Schreuer, *Commentary*, Art. 57, ¶ 34.

¹⁰⁵ RA-6, *Perenco Ecuador Limited v. The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6 (Decision on Challenge to Arbitrator, 8 December 2009), ¶ 27 (Kröner) ("*Perenco (Challenge)*").

¹⁰⁶ *Id.*, ¶ 27.

¹⁰⁷ *Id.*, ¶ 48.

¹⁰⁸ *Id.*, ¶ 53.

decided pursuant to the General Standards set forth in the IBA Guidelines.¹⁰⁹ However, as the recent decisions by the Chairman of the Administrative Council in the *Blue Bank* and *Burlington Resources* cases confirm, there is little practical difference between the standard derived from the IBA Guidelines applied in *Perenco* and the one set forth in Article 57 of the ICSID Convention. As the PCA stated in *Perenco*, under the IBA Guidelines, “Judge Brower would be disqualified if ‘circumstances . . . have arisen since the appointment, that, from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts’ as to Judge Brower’s impartiality or independence.”¹¹⁰ Under the General Standard of the IBA Guidelines, justifiable doubts exist “if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.”¹¹¹ This is an “appearance test.”¹¹² Accordingly, a finding that the arbitrator “is *actually biased* . . . or has actually prejudged the merits of the dispute is not necessary in order for the challenge to be sustained”¹¹³

54. The standard for impartiality is evaluated the same way in the Article 57 context. As the Chairman of the Administrative Council held in the recent *Blue Bank* and *Burlington Resources* decisions: “Independence and impartiality both ‘protect parties against arbitrators being influenced by factors other than those related to the merits of the case.’”¹¹⁴ For disqualification due to the lack of one of these qualities, “[t]he applicable legal standard is an ‘objective standard based on a reasonable evaluation of the evidence by a third party.’”¹¹⁵ Proof of actual dependence or bias is not required; “rather it is sufficient to establish the appearance of dependence or bias.”¹¹⁶ Applying that standard, the Chairman of the Administrative Council disqualified the challenged arbitrators in *Blue Bank* and *Burlington Resources*.¹¹⁷
55. The “appearance” standard is employed in numerous jurisdictions. As the Working Group that drafted the IBA Guidelines explained, in preparing the Guidelines, “[t]he members of

¹⁰⁹ *Id.* Notably, the decision does not make reference to any of the examples provided in the “Practical Application” section of the IBA Guidelines — *i.e.*, the Red, Orange, and Green lists. As the drafting history of the IBA Guidelines indicates, notwithstanding the practical assistance the Lists may provide, “[i]n all circumstances, the General Standards should prevail.” RA-12, IBA Working Group on Conflicts of Interest in International Arbitration, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUSINESS LAW INTERNATIONAL 433, 435 (2004) (“*Background Information on the IBA Guidelines*”).

¹¹⁰ RA-6, *Perenco (Challenge)*, ¶ 44 (quoting RA-11, IBA Guidelines, General Standard 2(b)).

¹¹¹ RA-11, IBA Guidelines, General Standard 2(c). This interpretation also has been accepted in the Article 57 context.

¹¹² RA-11, IBA Guidelines, Explanation to General Standard 2(b); *see also* RA-6, *Perenco (Challenge)*, ¶¶ 42–44.

¹¹³ RA-6, *Perenco (Challenge)*, ¶ 44 (emphasis in original).

¹¹⁴ RA-2, *Blue Bank (Challenge)*, ¶ 59; RA-3, *Burlington Resources (Challenge)*, ¶ 66.

¹¹⁵ RA-2, *Blue Bank (Challenge)*, ¶ 60; RA-3, *Burlington Resources (Challenge)*, ¶ 67 (quoting RA-7, *Suez (Challenge)*, ¶¶ 39–40).

¹¹⁶ RA-2, *Blue Bank (Challenge)*, ¶ 59; RA-3, *Burlington Resources (Challenge)*, ¶ 66.

¹¹⁷ RA-2, *Blue Bank (Challenge)*, ¶ 69; RA-3, *Burlington Resources (Challenge)*, ¶ 80.

the Working Group submitted 13 National Reports from the following jurisdictions: Australia, Belgium, Canada, England, France, Germany, Mexico, the Netherlands, New Zealand, Singapore, Sweden, Switzerland, and the United States.”¹¹⁸ These reports covered a wide range of issues, including whether “an ‘appearance’ test or something similar is applied”¹¹⁹ Out of the 13 surveyed, “[a]ll of the jurisdictions agree that a challenge to the impartiality and independence of an arbitrator depends on the *appearance* of bias and not actual bias.”¹²⁰

B. “Manifest”

56. To justify disqualification pursuant to Article 57 of the ICSID Convention, an arbitrator’s lack of impartiality must be “manifest.”¹²¹ Consistent with the meaning of that term in other provisions of the Convention,¹²² a lack of impartiality “becomes ‘manifest’ when it can be ‘easily understood or recognized by the mind.’”¹²³ In other words, “the term ‘manifest’ means ‘obvious’ or evident.”¹²⁴ The Chairman of the Administrative Council recently endorsed this understanding of the term “manifest,” stating first that “a number of decisions have concluded that [the term] means ‘evident’ or ‘obvious,’ and that it relates to the ease with which the alleged lack of the qualities can be perceived.”¹²⁵ In applying this standard in his assessment of the facts, the Chairman concluded in both cases that a third party would find, after undertaking a reasonable evaluation of the circumstances, a manifest lack of impartiality on the part of the disqualified arbitrator.¹²⁶

III. Professor Sands Must be Disqualified As Arbitrator in the Present Case

57. Applying the standard articulated by the Centre in *Blue Bank* and *Burlington Resources*, Professor Sands’ appearance of bias is manifest. As Chile explained in its letter to the Centre dated 22 August 2013, Professor Sands has a history of public statements regarding

¹¹⁸ RA-12, *Background Information on the IBA Guidelines*, pp. 436–437.

¹¹⁹ *Id.* p. 437.

¹²⁰ *Id.*, p. 441.

¹²¹ ICSID Convention, Art. 57.

¹²² *See, e.g.*, ICSID Convention Arts. 36(3), 52(1)(b).

¹²³ RA-5, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (Challenge Decision, 25 June 2008), ¶ 65 (Park, Remón) (citing this as the respondent’s argument, and stating two paragraphs later that “no reason exists that Respondent’s proposed test should not apply to disqualification.” *See id.*, ¶ 67).

¹²⁴ RA-1, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16 (Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010), ¶ 37 (Robinson, Alexandrov).

¹²⁵ RA-2, *Blue Bank (Challenge)*, ¶ 61; and RA-3, *Burlington Resources (Challenge)*, ¶ 68.

¹²⁶ *See* RA-2, *Blue Bank (Challenge)*, ¶ 69 (“[T]he Chairman concludes that it has been demonstrated that a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case”); RA-3, *Burlington Resources (Challenge)*, ¶ 80 (“In the Chairman’s view, a third party undertaking a reasonable evaluation of the July 31, 2013 explanations would conclude that the paragraph quoted above manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel”).

Pinochet and his regime, and of professional activities relating to Pinochet. This history, detailed below, gives rise to justifiable doubts as to his ability to “inspirar plena confianza en su imparcialidad de juicio”¹²⁷ in the present dispute. The circumstances surrounding Professor Sands’ views on Pinochet’s regime are analogous to those that led the PCA to disqualify Judge Brower in *Perenco*, inasmuch as Professor Sands’ publicly expressed opinions on the Pinochet regime reflect a negative opinion of the very government whose actions he would be judging in the arbitration.

A. Professor Sands’ Statements Regarding, and Experience With, Pinochet

58. In his communication of 5 August 2013 accepting his appointment as arbitrator in the present case, Professor Sands set forth the following disclosure:

[B]etween 1998 and 2000 I acted as counsel in proceedings before the English courts involving (i) the claim by Senator Pinochet to immunity in proceedings before the English courts (*R v Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) ex parte Pinochet*, House of Lords, judgments of 25 November 1998 and 23 March 1999 (Counsel for Human Rights Watch, Interveners)); and (ii) proceedings concerning access to Senator Pinochet’s medical record (*R v Home Secretary, ex parte Kingdom of Belgium*, Divisional Court, judgment of 15 February 2000 (Counsel for Belgium)).¹²⁸

59. Perhaps Mr. Sands’ service as counsel in the proceedings he identified in his disclosure would not — without more — provide a sufficient basis to justify disqualification in the present matter — given that one’s role as counsel and one’s pronouncements in that capacity do not necessarily reflect personal views. However, Professor Sands’ academic writings, and other public pronouncements regarding Pinochet, reveal deeply held personal beliefs that go well beyond any arguments he may have made as an advocate for his client Human Rights Watch in the course of the *Ex Parte Pinochet* proceeding.
60. It must be recalled in this context that the extradition of Pinochet in the *Ex Parte Pinochet* proceedings was sought by the Government of Spain for the prosecution of human rights violations, and that such prosecution was being coordinated by — and indeed had been commenced at the behest of — Spanish lawyer Mr. Juan Garcés, who, not coincidentally, is counsel for Claimants in this resubmission proceeding. As a matter of State, and in part on the basis that Pinochet was at that time a Senator of the Republic, Chile formally opposed the extradition of Pinochet from the U.K. to Spain to face proceedings in the Spanish courts for acts that had been committed in Chile.¹²⁹ Such opposition was a decision by the

¹²⁷ ICSID Convention, Art. 14(1).

¹²⁸ R-13, Arbitration Rule 6 Declaration of P. Sands, 5 August 2013.

¹²⁹ See Ex. R-34, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) ex parte Pinochet*, House of Lords (Opinions of the Lords of Appeal for Judgment in the Cause), 24 March 1999, p. 5 (noting that “the Republic of Chile applied to intervene as a party. Up to this point Chile had been urging that

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administration of democratically-elected President Eduardo Frei (1994–2000) and was led by his Minister of Foreign Relations, José Miguel Insulza (presently the Secretary General of the Organization of American States in Washington) — himself an active member of the Socialist Party who had been exiled by the Pinochet regime. Accordingly, Professor Sands was adverse in *Ex Parte Pinochet* not only to the legal interests of Pinochet himself, but also those of the Republic of Chile.

61. In any event, and as already noted, the nature of Chile’s concern transcends the fact itself of Professor Sands’ involvement as counsel on behalf of human rights groups in proceedings adverse to the interests of Pinochet and of the Republic. Of equal or greater concern is the fact that Professor Sands has publicly manifested personal views and a significant body of academic work on Pinochet and his military regime,¹³⁰ and indeed a significant part of his reputation in the field of public international law derived precisely from his role in the Pinochet extradition proceeding, and his writings on the subject.
62. Accounts of the circumstances that led Professor Sands to take on the Human Rights Watch representation in the Pinochet proceedings are revealing. For example, based on an interview with Professor Sands, an article in *The New Yorker* magazine published in 2009 recounts that, in 1998, he had “received a call asking him to represent Augusto Pinochet,

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immunity should be afforded to Senator Pinochet, but it now wished to be joined as a party. Any immunity precluding criminal charges against Senator Pinochet is the immunity not of Senator Pinochet but of the Republic of Chile. Leave to intervene was therefore given to the Republic of Chile”). As Professor Sands himself acknowledges in the book *Justice for Crimes Against Humanity* (of which he was co-editor), “[e]xtradition proceedings were initiated and pursued against Senator Pinochet despite serious reservations of political leaders in Chile, Spain and the UK.” Ex. R-36, M. Lattimer and P. Sands, *JUSTICE FOR CRIMES AGAINST HUMANITY* 10 (2003).

¹³⁰ Professor Sands has discussed Pinochet, the *Pinochet* case, or the “Pinochet principle,” in the following books, articles, interviews, presentations, and speeches (among others), over the last fifteen years: Ex. R-35, J. Alvarez and V. Lowe, *Pinochet Revisited*, Proceedings of the Annual Meeting (American Society of International Law), Vol. 95 (2001) (referencing Professor Sands’ service on a panel to discuss the *Pinochet* case); Ex. R-36, M. Lattimer and P. Sands, *JUSTICE FOR CRIMES AGAINST HUMANITY* (2003); Ex. R-38, *Interview of the Month: War Lies and Broken Laws*, May 2005; Ex. R-39, P. Sands, *Policymakers on Torture Take Note — Remember Pinochet*, SAN FRANCISCO CHRONICLE, 14 November 2005; Ex. R-37, P. Sands, *Mishcon Lecture 2005: Lawless World: International Law After 9/11 and Iraq*; Ex. R-42, P. Sands, *LAWLESS WORLD* (2006); Ex. R-41, P. Sands, *AFTER PINOCHET: THE ROLE OF THE NATIONAL COURTS, FROM NUREMBERG TO THE HAGUE* (2006); Ex. R-45, P. Sands, *Realm of the Possible*, THE GUARDIAN, 8 January 2007; Ex. R-43, Interview with Philippe Sands, *DEMOCRACY NOW*, 7 March 2006; Ex. R-44, P. Sands, *Globalizing Justice* (Amnesty International, Spring 2006); Ex. R-46, P. Sands, *TORTURE TEAM* (2008); Ex. R-47, P. Sands, *The Green Light*, VANITY FAIR, May 2008; Ex. R-48, *Interview with Philippe Sands*, NATIONAL PUBLIC RADIO, 19 June 2008; Ex. R-49, P. Sands, *10 years of the Pinochet principle*, THE GUARDIAN, 16 October 2008; Ex. R-50, P. Sands, *Addison C. Harris Lecture: Poodles and Bulldogs: The United States, Britain, and the International Rule of Law*, 84 IND. L.J. 1357, 1359–67 (2009); Ex. R-51, *Philippe Sands Considers A Legacy of ‘Torture,’* NATIONAL PUBLIC RADIO, 7 January 2009; Ex. R-53, *New Yorker Correspondent Jane Mayer and British Attorney Philippe Sands on Bush Administration Torture and How Obama Should Address It*, *DEMOCRACY NOW*, 20 May 2009; Ex. R-56, P. Sands, *Tony Blair finally faces Chilcot —but will former PM be let off hook?*, THE GUARDIAN, 24 January 2010; Ex. R-57, P. Sands, *A Memory of Justice: The Unexpected Place of Lviv in International Law — A Personal History*, 43 CASE W. RES. J. INT’L L. 739 (2011); Ex. R-58, P. Sands, *International Justice is Needed — Even if it Takes 100 More Years to Perfect It*, COLOMBO TELEGRAPH, 17 May 2012.

the former Chilean dictator. He told his wife, Natalia Schiffrin, about the offer. ‘Philippe, if you do,’ Sands recalls her saying, ‘I will divorce you.’”¹³¹ The article then goes on to observe: “Sands declined the case. Instead, he signed on to represent the other side, and helped pursue Pinochet for violations of international law.”¹³²

63. Although Professor Sands disputes the accuracy of newspaper articles in which he has been quoted,¹³³ the author of this particular article, Jane Mayer, is the first individual listed by name in the “acknowledgements” section of the very book that inspired the article in which the quotation was given: Professor Sands’ *Torture Team*. Professor Sands writes that he is “especially grateful to Jane Mayer, whose brilliant and brave articles in the *New Yorker* are a source of great inspiration, and whose assistance and collegiality was constant. I hope one day to be able to do the same in return.”¹³⁴
64. In a wide variety of public fora and contexts (including books, articles, television and radio appearances, and speaking engagements), Professor Sands has repeatedly invoked his human rights work against the Pinochet regime as a professional and personal cornerstone, and has articulated personal views on the Pinochet regime. Set forth below are but a few examples, all of which come from books or articles published by Professor Sands himself, or from statements he has made in interviews for which either a recording or full transcript is available:
- In his book *Lawless World*, and after summarizing the Pinochet extradition proceedings, Professor Sands made the following remark, which could be of particular relevance to the present case: “Pinochet had fair procedures, and he had his day in court, unlike his victims.”¹³⁵
 - In the same book, *Lawless World*, Professor Sands stated: “‘Where were you when Pinochet was arrested? In the select world of international law the sixteenth of October 1998 is the closest you will get to a JFK or a John Lennon moment.’”¹³⁶ In a later passage of the book, Professor Sands states that “judgments like that of the House of Lords in the Pinochet case provide hope to a great number of people around the world.”¹³⁷
 - In a law review article, Professor Sands referred to his participation in the *Ex Parte Pinochet* proceeding and other cases as “a great privilege” and called the decision to

¹³¹ Ex. R-52, J. Mayer, *The Bush Six*, THE NEW YORKER, 13 April 2009.

¹³² *Id.* The same *New Yorker* article described the Pinochet cases as Professor Sands’ “first chance to demonstrate his convictions professionally.”

¹³³ See Ex. R-16, Letter from P. Sands to ICSID, 11 September 2013, p. 2.

¹³⁴ Ex. R-46, P. Sands, *TORTURE TEAM*, viii (2008).

¹³⁵ Ex. R-42, P. Sands, *LAWLESS WORLD* 44 (2006).

¹³⁶ *Id.*, p. 23.

¹³⁷ *Id.*, p. 225.

extradite Pinochet a “landmark judgment against the claim to immunity, a clarion call for the right of victims and of individuals under the new international legal order.”¹³⁸

- In *Justice for Crimes Against Humanity*, a compilation of articles edited by Professor Sands and Mark Lattimer, Messrs. Sands and Lattimer noted in an introductory section that “[t]he cry for ‘justice,’ as voiced insistently by the relatives of those forcibly disappeared in the Pinochet case, provides the first and foremost argument for the application of international criminal law, given that the relevant state is itself frequently unwilling or unable to act.”¹³⁹
- In a passage of his book *Lawless World* in which he recounts the discussion that took place in his household once news emerged of Pinochet’s arrest in London, Sands recalls that his wife “Natalia was lined up with Peter Mandelson, the British Cabinet Minister who took to the airwaves to welcome the arrest of a ‘brutal dictator.’ They were both right.”¹⁴⁰
- Also from *Lawless World*: “where the matters were as serious as those alleged in Pinochet’s case, there was bound to be a temptation to bend the law to the facts, and to rule that if the defendant was responsible he should pay for the terrible crimes that had been committed.”¹⁴¹
- *Lawless World*: “Pinochet’s bubble of personal invincibility was burst. For the victims of international crimes these [human rights] treaties may be seen as having more enforceability than was previously thought to be the case.”¹⁴²

65. The foregoing statements, and their respective contexts, belie Professor Sands’ assertion, in his letter of 11 September 2013, that the only views he has expressed on Pinochet relate to the limited issue of immunity: “Mr. di Rosa’s [sic] letter attributes to me — by way of assertion rather than inquiry — a raft of personal views that I am said told [sic], and a professional reputation that is said to have been developed on the basis of those views and above-mentioned proceedings. ***Such views as I have expressed invariably relate to the limited issue of immunity*** from the jurisdiction of national (and international) courts of a former head of state, in criminal and extradition proceedings.”¹⁴³ Professor Sands thus

¹³⁸ Ex. R-57, P. Sands, *A Memory of Justice: The Unexpected Place of Lviv in International Law — A Personal History*, 43 CASE W. RES. J. INT’L L. 739, 742–744 (2011).

¹³⁹ Ex. R-36, M. Lattimer and P. Sands, JUSTICE FOR CRIMES AGAINST HUMANITY 19 (2003). Among the articles included in this book was one by Professor Brigitte Stern, to whose appointment to the tribunal in the original arbitration the Republic successfully objected on the basis of articles she had written on the subject of Pinochet (as discussed above).

¹⁴⁰ Ex. R-42, P. Sands, LAWLESS WORLD 26 (2006).

¹⁴¹ *Id.*, p. 29 (2006).

¹⁴² *Id.*, p. 43 (2006).

¹⁴³ Ex. R-16, Letter from P. Sands to ICSID, 11 September 2013, p. 2 (emphasis added). For some reason, Professor Sands’ rather sharp response is directed individually at one of Chile’s undersigned counsel, rather than at ‘Chile’ or ‘Chile’s counsel,’ as might have been expected.

suggests that his pronouncements on Pinochet have simply been dispassionate academic statements. But a *prima facie* review of the assertions quoted above lead any reasonable reader to the conclusion that Professor Sands' remarks reflect profound personal beliefs of a moral, political and/or ideological nature, and not merely academic or intellectual ruminations.

66. Moreover, and despite his protestations to the contrary, Professor Sands has in fact built much of his reputation in the field of human rights on his work in connection with Pinochet, and on the development on a global basis of what he has termed “the Pinochet principle,” pursuant to which heads of State should be held personally responsible, through national and international prosecution, for actions taken while in office.¹⁴⁴ Professor Sands has used this principle as the premise for a book and a number of academic and press articles,¹⁴⁵ and has discussed Pinochet in a number of interviews.¹⁴⁶ Professor Sands' human rights work against the Pinochet regime also appears to have influenced and shaped his view of international law as a general matter: “[I]n this century, said Human Rights Watch legal adviser Philippe Sands, the world has moved steadily away ‘from a 19th century tradition that says international law is about the protection of interests of states and (toward) the notion that says it's about the protection of interests of people.’”¹⁴⁷
67. All of the foregoing demonstrates that the views that may have been expressed by Professor Sands transcend the realm of his role of counsel in the U.K. Pinochet proceedings, as well as the limited issue of immunity, and rather reflect deeply-rooted personal convictions and beliefs; indeed, it could reasonably be concluded — based on Professor Sands' own statements — that his participation in the U.K. proceedings was

¹⁴⁴ See, e.g., Ex. R-49, P. Sands, *10 years of the Pinochet principle*, THE GUARDIAN, 16 October 2008 (“The legacy of the arrest warrant signed in Hampstead 10 years [ago] today is the Pinochet principle, that no one is above the law”); Ex. R-42, P. Sands, LAWLESS WORLD 43 (2006); Ex. R-36, M. Lattimer and P. Sands, JUSTICE FOR CRIMES AGAINST HUMANITY 3, 9 (2003) (stating that “[c]ommentators and human rights campaigners recognised the Pinochet judgments as amongst the most important human rights cases since Nuremberg, and spoke of a ‘Pinochet effect,’ whereby prosecuting authorities and courts around the world would find support for moves against other suspected of torture, crimes against humanity or war crimes that came to their country”); Ex. R-41, P. Sands, AFTER PINOCHET: THE ROLE OF THE NATIONAL COURTS, FROM NUREMBURG TO THE HAGUE (2006).

¹⁴⁵ See, e.g., Ex. R-42, P. Sands, LAWLESS WORLD (2006) (using the principle developed in *Ex Parte Pinochet* as a springboard for launching examinations into the actions of U.S. and U.K. leaders); Ex. R-49, P. Sands, *10 years of the Pinochet principle*, THE GUARDIAN, 16 October 2008. Professor Sands also has referred to this concept as a “Pinochet moment.” See, e.g., Ex. R-42, P. Sands, LAWLESS WORLD (Preface, p. xx) (2006); Ex. R-56, P. Sands, *Tony Blair finally faces Chilcot —but will former PM be let off hook?*, THE GUARDIAN, 24 January 2010 (including in a list of possible questions to ask former British Prime Minister Tony Blair regarding the Iraq war: “How often do you wonder whether you might one day face a ‘Pinochet moment’?”). Discussing the concept more generally, see, e.g., Ex. R-39, P. Sands, *Policymakers on Torture Take Note — Remember Pinochet*, SAN FRANCISCO CHRONICLE, 14 November 2005.

¹⁴⁶ See, e.g., Ex. R-43, Interview with Philippe Sands, DEMOCRACY NOW, 7 March 2006; Ex. R-48, Interview with Philippe Sands, NATIONAL PUBLIC RADIO, 19 June 2008.

¹⁴⁷ Ex. R-31, F. Vrazo, *British Ruling on Pinochet Could Signal A Sea Change*, THE PHILADELPHIA INQUIRER, 29 November 1998; see also Ex. R-32, *See Dictators' days of reckoning*, EDMONTON JOURNAL, 5 December 1998 (attributing the same quotation to Professor Sands).

prompted precisely by his personal and ideological beliefs concerning Pinochet and his dictatorial regime.

B. Professor Sands' Statements and Experience with Pinochet Manifestly Give Rise to Justifiable Doubts as to His Impartiality

68. Given the factual, historical, and procedural history of this dispute, Professor Sands' numerous public statements regarding Pinochet — coupled with his work in the *Ex Parte Pinochet* case — give rise to justifiable doubts as to Professor Sands' impartiality. Although not dispositive for purposes of the present request for disqualification, the fact itself that Professor Sands felt compelled to disclose his role in the *Ex Parte Pinochet* proceeding is suggestive. This disclosure was made by Professor Sands pursuant to ICSID Arbitration Rule 6, which requires that a prospective arbitrator sign a declaration stating, in relevant part, “Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties; and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party.”¹⁴⁸ Since he disclosed his role in the *Ex Parte Pinochet* proceeding only after stating that he was “not aware of any past or present professional, business or other relationship with the Claimant or Respondent in this case,”¹⁴⁹ it is clear that such disclosure was made not pursuant to point (a) above, but rather to point (b); *i.e.*, to his belief that his involvement in the Pinochet extradition proceeding was a circumstance “that might cause [his] reliability for independent judgment to be questioned by a party.”
69. Accordingly, the very fact that, after “inform[ing] [him]self as to the relevant facts and issues, including the identity of the parties and the likely legal issues,”¹⁵⁰ Professor Sands considered the subject of his disclosure relevant and therefore worthy of disclosure, indicates that the issue is not simply whether the *Ex Parte Pinochet* proceeding and the present case “involved different parties, different facts, and different applicable laws,”¹⁵¹ as Professor Sands now suggests.¹⁵²
70. Despite Chile's best efforts — and as a result of Claimants' own persistent endeavors — Pinochet's human rights' violations have been a recurring theme in this case and the larger context in which the case has played out. Professor Sands' service as counsel against

¹⁴⁸ ICSID Arbitration Rule 6.

¹⁴⁹ Ex. R-13, P. Sands Arbitration Rule 6 Declaration, 5 August 2013.

¹⁵⁰ Ex. R-16, Letter from P. Sands to ICSID, 11 September 2013, p. 1.

¹⁵¹ *Id.*

¹⁵² Even applying solely the criteria that Professor Sands invoked, there is in fact a conflict. For example, in reference to the legal proceedings relating to Pinochet disclosed in his communication of 5 August 2013, Professor Sands asserted, in his 11 September 2013 letter, that such proceedings “involved different parties [from those in the ICSID arbitration].” However, Professor Sands himself had recognized, in his book *Lawless World*, that “the government of Chile [had] formally intervened on the side of Pinochet” in the UK extradition proceedings. Ex. R-42, P. Sands, *LAWLESS WORLD* 37 (2006). Accordingly, contrary to Professor Sands' assertion, the Respondent in the ICSID case *sub judice*, Chile, was in fact one of the parties in the *ex parte Pinochet* proceedings in which Professor Sands participated as counsel.

Pinochet in two proceedings (in which his goal was aligned with that of counsel for Claimants, Mr. Garcés); the fact that Professor Sands deemed such experience sufficiently relevant to the present dispute to warrant disclosure; his distinguished career in the field of human rights (erected in significant part on the basis of the Pinochet cases); and his past expressions of unequivocal antipathy to the Pinochet regime, all would undoubtedly give rise to reasonable doubt by an objective third person with respect to Professor Sands' ability in this case to exercise the necessary impartial and independent judgment. Indeed, an objective third party would likely be surprised that someone with such overtly and widely professed views on the Pinochet regime could even be considered as an arbitrator in a case that is ultimately about an expropriation committed by the Pinochet regime, and in which the principal Claimant was by all accounts a victim of the Pinochet regime on a personal level.

71. Moreover, such justifiable doubts would exist regardless of Professor Sands' stated commitment to judge this case impartially and independently.¹⁵³ As stated above, "[a]n *appearance* of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality."¹⁵⁴ In this vein, in *Perenco v. Ecuador*, Judge Brower was disqualified as arbitrator notwithstanding a finding that the statement he had made to the press was not "*in fact* what Judge Brower subjectively intended by his comments, as he explained in his Statement."¹⁵⁵ Instead, the relevant issue was the *mere appearance* created by Judge Brower's comments, as interpreted by a reasonable observer.¹⁵⁶
72. Professor Sands himself previously has acknowledged this point, in the context of challenges based on arbitrators who are serving simultaneously as counsel. In that regard, Professor Sands has stated that "the test is not what we think, but what a reasonable observer would think."¹⁵⁷ He also effectively admitted, in a book published in 2006, that audiences expect him to have a particular bias against Pinochet. In his book *Lawless World*, for example, Professor Sands admits that, in an instance in which he spoke in an academic setting in Iran, his audience was "surprised"¹⁵⁸ when he simply recited the relevant facts of the *Pinochet* case, instead of providing "a lecture on the triumph of international law."¹⁵⁹ Professor Sands noted further that "[s]urprise or criticism was directed not at the House of Lords but at me: why the reticence about the decision, why was I not more positive, why did I not embrace the case as a great moment for international

¹⁵³ See Ex. R-16, Letter from P. Sands to ICSID, 11 September 2013, p. 3.

¹⁵⁴ RA-8, *Urbaser (Challenge)*, ¶ 43 (emphasis added).

¹⁵⁵ RA-6, *Perenco (Challenge)*, ¶ 53.

¹⁵⁶ *Id.*, ¶ 48.

¹⁵⁷ Ex. R-55, U. Balkiss Sulaiman, *London barrister opposes arbitrators acting as counsel*, GLOBAL ARBITRATION REVIEW, 7 October 2009.

¹⁵⁸ Ex. R-42, P. Sands, *LAWLESS WORLD* 225 (2006).

¹⁵⁹ *Id.*, p. 224 (2006).

law and the cause of human rights? In private discussions after the event many of the students were even more open.”¹⁶⁰

73. Following Professor Sands’ publication of one of the articles referenced above,¹⁶¹ Professor Roger Alford — an editor for *Kluwer Arbitration Blog* and current Notre Dame Law School international law professor and Associate Dean for International and Graduate Programs — had the following reaction, in a piece published in 2005:

Philippe Sands is at it again. In an article in the San Francisco Chronicle last week, available here, ***Sands appears to be publicly pushing his idea*** that David Addington, John Yoo, and others he describes as “higher in the administration’s hierarchy” (read: someone higher than the V.P.’s chief of staff!) should think twice about travelling abroad ***or they might suffer the same fate as Augusto Pinochet.*** It is precisely the same argument that Sands made in his debate with John Yoo a couple of weeks ago.

I would be curious if others have thoughts on whether this is a serious possibility. ***I have not heard anyone but Philippe Sands outspokenly and seriously pushing this idea.*** . . . In short, is Sands dead serious about the Pinochet precedent?¹⁶²

74. Given the discussion above, in particular concerning Professor Sands’ own writings and statements to the press, Chile does not believe that the attribution to Professor Sands of such views as “personal” ones was unfounded. Nor does it seem unreasonable to Chile to assert that part of Professor Sands’ professional reputation is based on his activities, writings, and pronouncements on Pinochet, given not only the frequency with which he himself has written and spoken on the subject, but also the frequency with which third parties have written about Professor Sands as a Pinochet expert, or referred to him as such.
75. Thus, apart from how objective and impartial Professor Sands would in fact *intend* to be as an arbitrator in this case, the appearance that he might be “influenced by factors other than those related to the merits of the case”¹⁶³ would nevertheless inevitably hang like a dark cloud over the remainder of the proceeding, and over the Tribunal’s ultimate award. As a practical matter, it seems impossible that he would be able to disregard, or disassociate himself from, his strongly-held personal feelings and professional dealings concerning the Pinochet regime. At the very least, on a subliminal or subconscious level, Professor Sands

¹⁶⁰ *Id.*, p. 225 (2006).

¹⁶¹ Ex. R-40, R. Alford, *Is Philippe Sands Serious about the Pinochet Precedent?*, OPINIO JURIS, 17 November 2005 (discussing and linking to the following article by Professor Sands, which had been published several days earlier in the *San Francisco Chronicle*: Ex. R-39, P. Sands, *Policy-makers on Torture Take Note — Remember Pinochet*, SAN FRANCISCO CHRONICLE, 14 November 2005).

¹⁶² Ex. R-40, R. Alford, *Is Philippe Sands Serious about the Pinochet Precedent?*, OPINIO JURIS, 17 November 2005 (emphasis added).

¹⁶³ RA-8, *Urbaser (Challenge)*, ¶ 43.

would be coming into the arbitration with preconceived notions concerning the Claimants and the Respondent, and their perceived status as victim and perpetrator, respectively, of human rights violations. As Claimant's own party-appointed arbitrator, Mr. Mohammed Bedjaoui, noted, "An arbitrator is not a disembodied, floating being, without origins, or ethnic, cultural, religious, social and other attachments. 'There are . . . some indistinct forms which pose a very difficult problem for those who will be demanding about indisputable impartiality. These forms are called Ideology (or that which we name ideology), Religion (or that which we name religion) and History (of more recent inspiration).'"¹⁶⁴ Professor Sands' history, as demonstrated above, poses precisely this problem.

IV. Earlier Exchanges Regarding the Issues Set Forth in this Request, and Responses Thereto

76. As indicated above, Chile has previously voiced the concerns underlying the present Request, through letters to the Centre dated 22 July 2013 and 22 August 2013, to which Professor Sands responded with his letters dated 5 August 2013 and 11 September 2013, respectively. Chile briefly summarizes the history of this correspondence before proceeding to address Professor Sands' remarks.
77. Claimants appointed Professor Sands in the 18 June 2013 cover letter that accompanied their Request for Resubmission.¹⁶⁵ Chile was of course aware at that time of Professor Sands' prior involvement in *ex parte Pinochet* and his public writings and statements on Pinochet. However, Chile did not think it plausible that Professor Sands would have accepted the appointment given his background, and in fact thought it possible that Professor Sands might not even be aware of the appointment. Based on its experience over the past 15 years, Chile instead initially believed that the appointment might be a ploy by Claimants to "Pinochetize" the new proceeding from the outset, by eliciting from Chile a Pinochet-based reaction to the appointment of Professor Sands.
78. However, following research on Professor Sands, Chile became aware of public reports indicating that Professor Sands was counseling Bolivia in a dispute against Chile, relating to the two nations' borders (a dispute which, as indicated, is now before the International Court of Justice). Since this, too, provided justifiable doubts as to Professor Sands' independence and impartiality, Chile decided initially to object solely on that basis, and by this expedient avoid the inelegant posture of criticizing someone for having undertaken activities and expressed views antagonistic to Pinochet. Chile accordingly expressed, in a letter to the Centre dated 22 July 2013, its concerns relating to Professor Sands' reported representation of Bolivia against Chile.¹⁶⁶ By response dated 5 August 2013, Professor Sands revealed not only that he was aware of the appointment but prepared to accept it, and in response to Chile's query, indicated that he was not representing Bolivia (although, as

¹⁶⁴ RA-9, Mohammed Bedjaoui, *The Arbitrator: One Man-Three Roles: Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator*, 5 J. INT'L ARB. (Issue 1) 7, 9 (1988).

¹⁶⁵ Ex. R-10, Letter from Claimants to ICSID, 18 June 2013, p. 2.

¹⁶⁶ Ex. R-11, Letter from Chile to ICSID, 22 July 2013.

discussed below, he did not make it clear whether he had done so in the past). In addition, in a separate statement (also transmitted to the Centre on 5 August 2013) Professor Sands made a disclosure concerning his participation in the *Ex Parte Pinochet* proceeding.¹⁶⁷

79. Particularly in light of such disclosure (and the ambiguity of his explanation with respect to any *past* involvement on behalf of Bolivia in its dispute with Chile), Chile asked Professor Sands to reconsider his appointment, via letter to the Centre of 22 August 2013, in which Chile alluded to many of the statements described in the present request.¹⁶⁸ Claimants responded to this letter on 23 August 2013,¹⁶⁹ promptly publishing their response at <http://www.elclarin.cl/images/pdf/2013-08-23DemandedespartiesDemanderesesses.pdf>.¹⁷⁰
80. For his part, Professor Sands responded to Chile's 22 August 2013 letter on 11 September 2013, in which (a) he expressed displeasure at the disclosure of Chile's request for his reconsideration — which by that point had been detailed in an 11 September 2013 *International Arbitration Reporter* article linking Claimants' earlier correspondence; and (b) he reaffirmed his decision to serve as arbitrator in the present case.¹⁷¹ Following receipt of this response, Chile had no choice but to challenge Professor Sands formally, through the present request.

A. Response to Professor Sands' Letter of 11 September 2013

81. While, as noted, Chile reserves its right to respond to any additional comments Professor Sands may make in response to the present Request, two brief comments are in order regarding Professor Sands' 11 September 2013 letter to the Centre.
82. First, the suggestion in Professor Sands' letter regarding the accuracy of the articles on which the present Request is based is entirely without merit. In his letter, Professor Sands noted that Chile's own letter "makes reference to various press articles. It ought to be clear already that such articles cannot necessarily be treated as accurate or complete; in the present case such articles (or the inferences drawn from such articles) are neither accurate nor complete."¹⁷² However, as they relate to statements by Mr. Sands, the majority of the articles cited in Chile's letter — which have been incorporated into the discussion in Section III above — were written by Professor Sands himself. The only exceptions are: (1) an article by *New Yorker* columnist Jane Mayer, with whom Professor Sands appears, based on his own statements (for whom, as indicated above, Professor Sands expressed

¹⁶⁷ Ex. R-12, Letter from P. Sands to ICSID, 5 August 2013; Ex. R-13, P. Sands Arbitration Rule 6 Declaration, 5 August 2013.

¹⁶⁸ Ex. R-14, Letter from Chile to ICSID, 22 August 2013.

¹⁶⁹ Ex. R-15, Letter from Claimants to ICSID, 23 August 2013.

¹⁷⁰ See Ex. R-65, Screenshots of www.elclarin.cl/fpa (showing publication of Claimants' 23 August 2013 correspondence). Claimants' letter was later picked up by the arbitration pleading and decision database housed at www.italaw.com.

¹⁷¹ Ex. R-16, Letter from P. Sands to ICSID, 11 September 2013, p. 3.

¹⁷² *Id.*, p. 2.

profound respect and admiration in the acknowledgments of his book *Torture Team*); and (2) an article published in a Philadelphia newspaper which quoted Professor Sands on the outcome of the *Ex Parte Pinochet* proceeding. With respect to the latter article, a Canadian newspaper printed an identical quote from Professor Sands,¹⁷³ which tends to corroborate the accuracy of the quote attributed to him by the Philadelphia newspaper.

83. Second, contrary to what Professor Sands suggests in his letter,¹⁷⁴ Chile did not disclose to the press its 22 August 2013 letter to *Investment Arbitration Reporter* (“*IAReporter*”) (or, for that matter, to any other publication). Rather, by explicit admission of the publication itself, it was Claimants who leaked to them their own letter dated 23 August 2013; the *IAReporter* article notes that “the claimants have published their own correspondence” from the arbitration, and provides a link to Claimants’ website.¹⁷⁵ The fact that Claimants themselves were the ones who disclosed their 23 August 2013 letter can be confirmed by visiting their own website, see <http://www.elclarin.cl/images/pdf/2013-08-23DemandedespartiesDemanderesses.pdf>.¹⁷⁶
84. In that 23 August 2013 letter, Claimants had quoted excerpts from Chile’s 22 August 2013 letter, and that is how the quotes from Chile’s letter found their way into the *IAReporter* article. Thus, it was not Chile that leaked the relevant information, as Professor Sands erroneously assumed in his letter of 12 September 2013. Indeed, it could be speculated that precisely the type of subconscious biases that Chile is concerned would influence Professor Sands in this case, were at play in Professor Sands’ assumption that Chile was the leaking party. This type of subtle and subconscious bias would inevitably color Professor Sands’ perception of the parties and issues at every juncture of the arbitral proceeding, and constitutes precisely the reason that his judgment could not be relied upon to be impartial in this particular case.

¹⁷³ Ex. R-32, *See Dictators’ days of reckoning*, EDMONTON JOURNAL, 5 December 1998.

¹⁷⁴ Ex. R-16, Letter from P. Sands to ICSID, 11 September 2013, p. 3 (“[S]hortly after Mr di Rosa’s [sic] letter was sent, an email was sent to me by Mr Luke Petersen [sic] of Investment Arbitration Reporter, putting to me certain propositions as to my appointment in these proceedings. It appears from the information disclosed by Mr Petersen’s communication (to which I have not replied), that he has been informed of the matters raised in Mr di Rosa’s letter. It appears that he has been in contact with one or other of the parties in these proceedings. I hope that [sic] the parties might recognise that such communications put an arbitrator in an invidious and unfortunate position, since he or she is not in a position to respond to factual allegations. . . . ***It appears that Mr. Petersen is better informed than I am as to the intentions (or actions) of the Respondent . . .***” (emphasis added)). This last assertion reveals rather clearly that Professor Sands assumed that the leaking party was Chile (and belies his more carefully worded earlier assertion — in the same paragraph — that the journalist had apparently been in contact with “one or other” of the parties).

¹⁷⁵ See Ex. R-67, *Chile objects to claimants’ nomination of Philippe Sands as arbitrator*, INVESTMENT ARBITRATION REPORTER.

¹⁷⁶ See Ex. R-65, Screenshots of www.elclarin.cl/fpa (showing publication of Claimants’ 23 August 2013 correspondence).

B. Response to Professor Sands' Letter of 5 August 2013

85. By letter dated 22 July 2013, Chile had initially expressed concern about Professor Sands' suitability as an arbitrator for this case in light of widespread media reports that Professor Sands was advising Bolivia in an ongoing border dispute against Chile (which is now before the International Court of Justice).¹⁷⁷ Chile had found a number of press articles, from six different newspapers (all of which are attached as exhibits hereto), indicating that Bolivia was taking advice from Professor Sands in connection with its dispute with Chile and a possible claim against Chile before the International Court of Justice.¹⁷⁸ Chile accordingly requested that Professor Sands "provide information to the parties herein regarding his role in the above-referenced Bolivia matter."¹⁷⁹ As Chile explained in its letter, a person's service as arbitrator in an international arbitration is incompatible with his or her service as counsel in another dispute in which the person is adverse to one of the parties in the international arbitration. The IBA Guidelines state that "justifiable doubts as to the arbitrator's impartiality or independence [may] arise"¹⁸⁰ if "[t]he arbitrator has *within the past three years* served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter."¹⁸¹
86. In Professor Sands' response dated 5 August 2013, he stated the following: "I wish to state clearly that (1) *I am not acting* as counsel for the Republic of Bolivia in the proceedings against the Republic of Chile at the ICJ, and (2) *I am not involved* in any proceedings for or against the Republic of Chile."¹⁸² Professor Sands' explanation is worded in the present tense, and thus indicates only that he was not counsel to Bolivia or adverse to Chile *at the time of writing*. Given that the IBA Guidelines expressly state that an arbitrator's service as adverse counsel may "give rise to justifiable doubts as to the arbitrator's impartiality or independence"¹⁸³ if it has taken place "within the past three years,"¹⁸⁴ Chile respectfully requests that Professor Sands further clarify his role in the Bolivia matter — in particular, whether he advised Bolivia at any time in the past with regard to its dispute with, or potential claim against, Chile. Chile reserves the right to expand the grounds for its challenge following receipt of such clarification.

¹⁷⁷ Ex. R-11, Letter from Chile to ICSID, 22 July 2013.

¹⁷⁸ *Id.* (citing Ex. R-59, *Bolivia contacta a consejero jurídico de la reina de Inglaterra para estudiar demanda contra Chile*, AMÉRICA ECONOMÍA, 10 December 2012; Ex. R-60, *Abogado inglés analiza posible litigio con Chile*, LOS TIEMPOS, 11 December 2012; Ex. R-61, *Gobierno monitorea pasos de Bolivia ante una eventual demanda marítima*, CNN CHILE, 16 December 2012, Ex. R-62, *Bolivia guarda sus cartas ante Chile*, 24 March 2013, LA PRENSA; Ex. R-63, *Bolivia contacta al abogado que defendió a Perú para su demanda marítima hacia Chile en La Haya*, CAMBIO 21, 22 April 2013; Ex. R-64, *Bolivia demandará a Chile ante el tribunal de La Haya para recuperar su salida al mar*, EL MUNDO, 22 April 2013).

¹⁷⁹ RA-11, Letter from Chile to ICSID, 22 July 2013, p. 2.

¹⁸⁰ RA-11, IBA Guidelines, Part II, ¶ 3 (defining the "Orange List").

¹⁸¹ *Id.*, § 3.1.2 (emphasis added).

¹⁸² Ex. R-12, Letter from P. Sands to ICSID, 5 August 2013 (emphasis added).

¹⁸³ RA-11, IBA Guidelines, Part II, ¶ 3 (defining the "Orange List").

¹⁸⁴ *Id.*, § 3.1.2.

V. Conclusion and Request for Relief

87. Professor Sands is without question, and justifiably, a well-respected and admired figure in the field of public international law. However, his particular professional background and personal beliefs concerning former Chilean dictator Augusto Pinochet and the human rights violations committed by Pinochet's military regime, would lead any reasonable neutral observer to conclude that Professor Sands would be ill-suited to serve as an arbitrator in a case in which the claims derive directly from actions committed by the Pinochet regime, and in which Claimants are seeking moral damages precisely for actions by the Pinochet regime. Professor Sands' perception would necessarily suffer an *actual* bias, in Chile's view. But at a minimum, his involvement in this particular case, given his particular background and history, would create a *perception* of bias. How could an arbitrator who has so frequently, vigorously, and publicly expressed his opprobrium of the Pinochet regime, fairly sit in judgment of actions committed precisely by such regime?
88. Chile has always believed that, irrespective of the fact that it was actions by the Pinochet regime that spawned Claimants' claims, it had compelling jurisdictional objections and merits defenses to the case *qua* investment dispute. Therefore, and much as Chile itself deplors and condemns the abuses of the Pinochet regime, Chile did not consider the human rights aspects to be an essential part of the case, and for that reason always has resisted Claimants' efforts to characterize it as a human rights case. At the same time, Chile is entitled to a tribunal composed of arbitrators who can approach the case as a legal matter involving an investment dispute, rather than view it through the prism of its historical and ideological background, or the characteristics and excesses of the particular regime that committed the acts that gave rise to the relevant bilateral investment treatment claims. Chile doubts — reasonably, in its opinion — that any person with deeply felt personal convictions about General Pinochet and his dictatorship would be able to focus solely on the relevant legal issues, and to disregard the overall context and background of the dispute, or the fact that the principal claimant is a natural person who was himself persecuted on an individual level by the Pinochet regime.
89. Chile laments having to mount a formal challenge against Professor Sands. However, for the reasons articulated above, it feels that it has no choice but to do so. This long-running case has had a very high public and political profile from the beginning, and is maintaining such a profile to this day. It is therefore particularly important, for the sake of the integrity of the proceeding and of the public perception of the legitimacy of the resulting judgment, that each of the three arbitrators in the case be devoid of any attribute or characteristic that would lead a reasonable observer to question the arbitrator's impartiality and motivations.
90. This particular case is also attracting significant attention precisely due to its longevity and the controversy that has always surrounded it. It would thus be especially unhelpful to the public perception of the case — and of ICSID and investment arbitration generally — if a person with a background such as that of Professor Sands were to be a member of the resubmission Tribunal in the *Pey Casado* case. This is precisely the type of arbitrator-related situation that is increasingly being perceived as anomalous by many objective observers and critics of the investment arbitration system.

91. In this particular case, the appointment of Professor Sands would inevitably lead to doubts and concerns regarding his impartiality, and the integrity of the eventual award, at a time when the investment arbitration system is already beset by widespread doubts concerning arbitrator conflicts. In a case as controversial and publicized as this one, it behooves all involved for the composition of the resubmission Tribunal to be impeccable — beyond any question or doubt. Given the foregoing, for an emblematic Pinochet-related case, is it too much to ask for three arbitrators with no personal history concerning Pinochet?
92. For the reasons articulated above, the Republic of Chile requests that Professor Sands be disqualified as an arbitrator in the resubmission proceeding of the *Pey Casado* ICSID arbitration.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Paolo Di Rosa', with a long horizontal flourish extending to the right.

Paolo Di Rosa
Gaela K. Gehring Flores