

In the Matter of an Arbitration Pursuant to the Convention on the Settlement of
Investment Disputes Between States and Nationals of Other States

ICSID CASE No. ARB/98/2

VÍCTOR PEY CASADO and FUNDACIÓN PRESIDENTE ALLENDE,
Claimants,

v.

THE REPUBLIC OF CHILE,
Respondent.

REQUEST FOR ANNULMENT

5 September 2008

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I. NATURE OF SUBMISSION

1. Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereafter, “the Washington Convention” or “the ICSID Convention”), and Rule 50 of the ICSID Arbitration Rules, the Republic of Chile (“the Republic” or “Chile”) submits the present Request for Annulment of the Award dated 8 May 2008 issued in *Víctor Pey Casado and Fundación Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2) (“the Award”).¹
2. As further specified in Section VII below, the Republic hereby also requests that the execution of the Award be suspended temporarily, in accordance with Article 52(5) of the ICSID Convention.
3. The present submission is structured as follows: Section II is an Introduction and Executive Summary. Section III describes the procedural history of the case. Section IV contains a brief narration of the facts of the case. Section V analyzes the Award and the deficiencies therein that justify annulment of the Award. Section VI articulates the grounds for annulment based upon the procedural irregularities of the arbitration proceedings. Section VII formally requests provisional suspension of execution of the Award in accordance with Article 52(5) of the ICSID Convention. Finally, Section VIII contains the Conclusion, and Section IX sets forth the Request for Relief.
4. The Republic reserves the right to expand upon the present Request for Annulment in additional written submissions to the *ad hoc* Committee once it is constituted.

¹ Attached as Annex RA-1.

II. INTRODUCTION AND EXECUTIVE SUMMARY

5. The *Pey Casado* case is likely to be remembered as the most anomalous and irregular in ICSID history. Plagued throughout the arbitral proceedings by procedural oddities, mysterious circumstances, inexplicable delays, bizarre antics, outrageous accusations by the Claimants, a revolving door of arbitrators, and unprecedented occurrences, the case finally concluded with the issuance of an Award on 8 May 2008 — well over 10 years after the arbitration request was originally filed.²

6. Over the course of this arbitration, which the Award itself characterized as “exceptionally long and complex,”³ the case featured a cast of seven different arbitrators (on a three-member Panel); multiple arbitrator resignations (including the bizarre and unexplained resignation of the first President of the Tribunal, only days after the Tribunal had apparently decided to rule in favor of Chile on jurisdictional grounds); the disqualification by ICSID — following a request by Chile — of the Claimants’ party-appointed arbitrator (the first and only such disqualification in ICSID history); an inexplicable *volte face* by the Tribunal headed by the Second President after reaching a decision to rule in favor of Chile on jurisdictional grounds and even agreeing on a draft award dismissing the claim (apparently the second time a ruling favorable to Chile had been thwarted under mysterious circumstances); strange antics by the Tribunal;

² The *Pey Casado* case is the second-oldest of the 121 cases currently pending at ICSID. Only *Compañía Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (“*Vivendi*”) — which was registered on 19 February 1997 — has been pending longer. It bears noting, however, that over the last decade, the *Vivendi* case has undergone the following multiple proceedings: (a) a complete arbitral proceeding before the original tribunal, which yielded an award on 21 November 2000; (b) a full Annulment proceeding, which generated a decision on 3 July 2002; (c) a Supplementary Decision and Rectification proceeding, which resulted in a determination issued on 28 May 2003; (d) a full Resubmission proceeding before a new tribunal (*i.e.*, a complete new arbitration), which generated an award on 20 August 2007; and (e) a second annulment proceeding, which is currently pending. In contrast, in the 10.5 years of duration of the *Pey Casado* case, there has been only a single proceeding, which yielded a lone Award — that of 8 May 2008 — which is the subject of the present Annulment request.

³ Award (*supra* footnote 1) ¶ 4.

incomprehensible procedural inequities (including the granting of the totality of Claimants' multiple document production requests throughout the arbitral proceedings and the concomitant denial of the totality of the Respondent's document production requests); inflammatory and sensationalist statements to the press by the Claimants; routine Internet publication by the Claimants — with the Tribunal's express written acceptance — of memorials, procedural letters and of the Tribunal's procedural orders; a stretch of 10 years without a jurisdictional decision (an ICSID record); a stretch of 2.5 years following the final merits hearing without issuing an Award (also an ICSID record); an Award imposing responsibility on the Republic for BIT claims that had never even been formally asserted by the Claimants; and sundry other incidents, oddities, and twists and turns too numerous to mention in this Introduction, but which will be addressed later in this Annulment Petition and in subsequent submissions by the Republic.

7. Aside from the unorthodox procedural history, from the beginning the *Pey Casado* case has had a marked political and public profile, due principally to the Claimants' efforts to characterize it as a human rights case associated with the military regime that governed Chile from 1973 until 1989. The Claimants have systematically sought to foster a "David and Goliath" impression both in the arbitral proceedings and in their constant recourse to the press, straining to pursue their claim not only at ICSID but also in the court of public opinion.
8. Further, the Claimants have enveloped the arbitration in a "circus-like" atmosphere, by indulging throughout the 10 years of litigation in constant inflammatory commentary to the press, the systematic leaking of sensitive documents from the proceedings, a parade

of outrageous and unsubstantiated accusations designed to portray the Republic as a “bad faith” litigator, and a carefully orchestrated campaign to keep the matter in the public eye and foster a perception of the case not just as a human rights matter of a historical nature, but as a continuing one.

9. However, as the Republic stressed throughout the arbitral proceedings, this is not a human rights case, and an ICSID tribunal is not a human rights court. The Republic fully accepted throughout the arbitration that the “El Clarín” newspaper — the confiscation of which in 1973 formed the basis of the Claimants’ ICSID claim — was in fact confiscated by the Chilean government, and that this had been done for political and ideological reasons; that issue was therefore not in dispute. The Republic also accepted that Claimant Mr. Víctor Pey Casado (hereafter “Mr. Pey”) was one of the thousands of Chileans who were forced into exile by the repressive military regime following the coup d’état in 1973; in fact, Mr. Pey availed himself of the special legal benefits that — following the return to democracy in Chile in 1990 — were provided by the Government of Chile to Chileans who had suffered exile during the military period. Thus, Mr. Pey’s status as a victim of the Pinochet regime was also not an issue in dispute in the arbitral proceedings.
10. Rather, the issues genuinely in controversy in the arbitration were purely legal ones. These included the issue of whether Mr. Pey was in fact the owner of the “El Clarín” (as he claimed to have been), or merely an intermediary in the relevant sales of shares (as Chile argued). The case also presented a series of purely legal issues associated with the jurisdiction of ICSID and the competency of the Tribunal (such as, *inter alia*, whether Mr. Pey was barred from ICSID due to his dual Chilean-Spanish nationality; whether the

Agreement for the Protection and Promotion of Investments between Chile and Spain (“the Chile-Spain BIT” or “the BIT”)⁴ — which entered into force in 1994 — could be applied retroactively to a confiscation that took place in 1973; whether there was an “investment,” and if so, whether such investment was made “in accordance with Chilean law” and qualified as a “foreign” investment, as required by the BIT; and whether the fork-in-the-road bar had been triggered).

11. Accordingly, the legal issues had nothing at all to do with the political background and backdrop. And yet the Claimants evidently succeeded in persuading the Tribunal to view the matter through a human rights prism, as a case in which the Tribunal should sit in judgment on the actions of the former military government of Chile. Thus, in a letter dated 7 October 2005, in the context of disqualification proceedings, the Claimants’ party-appointed arbitrator Mohammed Bedjaoui made the following assertion: “The Arbitral Tribunal would feel no less proud, for its part, for sanctioning with the full weight of the law the corruption and the dictatorship of Pinochet in Chile, seeking to bring justice to one of the many who suffered under that regime.”
12. In retrospect, it appears evident that Mr. Bedjaoui harbored a deeply-felt bias in favor of the Claimants due to his perception of the case as an emblematic human rights case, rather than as a legal dispute between an investor and the host State of the investment. This perception tainted Mr. Bedjaoui’s actions in the arbitration throughout the proceedings, and such influence as he exerted on his co-arbitrators during the proceedings — including, most importantly, over the Second President of the Tribunal, Mr. Pierre Lalive — rendered the arbitration itself tainted.

⁴ Attached as Annex RA-2.

13. For example, one of Mr. Bedjaoui's co-arbitrators, Mr. Leoro Franco, revealed — once again in the context of disqualification proceedings — that in January 2004, Mr. Bedjaoui had angrily abandoned the deliberations of the Tribunal at which the Second President had presented a draft Award favorable to Chile on the basis of Mr. Pey's dual nationality, and that Mr. Bedjaoui then refused to return to the deliberations, which therefore continued without him.⁵ Later, Mr. Bedjaoui was to present lengthy memoranda on the issue of nationality in a manifestly partial effort to reverse the decision that had already been reached by his co-arbitrators in favor of Chile on that issue in January 2004, and that had even been set forth in an agreed-upon Award dismissing the claim.
14. It is important to note that ICSID later disqualified Mr. Bedjaoui, following a challenge by Chile which was based, *inter alia*, on Mr. Bedjaoui's political and ideological bias in favor of the Claimants. This disqualification did not, however, extirpate the prejudice to Chile in the proceedings, as it is not unreasonable to conclude that Mr. Bedjaoui's bias in the end influenced the result of the case — particularly since it was his strenuous efforts on the issue of nationality that led to the reversal of the Second President's initial conclusion and of the draft award favorable to Chile on that issue.
15. Similarly, there are reasonable grounds to believe grave irregularities had taken place earlier in the case, in connection with the Claimants' request on 12 March 2001 for the resignation of the first President, Mr. Francisco Rezek, which was presented only days after the deliberations by the Tribunal had also evidently concluded with a decision to rule in favor of Chile on jurisdictional grounds.⁶ The timing of such request suggests the

⁵ This unusual incident involving Mr. Bedjaoui is described in more detail *infra*.

⁶ The procedural history of the case is set forth (in chronological order) in Section III of the Request *infra*.

Claimants were aware of the contents of the Tribunal’s deliberations and that they at least feared — or more likely, knew — of an impending decision in favor of Chile.

Significantly, Mr. Rezek later revealed that Claimants’ request came “several days after the last meeting behind closed doors of the arbitrators to discuss their final opinions.”

16. The likelihood that Claimants were acting based on confidential information concerning the inner workings of the Tribunal is heightened by the following revelation by arbitrator Leoro Franco, also made during disqualification proceedings in 2005. In a letter dated 16 December 2005, he observed of Claimants’ lead counsel, Mr. Garcés that

. . . from [his] communications it can be deduced that he is meticulously aware of what occurs within the Tribunal, of what the Tribunal does or does not plan to do in a next session, of what the General Secretariat of ICSID plans to do, demonstrating as much knowledge as that which an arbitrator who is in the proceeding might possess⁷

17. Thus, it can reasonably be inferred that Claimants’ request for the resignation of Mr. Rezek in 2001 was nothing but a bold effort by the Claimants *in extremis* to derail an adverse award. This interpretation is further supported by the implausible grounds invoked by the Claimants for their resignation request: the alleged failure by the Tribunal to respond to Claimants’ request to exclude certain items of evidence that they contended Chile had presented out of time.
18. On 13 March 2001, the very next day after the resignation request was submitted by the Claimants, the President of the Tribunal resigned. The resignation itself was bizarre, since evidentiary rulings — or in this case, the absence of such a ruling — are seldom if ever a basis for the president of an international arbitral tribunal to decline continued

⁷ Mr. Leoro Franco further underscored Claimants’ counsel’s evident knowledge of the Tribunal’s deliberations in a subsequent letter, dated 15 January 2006, in which he stated: “It does not appear, on the other hand, that Mr. Garcés was unaware of aspects . . . related to the deliberations of the Tribunal”

service, particularly right after reaching a critical and apparently dispositive conclusion on jurisdiction.

19. Moreover, Mr. Rezek confirmed that the alleged error was harmless, clarifying in writing that the documents of which Claimants complained in fact had *not* been considered by the Tribunal and were to be declared inadmissible. Thus, there was in fact no basis whatsoever — not even the flimsy one alleged by the Claimants — for the President to resign. And yet, quite oddly, he resigned anyway, invoking as a reason the lack of “confidence by the claimant party in the arbitration president.”
20. Ultimately, the case was to drag on for many years and to involve multiple rounds of written briefs and a number of hearings (including four hearings on jurisdiction alone). The parties’ expenditures in the proceeding accumulated to enormous proportions. Meanwhile, Mr. Pey — who was 82 years old when the claim was filed in November 1997 — was already 91 by the time the fourth and final jurisdictional hearing was held in Paris in January 2007. *By that time, and even though 10 years had elapsed since the filing of the claim, the Tribunal had still not even decided whether it was competent to hear the case.*
21. Meanwhile, during that period Mr. Pey had lost all opportunity to avail himself of legal recourses in Chile. After the return to democracy in Chile, the Chilean government had by law established an administrative procedure to compensate the victims of property confiscations during the military period. Such law provided that claims had to be asserted before a specified date, and Mr. Pey had chosen not to present claims in accordance with this procedure, as he had decided to take his chances in international arbitration instead. As it happens, the limitations period for the filing of such claims

under Chilean law expired during the course of the ICSID proceeding. Meanwhile, third parties who claimed to be owners of shares of “El Clarín” submitted claims under the new procedure for the newspaper confiscation, and following administrative proceedings in which it was determined that such petitioners were in fact the genuine owners of “El Clarín,” Chile had compensated them fully. Not having made any claims in such proceedings by the deadline established by the relevant law, Mr. Pey had therefore waived any rights to resort to a Chilean jurisdiction.

22. In light of these circumstances, the ICSID Tribunal faced a difficult moral choice in its deliberations in 2007 and 2008. After 10 long years of ICSID proceedings, due to long delays many of which were attributable to the Tribunal itself, the Tribunal likely felt a certain compunction in dismissing the claims outright. It opted instead for a Solomonic solution that perhaps it hoped would satisfy both of the parties: First, it found a way to rule in favor of the Claimants, by finding liability by Chile on the bases of two BIT claims that had not really been asserted by the Claimants in the arbitral proceedings. (This was rendered necessary by the fact that the Tribunal had found itself unable — due to the non-retroactivity of the BIT — to rule in the Claimants’ favor on the basis of the BIT claims that the Claimants *had* in fact asserted — all of which related to the expropriation of “El Clarín” in the 1970’s.
23. At the same time, however, the Tribunal limited its award of damages to an amount that would serve merely to compensate Claimants for their expenses and the nuisance value of litigating at ICSID for 10 years. Perhaps the Tribunal hoped that this Award — at US\$10 million plus interest and costs, just roughly 2% of the more than US\$515 million Claimants originally sought — would be insubstantial enough that Chile would remain

silent rather than assert objections as a matter of principle. Perhaps the Tribunal further hoped that, after such a long and tempestuous arbitral proceeding, the Claimants would simply accept the Award and be done with the matter.

24. A plain reading of the Award reveals that the Tribunal strained inordinately hard throughout the Award to find in Claimants' favor on issue after issue, both jurisdictional- and merits-related. While the result the Tribunal reached on any one of these issues — taken in isolation — is surprising, the aggregate of all these strained determinations is downright implausible. The series of unlikely findings in favor of the Claimants strongly suggests a results-oriented approach of the Tribunal designed to find *some* basis for giving Claimants at least a modicum of compensation, in light of Claimants' years of persistence in pursuing their claims and the Tribunal's inability — even after 10 years — to reach a determination on jurisdiction and competence.
25. In reaching this outcome, the Tribunal incurred multiple procedural and substantive violations — many of which individually would justify annulment, but which collectively absolutely require it. These violations, discussed in greater length below, include depriving the Republic of the opportunity to respond to the BIT claims that formed the basis of the Tribunal's liability holding; precluding the Republic from cross-examining Mr. Pey; denying all of the Republic's discovery requests while granting all of the Claimants'; finding liability and granting damages based on claims and theories never articulated by the Claimants; depriving the Republic of the opportunity to comment on the Tribunal's methodology for calculation of damages; improperly placing the burden of proof on the Republic for outcome-determinative jurisdictional and merits issues; making contradictory rulings; failing to apply the relevant law; and failing to explain its

reasoning or providing inconsistent reasons for these and other crucial rulings, among other deficiencies that render the Award annulable and which are explained below.

26. However, this Solomonic approach, while perhaps understandable from a motivation perspective, is wholly unacceptable in the ICSID context. The parties had not consented for the Tribunal to rule in equity, as an “*amiable compositeur*.” A tribunal can only rule *ex aequo et bono* in an ICSID proceeding “if the parties so agree,” as Article 42(3) of the ICSID Convention specifically provides. Here, however, the parties did not so agree. Therefore, the Tribunal impermissibly exceeded its authority, rendering its Award annulable for that reason as well.
27. The Award should not be allowed to stand merely on the basis that it might be perceived as “fair” in some fashion when viewed in the light of the extraordinary length and costliness of the proceedings. Ultimately, any determination of that nature would not only be *ultra vires* from a formal standpoint, but would come at the expense of the Republic of Chile’s image and reputation. The *ad hoc* Committee appointed to decide this Annulment Request should not countenance such a result. As the English saying goes, “Two wrongs do not make a right.”

* * *

28. One more comment is in order concerning the nature of this request and the relevant principles of review. The Republic is keenly aware of the distinction between annulment proceedings, on the one hand, and appellate proceedings, on the other.⁸ Although the Republic describes in certain detail in this Request for Annulment many of the factual

⁸ The present ICSID Annulment proceeding is the third such proceeding to which the Republic of Chile is a party (*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (as Petitioner); *Sociedad Anónima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7) (as Respondent)).

and legal issues that undergird the Award, it is not asking the *ad hoc* Committee to review specific issues of law or fact. Rather, the detailed factual and legal background is provided solely to enable the *ad hoc* Committee to assess more faithfully whether the Tribunal's Award and/or procedural conduct are of such a nature as to merit annulment of the Award.

29. The reasons that justify annulment, however, are articulated solely by reference to the specific grounds identified in Article 52 of the Convention, and more specifically, those set forth in ICSID Convention Article 52(1), subparagraphs (b), (d), and (e), respectively: (i) the Tribunal manifestly exceeded its powers; (ii) there was a serious departure from a fundamental rule of procedure; and (iii) the Tribunal failed to state the reasons on which the Award was based.
30. The present Petition identifies the more egregious deficiencies in the Award and in the procedural conduct of the Tribunal, which shall be detailed and supplemented as appropriate in later submissions by the Republic.

III. PROCEDURAL HISTORY

31. **Filing and Registration of Arbitration Request.** Claimants asserted their claims in an arbitration request dated 3 November 1997, pursuant to the BIT, which entered into force on 29 March 1994. The Request for Arbitration was registered by the Secretary-General of ICSID on 20 April 1998.
32. **Constitution of Tribunal.** The original Tribunal was constituted on 14 September 1998, with the following members: Mr. Francisco Rezek (Brazilian) (President); Mr.

Mohammed Bedjaoui (Algerian, appointed by the Claimants); and Mr. Jorge A. Witker Velásquez (Mexican, appointed by the Republic) (hereafter, “the First Tribunal”).

33. Following a controversy about Mr. Witker’s nationality, he resigned on 21 October 1998, and was replaced on 18 November 1998 by Mr. Galo Leoro Franco of Ecuador. The Tribunal as reconstituted was conformed as follows: Mr. Francisco Rezek (President); Mr. Mohammed Bedjaoui; and Mr. Galo Leoro Franco (hereafter, “the Second Tribunal”).
34. **Initial Pleadings and Hearing on Jurisdiction.** On 22 March 1999, the Claimants submitted their first Memorial on the Merits. The Republic responded by objecting to the jurisdiction of ICSID and the competency of the Tribunal, by letter dated 4 April 1999. On 3-5 May 2000, following two rounds of written briefs on the jurisdictional objections raised by the Republic — Memorial, Counter-Memorial, Reply and Rejoinder, as is common in ICSID proceedings — the Second Tribunal held a hearing on jurisdiction (hereafter, “First Jurisdictional Hearing”).
35. **The Tribunal’s 2001 Deliberations and Claimants’ Request for Resignation of the First Tribunal President.** In early March 2001, the Tribunal held a round of deliberations. Only a few days later, on 12 March 2001, the Claimants submitted a letter to Mr. Rezek, the President of the Tribunal, asking him to resign. The letter stated as a basis for such request the fact that the President “permitted that, after the close of the 5 May 2001 [sic] hearing,⁹ the Chilean delegation submit new documents and admitted them into the arbitral proceeding”

⁹ It appears evident that this was intended by the Claimants as a reference to the 5 May 2000 hearing.

36. The very next day, 13 March 2001, with no explanation other than the lost “confidence by the claimant party in the arbitration president,” the President of the Tribunal resigned. In his resignation letter, the President noted that the Tribunal in fact had *not* admitted into evidence the documents complained of.
37. In his resignation letter, Mr. Rezek also made the following significant comment, which further buttresses the Republic’s interpretation that a decision had already been taken in favor of Chile that the Claimants were attempting to thwart:

I profoundly regret that the lack of confidence by the Claimant in the President should only have been expressed at this stage of the procedure, that is to say, several days after the last meeting behind closed doors of the arbitrators to discuss their final opinions.

38. Mr. Rezek further stated:

The file comprising the normal written phase, complemented by the oral pleadings, has already provided the Tribunal with all that could be necessary for it to make a determination.

39. The fact itself of the Claimants’ resignation request to Mr. Rezek, only days after the Tribunal’s deliberations had ended, suggests rather powerfully that they had been apprised of the result of such deliberations and that such result was adverse to them. It remains unclear why an eminent and experienced arbitrator — at the time a sitting Judge of the International Court of Justice (ICJ), and a former President of the Brazilian Supreme Court — would resign as arbitrator from an important case for such a trivial reason as the one adduced by the Claimants (even if such reason had had merit, which turned out not to be the case). It remains unclear also why he took such a drastic step so quickly — the very next day after receiving the resignation request.

40. The episode of Mr. Rezek’s resignation remains to this day a great mystery to the Republic, as a later request by Chile for an investigation by ICSID went unheeded. This was the first of what were to be a number of outcome-altering procedural anomalies in the case.
41. **Reconstitution of Tribunal.** On 11 April 2001, the Tribunal was reconstituted with the appointment of Mr. Pierre Lalive (Swiss) as President to replace Mr. Rezek. The members of this reconstituted Tribunal were thus the following: Mr. Pierre Lalive (President); Mr. Mohammed Bedjaoui; and Mr. Galo Leoro Franco (hereafter, “the Third Tribunal”).
42. **Certification of Point of Vacancy.** Rule 12 (“Resumption of Proceeding after Filling a Vacancy”) of the ICSID Rules of Arbitration provides as follows:
- As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.
43. As noted, in his resignation letter, Mr. Rezek had stated that the arbitrators had had their “last meeting ... to discuss their final opinions” and that they had all that was necessary to “make a determination.”
44. Given such circumstances and the stage at which the prior Tribunal had been truncated, what appeared appropriate to the Republic in light of Rule 12 was for the new President simply to review the existing file, decide whether he agreed or disagreed with the determination that had been reached by the previous Tribunal, and then make arrangements for the drafting of the appropriate award (and dissenting opinion, as applicable).

45. For this reason, upon reconstitution of the Tribunal, the Republic had sent multiple letters in April 2001 pursuant to Rule 12, asking that the new President certify the procedural point at which the arbitral proceedings had been suspended upon the previous President's resignation. However, by letter dated 1 May 2001, the new President of the Tribunal concluded that no determination on jurisdiction had been made as of the time of the resignation of Mr. Rezek, and stated that although he "lamented" the consequent delay and cost implications for the parties, he had decided that further written submissions and hearings on jurisdiction were in order.
46. **Written and Oral Pleadings.** Thus, the proceeding continued. Two more rounds of written submissions were made by the Parties on the jurisdictional issues, following which, on 29-30 October 2001, the Third Tribunal held a new hearing on jurisdiction (hereafter, "Second Jurisdictional Hearing"). Following the hearing, the parties made another written submission ("notes de plaidoirie").
47. **Parties Requests for Provisional Measures.** Both parties had previously requested provisional measures — the Republic on 13 September 1999, and the Claimants on 23 April 2001. The Republic for its part had asked the Tribunal to require the Claimants to post a guarantee for certain costs. The Claimants meanwhile had sought an order suspending the execution of an administrative determination called Decision 43, taken by the Republic's Ministry of National Assets on 28 April 2000 (hereafter, "Decision 43"), pursuant to which the Republic had authorized compensation for the confiscation of "El Clarín" to certain individuals whom the Chilean State had concluded were the genuine owners of that newspaper — the same property for whose confiscation Mr. Pey was claiming at ICSID.

48. In its Decision on Provisional Measures dated 25 September 2001, the Tribunal rejected both parties' requests. In denying Claimants' request, the Tribunal explained that the provisional measures sought with regard to Decision 43 were not appropriate because such Decision was directed "at a series of persons who are not the Claimants . . ." and because "Decision No. 43 and its execution in Chile do not have consequences that can affect either the competence of the ICSID Arbitral Tribunal, or the rights alleged by the Claimants in their request for provisional measures . . ." (Notwithstanding this conclusion and as described *infra*, the Tribunal later incongruently ruled on the merits that the very same Decision 43 had in fact adversely affected Claimants' rights in a way that violated Chile's "fair and equitable treatment" obligation under the BIT.)
49. **Joinder of Jurisdictional Issues to Merits.** On 8 May 2002, the Third Tribunal issued a decision in which it declined to uphold or reject the jurisdictional objections raised by Chile on 4 April 1999, deciding instead to join the jurisdictional issues to the merits.
50. Thus, the proceeding resumed yet again, continuing now into its fifth year. The Tribunal established a new procedural calendar for further written submissions (this time on both merits and jurisdictional issues).
51. **The Discovery Process.** On 20 May 2002, the Claimants presented to the Third Tribunal a set of document production requests for the Republic, in accordance with the procedure and time-table that had been established by the Tribunal for evidentiary exchanges between the parties. On 22 July 2002, in Procedural Order No. 7/2002, the Tribunal granted all of the Claimants' discovery requests. These requests supplemented earlier ones made by the Claimants (for example, on 5 October 1998; 9 February 1999; and 22

July 1999). Ultimately, the Tribunal granted all such requests, and the Republic provided documents in response thereto.

52. On 3 October 2002, Chile presented — for the first time in the arbitral proceeding — its own document production requests: a list of only 17 items, all of them directly relevant to key issues in the arbitration. (The items requested included, for example, copies of Mr. Pey’s passports, and documents proving Mr. Pey’s ownership of the bank accounts from which the contractual payments for the alleged purchase of “El Clarín” originated, and powers of attorney to Mr. Pey from the alleged seller of the “El Clarín” shares.) Prior to receiving any response from the Tribunal, the Republic then supplemented its discovery request on 30 October 2002, by adding four more items to its earlier request.
53. On 11 November 2002, the Tribunal, with no explanation whatsoever, rejected the totality of the Republic’s discovery requests.¹⁰
54. Thus, in the end, in this arbitration the Tribunal *granted the entirety* of the discovery requests made by the Claimants throughout the arbitral proceeding, and yet *denied the entirety* of the discovery requests made by the Republic.
55. Notwithstanding its objections to such disparate treatment, the Republic complied with the Tribunal’s discovery orders by making a series of document productions throughout the remainder of 2002 in response to the Claimants’ document requests (meanwhile of course obtaining none at all from the Claimants).

¹⁰ Although the relevant letter dated 11 November 2002 sent by the Secretary of the Tribunal offered no explanation, the letter stated that the Tribunal would articulate its reasons for the Tribunal’s denial of Chile’s discovery requests in a subsequent communication. However, no such explanation was provided in any subsequent communication.

56. **The Republic’s Bifurcation Request.** On 8 October 2002, the Republic requested that the Tribunal bifurcate the proceedings so as to handle the issue of damages separately from that of jurisdiction and merits. The Republic explained that this was necessary because it had not been until their Second Memorial of 11 September 2002 that the Claimants had for the first time presented an articulation of their claimed damages. The Republic noted that it would take additional time to address the damages issue (particularly given that at that time the Republic’s Counter-Memorial deadline was imminent). On 11 November 2002, however, the Tribunal rejected the Republic’s request.
57. **Claimants’ Ancillary Claim.** On 4 November 2002, the Claimants submitted to the Tribunal an Ancillary Claim. In such claim, they sought to transfer to the ICSID jurisdiction a claim that they had asserted earlier in local Chilean courts requesting compensation for the confiscation by the Chilean authorities of a Goss printing press that belonged to “El Clarín” and had been taken during the seizure of the “El Clarín” property on 11 September 1973. (This Ancillary Claim was to play a significant role in the Tribunal’s eventual determination on the merits, as will be explained *infra*.)
58. **Further Round of Pleadings.** Between September 2002 and April 2003, the Parties presented two more rounds of written briefs. By the end of that time period, the Claimants had already submitted 9 formal written pleadings in the course of the arbitral proceeding: Arbitration Request; First Memorial on Merits; First Jurisdictional Counter-Memorial; First Jurisdictional Rejoinder; Second Jurisdictional Counter-Memorial; Second Jurisdictional Rejoinder; Notes de Plaidoirie (following Second Jurisdictional Hearing); Second Memorial on Merits/Third Jurisdictional Counter-Memorial; and First

Reply on the Merits/Third Jurisdictional Rejoinder. The Respondent, for its part, had presented the following 7 formal written briefs: First Jurisdictional Memorial; First Jurisdictional Reply; Second Jurisdictional Memorial; Second Jurisdictional Reply; Notes de Plaidoirie (following Second Jurisdictional Hearing); First Merits Counter-Memorial/Third Jurisdictional Memorial; First Merits Rejoinder/Third Jurisdictional Reply.

59. **Request for Raise in Arbitrator Fees.** On 23 January 2003, the President of the Tribunal submitted a letter requesting an increase in his arbitrator fees. Up until that point, he had been receiving US\$3,000/day in fees (the then-standard ICSID rate). His request was for an increase to US\$4,000/day. Chile concluded that given the advanced stage of the proceedings, it had no choice but to accept. Both parties ultimately granted the request.¹¹
60. **The Merits Hearing.** On 5-7 May 2003, upon completion of new rounds of written briefs on merits and jurisdictional issues, the Third Tribunal held a hearing on jurisdiction and the merits in Washington, D.C. (hereafter, “First Merits Hearing/Third Jurisdictional Hearing”). Prior to the hearing, and despite the complexity of the legal and factual issues, as well as the significant number of expert and witness statements that had been submitted, the Tribunal simply decided that it did not wish to hear any witnesses or experts. Thus, in a letter dated 23 April 2003, the Secretary of Tribunal notified the

¹¹ The Republic notes that an amendment was subsequently made in April 2006 to Regulation 14 of the ICSID Administrative and Financial Regulations, establishing constraints on increases in arbitrator fees. This was not the only unusual request received by the parties from the President. Later, on 29 June 2005, by means of a letter to the parties conveyed by the ICSID Secretariat, he asked that the parties authorize that his air travel be carried out in First Class, for medical reasons. At the same time, he also requested that his wife be allowed to travel with him at the parties’ expense — likewise in First Class — in order to assist him with his medical needs. As with the earlier fee increase request, Chile concluded with respect to this request that it had no choice but to accept. In the end, both parties again granted the request. More recently, and as discussed below, on 1 August 2008, the President through the ICSID Secretariat conveyed to the parties a request for a raise in fees from the current rate of \$4,000/day to a rate of \$10,000/day. This time the request was denied by the Republic, by means of a letter dated 15 August 2008.

parties in connection with the impending May 2003 hearing that “[t]he President of the Tribunal has asked me to inform that the Arbitral Tribunal, at this phase and before having heard the oral arguments of the parties, does not see the need to hear experts or witnesses.”

61. **Denial of Right to Cross-Examine Mr. Pey.** Notwithstanding the foregoing, and over the Republic’s objection, the Tribunal allowed Mr. Pey — one of the Claimants — to speak at the hearing. Despite the express understanding that he was speaking solely as a party rather than as a witness, Mr. Pey provided testimony on factual issues. However, the Republic was not granted an opportunity to cross-examine Mr. Pey at that hearing, or — for that matter — at any other time in the course of the 10-year proceeding (even though he testified on factual issues at other hearings as well).
62. **The Tribunal’s 2004 Deliberations and Draft Award Favorable to Chile.** On 26-28 January 2004, the Tribunal met in Paris for deliberations and to discuss a draft award that had been prepared and distributed to his co-arbitrators by Mr. Lalive. According to later revelations by arbitrator Leoro Franco in the context of disqualification proceedings, the award provided for the dismissal of all claims against Chile for lack of jurisdiction due to Mr. Pey’s Chilean nationality.
63. During those deliberations, according to Mr. Leoro Franco, there was a sharp and heated exchange between Mr. Lalive and Claimants’ party-appointed arbitrator, Mr. Bedjaoui, which continued to escalate to such a degree that Mr. Leoro Franco’s intervention became necessary to restrain them. By Mr. Leoro Franco’s account, an angry Mr. Bedjaoui then precipitously abandoned the place of deliberations, and subsequently refused to return. The deliberations therefore continued to conclusion without him.

64. At the conclusion of such deliberations, on 28 January 2004, the two remaining arbitrators (Messrs. Lalive and Leoro Franco) agreed upon the text of the draft award, the basic holding of which had remained unchanged in favor of Chile — *i.e.*, it dismissed the claim on the basis of lack of jurisdiction due to Mr. Pey’s Chilean nationality. They further agreed that the text would soon be circulated for signature following — as Mr. Leoro Franco later recalled — some “minor amendments” and “mechanographical” adjustments.
65. However, the January 2004 meeting was followed by a period of silence, eventually to be broken by a “long note” sent by Mr. Bedjaoui to his co-arbitrators. Mr. Leoro Franco later characterized this document as “a substitutive text of the award that, in truth and even though our much esteemed colleague abandoned part of the session in which it was considered, was approved in Paris on 26 January 2004.”
66. There followed an additional long period of apparent inactivity of the Tribunal, during which time the award was not circulated for signature despite the agreement reached by Messrs. Lalive and Leoro Franco in January 2004.
67. **Reversal of Draft Award Favorable to Chile.** On 8 July 2005 — a full year and a half after the January 2004 session at which Mr. Lalive’s draft award in favor of Chile had been approved — Mr. Lalive circulated to his co-arbitrators a new version of the award. As co-arbitrator Leoro Franco later explained, to his great surprise this new draft was “entirely contrary to the award approved in Paris in January 2004” and it “inexplicably completely changed the orientation of his original draft, without valid reason whatsoever, and to the contrary, it was done outside of the procedural rules.” The new draft

concluded that Mr. Pey in fact was *not* a Chilean national and that the Tribunal *did* have jurisdiction over the claim.

68. **Denunciation of Tribunal Anomalies by Arbitrator G. Leoro Franco.** As he later explained, Mr. Leoro Franco was torn by the dilemma between, on the one hand, abiding blindly by the duty of arbitrator confidentiality (and thereby abetting an irregular process), and on the other hand, disclosing the truth about the irregularities in the proceedings and in the conduct of the Tribunal. Ultimately, Mr. Leoro Franco opted for the latter, deciding to reveal to a Chilean official (not a member of the Chilean defense team) in the summer of 2005 his opinion that the arbitration involved a “grave situation presented by a proceeding that lacked elemental norms” and that “affected the institutionality of arbitration and good faith,” expressing concern also about an anomalous reversal by the Tribunal President with respect to an agreed-upon draft award.
69. Following this surprising turn of events, the Republic faced the difficult task of evaluating what it should do in light of the alarming revelations by Mr. Leoro Franco.
70. **Chile’s Request for Disqualification of Entire Tribunal.** The multiple anomalies that the Republic had itself witnessed in the proceeding, combined with the even more deplorable and worrisome ones disclosed by Mr. Leoro Franco, led the Republic — after careful deliberation — to the conclusion that the proceedings had become so tainted that the Republic could not entrust to the existing members of the Tribunal the task of carrying the arbitration to a conclusion that would yield a fair and impartial award.
71. Accordingly, on 23 August 2005, Chile submitted a request to the Secretary-General of ICSID requesting the disqualification of all three of the arbitrators of the Third Tribunal.

In accordance with the ICSID rules, the arbitral proceeding was immediately suspended upon the submission of the disqualification request.

72. The request, as supplemented by later submissions, adduced numerous grounds for the proposed disqualification, including, *inter alia*, the abnormal delay in the proceedings, Mr. Bedjaoui's manifest lack of impartiality and his assumption of the Foreign Minister position in Algeria, and the serious irregularities that had been reported by Mr. Leoro Franco — not the least of which was the unexplained and suspicious 180-degree reversal by the Tribunal President in his basic conclusion on the key jurisdictional issue of the case, and the mysterious replacement of the previously agreed-upon award with an entirely contrary one.
73. Further, in light of the institutional implications for ICSID both of the irregularities that had afflicted the case, as well as of the unprecedented request by Chile for the dismissal of the entire Tribunal, the Republic decided also that it would be appropriate for a high-level Chilean delegation to meet with the ICSID Secretary-General to explain the circumstances. Such meeting took place soon thereafter and is described further below.
74. At the point of Chile's disqualification request — August 2005 — the Tribunal was already well into its third year of deliberations following the final hearing held in May 2003, a delay that was unprecedented in ICSID history. As it turned out, there was no immediate prospect, even at that point, of conclusion of the proceedings: during the disqualification phase it became revealed that following the distribution of the new and opposite draft award in July 2005, the Tribunal had scheduled another round of deliberations, which had not yet been held. Moreover, in such deliberations at best the Tribunal would have agreed upon a *jurisdictional* decision. This meant that the entirety

of deliberations on the issue of responsibility (and, if necessary, of damages) and the drafting of an award on the merits issues still lay in the future. This in turn suggested that the award — already the subject of a record delay — likely would have been delayed by at least another year or more.

75. **Resignation of Arbitrator G. Leoro Franco.** On 26 August 2005, arbitrator Mr. Leoro Franco resigned from the Tribunal. Like Mr. Rezek before him, he cited as a motive only a loss of confidence in him by one of the parties to the arbitration.
76. **High Level Chilean Delegation Meeting at ICSID.** On 2 September 2005, the then-Minister of Economy of Chile, Jorge Rodríguez Grossi, accompanied by the Ambassador of Chile to the United States Andrés Bianchi, Ministry of Economy General Counsel Mr. Claudio Castillo Castillo, and outside counsel Mr. Jorge Carey, met with the then-ICSID Secretary General, Mr. Roberto Dañino, in Washington. The contents of such meeting are memorialized in a letter subsequently sent to the parties by Mr. Dañino.
77. **Disqualification of Arbitrator M. Bedjaoui.** On 21 February 2006, following a formal consultation by ICSID with the Permanent Court of Arbitration in the Hague, ICSID granted the Republic's request for the disqualification of Mr. Mohammed Bedjaoui as arbitrator — the first (and only) such disqualification in ICSID history. At the same time, ICSID rejected the Republic's request for the disqualification of Mr. Lalive.
78. **Designation of Arbitrator M. Chemloul.** On 31 March 2006, as a replacement for the disqualified arbitrator, the Claimants appointed as their new party-appointed arbitrator Mr. Mohammed Chemloul, who, like Mr. Bedjaoui, was an Algerian national. (The significance of the Algerian connection to the Claimants is explained *infra* in Section IV.)

79. **Designation of Arbitrator E. Gaillard.** On 25 April 2006, pursuant to Rule 8(2) of the ICSID Arbitration Rules, Messrs. Lalive and Chemloul decided not to accept Mr. Leoro Franco's resignation, as a result of which the responsibility for designating his replacement devolved upon ICSID.
80. On 6 June 2006, ICSID notified the parties of its intention to nominate Mr. Emmanuel Gaillard of France as Mr. Leoro Franco's replacement.
81. On 22 June 2006, the Republic, concerned about Mr. Gaillard's role as counsel to Sonatrach — the Algerian oil company, of which Claimants' new party-appointed arbitrator Mr. Chemloul had been General Counsel — sent a written communication to ICSID inquiring whether Mr. Gaillard's links to Sonatrach might not impair his impartiality and objectivity in this matter.
82. Mr. Gaillard did not respond, and ICSID, for its part, on 11 July 2006 informed the parties that it had received the Republic's 29 June 2006 communication, but that the President of the World Bank Administrative Council had selected Mr. Gaillard as an arbitrator and would proceed to request his acceptance.
83. **Reconstitution of Tribunal.** On 14 July 2006, ICSID informed the parties that the Tribunal had been reconstituted, with the following members: Pierre Lalive (Swiss) (President); Mohammed Chemloul (Algerian); and Emmanuel Gaillard (French) (hereafter, "the Fourth Tribunal").
84. Thus, almost 9 years after the filing of the arbitration request, the Tribunal now had two new members.

85. **Procedural Debate Concerning Resumption of Proceedings.** On 16 August 2006, to ensure its right to an adequate defense (and despite the possible additional delay that it could entail, the Republic asked in writing that, in light of the fact that there were two new arbitrators, the parties be granted the opportunity to make new written submissions and have a new hearing (as had been done when Mr. Lalive replaced Mr. Rezek, occasion on which there had been only one rather than two new arbitrators on the Tribunal).
86. On 13 September 2006, the Tribunal rejected the Republic's request for new written pleadings, but agreed to have one more hearing, solely limited however to specific questions that the Tribunal was to pose to the parties in writing and in advance of the hearing.
87. On 13 September 2006, the Tribunal also distributed to the parties the *second* draft jurisdictional decision that had been prepared by the Third Tribunal (*i.e.*, the one that purported to rule *against* Chile).
88. On 27 September 2006, the Republic asked in writing that, given the foregoing, the Tribunal also distribute to the parties the *first* draft award of the Third Tribunal (*i.e.*, the one that purported to rule in favor of Chile). Further, the Republic asked the Tribunal to allow both jurisdictional and merits issues to be discussed at the hearing. Finally, the Republic reiterated its request to allow the parties to make new written submissions.
89. **Claimant Disclosure of Confidential Documents.** On 27 September 2006, following repeated disclosures by the Claimants to the press of confidential written records of the arbitral proceedings, the Republic requested that the Tribunal order that Claimants suspend internet publication of the documents of the arbitration. (Claimants had, for instance, published on their website the draft award favorable to the Claimants that had

been circulated by Mr. Lalive on 13 September 2006; in addition, they had previously also published a sizeable portion of the arbitral case file, including confidential documents such as correspondence between the parties; ICSID correspondence; letters from the Tribunal; letters submitted by Chile; hearing transcripts; Procedural Orders; and Claimants' pleadings). As discussed below, this request was rejected.

90. On 2 October 2006, the Tribunal distributed to the parties a narrow list of five specific questions to be addressed at the hearing to be held in January 2007, all of them jurisdiction-related (namely, questions concerning: nationality under the ICSID Convention, nationality under the BIT, nationality under Chilean law, *ratione temporis* jurisdiction, and the MFN clause of the BIT).
91. On 24 October 2006, in Procedural Order No. 13, the Tribunal rejected all of the Republic's procedural requests mentioned in paragraph 88 above. The Tribunal's communication appeared disproportionately aggressive, prompting a letter dated 17 November 2006 by the Republic expressing concern about the "caustic" tone of such communication, and about whether it might reflect an inability by the Tribunal members to maintain impartiality following the bitter disqualification proceedings.¹²
92. **The Fourth Jurisdictional Hearing.** On 15-16 January 2007, the Fourth Tribunal held its final hearing in Paris (hereafter, "Fourth Jurisdictional Hearing").
93. Prior to the hearing, the Tribunal had instructed the parties that they could address only the issues on the list that it had distributed in advance to the parties. Despite the fact that such issues related only to jurisdictional matters, and that the Tribunal had explicitly

¹² Even during the disqualification phase, the Republic had expressed concern about what seemed disproportionately vehement and aggressive communications by Mr. Lalive in response to Chile's challenge.

rejected the Republic's earlier request for the hearing to include merits issues, the Tribunal allowed the Claimants to address at some length at the hearing issues that pertained solely to the merits. The Republic objected to this at the hearing but was overruled.

94. Far more importantly (and as will be explained in detail below), at the Paris hearing the Tribunal in essence allowed the Claimants to assert a new BIT claim on the last day of the last hearing of a 10 year-long arbitration. The Republic never had the opportunity to respond to such claim, which is especially significant insofar as that claim was later to become one of only two on which the Tribunal based its ruling against the Republic on the issue of responsibility.
95. At the conclusion of the Paris hearing, the Republic asked that the parties be granted the opportunity to submit their "notes de plaidoirie," but the Tribunal rejected this request.
96. **The Award.** On 8 May 2008, almost 16 months after the Fourth (and final) Jurisdictional Hearing, the Fourth Tribunal rendered its Award.
97. In the Award, the Tribunal rejected all of the Republic's jurisdictional objections, and concluded moreover that Chile had violated the BIT (a) by committing a "denial of justice" and (b) by discriminating against Claimants, in violation of the "fair and equitable treatment" clause of the BIT. (These determinations are further discussed below.) The Award also granted the Claimants an amount of US\$10 million in damages, plus interest and part of the costs of the arbitral proceeding. Finally, the Award imposed a deadline of 90 days for the Republic to enforce the Award.

98. **Claimants' Request for Revision of the Award.** On 2 June 2008, the Claimants submitted to ICSID a Request for Revision of the Award. At the same time, however, they evidently provided a copy of their Request to the press, for it was published immediately on the University of Victoria website (<http://ita.law.uvic.ca/documents/PeyRevisionSPA.pdf>). The Republic first learned of the existence of the Request for Revision from a journalist who called one of the Republic's attorneys on 2 June 2008 to ask for comments on the new filing. The Request for Revision was then received by the Republic from ICSID the following day, 3 June 2008. Thus, due to the Claimants' disclosure, the public worldwide had had access to the Claimants' Revision Request before the Republic had even received it from ICSID.
99. In their Request for Revision, the Claimants asked that the amount of damages in the Award be elevated from the figure of US\$10 million plus interest and costs that had been awarded to them in the 8 May 2008 Award, to a figure of almost US\$800 million. This figure far exceeds the approximately US\$515 million Claimants had sought in their First Merits Memorial, a demand they had subsequently reduced in their Second Merits Memorial to US\$397 million.
100. On 17 June 2008, ICSID registered the Claimants' request for Revision of the Award. On 20 June 2008, ICSID notified the parties that the Revision Tribunal had been constituted, with the same members of the Tribunal that had issued the Award of 8 May 2008 (*i.e.*, Messrs. Lalive, Chemloul, and Gaillard).
101. **Republic's Request for Stay of Enforcement of the Award.** On 16 July 2008, the Republic submitted a letter asking that, pursuant to Article 51(4) of the ICSID Convention, the Tribunal stay enforcement of the Award of 8 May 2008 until the

Revision Request was decided upon, or alternatively, for an interim period of at least 30 days. The purpose of this alternative request was to enable the Republic to have the benefit of the full 120 days allowed by the ICSID Convention to prepare an annulment petition, which — barring a stay — would not be possible due to the 90-day enforcement deadline that had been established by the Tribunal in its Award.

102. **Renewed Request for Raise in Arbitrator Fees.** On 1 August 2008, with the Republic’s request for a stay of enforcement still pending and the deadline for enforcement of the Award (6 August 2008) fast approaching, the President of the Tribunal requested another raise in his arbitrator fees, this time from his existing rate of US\$4,000/day to the proposed rate of US\$10,000/day — a 150% increase. The Republic did not respond immediately, opting instead to consider the matter.
103. Also on 1 August 2008, Claimants replied to the Republic’s 16 July 2008 request for a stay of enforcement, opposing the request.
104. On 5 August 2008 the Tribunal granted the Republic’s request for a stay of enforcement.
105. **Deadline for Republic’s Response to Revision Request.** In a letter dated 8 August 2008, the Tribunal proposed dates for the first session of the Revision Proceeding, noting that the purpose of such session was “above all to agree upon a calendar for the written submissions and a hearing” In the same letter, the Tribunal also proposed certain procedural dates, suggesting a deadline of late October 2008 for the Republic’s main written submission, and inviting the parties’ views.
106. In a letter dated 12 August 2008, and in reliance on the Tribunal’s own statement in its 8 August letter, the Republic conveyed its belief that the first session would be the

appropriate context in which to address the deadlines and other procedural issues, and accordingly did not comment on the specific dates prepared by the Tribunal.

107. The Claimants for their part, by letter also dated 12 August 2008, responded to the proposed dates by requesting *inter alia* that the Republic's deadline be shortened to 15 September 2008.
108. By letter of 15 August 2008, the Republic rejected the President's request of 1 August 2008 for an increase in fees.
109. By letter dated 25 August 2008, the Republic informed the Tribunal that it did not accept the assertions in Claimants' letter of 12 August, and again reserved its right to opine fully on procedural issues at the upcoming session.
110. In a letter also dated 25 August 2008, the Claimants insisted on its proposed 15 September 2008 deadline for the Republic's response.
111. On 26 August 2008, the Republic conveyed its disagreement with the Claimants' assertions in their 25 August 2008 letter, particularly with regard to the procedural calendar, and reiterated — for the third time — its intention to articulate its views on such subjects at the impending session.
112. Notwithstanding such indications from the Republic, and despite the Tribunal's written statement that the purpose of the first session would be "above all" to establish the procedural time limits, in a letter dated 29 August 2008 the Tribunal proceeded to adopt the Claimants' proposal to change the Republic's deadline to 15 September 2008. Thus, prior to the first session with the parties, and without having heard the views of the Republic either on the subject of the number of written submissions in the proceeding or

the deadlines for such pleadings, the Tribunal had shortened the Republic's deadline from 8 weeks to 2 weeks.

113. On 3 September 2008, the Republic submitted a letter pointing out the unfairness of such decision and requesting reconsideration, particularly in light of the fact that the Republic had not yet had an opportunity to be heard on the subject, as required by the ICSID rules.
114. On 5 September 2008, the Republic filed the present Annulment Petition, as it prepared also for the impending 10 September 2008 session in the Revision Proceeding and as it drafted its response to the Revision Request (which, as of the time of submission of the present Annulment Petition, is still due 15 September 2008).

IV. FACTUAL BACKGROUND

115. **Who Is Mr. Víctor Pey Casado?** Claimant Víctor Pey Casado was born in Madrid, Spain on 31 August 1915, and he lived in Spain until the Spanish Civil War.
116. In 1939, Chile welcomed thousands of refugees from that war, including Mr. Pey, who arrived in Valparaiso, Chile on 3 September 1939, at age 24, on a refugee ship called *The Winnipeg*. As described below, Mr. Pey was to settle in Chile and establish deep personal and professional roots in Chile for the following 34 years.
117. He worked initially as a contractor and engineer in Valparaiso. Sometime thereafter, Mr. Pey requested permanent resident status in Chile, which was granted to him on 14 June 1945, by means of Supreme Decree N° 3071.
118. On 18 February 1953, Mr. Pey married his first wife (a Chilean national) in Chile. On 28 December 1953, Mr. Pey's first daughter was born in Santiago. At some point thereafter,

- Mr. Pey married for a second time, again to a Chilean, with whom he had a second daughter (also born in Chile).
119. On 1 July 1958, in a letter addressed to the President of Chile, Mr. Pey requested that he be granted Chilean nationality, pursuant to a Dual Nationality Treaty between Spain and Chile that was about to enter into force. The Dual Nationality Treaty subsequently entered into force, on 28 October 1958.
 120. On 11 December 1958, Mr. Pey was formally granted Chilean nationality, by virtue of Supreme Decree N° 8054. From that date on, his primary nationality was the Chilean one, in accordance with the provisions of the Dual Nationality Treaty, although he retained his Spanish nationality as a secondary nationality.
 121. From 1940 to 1973, Mr. Pey worked as a Professor of Industrial Engineering at the University of Santiago, and was also employed by the Universidad Técnica Estatal between 1951 and 1965.
 122. Mr. Pey resided in Chile uninterruptedly from September 1939 until October 1973.
 123. **The “El Clarín” Newspaper and Related Companies.** In 1955, Chilean nationals Darío Sainte Marie and Merino Lizana established the “El Clarín” newspaper in Chile, originally under the name Sociedad Impresora Merino y Cía. Ltda., renamed “Empresa Periodística Clarín Ltda.” (“EPC” or “El Clarín”) in 1960.
 124. In 1967, a company called Consorcio Publicitario y Periodístico (hereafter “CPP”) was constituted in Chile, with Darío Sainte Marie as the controlling shareholder. On 6 May 1968, CPP acquired a controlling interest (95.5% of shares) in EPC. On 27 November 1972, CPP acquired an additional 3.5% stake in EPC, increasing its interest to 99% of the

shares outstanding. (The issue of ownership of the CPP shares and the relevant transactions were to become among the most contested issues in the arbitration.)

125. **The Political Context.** Salvador Allende, leader of Chile’s Socialist Party, was the candidate of a left-wing coalition party called Unidad Popular in the Chilean presidential elections of 1970. On 4 September 1970, Salvador Allende was elected President of Chile.
126. **Víctor Pey’s Role in “El Clarín.”** In 1969, Mr. Pey began advising Mr. Sainte Marie on the planning and construction of facilities for the “El Clarín” newspaper, which was to become closely aligned ideologically with President Allende when he began his presidency in 1970. (At that time, both Mr. Sainte Marie and Mr. Pey were personal friends of Mr. Allende).
127. In 1972 Darío Sainte Marie moved to Spain. Mr. Pey’s involvement in “El Clarín” continued, and he became Chairman of the Board of CPP.
128. Starting in 1972, there were a series of transfers of shares of CPP. The timing and participants in the relevant transactions were the subject of sharp dispute and lengthy debate in the ICSID arbitration.
129. In the arbitration, Mr. Pey was to claim that he himself — using his own funds — had purchased the entirety of the CPP shares from Darío Sainte Marie in 1972.¹³ Chile, for its part, contended that a majority of the shares had been purchased from Darío Sainte Marie by two friends of President Allende named Jorge Venegas and José Emilio

¹³ As discussed below, Mr. Pey claimed in the proceedings to have paid out of his own personal resources to Mr. Sainte Marie for the CPP shares a total amount of US\$1.28 million, which is a substantial sum even now, but especially so in 1972. However, Mr. Pey had not been known at that time — or at any time — to possess significant personal resources (as demonstrated by documentation contained in the record).

González, and that the remainder had been in the possession of Mr. Sainte Marie and another gentleman named Ramón Carrasco Peña. Chile further argued that Mr. Pey had been a key managerial figure of “El Clarín” and an intermediary in the sale of CPP shares, but never the owner of “El Clarín” or of CPP shares. (As noted below, Messrs. Venegas and González later testified in court proceedings in Chile in 1975 that they had purchased the CPP shares at President Allende’s request, and that another friend of Mr. Allende’s — Mr. Víctor Pey Casado — had served as the intermediary for the relevant transactions, since Pey Casado was managing the newspaper and Mr. Sainte Marie was living abroad.)

130. On 13 May 1972, Mr. Pey met with Mr. Sainte Marie in Estoril, Portugal, where they signed a document entitled “Estoril Protocol”, which the Claimants characterized in the arbitral proceeding as a contract for the purchase by Mr. Pey of Mr. Sainte Marie’s interest in CPP of the totality of the CPP shares — 40,000 shares (even though the “Protocol” did not anywhere state that it was a sale contract, nor did it make any reference to Mr. Pey Casado as a buyer).
131. The payment for the alleged purchase by Mr. Pey of the shares was completed primarily through a series of wire transfers. Claimants alleged that an initial payment of US\$500,000 had been sent on 29 March 1972 to Mr. Sainte Marie through the London branch of Manufacturers Trust Co. from an account in a bank called *Zivnostenska Banka, N.C.*, which was located in the Soviet-bloc country then known as Czechoslovakia. That payment was received in Mr. Sainte Marie’s account in *Banco Hispano Americano de Madrid* on 4 April 1972, nearly six weeks before the “Estoril Protocol” was signed.

132. The “Estoril Protocol” of 13 May 1972 made reference to a payment of US\$500,000; although Claimants provided evidence of the transfer itself, they never presented any documentation suggesting that Mr. Pey was the owner either of the account in *Zivnostenska Banka, N.C.* or of the account in Manufacturers Trust Co.¹⁴ The real source of these funds remains unknown to this day.
133. On 3 October 1972, Mr. Sainte Marie received an additional sum of US\$780,000 through a series of wire transfers originating from Mr. Pey’s account in the Swiss bank *Bank für Handel und Effekten*. The evidence presented in the arbitration showed, however, that Mr. Pey had opened his account with the *Bank für Handel und Effekten* on 25 September 1972, and that the very next day, 26 September 1972, an amount of US\$780,000 had been wired into that account from an account in the *Banco Nacional de Cuba*.
134. The Claimants never revealed the origin of the funds transferred from the *Banco Nacional de Cuba*. As with the account in the Czechoslovakian bank, Claimants did not prove — or even allege — that Mr. Pey owned the Cuban bank account from which the funds originated. The source of those funds, too, remains unknown.
135. Thus, of all the bank accounts involved in the wire transfers from Czechoslovakia and Cuba pursuant to which Mr. Pey claims to have purchased “El Clarín,” the only account that Mr. Pey even claimed to be his own was the transit account at the *Bank für Handel und Effekten* that had been opened one day before the transfer from the *Banco Nacional de Cuba*.

¹⁴ As mentioned earlier, the Tribunal rejected the Republic’s request for documentation from the Claimants showing ownership of the relevant bank accounts.

136. On 2 October 1972, in Geneva, Mr. Pey unilaterally signed a document in which he declared to have received 12,000 of Mr. Sainte Marie's 40,000 shares of CPP, and indicated that he would hold them pending the fulfillment of certain conditions.
137. On 6 December 1972, Mr. Pey resigned as Chairman of the Board of CPP. On 14 December 1972, Mr. Pey also resigned from his position as member of the Board of Directors of CPP.
138. **The Military Coup D'Etat of 11 September 1973 and Military Takeover of "El Clarín."** On 11 September 1973, a military coup toppled President Allende, and a four person Military Junta, which included General Augusto Pinochet, assumed the reins of power. The military moved swiftly to arrest individuals perceived to be sympathizers of President Allende or of socialist or left-wing causes, and to physically take over entities associated with the Socialist Government and socialist causes.
139. Thus, on the day of the coup, military officials arrived at the premises of "El Clarín" and took control of the property, in the process seizing documents, including documents located in Mr. Pey's office there. Mr. Pey was not present at "El Clarín" at the time, having gone into hiding when the news of the coup broke. (We describe further below Mr. Pey's departure from Chile.)
140. **Decrees Relevant to the Confiscation of "El Clarín" and Related Legal Proceedings in Chile.** On 13 October 1973, the Military Government issued Decree Law No. 77, which dissolved all Marxist entities and their affiliates, and confiscated their assets.
141. On 3 December 1973, the Government issued Supreme Decree No. 1,726, in order to implement Decree Law No. 77.

142. On 21 October 1974, the Government issued Exemption Decree No. 276, which specifically applied Decree Law No. 77 to CPP and EPC and declared to be “under investigation” assets held by Darío Sainte Marie, Osvaldo Sainte Marie, Víctor Pey Casado, Mario Osses González, Emilio González, Jorge Venegas and Ramón Carrasco, pending determination of the relevant ownership rights.
143. Subsequently, Decree 165 of 10 February 1975 formally dissolved CPP and EPC, confiscating the assets of those companies. It was this 1975 decree that transferred the property rights over “El Clarín” to the Chilean State, thereby formalizing the confiscation that had occurred *de facto* on 11 September 1973.
144. On 24 April 1975, Supreme Decree 580 applied Decree Law No. 77 to Mr. Pey and confiscating a savings account owned by him.
145. On 25 November 1977, Supreme Decree No. 1200 confiscated all assets, rights and shares held by Mr. Pey, naming specifically only certain savings certificates, as well as cash, rights and shares related to a company called Socomer Ltda. (Notably, this decree made no reference to the CPP shares that Mr. Pey later claimed to have owned.)
146. On 8 January 1979, Supreme Decree No. 16 liberated Mr. Pey’s assets relating to Socomer Ltda., thereby restoring his control over them. (Once again, such decree did not make any reference to the CPP shares.)
147. Following the resumption of democracy in Chile in 1990, Mr. Pey initiated a series of legal proceedings in Chile relating to the above decrees and the confiscations during the military period.

148. Thus, in 1994 he filed a petition in the Eighth Criminal Court in Chile for the return of the documents related to CPP that had been seized from Mr. Pey's office at "El Clarín" by the military in 1973.
149. On 3 March 1995, Mr. Pey filed a judicial action before the 21st Court of Santiago for the annulment by the judiciary of decrees 276, 580 and 1200 mentioned above, seeking restitution value and compensation for consequential damages.
150. On 27 April 1995, the Eighth Criminal Court ordered that the documents seized from "El Clarín" be returned to Mr. Pey. (In the relevant order the Court did not purport to pronounce itself on the issue of ownership of "El Clarín," but rather simply directed — in a one-sentence ruling — that the documents seized from Mr. Pey's offices at "El Clarín" be returned to him).
151. On 4 October 1995, Mr. Pey filed suit in the First Civil Court in Santiago, claiming a right to restitution or indemnification for a Goss printing machine which "El Clarín" allegedly had acquired before the 1973 confiscation of "El Clarín" and which had been seized during such confiscation.
152. On 13 January 1997, the 21st Court of Santiago ruled in Mr. Pey's favor on his request for the annulment of decrees 276, 580 and 1200, and ordered compensation to Mr. Pey. This judgment was confirmed by the Chilean Supreme Court on 14 May 2002. On 17 December 2002, Chile's Vice Minister of Justice issued a resolution ordering payment to Mr. Pey of a specified sum in Chilean pesos plus interest, equivalent to US\$103,599.28. The National Treasury effected such payment on 24 December 2002.

153. **Testimony of Venegas and González in 1975 Tax Proceedings.** In 1975, the Internal Tax Service in Chile had initiated an investigation against Darío Sainte Marie, Osvaldo Sainte Marie, Ramón Carrasco Peña, Víctor Pey Casado, José Emilio González, and Jorge Venegas, as well as two accountants for CPP and EPC, relating to potential tax violations committed by CPP and EPC. During the relevant proceedings, Mr. Venegas and Mr. González provided testimony in which they declared that they had purchased shares in CPP in 1972. They also provided evidence that they were still the legal owners of those shares on 11 September 1973.
154. This testimony was provided to the authorities during the early and highly repressive period of the military dictatorship. Since in their declarations they were admitting ownership of shares in an organization that the military authorities had deemed to be “Marxist”, they did so at considerable personal risk. For that reason, they had no incentive at all to falsely claim ownership of “El Clarín,” and to the contrary, significant motivation to deny ownership and attribute ownership to others if they were not themselves the genuine owners. However, in their declarations, Mr. Venegas and Mr. González in fact recognized their ownership of CPP, mentioning in their descriptions of the relevant transactions that Mr. Pey had served the role of intermediary with the seller, Mr. Sainte Marie, who was abroad at the time.¹⁵
155. **Víctor Pey’s Departure from Chile in 1973 and Subsequent Travels.** On 27 October 1973, following the coup, the Chilean authorities granted Mr. Pey safe passage to leave Chile and he departed for Venezuela.

¹⁵ It bears noting that it was, among others, the heirs of these two gentlemen — Messrs. Venegas and González — who were later compensated by the Chilean State by means of Decision 43 of the Ministry of National Assets. As mentioned, Decision 43 was central to the Tribunal’s merits ruling, and is discussed *infra*.

156. It is significant to note, in connection with the departure from Chile of thousands of Chileans during this period, that a good number of supporters of the Allende Government ended up going into exile in Algeria, whose ruler Houari Boumédiène and government at the time were especially sympathetic to President Allende. Mr. Allende visited Algeria during his Administration, in a widely publicized trip that included a visit to Moscow.
157. On 23 November 1973, Mr. Pey traveled to Lima, Peru. In 1974, Mr. Pey traveled back and forth from Peru to Colombia, Germany, the United States and Spain. On 31 May 1974, he traveled to Spain.
158. At some point prior to 29 November 1974, Mr. Pey returned to Venezuela. On 25 June 1979, the Spanish Consulate in Lima, Peru issued Mr. Pey a Spanish passport, and in 1984, the same Consulate granted him a second Spanish passport.
159. Between 1974 and 1986, according to immigration records provided by the Government of Peru, Mr. Pey entered and departed Peru with 18 different passports.
160. **Víctor Pey's Return to Chile in 1989.** On 4 May 1989, shortly before the formal restoration of democracy in Chile, Mr. Pey returned to Chile for the first time since his departure on 1973. According to the Claimants, the purpose of his visit was simply to locate the shareholding documents of CPP which were confiscated in September 1973. However, in reality he returned to Chile to settle, live and work as a Chilean. Within a few years, Mr. Pey had lived in Las Condes, then in Vitacura and later in communities in the metropolitan region of Santiago; had worked for his brother in Arica, Chile; and had claimed Chilean social security benefits.

161. On 5 January 1991, Mr. Pey requested and received from the Chilean Civil Registration and Identification Service a national identity card, valid for 10 years.
162. On 20 February 1991, Mr. Pey requested a Chilean passport from the Chilean Civil Registration and Identification Service, which was granted on 22 February 1991.
163. On 20 June 1991, Mr. Pey was granted a driver's license in Las Condes, Chile.
164. On 5 July 1991, Mr. Pey traveled to Venezuela and the United States using his newly issued Chilean passport.
165. On 17 February 1992, Mr. Pey indicated that he was a Chilean national on the electoral registry in Vitacura, in the metropolitan region of Santiago, Chile, and noted his residence as Vitacura 6265, Torre C, Departamento 1401.
166. On 26 August 1992, Mr. Pey applied for Chilean social security benefits. In his request, Mr. Pey attached a copy of his work contract dated 1 August 1992 which stated that he was a Chilean national.
167. On 25 May 1992, Mr. Pey applied in writing for benefits that had been established by a Chilean law promulgated in 1990 for the purpose of assisting Chilean nationals who returned to Chile after being in exile during the military period. He later received benefits under this law including customs exemptions.
168. **Creation of Fundación Presidente Allende.** On 6 October 1989, Mr. Pey presented himself before a notary public and granted a power of attorney to Mr. Juan Garcés for the purpose of establishing a Spanish foundation to be known as Fundación Presidente Allende. Subsequently the Fundación Presidente Allende was created as an establishment under Spanish law before a notary public in Madrid on 16 January 1990.

The objective of the Fundación was to “promote the liberties and cultural, civic, democratic, social and economic rights of the people of Chile and Hispano-American people as well, in accordance with the values and ideals supported by Salvador Allende.”

169. The Articles of Constitution of the Fundación Presidente Allende identified Mr. Pey as a Chilean and Spanish dual-national, specifically citing his Chilean and Spanish identification numbers.
170. By means of a document signed in Miami on 6 February 1990, Mr. Pey purported to donate 90% of his alleged stock holdings in CPP and EPC to the Fundación Presidente Allende.
171. The Chile-Spain BIT was signed on 2 October 1991, and entered into force on 29 March 1994.
172. **Víctor Pey’s Efforts to Shed his Chilean Nationality.** On 10 December 1996, Mr. Pey sent a written communication to the Chilean Department of Immigration and Migration asserting that he had resided in Madrid since 1974. Mr. Pey later argued that this document constituted the first of three alleged renunciations of his Chilean nationality. However, the document itself had referred only to a change of residence, not to any renunciation of Chilean nationality.
173. On 7 January 1997, Mr. Pey sent a letter to the Spanish Consulate in Santiago, also claiming that he had resided in Madrid since 1974. Again, this letter did not make any reference to renunciation. Nevertheless, Claimants in the arbitral proceeding were to characterize this letter as the second of alleged three renunciations by Mr. Pey of his Chilean nationality.

174. On 13 March 1997 — only a few months prior to the filing of the ICSID claim — co-Claimant President Allende Foundation amended its bylaws, retaining intact however the reference therein to Mr. Pey’s dual Spanish-Chilean nationality.
175. On 15 April 1997, Spain’s Secretary of State for International and Iberoamerican Cooperation rejected a request submitted by Mr. Pey for diplomatic protection by Spain. Among other things, the Secretary of State rejected Mr. Pey’s claim that he had renounced his Chilean nationality.
176. On 17 April 1997, Spain’s Director of International Economic Relations separately also rejected Mr. Pey’s request for diplomatic protection, for reasons similar to those articulated by the Secretary of State.
177. On 21 May 1997, Mr. Pey traveled to Spain from Chile, by way of the United States, using his Chilean passport. On 15 September 1997 — less than two months before filing his ICSID arbitration request — Mr. Pey traveled to Argentina from Chile once again using his Chilean passport.
178. On 16 September 1997, Mr. Pey signed a document at the Spanish Consulate in Mendoza, Argentina that characterized his 10 December 1996 letter to the Chilean Department of Immigration and Migration as a renunciation of Chilean nationality, and that purported to ratify such renunciation. In the arbitration proceedings, Mr. Pey characterized this as the third of his three alleged renunciations.
179. This 16 September 1997 document was the very first document in which the word “renunciation” was even mentioned by Mr. Pey. It never became clear in the proceedings why Mr. Pey had chosen a *Spanish* Consulate in *Argentina* to renounce his Chilean

nationality, or why he believed that an attempted renunciation in that manner could possibly have any legal effect in Chile (particularly since the alleged renunciation had not simultaneously been conveyed to any *Chilean* authority). The Spanish consular official had done no more than to authenticate Mr. Pey's signature on the manifestation, and there is no proof that the alleged renunciation document signed at the Spanish Consulate in Argentina was in any way registered or ratified by Chilean authorities (even if it had been, as explained *infra*, such registration or ratification would not have been legally valid under Chilean law).

180. On 3 November 1997, Claimants Mr. Pey and the President Allende Foundation filed their arbitration request at ICSID.
181. On 24 April 1998, in a letter to the Spanish Foreign Minister, Mr. Pey's counsel stated that Mr. Pey's transfer of residence had served to renounce Mr. Pey's Chilean nationality.
182. On 7 July 1998, the Spanish Embassy in Santiago forwarded to Chile's Minister of Foreign Affairs a copy of Mr. Pey's counsel's 24 April 1998 letter.
183. On 10 July 1998, Chilean authorities received the Spanish Embassy's 7 July 1998 letter. This was the very first time that the Republic had been notified of Mr. Pey's attempt to renounce his Chilean nationality — over 7 months *after* Mr. Pey had filed his ICSID Request for Arbitration.
184. On 4 August 1998 — more than 3 months after the date of registration of the arbitration and 8 months after Mr. Pey filed his ICSID Request for Arbitration — on the basis of Mr. Pey's written communications, a low-level employee of the Civil Registry entered some

hand-written notes on Mr. Pey's registration card, noting that he was a foreigner because he had renounced his Chilean nationality.¹⁶

185. On 3 June 1999, after uninterruptedly since 1990 referring in its own bylaws to Mr. Pey as a dual Chilean-Spanish national, Claimant President Allende Foundation finally amended the bylaws to remove the reference to Mr. Pey's dual nationality — more than a year *after* the date of registration of the Claimants' Request for Arbitration.
186. **Decision 43 of the Ministry of National Assets (2000).** On 23 July 1998, Chile promulgated Law No. 19.568, which was designed to compensate those persons who had suffered confiscations of property at the hands of the military government. The compensations were to be effected pursuant to an administrative process conducted by the Ministry of National Assets of Chile.
187. At the time the law entered into force, Mr. Pey had already submitted his BIT claim to ICSID, for which reason — as he himself stated in a letter to the Chilean Government — he was barred by the BIT from filing a claim under the new law for the confiscation of CPP. In this letter, Mr. Pey expressly informed the Republic that he would not be an applicant under the law.
188. Subsequently, the successors of several individuals — Darío Sainte Marie, Ramón Carrasco Peña, Emilio González and Jorge Venegas — presented claims under the new law for the confiscation of their shares of CPP.
189. After review and investigation of the claims filed by the above-named individuals, on 28 April 2000, the Chilean Ministry of National Assets issued Decision 43, in which it

¹⁶ This unauthorized bureaucratic action was later disavowed by the Civil Registry.

authorized compensation to the successions of those four individuals, as they had proven to be the genuine owners of CPP. The Decision also partially denied the applications of two other applicants. Since Mr. Pey had not filed any application, Decision 43 did not mention him.

* * *

190. The foregoing procedural and factual background is provided in some detail in order to place in context the deficiencies in the Award and arbitral process that motivate the present Request for Annulment, and to facilitate from the outset an understanding of such deficiencies by the *ad hoc* Committee. We shall now address the 8 May 2008 Award.

V. GROUNDS FOR ANNULMENT DUE TO DEFICIENCIES IN THE AWARD

191. As mentioned earlier, in its 8 May 2008 Award, the Tribunal decided to reject all of the Republic's jurisdictional objections, to impose responsibility on the Republic for certain alleged violations of the Chile-Spain BIT, and to award the Claimants damages of US\$10 million, plus certain costs, plus interest. The Award also imposed a deadline of 90 days for the Republic to comply with the terms thereof.

192. The Award is deeply flawed for a number of reasons, which reveal that the Tribunal:

- manifestly exceeded its powers, including among other things by failing to apply or entirely disregarding the proper law, by failing to identify and apply the appropriate burden of proof on core jurisdictional issues as well as merits issues, and more generally, by asserting jurisdiction over claims that were outside the scope of its competence (as a result of all of which the Award is annulable under Article 52(1)(b) of the ICSID Convention);
- failed to explain its reasoning with respect to a number of key determinations, provided inconsistent or contradictory reasoning with respect to others, and failed to deal at all with certain questions submitted (all of which render the Award annulable under Article 52(1)(e) of the ICSID Convention); and
- seriously departed from a fundamental rule of procedure, including among other things, by making procedural decisions and conducting the proceedings in a way that deprived the Republic of due process — for example, by denying all of the Republic’s discovery requests while at the same time granting all of the Claimants’ requests; by depriving the Republic of the opportunity to be heard on ultimately dispositive merits issues as well as other issues; by precluding the Republic from ever cross-examining the Claimants’ key fact witness, who was Mr. Pey himself; and by reversing the burden of proof on key issues (for which reasons the Award should be annulled pursuant to Article 52(1)(d) of the Convention).

193. The principal conclusions reached by the Tribunal in the Award, and the specific deficiencies in the Award that render it annulable, are identified briefly below, and will be explained in more detail at a subsequent stage in the annulment proceedings.

A. The Jurisdictional Determinations in the Award

194. The Tribunal (as variously constituted) struggled throughout the ten years of proceedings with the issue of its competency to address the claims asserted and of ICSID's jurisdiction over such claims. Ultimately, in its 8 May 2008 Award, the Tribunal rejected all of the Republic's jurisdictional objections.

(1) Nationality

195. From the beginning of the arbitral proceedings, Chile objected vociferously that the arbitral Tribunal lacked competence because of Mr. Pey's dual Spanish-Chilean nationality. As it happens, the Tribunal at least once — and possibly twice — during the proceedings reached the conclusion that the case should be dismissed for lack of jurisdiction on the basis of Mr. Pey's nationality. Such conclusion never yielded a corresponding award, however, due to mysterious — and ultimately unexplained — turns of events, which were alluded to above and are discussed further below.

196. The Republic had advanced two different nationally-based objections, the first of which was based on the relevant requirements of the ICSID Convention, and the second on the requirements of the Chile-Spain BIT.

197. Briefly described, in its written submissions the Republic had contended that Mr. Pey had been a dual Chilean-Spanish national uninterruptedly since 1958, which is when he voluntarily acquired the Chilean nationality after having moved to Chile from Spain at

age 24. Chile argued that since he was still a Chilean national, Mr. Pey was barred from access to ICSID pursuant to Article 25(1) of the ICSID Convention, particularly in light of Article 25(2)(a) of the Convention, which expressly forbids claims by dual nationals against one of the states of nationality (“National of another Contracting State’ . . . does not include any person who on either date also had the nationality of the Contracting State party to the dispute”).¹⁷ The phrase “either date” refers to the date of the parties’ consent to arbitration and the date of registration of the arbitration request by ICSID (hereafter, “the critical dates”).

198. In addition, the Republic had argued that even though Mr. Pey had concededly not lost his Spanish nationality when he became Chilean, his “dominant and effective” nationality at the time of the alleged investment, as well as of the confiscation of “El Clarín”, had been the Chilean nationality and that therefore he also did not qualify as a foreign investor under the BIT. The BIT defined an “investor” as a national of one of the parties “in accordance with the law of the corresponding Party.” Chilean law included a Dual Nationality Treaty between Spain and Chile, which provided that every person registered thereunder could have both nationalities, but that only one of them would be the “effective” one for legal purposes. It was undisputed that Mr. Pey had acquired the Chilean nationality pursuant to the Dual Nationality Treaty, and registered under that treaty in 1958, and that his effective nationality was the Chilean one in 1972 when the alleged investment was made, as well as on 11 September 1973, when the confiscation of “El Clarín” occurred.

¹⁷ Article 25(2)(a) states in its entirety as follows: “National of another Contracting State” means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, *but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.*”(emphasis added).

(a) Annulable Features of Award on Issues of Nationality under the ICSID Convention

199. In an effort to overcome the Republic's jurisdictional objection based on the ICSID Convention, the Claimants had argued that, prior to the critical dates for purposes of Article 25(2)(a) of the ICSID Convention, Mr. Pey had lost his Chilean nationality by virtue of: (a) the Chilean State's denial to Mr. Pey of civil and political rights following the 1973 coup, and its alleged refusal to grant him a Chilean passport; and (b) Mr. Pey's alleged voluntary renunciation of his Chilean nationality. They contended that therefore Mr. Pey had been solely a Spanish national on the critical dates, which in this case were 2 October 1997 (date of consent to arbitration) and 20 April 1998 (date of registration of the Claimants' arbitration request).
200. The Tribunal rejected the argument that Chile had deprived Mr. Pey of his Chilean nationality by denying him civil and political rights. Therefore the analysis in the Award turned on the issues of whether or not voluntary renunciation of Chilean nationality was possible, as a matter of Chilean law, and whether Mr. Pey had effectively renounced such nationality, as a factual matter.

(i) Failure to Apply Chilean Law on Issue of Voluntary Renunciation

201. The settled rule in international law — which the Tribunal acknowledged in the Award — is that the determination of who is and who is not a national of a State is a matter for that State's law, and that State's law alone. In the Award, the Tribunal therefore conceded that Chilean law — exclusively — was the applicable law for purposes of the determination of whether Mr. Pey was or was not a Chilean national:

The Tribunal considers, following the established norms of international law, that **it is under Chilean law that [the Tribunal] must examine** in the present case whether the Chilean authorities had deprived Mr. Pey Casado of his Chilean nationality, as the Claimants allege, or, if that were not the case, whether alternatively Mr. Pey Casado renounced his Chilean nationality in a valid way.¹⁸

202. Later in the Award the Tribunal further underscored the applicability of Chilean law:

Thus, the only issue that remains to be determined is whether Mr. Pey Casado's declaration and other acts amount to a renunciation of his Chilean nationality. **Given that, as we have seen, all of the issues relating to such nationality depend in principle on Chilean law, it is necessary to analyze Chilean law on this matter.**¹⁹

203. This conclusion was consistent not only with long-standing general principles of international law on the subject, but also with the Chile-Spain BIT, which as noted specifically defined an "investor" as a national "in accordance with the law" of the relevant State.

204. The Republic in its written submissions had shown how Mr. Pey had consistently described himself as a Chilean national over the years, and how — *even after the filing of his arbitration request at ICSID in 1997* — he had taken measures that *ipso facto* demonstrated his Chilean nationality, such as the acquisition and use of Chilean passports and national identity cards. Similarly, and as noted earlier, the bylaws of co-Claimant Fundación Presidente Allende continued to describe Mr. Pey as a dual national long after the ICSID arbitral claim was filed, which is especially significant not only because such Foundation was a co-Claimant in the ICSID case, but also because Mr. Pey was at that time the President of the Foundation.

¹⁸ Award ¶ 260 (emphasis added).

¹⁹ Award ¶ 295 (emphasis added).

205. More importantly, the Republic had proven in its papers that Mr. Pey could not have renounced his Chilean nationality for the simple reason that it was not and never had been possible under the Chilean Constitution — prior to the entry into force of a constitutional amendment in 1995 — for a person to voluntarily renounce the Chilean nationality.
206. The relevant provision of the Chilean Constitution, Article 11, captioned “Bases for Loss of Chilean Nationality”, specified only five grounds for loss of Chilean nationality — none of which was voluntary renunciation: (1) by naturalization in a foreign country; (2) by means of a supreme decree; (3) by means of a judicial sentence for crimes against the honor of the country or the essential and permanent interests of the State; (4) by annulment of naturalization papers; and (5) by a law revoking naturalization granted by special grace.
207. Chile presented abundant jurisprudential and doctrinal evidence — as well as the direct testimony to the Tribunal by Dr. José Luis Cea, the President of Chile’s Constitutional Court — establishing that the list in Article 11 was intended by the constitutional drafters to be an exhaustive one, and that it had subsequently been interpreted as such by the courts and publicists.
208. At the Fourth Jurisdictional hearing, held in Paris in January 2007, Dr. Cea, the President of the Chilean Constitutional Court — which is the ultimate Chilean authority on the interpretation of the Chilean Constitution and its provisions — was unequivocal in his pronouncement:

. . . I find myself with the duty to insist, to emphasize, that prior to the constitutional amendment of 2005, renunciation as grounds for loss of nationality did not exist in Chile. I will repeat that:

renunciation as grounds for the loss of nationality did not exist in Chile.

209. Dr. Cea further stressed:

That renunciation as grounds for the loss of nationality prior to the 2005 constitutional amendment did not exist in Chile is an irrefutable legal fact.

210. The non-existence of the concept of voluntary renunciation under Chilean law at the time of the initiation of the ICSID arbitration is further demonstrated by the fact that eight years *after* the initiation of Claimants' ICSID arbitration, voluntary renunciation was *added* to Article 11 of the Chilean Constitution as a *new* basis for loss of nationality pursuant to a constitutional amendment that entered into force on 26 August 2005.

211. Prior to that date, the first of the five grounds contemplated in Article 11 for loss of the Chilean nationality — namely, automatic loss upon nationalization in a foreign country — had been generating significant problems for Chileans living abroad who for practical purposes needed to obtain the nationality of their place of residence (*e.g.*, to obtain benefits), but who did not want to lose their Chilean nationality by doing so. Accordingly, the Chilean authorities decided that the automatic loss provision in the constitution should be eliminated, replacing it with a new one pursuant to which loss of Chilean nationality upon nationalization abroad would be *voluntary* rather than automatic.

212. Thus, the 2005 Constitutional amendment created an entirely new basis for loss of nationality by voluntary renunciation, which became the first on the list in the article as amended. Thus, following the amendment, Article 11 stated as follows:

Chilean nationality is lost:

1. *By voluntary renunciation before the competent Chilean authority. The renunciation only will take effect by gaining foreign nationality.*
2. By means of a supreme decree, in case of services rendered to enemies of Chile or its allies during a foreign war;
3. By annulment of naturalization papers, and
4. By a law revoking naturalization granted by special grace.²⁰

213. It should be noted that in the message by the President of the Republic to the Chilean Congress by which he formally transmitted the proposed amendment for the Congress's consideration, the President had stated:

The proposal is to replace the existing ground for loss of nationality upon acquisition of a foreign nationality with a new ground consisting of the voluntary and express renunciation of the Chilean nationality²¹

214. Accordingly, given the plain text of the relevant Constitutional article before and after the amendment, the situation was quite simple: before the amendment, there was no voluntary renunciation under Chilean law; after the amendment — which came into effect eight years after the initiation of the arbitration — for the first time voluntary renunciation became possible.

215. Thus, the settled law in Chile at the time of Mr. Pey's three alleged renunciations (which according to Mr. Pey took place in December 1996, January 1997, and September 1997, respectively) was that a Chilean national could not lose his Chilean nationality simply by attempting to voluntarily renounce it. This rule of law was plain, simple, unqualified, and uncontroversial, and no legitimate source of Chilean law had ever stated otherwise.

²⁰ Thus, the Article as amended also eliminated the third basis for loss of nationality contained in the previous version of the Article: "By means of a judicial condemnatory sentence for crimes against the honor of the country or the essential and permanent interests of the State"

²¹ Emphasis added.

216. Notwithstanding all of the foregoing, and even though the Tribunal (a) had expressly asserted in the Award that it deemed Chilean law to be the applicable law for purposes of its determination on Mr. Pey’s nationality; (b) had accepted in its Award that Mr. Pey was not deprived of his nationality by the Chilean State;²² and (c) had itself conceded in the Award that “the Chilean Constitution does not expressly contemplate renunciation as a grounds for loss of the nationality,”²³ the Tribunal nevertheless imposed its own, unsupported, interpretation of Chilean law on the subject. It proceeded to rule that it was in fact possible to voluntarily renounce the Chilean nationality; that Mr. Pey had in fact done that; and that Mr. Pey had therefore been solely a Spanish national on the critical dates for purposes of the nationality requirements of the ICSID Convention.
217. In doing so, and as further explained below, the Tribunal undertook two impermissible lines of analysis that justify annulment: First, it interpreted Chilean nationality law in terms of what it thought such law *ought* to be to render it more sensible or logical, despite clear evidence that the contents of the plain text of the relevant Chilean law were entirely different; and second, the Tribunal applied a comparative international analysis to an issue that, by its own admission, required a determination under Chilean law.
218. In the relevant part of the Award, the Tribunal stated the following main conclusion:

In the opinion of the arbitral Tribunal, the Respondent was not able to demonstrate in a convincing manner the impossibility or illegality, under Chilean law, of a voluntary renunciation of the Chilean nationality, in the absence of precise texts and pertinent jurisprudence.²⁴ Thus, with regard to the decisions of the Chilean courts that were

²² See Award ¶¶ 273-274.

²³ Award ¶ 297.

²⁴ Oddly, just one paragraph earlier in the Award, the Tribunal had itself made reference to a Chilean court case cited by the Republic in which the Chilean court had rejected “*the possibility of renouncing purely and simply to the [Chilean] nationality.*” (Award ¶ 306).

provided on the subject, none of them refers to a situation identical to that in the present controversy²⁵

219. With respect to Article 11 of the Constitution, the Tribunal asserted that it was “ambiguous” and that “there was no justification for giving a strict interpretation to Chilean law for the purpose of prohibiting a voluntary renunciation of Chilean law in the present case.”²⁶

220. The Tribunal failed to explain why it concluded that the relevant Chilean Constitutional article was “ambiguous” with respect to whether or not the list of bases for loss of nationality contained therein was exhaustive. On this point it simply declared the following, with no explanation:

The text itself of Article 11 of the Chilean Constitution is ambiguous on this issue, and does not at all permit one to affirm or postulate the alleged exhaustive nature of the enumerated bases for loss of nationality. Now, the Tribunal considers that there is no justification for effecting a strict interpretation of Chilean law for the purpose of prohibiting a voluntary renunciation of Chilean nationality in the present case.²⁷

221. Thus, the Tribunal simply ignored not only the plain terms of the relevant constitutional norm, but also all of the evidence provided to it showing that such norm was intended to be strictly construed and had in fact been so construed systematically by courts and commentators. It also directly ignored the testimony of the President of the Chilean Constitutional Court.

222. However, it is not open to an international tribunal in the face of incontrovertible evidence in support of a proposition (or as the President of the Chilean Constitutional Court characterized it, “an irrefutable legal fact”), simply to declare, *ex cathedra*, “I am

²⁵ Award ¶ 307.

²⁶ Award ¶ 308.

²⁷ Award ¶ 308.

not convinced.” But in essence that is what the Tribunal did with respect to its interpretation of Article 11 of the Chilean Constitution, and thus the Tribunal’s handling of the issue in the Award constitutes an axiomatic case of “failure to state reasons” under Article 52(1)(e) of the ICSID Convention, as well as a manifest excess of power under Article 52(1)(b).

223. Similarly baffling is the Tribunal’s handling of the 2005 Constitutional amendment that for the first time established voluntary renunciation as a basis for loss of nationality under Chilean law. The Tribunal failed to explain why the Constitutional amendment did not in and of itself constitute conclusive evidence that voluntary renunciation had not been permissible under Chilean law prior to the entry into force of such amendment in 2005. The amendment would have had no reason for being if voluntary renunciation had already existed in the Chilean legal system, as Claimants alleged and as the Tribunal concluded.
224. The Tribunal’s handling of this point was remarkable, in that it solved the problem simply by declaring it not to be a problem: “The arbitral Tribunal considers that the Chilean constitutional reform of 2005 does not constitute any modification in what regards voluntary renunciation of nationality: it has always been possible to renounce the Chilean nationality and the new article of the Constitution does nothing but confirm and define such possibility”²⁸
225. The Tribunal itself recognized that the President of the Chilean Constitutional Court, Dr. Cea, had explained that the constitutional amendment had in fact changed Chilean law on this point: “According to Professor Cea, the possibility of renouncing the Chilean

²⁸ Award ¶ 312.

nationality did not exist before this reform and it was through Law 20.050 of the constitutional reform that it was introduced into the Chilean legal system.”²⁹ If this is so, and since Law 20.050 was not enacted until 2005, it means *a fortiori* that Mr. Pey could not have renounced his Chilean nationality in 1996 and/or 1997 when he claims that he did. But, the Tribunal waved aside this obvious and inescapable obstacle to its determination, resorting to the extraordinary expedient of simply asserting that the constitutional amendment had not effected any change whatsoever, and that therefore there was no conflict.

226. An international arbitral tribunal lacks the power simply to deny the undeniable. There are some issues — even legal issues — that are ultimately not subjective or open to interpretation. When despite the obvious and incontrovertible fact that the relevant legal norm is “x”, a tribunal nevertheless asserts that the relevant legal norm is “y”, it is manifestly exceeding its power. The power of an international tribunal does not include the power to declare “x” to be “not x” in circumstances in which, by any reasonable and objective standard, it really is “x”. Such is the case here: the implication of the 2005 Amendment are inescapable and devastating to the Claimants’ position, under any reading of such norm, yet the Tribunal simply disregarded such implications.

227. Later in the Award, the Tribunal stated that “[t]he 2005 reform of Article 11 of the Constitution did nothing other than add the formal requirement that, in order to validly renounce the Chilean nationality, the renouncing party must present this renunciation before a competent Chilean official, *a requirement which did not exist before.*”³⁰ It is

²⁹ Award ¶ 304.

³⁰ Award ¶ 316 (emphasis added).

undeniable that such formal requirement did not exist before, but that was only because the entire concept of voluntary renunciation did not exist before. The logic of the Tribunal on this point is therefore unsustainable, further underscoring that its conclusion was a manifest excess of power.

228. The Tribunal purported to justify its decision in part on which it concluded was the underlying goal of the Chilean norms on loss of nationality. Specifically, it asserted that since the Chilean laws on loss of nationality were intended to avoid situations of statelessness, and that since in the present case Mr. Pey would not have been rendered stateless by renouncing his Chilean nationality (due to his existing Spanish nationality), his voluntary renunciation had to be admitted as valid, as there was no “argument capable of justifying . . . a discriminatory regime in regard to voluntary renunciations: permissive in the case of acquisition of another nationality and prohibitive in the case another nationality has already been acquired, that is, in cases of dual nationality.”³¹
229. It therefore appears that the Tribunal rejected the Republic’s jurisdictional objection on the basis of what it construed to be *the purpose* of the relevant rule of Chilean law, rather than on the *content* of the rule itself. The Republic submits, however, that it was not within the Tribunal’s authority to arrogate to itself the power to determine that the voluntary renunciation in this particular case was valid under Chilean law simply because in the Tribunal’s view a general prohibition on voluntary renunciation would somehow be “discriminatory”,³² “illogical”³³ or at odds with the Tribunal’s interpretation of the purpose of the Chilean nationality norms, or with its view on the consistency or

³¹ Award ¶ 311.

³² Award ¶ 311.

³³ Award ¶ 311.

inconsistency of a general prohibition with such alleged purpose. The Tribunal did not explain why it believed it was entitled to adopt this approach.

230. The Tribunal's conclusion was thus predicated on its *normative* assessment that a voluntary renunciation should be deemed valid under Chilean law when it is not incompatible with what the Tribunal construed to be the purpose of the relevant Chilean norms, rather than on an *objective* assessment of what the relevant norms in fact were under Chilean law, as dictated by the relevant Chilean laws and as interpreted by the relevant Chilean authorities. In other words, the Tribunal substituted its own conclusion of what it believed the relevant Chilean nationality norms *should* be, for what the relevant Chilean nationality norms in fact *were*.
231. The Republic submits that by doing so, the Tribunal failed to apply the applicable law, and thereby manifestly exceeded its power. The Tribunal's sole function was to learn just what the relevant Chilean legal norm was and to apply it. By basing its decision on what it deemed a *more sensible* interpretation of Chilean law in the particular context before it rather than on the clear dictates of the relevant legal norm itself, the Tribunal failed to apply the appropriate law. Moreover, the Tribunal's approach yielded a result that was practically tantamount to that of amending a Sovereign State's law, an outcome that similarly highlights the manifest nature of its excess of power.
232. Further, the Tribunal also committed a failure to apply the relevant rule of law by purporting to interpret Chilean law under principles of construction of other constitutional regimes. Despite the Tribunal's conclusion that Chilean law was exclusively the applicable law, and notwithstanding the abundant evidence provided by the Republic that Chilean constitutional law mandated a strict interpretation of the

relevant article of the Chilean Constitution, the Tribunal based its conclusion, at least in part, on its assessment that *other constitutional regimes* are not interpreted strictly, but rather merely establish general guidelines:

It also bears mentioning in this regard that, in the field of comparative constitutional law, the text of the Constitution very often is conceived of in programmatic terms or in general principles — which subsequent interpretation and practice, along with the political evolution, must complete and define — so much so that it is difficult to presume the limited or exhaustive character of the above-referenced constitutional provision.³⁴

233. However, the practice in other constitutional regimes is entirely irrelevant to a determination of what the Chilean constitutional regime mandates; a *Chilean* legal norm should be interpreted in accordance with the *Chilean* rules of constitutional interpretation. It was therefore a manifest excess of power for the Tribunal to purport to interpret the meaning of the relevant Chilean constitutional norms by reference and analogy to the constitutional norms and practices of other nations.
234. As noted by Mr. Emmanuel Gaillard with respect to the annulment decisions in *Klockner v. Cameroon* and *Amco v. Indonesia*, “[b]oth *ad hoc* committees held that international law could only come into play in the second sentence of Article 42(1) if the law of the host State contained gaps or in the case of a collision between the two sets of norms.”³⁵ And in *Klockner v. Cameroon*, the *ad hoc* committee, whose President was Mr. Pierre Lalive, stated that “... arbitrators may have recourse to the ‘principles of international law’ only after having inquired into and established the content of the law of the State

³⁴ Award footnote 256.

³⁵ E. Gaillard, “The Extent of Review of the Applicable Law in Investment Treaty Arbitrations”, in Annulment of ICSID Awards, (E. Gaillard, ed. 2004), at 229-230.

party to the dispute (which cannot be reduced to one principle, even a basic one) *and after having applied the relevant rule of the State's law.*"³⁶

235. The Tribunal in *Pey Casado* did not contend that there was a lacuna in Chilean nationality law, or that such nationality law was in conflict with international law. Rather, it simply contended that because it was possible in other constitutional legal systems to interpret as non-exhaustive lists contained in constitutional provisions, it was therefore also appropriate to interpret as non-exhaustive the list of bases for loss of Chilean nationality set forth in the Chilean Constitution, even though under Chilean law such list articulated very precise and limited enumeration of bases that were not subject to addition or expansion by subsequent laws or regulations, and much less by judicial interpretation.

236. As Mr. Pierre Lalive has stated with respect to annulment of ICSID Awards,

. . . [T]he interpretations of the terms “to apply the proper law” must involve a minimum of effectivity, or “real” substance, and it cannot be enough for the tribunal merely to declare “we hereby apply the law of X.” And in case the parties have agreed that the law of X should apply to the contract, the tribunal would violate its missions in applying the law of Y or “general principles of law” alleged to be tacitly recognized everywhere, or in State X!³⁷

237. Mr. E. Gaillard for his part has observed that, “... a tribunal’s failure to apply the proper law — as opposed to a mere mistake in the application of the law — is subject to review under the manifest excess of powers standard of Article 52(1)(b) of the Washington Convention....”³⁸

³⁶ *Klockner I*, 2 ICSID Rep. 95 (1994), ¶ 70 (emphasis added).

³⁷ P. Lalive, “Concluding Remarks,” in Annulment of ICSID Awards (E. Gaillard, ed. 2004), at 310-311.

³⁸ E. Gaillard, “The Extent of Review of the Applicable Law in Investment Treaty Arbitrations”, in Annulment of ICSID Awards, at 236.

238. Here, the unexplained substitution by the Tribunal of its own normative and comparative law interpretations of the relevant Chilean norms, and its clear failure to apply the law that the Tribunal itself had deemed applicable, constitutes a manifest excess of power, as well as a failure to state reasons. Consequently, the Award must be annulled in accordance with Article 52(1)(b) and Article 52(1)(e), respectively, of the ICSID Convention.
239. Ultimately, the Tribunal tried to justify its legal overreaching on the issue of voluntary renunciation by strained reference to the purpose of the ICSID Convention itself. Thus, the Award refers to drafting history of the ICSID Convention showing that the negotiators had been concerned about the possibility of “imposing” their nationality on a Claimant to thwart jurisdiction. The Award states: “[A] prohibition of the renunciation of nationality (in case such renunciation does not give rise to a condition of statelessness) is equivalent to the imposition of nationality on the part of the State.”
240. However, reliance on this passage is misplaced, as it could not have been the intention of the ICSID negotiating parties that an ICSID tribunal could simply ignore or distort the clear dictates of a domestic law of nationality, simply on the basis of the arbitrators’ subjective perception that such law is inconsistent with the spirit of the ICSID Convention.³⁹
241. More importantly, the circumstances are not at all analogous, insofar as Chile did not “impose” the Chilean nationality on Mr. Pey. The ICSID Convention negotiators were concerned with preventing situations in which a State would “pin” its nationality on a would-be Claimant who did not wish to have such nationality, simply by declaring by fiat

³⁹ See Award ¶ 320.

that such person is a national of that State, for the purpose of barring such person from ICSID. But that is not at all the situation in the present case: Mr. Pey *voluntarily* acquired the Chilean nationality in 1958, and then proceeded to carry on almost his entire adult life in Chile. He married in Chile (twice); he had children in Chile; he conducted his professional activities there; he obtained and extensively used Chilean national identity cards and Chilean passports, he registered to vote as a Chilean, he availed himself of the benefits provided to returning Chilean exiles after the military period, etc. etc. Nobody “imposed” the Chilean nationality on Mr. Pey.

242. Rather, the truth is that in 1996, when Mr. Pey realized that his Chilean nationality would constitute a formal impediment for him to assert a BIT claim at ICSID, he commenced desperate efforts to shed his Chilean nationality. Hence his alleged “renunciations” in 1996 and 1997, which immediately preceded the filing of his ICSID claim in November 1997. However, it happened to be the case — whether right or wrong — that Chilean law did not enable its nationals simply to renounce their Chilean nationality at will. This became a very inconvenient fact for Mr. Pey when, for the sake of filing a gargantuan claim against Chile at ICSID, it became necessary for him to discard his Chilean nationality.

243. Thus, it was simply an unfortunate coincidence for Mr. Pey that Chilean nationality law did not contemplate the legal concept of “voluntary renunciation,” and that under applicable Chilean law the Chilean authorities could not constitutionally have recognized such a renunciation (even if they had wanted to) because it would have been null and void *ab initio* under Chilean law.

244. Given the foregoing, Mr. Pey’s situation cannot at all be equated to that of States who in bad faith attempt to impose their nationality on an investor against the latter’s will; here, not only did Mr. Pey voluntarily acquire his Chilean nationality (a fact that Mr. Pey fully admits), but rather, it is Mr. Pey who for the sole purpose of monetary gain attempted to cast off his Chilean nationality like an unwanted skin, having benefited for decades — the military period notwithstanding — from the nationality of a country that received him with open arms as a refugee in 1939.

(ii) Failure to Evaluate Whether Mr. Pey in Fact had Renounced his Chilean Nationality

245. Even if it were accepted *arguendo* that it was conceptually possible — as a matter of law — for Chilean nationals to voluntarily renounce the Chilean nationality at the time of Mr. Pey’s alleged renunciation, the Tribunal was required to proceed to a second level of analysis — which is to address whether Mr. Pey as a matter of fact effectively renounced his Chilean nationality. The Tribunal focused heavily in the Award on whether it was legally possible under Chilean law for Mr. Pey to renounce, but almost not at all on whether he had effectively done so.

246. As mentioned earlier, the first date on which authorities of the Republic received a communication from Mr. Pey in which he expressly purported to renounce his Chilean nationality was on 10 July 1998 — well *after* the critical dates for purposes of Article 25(2)(a) of the Convention. Mr. Pey had previously sent letters notifying the Chilean government for purposes of the Dual Nationality Treaty that he had changed his domicile to Spain. However, such communications did not mention the term “renunciation” or otherwise purport to constitute a renunciation; in any event, a mere change of domicile

would not have resulted in a loss of Chilean nationality, but rather only in a change in “effective” nationality.

247. The Tribunal failed to explain how Mr. Pey could have effectively renounced his Chilean nationality without informing any Chilean authority of his renunciation prior to the critical dates. There is likely no country in the world in which it is possible to renounce a nationality without some type of notification to the relevant authorities of that State. Accordingly, even if the communication that was received by Chilean authority on 10 July 1998 had been effective in achieving a renunciation, it would still mean that Mr. Pey was a Chilean national on the critical dates, and that therefore he was barred from ICSID.
248. The Tribunal’s utter failure to address this simple but determinative point constitutes not only a manifest failure to explain reasons pursuant to Article 52(1)(e), but also a manifest excess of power by failure to apply the relevant law (triggering Article 52(1)(b) of the Convention) .
249. Finally, it was a serious departure from a fundamental rule of procedure under Article 52(1)(c), as well as a manifest excess of power under Article 52(1)(b), for the Tribunal to reverse the burden of proof on the issue of nationality, as it evidently did.
250. As Professor Christoph Schreuer noted in his commentary on the ICSID Convention, it is the claimant’s responsibility to ensure that any renunciation of nationality be validly effected:

The individual investor’s only chance to gain access to the Centre may be to relinquish the host state’s nationality before consent to ICSID’s jurisdiction is perfected. Obviously, the benefits from such a step would have to be weighed against any costs arising from the surrender of the host State’s nationality. *Also the investor would have to ensure that the*

*renunciation of the nationality is valid under the host State's law. A written affirmation to this effect is advisable.*⁴⁰

251. In the present case, the parties were in agreement that Mr. Pey had been a Chilean national, the disagreement being whether or not he had at some point ceased to be Chilean. In light of that fact, the burden of proof should have been on Mr. Pey to prove that he had in fact renounced his nationality as he was claiming.
252. However, the Tribunal placed the onus on the Republic to establish that Mr. Pey had *not* renounced his Chilean nationality,⁴¹ thereby imposing on Chile the burden of proving the negative (*probatio diabolica*). The Tribunal's discussion in the Award renders it evident that it considered that "the Respondent was in the position of the Claimant" on jurisdictional issues,⁴² and from that flawed premise it reached the oversimplified conclusion that the Republic bore the burden of proof on all jurisdictional issues, regardless of context or circumstances.⁴³ However, this is not correct, as was amply discussed by the Republic at the hearing held in January 2007.
253. Furthermore, despite extensive discussion of the subject of burden of proof at that hearing, and the critical importance of the issue for the case, not only did the Tribunal not

⁴⁰ C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2001) at 272, ¶ 446.

⁴¹ Award ¶ 307 states that the Republic was "not able to demonstrate in a convincing manner the impossibility or illegality, under Chilean law, of a voluntary renunciation of the Chilean nationality, in the absence of precise texts and pertinent jurisprudence."

⁴² "The general principle of law, according to which the burden of proof is on the claimant (*actori incumbit probatio*), is particularly applicable in the context of a judicial proceeding or international arbitration, and in accordance with this same principle, it is the Respondent asserting the jurisdictional objection who must prove the facts on which it bases its objection, since in regard to the latter the Respondent is considered to be in the same position as a claimant" (8 May 2002 Decision, ¶ 105).

⁴³ It is evident that the burden of proof on nationality had also incorrectly been placed on the Republic by the Tribunal in the 8 May 2002 Decision (in which the Tribunal had joined the jurisdictional objections to the merits). There, the Tribunal had stated that "it does not appear that either the Respondent has proved its assertion regarding the Chilean nationality of the Claimant, nor that the latter has demonstrated, for its part, that he validly renounced such nationality or was deprived of it"⁴³ The fact that in such circumstances the claim was not dismissed means *a fortiori* that the burden of proof had been placed on the Republic. Thus, this determination too was a serious departure from a fundamental rule of procedure and a manifest excess of powers, and constitutes a separate ground for annulment.

address it in the Award, but in fact did not even mention it anywhere in its 236-page ruling. The failure of the Tribunal to explain its reasoning on the outcome-determinative issue of the proper allocation of the burden of proof renders the Award annulable under Article 52(1)(e).

(b) *Annulable Features of Award on Issues of Nationality under the BIT and the Requirements of the Chile-Spain Nationality Treaty*

254. The Republic articulated in the proceedings a second jurisdictional objection relating to nationality, based on the requirements of the BIT rather than of Article 25(2)(a) of the Convention. This second objection was founded on the following basic premises: (a) that in order for an investor to enjoy the protections of a BIT, he or she must have been a foreign national at the time of the relevant investment, as well as at the time of the State acts or omissions alleged to have violated the BIT; (b) that, in the case of dual nationals, this means that at the relevant times the investor’s “effective nationality” must have been that of “the other State party to the BIT” (*i.e.*, not that of the host State of the investment); and (c) that the BIT mandated expressly that the issue of nationality of an investor be determined in accordance with the law of the relevant State.
255. The Chile-Spain BIT does not specify any particular rules for the handling of investments or claims made by dual nationals. However, the treaty at Article 1 does define the term “investor” as “a national *in accordance with the law of the corresponding Party . . .*”⁴⁴ Thus, the issue of whether Mr. Pey was a Chilean national at the time he became an “investor” in Chile and at the time he suffered the alleged grievance was an issue to be determined under Chilean law.

⁴⁴ Emphasis added.

256. As will be recalled from Section IV above, Mr. Pey had voluntarily acquired the Chilean nationality in 1958 in accordance with the terms of the Dual Nationality Treaty between Chile and Spain. That treaty expressly provides that a person registered thereunder can retain his or her original nationality and have two nationalities, but “on the condition that only one of them can have full effectiveness, give rise to political dependency, and establish the law to which [the person] will be subject.” The Treaty provided moreover that “Spaniards in Chile who register under the Treaty shall enjoy the full legal condition of nationals ...” but that such persons “may not be subject simultaneously to the legislation of both [States] in their condition as nationals of such States, but rather only of that in which they are domiciled.”
257. The Claimants did not contest in the proceedings that Mr. Pey had acquired the Chilean nationality and registered under the Treaty in 1958. In accordance with the above-quoted segments of the Treaty, this meant that thereafter he was subject solely to Chilean law. Nor did Claimants contest that at the time of the alleged investment (1972) and of the confiscation of “El Clarín” (11 September 1973), Mr. Pey was domiciled in Chile and that therefore his “effective nationality” for purposes of the Dual Nationality Treaty was the Chilean one. This meant that both at the time he made his alleged investment, as well as at the time that the Chilean authorities took over the “El Clarín,” for all legal purposes (including any possible BIT claim, if the BIT had been in force at the time) Mr. Pey was a Chilean — not a foreigner.
258. During the arbitral proceedings, the Republic argued that, because Mr. Pey’s “effective nationality” at the relevant times for purposes of the BIT was solely that of Chile by

virtue of the Dual Nationality Treaty, he could not now claim under the BIT as if he had in fact been a foreigner at such times.

259. The Tribunal, however, in its Award, did not really address this argument in any meaningful way. Instead, it simply dismissed the objection on the basis that Mr. Pey had been a Spanish national at the time of consent to arbitration, and at the time of the relevant BIT violations.⁴⁵ The Tribunal did not explain why it considered those particular dates to be the determinant ones for purposes of the nationality requirements of the BIT.
260. More importantly, the Tribunal did not explain why it deemed irrelevant the concept of “effective nationality” in the specific context of this case, which was unique due to the existence of the Dual Nationality Treaty and the fact that Mr. Pey was registered thereunder. In fact, the Tribunal did not even mention such treaty in the relevant portion of its Award, concluding simply that because the Chile-Spain BIT did not expressly bar claims by dual nationals, such claims were permissible — even in the case of those whose effective nationality was that of the host State of the investment.⁴⁶
261. However, in reaching that conclusion, aside from failing to explain its reasons, the Tribunal failed to apply the proper law. The BIT’s definition of “investor” as a national “in accordance with the law of the corresponding State” required that the Tribunal take into account the law of Chile for purposes of the determination of Mr. Pey’s nationality under the BIT. Since the rules of nationality in the particular case of Spanish-Chilean dual nationals was governed in Chile (as well as in Spain) by a *sui generis* legal regime — *viz.*, the Dual Nationality Treaty — by failing to address the implications of such

⁴⁵ Award ¶ 416.

⁴⁶ Award ¶ 415.

treaty the Tribunal failed to apply the proper law and therefore manifestly exceeded its powers (thereby rendering the Award annulable under Article 52(1)(b)).

262. Here again, as with so many issues in its Award, the Tribunal's determination was outcome-determinative. Had the Tribunal started from the premise mandated by the Dual Nationality Treaty that only one of the two nationalities could have full legal effectiveness, it would have inexorably been led to the conclusion that Mr. Pey could not be deemed anything other than a Chilean at the time of the relevant violation. This in turn would have meant that his alleged investment was merely a national investment, not a foreign one. And if that were the case, it would follow *a fortiori* that Mr. Pey was not the owner of a "*foreign investment*" that could be subject to the protections of the BIT.
263. Finally, the Tribunal asserted that even if a BIT's protections could be deemed to apply only to nationals whose effective nationality is not that of the host State of the investment, Mr. Pey had been domiciled in Spain since 1974 and therefore his "primary" nationality had been the Spanish one since that year. Even if the foregoing were true — which Chile contested — it still does not justify the Tribunal's finding, insofar as the State act that harmed the investment — the expropriation of "El Clarín" — had taken place on 11 September 1973 (*i.e.*, before Mr. Pey's effective nationality switched to that of Spain according to the Tribunal). The fact that 11 September 1973 was the relevant date of the grievance for purposes of Claimants' BIT claim is rendered evident by the fact that the Claimants in their pleadings calculated their damages starting from 11 September 1973. And yet on that date, even by Claimants' own admission, Mr. Pey's effective nationality was still that of Chile.

264. Accordingly, from Chile's perspective at the time, the confiscation that occurred in 1973 was a confiscation of an investment owned by a Chile national. Furthermore, the BIT did not exist at that time (and would not enter into force until two decades later).
265. That the Tribunal exceeded its powers in concluding that Mr. Pey's investment had been a "*foreign investment*" is revealed most patently by the fact that under the Tribunal's reasoning, the following scenario could rise to an actionable claim under a BIT: An investor whose exclusive nationality is that of country "X" acquires an investment in his own country. Country "X" then expropriates the investment. (Thus, there is no international dimension whatsoever to the grievance, as the investor is a national.) At some point thereafter, the investor becomes a dual national by acquiring the nationality of country "Y" (with which country "X" has a BIT). On the basis of his newly acquired nationality of country "Y", the investor then proceeds to assert a BIT claim against country "X" for the expropriation that occurred when the investor was exclusively a national of country "X". Such a scenario would be a perversion of the BIT and of the ICSID system, and inconsistent with basic principles of international law. And yet, it is not in any way dissimilar conceptually to that of the present case, given that by virtue of the Dual Nationality Treaty (which the Tribunal disregarded) Mr. Pey's nationality at the relevant times should have been deemed for all legal purposes to be solely that of Chile.
266. For the reasons articulated above, the portion of the Award that addresses nationality under the BIT reveals that the Tribunal manifestly exceeded its power, rendering the Award annulable under Article 52(1)(b) of the Convention, and failed to explain its reasoning, subjecting the Award to annulment under Article 52(1)(e).

(2) Annulable Features of Award on Issues of BIT Requirement of an Investment Made by the Claimant(s)

267. One of the central issues in the arbitration — both in the jurisdictional context as well as in the merits — was whether Mr. Pey had in fact been the owner of CPP and “El Clarín,” as he claimed to have been. This was critical insofar as the confiscation of CPP and “El Clarín” was the basis for the Claimants’ BIT claims, and to the extent he were not the owner of such property, he could not claim under the BIT.
268. The Republic did not deny that Mr. Pey had been an important player in “El Clarín”, but contended that Mr. Pey had always been a manager, officer, and intermediary, but never an owner of any shares.
269. In the proceedings, the Republic demonstrated — based on contemporaneous record and witness testimony — that none of the shares of CPP had ever been registered in the company’s books as belonging to Mr. Pey. In contrast, such records did reflect the ownership of certain individuals (hereafter, “the third parties”) who were the ones that were ultimately compensated by Chile as part of Decision 43 — a decision which the Tribunal ultimately deemed to constitute a “discrimination” against Mr. Pey and thus a violation of the BIT.
270. The Republic had pointed also, as evidence of Mr. Pey’s role merely as an “intermediary” in the sale of shares relating to “El Clarín”, to a power of attorney issued to Mr. Pey by Mr. Sainte Marie — the original owner of CPP and one of the third parties who owned shares at the time of the coup on 11 September 1973. Pursuant to such power of attorney, Mr. Sainte Marie commissioned Mr. Pey with the task of selling 50% of the shares of “El Clarín.” (The Tribunal itself at least twice made reference to this power of attorney —

footnote 98 and paragraph 189 of the Award — but did not subsequently address its significance.)

271. Other records presented by the Republic included contemporaneous CPP records,⁴⁷ as well as contemporaneous records of the Chilean regulatory agency with responsibility for supervision of corporations, called the Superintendency of Corporations, which reflected the shareholding ownership in 1972 and 1973 as reported by the CPP itself. Such records showed that the “third parties” were the relevant shareholders at that time, and that Mr. Pey did not own a single share.
272. The Claimants had no choice but to concede that Mr. Pey did not appear in any formal records of the company or of the regulatory authorities as the owner of any shares, as his name indisputably did not appear in the share certificates allegedly acquired, nor in the relevant transfer documents, nor in the corporate books of the CPP, nor in the records of the Superintendency of Companies. Further, the Republic had demonstrated that the stock certificates had been given to Mr. Pey by the third parties who owned them for the purpose of having Mr. Pey sell them on their behalf. Accordingly, such third parties also provided Mr. Pey with signed “blank” transfers, which were transfer documents signed by the third parties as sellers, and in which the names of the purchasers had been left blank. The idea was that Mr. Pey would fill in such blanks once he found buyers for the shares.

⁴⁷ Despite strenuous searches, the Republic was unable to locate the CPP’s shareholder register (“Libro Registro de Accionistas”), even though presumably such register had been seized by the military in 1973. However, the Republic had explained that the contemporaneous reports of the Superintendency of Corporations necessarily reflected the contents of the missing shareholder register, insofar as the Superintendency reports were based directly on information provided by the companies themselves. Throughout the proceedings the Claimants were to characterize the non-production by Chile of the CPP shareholder register as a bad faith effort by Chile to conceal damaging evidence; this was a comfortable posture for the Claimants insofar as they knew that if the Republic had in fact located such document, it would have produced it, given that in all certainty such document would have been consistent with the other records in evidence which showed that Mr. Pey did not own any CPP shares.

273. The share certificates in the names of the third parties and the signed “blank” transfers referenced above were in Mr. Pey’s possession in his offices at “El Clarín” on 11 September 1973, and were seized by the military when they took over the newspaper.
274. On the mere basis of physical possession of the documents mentioned above, Mr. Pey and his counsel were later to develop a remarkable theory of ownership, despite the absolute lack of evidence of any corporate or regulatory documentation evidencing such ownership, and despite the fact that — as the Republic abundantly proved in the proceedings — Chilean corporate law at the time did not contemplate the legal concept of “bearer ownership” for corporate shares, but rather required registration of shares for ownership to be established.
275. Aside from the foregoing factors — which demonstrate a legal impossibility of ownership by Mr. Pey — the Republic also identified numerous fatal inconsistencies in the Claimants’ account concerning the nature of the documents they alleged to constitute a contract for the sale of “El Clarín”, insofar as the texts of such documents were not characterized as “sales contracts” anywhere in their text, and Mr. Pey was nowhere therein characterized as a buyer. Moreover, the documents contained certain conditions the satisfaction of which was not proven by the Claimants (a fact the Tribunal ultimately simply ignored).
276. Further, the Republic similarly identified irresolvable inconsistencies in the Claimants’ description of the various transactions pursuant to which Mr. Pey allegedly purchased the shares, including chronological and mathematical impossibilities with respect to the number of shares bought and sold at different times, and the participants in such transactions.

277. The Republic also presented evidence of contemporaneous testimony provided by several of the “third parties,” as well as other individuals involved in CPP, in the context of court proceedings in the 1970’s, all of which also pointed to ownership of the CPP shares by the third parties and Mr. Pey’s role as intermediary in the relevant transactions.
278. In its Award, however, the Tribunal disregarded all of the foregoing, in the end concluding simply that it was persuaded that Mr. Pey had acquired the relevant shares, despite the “informal” nature of such acquisition, and even though the Tribunal itself conceded repeatedly conceded that the relevant certificates bore the names only of the third parties. The Tribunal acknowledged, for example, that “share certificates were issued in the name of Messrs. Gonzalez, Venegas, and Carrasco”⁴⁸ (As will be recalled, those three gentlemen — together with Darío Sainte Marie — were the third parties whose successors were subsequently compensated by Chile in the context of Decision 43.) Similarly, at paragraph 187 of the Award, the Tribunal concedes that “[o]n 14 July 1972, CPP S.A. issued 20.000 share certificates [“títulos”] in the name of Mr. Gonzalez, and his name was registered in the Shareholders Register of the company. At the same time, Mr. Pey retained the certificates and the ‘blank’ transfers signed by Mr. Gonzalez.” Other statements by the Tribunal acknowledge the issuance of share certificates in the name of Messrs. Sainte Marie and Venegas.⁴⁹
279. The Tribunal did not explain why it did not deem anomalous the fact that none of the relevant documentation showed Mr. Pey as the owner, or why — if he was genuinely the owner of US\$1.28 million worth of CPP shares — he never bothered to register them in

⁴⁸ Award ¶ 184.

⁴⁹ Award ¶ 188.

his own name. On this last point, the Tribunal meekly speculated that Mr. Pey “very probably had the intention of doing so [*i.e.* of complying with the formalities] as soon as the political and economic situation would permit it”⁵⁰, and attributed that failure to the fact that it was rendered “impossible due to the seizure of the share certificates.”⁵¹

Without explanation, the Tribunal disregarded evidence that Mr. Pey had had in his possession the share certificates *for over a year* prior to the coup d’etat, but had not registered them (and that, in contrast, on a prior occasion in his capacity as President of CPP he had promptly (and personally) carried out the relevant bureaucratic requirements to register CPP shares acquired by third parties Venegas, Gonzalez, and Carrasco).

280. Thus, in the end the Tribunal simply accepted without much explanation the notion that the mere fact of Mr. Pey’s control and physical possession of the relevant share certificates constituted proof of ownership, stating that “the Tribunal also is not convinced by the Respondent’s arguments concerning the consequences of the failure to observe the formalities, especially of registration in the Shareholders’ Register.”⁵²

However, in reaching this conclusion, the Tribunal manifestly failed to apply Chilean corporate law, which was the applicable law, and did not explain precisely why it was “not convinced.” Such failures render the Award annulable as a manifest excess of powers under Article 52(1)(b) and a failure to state reasons under Article 52(1)(e).

281. Further, the Tribunal also concluded that Mr. Pey had “contributed his own capital to acquire the CPP S.A. and EPC Ltda. Companies.”⁵³ However, the Tribunal did not

⁵⁰ Award ¶ 228.

⁵¹ Award ¶ 228.

⁵² Award ¶ 227.

⁵³ Award ¶ 233(a).

explain on what basis it reached this conclusion, insofar as there was no proof whatsoever in the record of it. (The Republic had explicitly requested evidence of Mr. Pey’s ownership of the bank accounts from which the payments to Mr. Sainte Marie had originated in its discovery requests, but as noted earlier these were denied by the Tribunal). To the contrary, the Republic had presented evidence that showed that Mr. Pey had never had the financial means to make a purchase of the magnitude alleged, and that he had not owned the bank accounts from which the payments to Mr. Sainte Marie had originated.

282. Ultimately, the Tribunal manifestly exceeded its powers by assuming jurisdiction after concluding — in utter disregard for the applicable law — that Mr. Pey owned the CPP shares under Chilean law, and that therefore he owned an “investment” for purposes of the BIT. Moreover, the Tribunal failed to articulate reasons for many critical aspects of this decision.
283. There is one additional aspect of the Tribunal’s decision on Mr. Pey’s alleged ownership of the CPP shares that warrants annulment of the Award, and that is that the Tribunal did not articulate how it allocated the burden of proof on this issue. This was especially important, since the Claimants bore the burden of proof in establishing that they had in fact made an investment in Chile.
284. By failing to address this issue, the Award failed to state reasons and is therefore annulable. Moreover, by asserting jurisdiction and imposing responsibility based on a determination on the issue of ownership with respect to which the Tribunal had reversed the burden of proof — both in the jurisdictional and merits contexts — and by failing to

evaluate whether the appropriate party had in fact carried its evidentiary burden, the Tribunal manifestly exceeded its powers.

(3) Annulable Features of Award on Issues of BIT Requirement of an Investment “in accordance with Chilean law”

285. Article 1(2) of the Chile-Spain BIT provides that the BIT only applies to investments “acquired in accordance with the legislation of the country receiving the investment.”⁵⁴

Accordingly, in the present case in order to enjoy the BIT’s protections, Mr. Pey was required to have made an investment “in accordance with the legislation” of Chile.

286. The Republic presented extensive evidence showing that under Chilean law in 1972, transfers of ownership of shares of corporate stock could be validly effected only pursuant to certain formalities (*e.g.* registration in the company’s Share Register) that were explicitly established in the relevant laws and regulations.

287. The Tribunal acknowledged the existence of such requirements, stating in the Award that “ ... in 1972, to acquire ownership of shares with *erga omnes* effect, it was necessary to comply with the formalities set forth in Article 451 of the Commercial Code and Article 37 of the Regulations for Corporations.”⁵⁵

⁵⁴ BIT Art. 1(2) provides as follows:

The term “investments” shall include every kind of asset such as any type of property and rights acquired in accordance with the laws and regulations of the Contracting Party in whose territory the investments are made, in particular, though not exclusively:

- Stocks and other forms of participation in companies;
- Credits, shares and derivative rights of any kind of realized investment with the purpose of creating economic value, including, in particular, loans provided for this purpose, capitalized or not.
- Movable and immovable property, as well as any rights related to the same including any type of intellectual property rights, in particular, patents, copyrights, trade marks and trade names, industrial licenses and know-how
- Concessions under public law or contract, in particular, concessions for prospecting, cultivating, extracting or exploiting natural resources.

⁵⁵ Award ¶ 226.

288. The Republic had presented evidence proving that, consistent with the Republic’s argument that he had never been the owner of CPP, Mr. Pey had entirely failed to comply with the formal requirements imposed by Chilean corporate law — including requirements for registration of shares purchased — and that therefore any investment by Mr. Pey was not made “in accordance with” Chilean law.
289. The Tribunal seemed to accept that fact, but for reasons that it did not explain, was not troubled by it. That is, the Tribunal accepted that certain legal requirements existed under Chilean law, agreed that such requirements had not been satisfied by Claimant Mr. Pey, and yet nevertheless concluded that the relevant jurisdictional requirement imposed by the BIT had been satisfied.
290. The Tribunal provided no reason, for example, for finding that the supposed non-registered transfer of shares from Mr. Sainte Marie to Mr. Pey was opposable to Chile. The Tribunal had acknowledged that it was necessary in 1972 to respect the formalities of registration in the Shareholders Register “in order to acquire ownership in the shares *erga omnes*.”⁵⁶ But an *erga omnes* right is a property right, purely and simply, because it may be opposed to all persons, contrary to a contractual right, which only binds the participants. And so, even the Tribunal’s own reasoning leads to the inevitable conclusion that Mr. Pey could not have been the owner of the CPP shares.
291. The Tribunal sought to avoid the necessary implications of the foregoing by asserting that “[a]t most, it may be concluded that the non-respect of the formalities may render the litigious transfer unopposable to third parties.”⁵⁷ What cannot follow from such

⁵⁶ Award ¶ 226.

⁵⁷ Award ¶ 227.

reasoning, and remained unexplained by the Tribunal, is just how or why a transfer that is unopposable to third parties for want of registration should be deemed opposable to Chile, which was in fact a third party to the purported transfer between Messrs. Sainte Marie and Pey.

292. By asserting jurisdiction after completely disregarding the relevant applicable law — and therefore *a fortiori* also completely disregarding Article 1(2) of the BIT — as well as by in effect reversing the burden of proof on this issue, the Tribunal engaged in a manifest excess of power. Moreover, due to the Tribunal’s failure to explain its logic, the Award “failed to state reasons” within the meaning of Article 52 of the ICSID Convention.
293. Finally, the Tribunal did not really address squarely the specific objection raised by the Republic in the context of Article 1(2) of the BIT, as it addressed the issue of the formal requirements of Chilean corporate law only indirectly, in the segment of the Award that addressed the more general issue of whether Mr. Pey was the owner of the CPP shares. The Tribunal’s failure to address directly the relevant jurisdictional objection constituted a violation of the Tribunal’s obligation under Article 48(3) of the ICSID Convention to prepare an award that “shall deal with every question submitted to the Tribunal ...” Such failure is an additional basis to annul the Award under Article 52(1)(e).

(4) Annullable Features of Award on Issues of BIT Requirement of “Foreign” Investment for pre-BIT Investments

294. Article 2(2) of the Chile-Spain BIT provides:

This Treaty shall apply from the date of its entry into force to investments made by investors of one Contracting Party in the territory of the other. *However, it shall also apply to investments made prior to*

*its entry into force and that, in accordance with the legislation of the respective Contracting Party, qualified as a **foreign** investment.*⁵⁸

295. Since the relevant “investment” was alleged to have taken place in 1972, and thus predated the BIT (which entered into force in 1994), the italicized portion of Article 2(2) above applies. Therefore, for Mr. Pey’s investment to qualify for protection of the Chile-Spain BIT, it needed to be a “foreign investment” that had qualified as such under the Chilean law applicable at the time.

296. In its Award, the Tribunal agreed with this basic premise, stating that

. . . [I]t is clear that articles 1.2⁵⁹ and 2.2 of the BIT require that an investment made by an investor be made in conformity with the Chilean legislation in force at that time, and, in the case of investments already existing at the time of entry into force of the BIT, that they can be deemed to qualify as a foreign investment in accordance with such legislation.⁶⁰

297. Further, the Tribunal made the following specific pronouncements on the issue of the applicable law: “The Tribunal considers that the legislation to which the BIT refers is the Chilean legislation at the time the investment was made, that is, in 1972”⁶¹; and, “For the BIT to be applicable to a transaction effected in 1972, it is necessary for the transaction in controversy to correspond to the definition of investment that appears in article 1.2 of the BIT, and that it be deemed a foreign investment in accordance with the Chilean legislation applicable at the time.”⁶²

⁵⁸ Emphasis added.

⁵⁹ Article 1(2) defines the term “investment”, and reads in part as follows: The term “investments” shall include every kind of asset such as any type of property and rights *acquired in accordance with the laws and regulations of the Contracting Party in whose territory the investments are made . . .*” (emphasis added).

⁶⁰ Award ¶ 379 (emphasis added).

⁶¹ Award ¶ 369.

⁶² Award ¶ 370.

298. The next task for the Tribunal was therefore to identify the relevant Chilean legal norms that had been in force in 1972. Chile had noted that in 1971 Decision 24 of the Commission of the Cartagena Agreement (a regional treaty of which Chile was a party) had already entered into force. Decision 24 established certain common norms regulating foreign capital and investment that the parties undertook to enact into law in their respective States. Since Decision 24 had been brought into force in Chile by means of Decrees No. 482 and 488 of 1971, any investment that had been made in 1972 in Chile but not made in accordance with such legislation would be outside the scope of the BIT.
299. Decision 24 contained a number of provisions that would have barred Mr. Pey's investment, including, *inter alia*, Article 2 thereof, which provided that "any foreign investor who wishes to invest in one of the member States [of the Cartagena Agreement] must present its request before the competent national authority, which, after evaluation, shall authorize it when appropriate given the development priorities of the host State." Moreover, Article 43 of Decision 24 provided that "new foreign direct investment will not be allowed in companies of domestic transport, publicity, commercial radio, television stations, newspapers, magazines or in any company dedicated to the domestic commercialization of products of any type."
300. Chile provided evidence that the President of Chile had designated an inter-agency entity called the "Foreign Investment Committee" to serve as the competent authority for purposes of Decision 24. It was not disputed that Mr. Pey had not registered his alleged foreign investment with the Foreign Investment Committee, or with any other competent Chilean authority.

301. In the arbitral proceedings, the Claimants argued, however, that Decision 24 had not been in force in Chile at the time of Mr. Pey’s alleged investment (1972). In the end, the Tribunal rejected the Claimants’ arguments in that regard.⁶³
302. The determination that the applicable legal norm in Chile was Decision 24 should have led the Tribunal — *a fortiori* — to the conclusion that the Claimants’ alleged investment had not qualified as a “foreign investment” under Chilean law in 1972 (since it was not disputed that Mr. Pey’s alleged investment had not been registered or otherwise recognized as a “foreign investment” by the Chilean state, and since the investment was in the newspaper industry, in which Decision 24 expressly barred foreign investment). Such conclusion in turn would have led inexorably to the conclusion that the claim was barred for failure to meet the jurisdictional requirement imposed by Article 2(2) of the BIT.
303. However, after determining that Decision 24 was in fact the applicable rule of law, instead of simply applying such law to the facts before it, the Tribunal undertook an additional level of analysis: whether Decision 24 was being “effectively enforced” in Chile at the time of the investment. Thus, the Tribunal stated:

The Tribunal concludes that, although Decrees No. 482 and 488 brought Decision 24 into force in Chile, the latter was not the object of an effective application, because the necessary measures for that purpose were not adopted, due to the risks that this presented. Therefore, it is useless to undertake an analysis of the substantive provisions of Decision No. 24 concerning foreign investments.⁶⁴

304. Having thus decided that it did not need to assess the substantive provisions of Decision 24, the Tribunal went on to conclude that “under the Chilean law applicable in 1972,

⁶³ See Award ¶¶ 383, 388-391.

⁶⁴ Award ¶ 401.

there was no established definition of the concept of foreign investment” and that therefore “the transaction carried out by Mr. Pey was effected in accordance with the applicable Chilean law.”⁶⁵ Accordingly, the Tribunal failed to apply the proper law, which subjects the Award to annulment under Article 52(1)(b). Moreover, by purporting to condition its application of the relevant Chilean rule of law on the degree to which such rule of law was being enforced in Chile at the time of the alleged investment, the Tribunal was effectively superimposing onto the BIT a requirement that it did not contain. Under the BIT, for a pre-BIT investment to qualify for protection under the BIT, the investment is required to have had “the quality of a foreign investment under the host State’s law.” The provision does not contain any additional provision stating that such requirement applies “only if the host State’s law was being actively enforced at the time of the investment.”

305. By adding a limitation that the BIT did not contain — thereby gratuitously expanding the scope of Chile’s consent to arbitration under the BIT — the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the Convention. Moreover, by failing to explain why it added a layer of analysis to the BIT that the latter did not contemplate, the Tribunal also committed a “failure to state reasons” which render the Award annulable under Article 52(1)(e) of the Convention.

306. The Tribunal also provided inconsistent reasons for its decision to reject Chile’s jurisdictional objection based on the Claimants’ failure to invest “in accordance with Chilean law” in the following respect. In 1972, there was a law in force in Chile called “Ley de Abuso de Publicidad,” No. 16.643, which had reserved exclusively for Chilean

⁶⁵ Award ¶ 411.

nationals the ownership of newspapers in Chile (consistent with the requirement in Article 43 of Decision 24, referenced above).

307. In light of such law, Chile had pointed out in the arbitration that Mr. Pey found himself in a fatal dilemma: in 1972 he was either a foreigner (in which case he would have violated the above-mentioned Law No. 16.643 by purchasing the newspaper “El Clarín” — thereby failing to invest “in accordance with Chilean law” as required by the BIT); or he was a Chilean national (in which case he would have not have owned a “foreign investment” for purposes of Decision 24 — thereby failing to own an investment that “qualified as a *foreign* investment” under Chilean law at the time it was made, as required by the BIT).
308. The Tribunal however dismissed this point without explanation, noting merely that given its conclusion on Decision 24, the dilemma never really existed, and that moreover Mr. Pey was a dual national. However, the Tribunal did not explain why it allowed Mr. Pey to have it both ways — to count him as a foreigner for purposes of the BIT, but as a Chilean for purposes of the Chilean norms restricting foreign investment in the newspaper sector. These conclusions are logically inconsistent, and the Tribunal’s failure to reconcile them was a “failure to state reasons” on yet another outcome-determinative point, a further basis for annulment of the Award.

(5) Annulable Features of Award on Issues of BIT Requirement of an “Existing” Investment at Time of BIT’s Entry into Force

309. The Tribunal correctly construed Article 2.2 of the BIT as requiring “that an investment made by an investor be made in conformity with the Chilean legislation in force at that time, and, *in the case of investments already existing at the time of entry into force of the*

BIT, that they can be deemed to qualify as a foreign investment in accordance with such legislation.”⁶⁶ Thus, an investment that had been made before the date of the BIT’s entry into force, but that had also *terminated* before such date (*i.e.*, that was no longer “existing”), would be outside the scope of the BIT.

310. The Republic of Chile could not have committed any post-entry into force breach of the BIT with respect to Mr. Pey’s alleged investment for the simple reason that the relevant companies had already been definitively expropriated by 1975 — almost 20 years before the BIT’s entry into force. Therefore, by the date of the BIT’s entry into force, the alleged investment no longer existed — *i.e.*, it was not an “investment already existing at the time of entry into force of the BIT.”

311. The fact that after an expropriation an investor no longer possesses the relevant investment does not, of course, in and of itself bar a claim under a BIT for such expropriation, but this is true only so long as the expropriation itself occurred *while the BIT was in force* (*i.e.*, at a time when the relevant investment was protected by the BIT). That is not the case, here, however, as the expropriation of “El Clarín” occurred two decades before the BIT entered into force, at a time when Chile was not bound by the BIT obligations, and therefore could not bear responsibility under the BIT for such actions. This much the Award correctly recognized.⁶⁷

312. Nevertheless, and with no explanation whatsoever, when it came time to apply the relevant law to the facts before it, the Tribunal chose to indulge in the fiction that the investment was one that was “existing” at the time of the BIT’s entry into force in 1994

⁶⁶ Award ¶ 379 (emphasis added).

⁶⁷ Award ¶¶ 579-586.

— when in reality to the extent it ever existed it was completely terminated and rendered non-existent by 1975 at the latest.⁶⁸

313. In concluding that Chile had committed a breach of the BIT with respect to Mr. Pey’s investment notwithstanding the fact that such investment had been completely and definitively extinguished long before the BIT, the Tribunal manifestly exceeded its power.

314. Furthermore, the Tribunal’s failure to explain in its Award how Chile could have breached the BIT with respect to an investment that was not an “already existing” investment at the time of the BIT’s entry into force, or, alternatively, to explain why it considered that Claimants’ investment was an “existing investment” in 1994 even though it had been fully expropriated at the latest by 1975, is an annulable failure of the Tribunal to state the reasons on which its Award was based.

(6) Annulable Features of Award on Issues of *Ius Standi* and Jurisdictional Issues Concerning Co-Claimant Fundación Presidente Allende

315. In the proceedings, the Republic objected to the standing of co-Claimant President Allende Foundation (“the Foundation”), as well as to the jurisdiction of ICSID over claims by such entity. The Foundation was created in January 1990 in Spain. In February 1990, Mr. Pey donated to the Foundation 90% of his purported rights in various companies, including CPP and “El Clarín.”

316. The Republic had contended in the proceedings, *inter alia*, that the Foundation lacked *ius standi* because Mr. Pey could not grant to the Foundation rights that he did not have.

⁶⁸ Claimants did not allege that they had made any new or different investment *after* the date of the BIT’s entry into force; nor did they allege that they had made some other investment *before* entry into force which — unlike the “El Clarín” investment — had continued past the date of entry into force and was therefore still protected by the BIT.

Aside from the fact that Mr. Pey was not the owner of CPP or “El Clarín” at the time of his alleged cession in 1990, Mr. Pey had no BIT rights (because the BIT did not enter into force until 1994); therefore, he could not have ceded any BIT rights to anyone.

317. Moreover, the alleged rights had been donated, as a result of which, the Foundation never paid a cent for them — further evidencing that there had been no “investment” by the Foundation. The Republic also argued that in order for a cession of the right to claim against the Republic under a BIT to have been effective, prior approval of the Republic was required.

318. In the Award, the Tribunal ultimately did not explain why it concluded that a claimant could assert a claim pursuant to the BIT under these circumstances. The analysis offered by the Tribunal was internally inconsistent and even contradictory. For example, on the issue of whether prior consent by the Republic would have been required, the Tribunal first stated the following conclusion: “*In the opinion of the Tribunal, under the law applicable to the cession (whether it be Spanish, Chilean or some other law), **the consent of the assigned debtor is not required***”⁶⁹ The Tribunal further asserted in this regard that it disagreed with the Republic’s expert Professor Rudolf Dolzer, who — the Tribunal observed — had noted in his expert report that ““unless Chile agreed to the assignment (assuming all jurisdictional requirements were met), the Tribunal cannot have jurisdiction over the claim presented by the President Allende Foundation””⁷⁰

319. In determining that the mere cession of the CPP shares had converted the Foundation into an “investor” for purposes of the BIT, thereby granting it the right to claim against Chile

⁶⁹ Award ¶ 528 (emphasis added).

⁷⁰ Award footnote 473 (quoting from R. Dolzer Expert Report).

under that treaty, the Tribunal asserted that it “shared the point of view expressed by the arbitral tribunal in the *Amco Asia v. Indonesia* case”⁷¹ In particular, the Tribunal quoted approvingly of the following passage from *Amco Asia*:

. . . the right to invoke the arbitration clause is transferred by Amco Asia with the shares it transfers As a result, the right to invoke the arbitration clause is transferred with the transferred shares, whether or not they constitute a controlling block, ***being it understood that for such a transfer of the right to take place, the government’s approval is indispensable.***⁷²

320. Immediately after quoting the passage above, the Tribunal states in the Award:
- “Although the competence of the *Amco Asia* Tribunal was based on a classic arbitration agreement, and not on a BIT, *the same principle is applicable in the present case.*”⁷³
321. It is simply impossible to reconcile the conclusion of the Tribunal in paragraph 528 of the Award — that the consent of a respondent is *not* required for an assignment of BIT rights to claim against such respondent — with its conclusion at paragraph 540 of the Award that the *Amco Asia* principle is applicable in the present case, given that the *Amco Asia* principle expressly contemplates that for an assignment of the right to assert an arbitral claim, the “government’s approval is indispensable.”⁷⁴ The Tribunal did not in any way explain how it could simultaneously reach such disparate conclusions.
322. By failing outright to articulate its reasoning on some points relating to the status of the President Allende Foundation as a co-Claimant, and by providing inconsistent reasons for its determinations on other points, the Tribunal committed a failure to explain the reasons

⁷¹ Award ¶ 539.

⁷² Award ¶ 539 (quoting *Amco Asia* Award) (emphasis added).

⁷³ Award ¶ 540.

⁷⁴ Award ¶ 540.

upon which the relevant portion of the Award was based. This is an annulable deficiency under Article 52(1)(e).

323. The Republic notes also that many if not most of the Tribunal's findings with respect to the Foundation are derivative from its conclusions regarding Mr. Pey, and that therefore to the extent that a given finding concerning Mr. Pey is ultimately deemed annulable, it could also render annulable any derivative conclusion regarding the Foundation. For example, the Tribunal noted that for the Foundation to constitute an "investor" under the BIT, it was necessary for it to have acquired property rights over CPP and EPC. Since the Tribunal had concluded that Mr. Pey was in fact the owner of such property rights, it deemed the cession of those rights to the Foundation to have conferred upon the latter the status of investor. However, to the extent that the Tribunal's handling of the issue of ownership may have suffered from annulable flaws (as the Republic believes was the case, as explained in the relevant discussion earlier in this Petition), there would be a cascade effect with respect to the Tribunal's conclusion regarding the Foundation. Accordingly, the Republic believes that the *ad hoc* Committee should examine carefully the possible implications of its determinations concerning the Award's conclusions regarding Mr. Pey for the Award's handling of the standing of the Foundation as a co-Claimant.

B. The Tribunal's Merits Determinations

324. In its Award, the Tribunal ultimately concluded that it did not have *ratione temporis* jurisdiction over the BIT claims asserted by the Claimants relating to the confiscation of "El Clarín" that took place in the 1970's, because the relevant expropriatory acts predated the BIT's entry into force in 1994.

325. As discussed below, such confiscation-related claims in the end were really the only claims that the Claimants had genuinely asserted before ICSID under the BIT. The Tribunal nevertheless concluded that Chile was liable under the BIT, on the basis of two violations that allegedly post-dated the BIT's entry into force. The first such violation was a "denial of justice" allegedly committed by Chile due to the failure of the First Civil Court of Santiago to rule for seven years on the Claimants' claim for compensation for the confiscation of the Goss printing machine that belonged to "El Clarín."
326. The Tribunal finding of a second BIT violation was premised on the above-mentioned Decision 43. The Tribunal concluded that by compensating third parties rather than the Claimants in accordance with Decision 43, Chile had violated its BIT obligation to provide "fair and equitable treatment" to the Claimants by discriminating against them.
327. Each of these two findings of BIT violation by Chile is discussed below, as well as the Tribunal's conclusions on the issue of valuation of damages.

(1) Responsibility

(a) Annulable Features of Award on Issues of "Denial of Justice"

(i) The Relevant BIT Claim was Never Asserted by the Claimants

328. The Tribunal's determination on the issue of responsibility based on an alleged "denial of justice" is truly extraordinary insofar as it was predicated upon an alleged BIT claim that had never been asserted by the Claimants — either in their original Request for Arbitration, or in any ancillary, incidental or additional claim pursuant to Article 46 of the ICSID Convention.

329. The Tribunal asserted in the Award that a claim for “denial of justice” had been raised by the Claimants in an “Ancillary Request” of 4 November 2002:

In their “Ancillary Request” dated November 4, 2002, Claimants presented a claim for compensation for the loss of a Goss printing machine, alleging to have been victims of a denial of justice as provided by international law. Claimants alleged that justice had been denied because from 1995 to 2002 “*in Chile no decision had been adopted regarding the restitution amount in stricto sensu of the printing machine, or the compensation for its value.*”⁷⁵

330. However, this statement by the Tribunal is entirely incorrect: no “denial of justice” claim was ever asserted by the Claimants in the Ancillary Request mentioned by the Tribunal, or for that matter, in any other request by the Claimants.

331. Briefly explained: All of Claimants’ BIT claims — including those articulated in the Ancillary Request of 4 November 2002 — centered exclusively on the confiscation of the “El Clarín” newspaper (and related assets, such as the Goss machine) in the 1970’s. However, as indicated, the Tribunal had concluded that *ratione temporis* constraints (*i.e.*, the non-retroactivity of the BIT, which entered into force in 1994) prevented it from asserting jurisdiction over the confiscation that had occurred in the 1970’s. Claimants had not alleged BIT violations in connection with any State acts or omissions that had taken place *after* the BIT’s date of entry into force in 1994.

332. Likely due to the equity-based considerations discussed earlier in this Petition, the Tribunal therefore had to strain to identify some post-entry into force State act that could be characterized as a BIT violation. One of the two theories the Tribunal was able to muster in that regard was simply to attribute to the Claimants the allegation of a BIT claim for “denial of justice” that the Claimants had never really articulated in the

⁷⁵ Award ¶ 639.

proceeding, so that such claim could then serve as a vehicle for the Tribunal's determination in favor of the Claimants. It is difficult to imagine a more quintessential example of *ultra petita* excess of power. The precise circumstances of this bizarre outcome are detailed below.

333. In their original Request for Arbitration in 1997, the Claimants had alleged that Chile had violated the BIT as a result of Chile's confiscation in the 1970's of the "El Clarín" newspaper and of the company that controlled the newspaper — CPP, of which Mr. Pey claimed to be the owner at the time of the confiscation. The Request for Arbitration had invoked a number of the provisions of the BIT (*e.g.*, clauses on expropriation, "fair and equitable treatment," *etc.*), but all such BIT clauses were alleged to have been violated as a result of the expropriatory acts committed by Chile in the 1970's.
334. Significantly, the 1997 Request for Arbitration expressly indicated that it did not include a claim for compensation for a Goss printing machine that had been confiscated together with other "El Clarín" assets, because a claim had already previously been filed by Claimants in the First Civil Court of Chile in 1995 for compensation for the confiscation of the Goss machine. In that local court proceeding, Claimants had requested either restitution of the machine, or compensation for its value. Thereafter, for several years, the Claimants pursued the Goss machine claim in Chile, and in parallel pursued the ICSID claim in Washington.
335. On 4 November 2002, however, the Claimants presented to the Tribunal an "Ancillary Request" pursuant to Article 46 of the ICSID Convention, by means of which it sought to transfer to the ICSID jurisdiction the confiscation claim relating to the Goss machine, which until that time it had been pursuing in the Chilean courts. The cover page of the

relevant request was captioned “Ancillary Request” and immediately below the caption included a long subheading that described the nature and purpose of the Request. Such subheading made it clear that the claim was solely for the *confiscation* of the Goss machine:

*relating to compensation for damages resulting from the **confiscation** by the Authorities of Chile of a Goss printing machine*, confiscated by Supreme Decree No. 165 of 10 February 1975, which the Claimants submit to the Tribunal in conformity, in particular, with the most favored nation clause of the BIT in force between Spain and Chile of 2 October 1991, which allows them to invoke also the BIT between Switzerland and Chile of 24 September 1999. (emphasis added).

336. Thus, it is evident from the subtitle of the Ancillary Request (as well as the body of the Request itself), that the purpose of this Request was unequivocally to transfer to the ICSID Tribunal the *confiscation* claim for the Goss machine that had been pending without resolution in the Chilean courts.
337. The purpose of the reference in the Ancillary Request (including in its subheading) to the Chile-Switzerland BIT was to overcome any potential “fork in the road” jurisdictional bar, by invoking — via the MFN clause of the Chile-Spain — the clause in the Chile-Switzerland BIT which provided that any investment claims taken to local courts, if not resolved within eighteen months, could be transferred to an international arbitration tribunal. In other words, Claimants were contending that since the Goss machine claim had been pending in the Chilean courts for seven years (*i.e.*, more than 18 months), they could now resort to ICSID under the BIT via the MFN clause.
338. Thus, the fact that the Goss machine claim had been pending without resolution in the Chilean courts for seven years was merely the *justification* that was adduced by the Claimants for requesting a transfer of the case to the ICSID Tribunal — but it was not the

substantive BIT claim being asserted in the Ancillary Request. Nowhere in the Ancillary Request was “denial of justice” asserted as a new and separate BIT violation in and of itself.

339. Rather, the BIT claim asserted in the Ancillary Request was simply the same claim for restitution or compensation for the Goss machine *confiscation* which had been asserted in the Chilean court, and which the Claimants were asking be “*transferred* to the ICSID Tribunal.” Thus, while the Ancillary Request claimed violation of various BIT clauses (expropriation, “fair and equitable treatment,” etc.), it did so — much as the Claimants’ original request had done — in connection solely with the acts of confiscation that had occurred in the 1970’s.
340. Much like the subheading of the Ancillary Request, which refers solely to “confiscation”, the text of the Ancillary Request stated that “*the Claimants present before the Centre [ICSID] a claim for compensation for the confiscation of the Goss machine.*” Further, the cases cited in the request in support of the claim were all cases concerning confiscation issues.
341. It bears noting, furthermore, that while the words “denial of justice” did appear in the Ancillary Request, it was only in connection with a discussion of the appropriateness of transferring the case to ICSID pursuant to the MFN clause. It was not, however, in any way presented formally as a new cause of action under the BIT. This is evident from a simple review of the plain text of the Ancillary Request.
342. It was for this reason that when the Republic replied to the Ancillary Request in Chile’s Counter-Memorial on the Merits, filed on 3 February 2003, it addressed only the MFN clause issue raised by the Ancillary Request. There was no need to respond to the merits

aspect of such request because, as the Claimants themselves had recognized in the Request, the latter “did not modify in any respect the facts and legal arguments stated by the Claimants — submitted to the Arbitral Tribunal on 7 November 1997 [*i.e.*, the Request for Arbitration].”

343. Thus, the new claim presented in the Ancillary Request was substantively identical to the one raised in the original Request for Arbitration and presented exactly the same merits issues of ownership of the CPP and EPC (whose assets included the Goss machine). The only difference was that the scope of the original BIT claim was now being updated to include the Goss machine, for which reason Claimants were requesting a corresponding increase in the amount of damages.
344. Consistent with the foregoing, Claimants’ Reply dated 23 February 2003 included a section captioned “denial of justice”, but such section was only — as its subtitle unambiguously indicates — a “response to sections III-C to III-E of Chile’s Counter-Memorial.” Sections III-C to III-E of Chile’s Counter-Memorial in turn had addressed only jurisdictional objections (*viz.*, the non-retroactivity of the Chile-Spain BIT, the non-existence of an “investment”, and the “fork in the road” objection); however, they did not address or respond to any substantive claims.⁷⁶
345. At the May 2003 hearing on merits and jurisdiction, Claimants’ counsel mentioned the term “denial of justice” only once in the entire hearing. And there, once again, the reference was made only in connection with the propriety of transferring the Chilean

⁷⁶ While certain references were made in the Claimants’ Reply dated 23 February 2003 to “denial of justice” that could be characterized as substantive in nature, they cannot be deemed to delineate a claim as such.

court claim to the jurisdiction of ICSID via the MFN clause, and not as a free-standing BIT claim:

Therefore, we conclude that our interpretation of the most favored nation clause and the most favored investment to resolve a dispute, raised after the denial of justice in the Goss issue, is perfectly supported by the Spain-Chile BIT.

346. Moreover, at that same May 2003 hearing, Claimants expressly ratified that the entirety of the claims in their Request for Arbitration — as well as their “Ancillary Request” — were *confiscation* claims only:

We refer specifically to the *confiscation*, and also to the Ancillary Request dated 4 November 2002, that in its cover page indicates that it refers to compensation for damages resulting from the *confiscation* by the Chilean authorities based on Decree No. 165 of 1975.

347. Consistent with the foregoing, the Claimants also never presented a separate valuation of damages for any “denial of justice” claim following their Ancillary Claim, whereas they did claim for additional damages on the basis of the value of the confiscated Goss printing machine itself.

348. Given the foregoing, and since no “denial of justice” claim had ever been articulated by the Claimants, the Republic never responded substantively to any such claim, either in its written pleadings or at the merits hearing, at any point in the arbitral proceeding.

349. The truly exceptional aspect of the “denial of justice” issue is what took place at the Fourth Jurisdictional Hearing, held in Paris in 15-16 January 2007 (which proved to be the final hearing). At that point, no further substantive pleadings had been submitted or hearings held since the May 2003 hearing; accordingly, there had been no new claims asserted and thus no new developments on any purported “denial of justice” claim.

350. The January 2007 hearing was devoted, by the Tribunal’s express order, only to a narrow list of jurisdictional questions. In Claimants’ presentation at that hearing (as distinguished from their responses to Tribunal questions), once again the Claimants did not make any reference to any claim under the BIT based on “denial of justice” as an independent cause of action.
351. What follows is the extraordinary part. At the end of the 15 January 2007 session, and notwithstanding that the scope of the hearing did not extend to merits issues (and that in fact the Tribunal had rejected an earlier request from the Republic for the hearing to encompass merits issues), the Tribunal posed the following question to the Claimants:

The second question, linked to the first — and it is better to ask it this evening — has to do with your argument of denial of justice, but you are not obligated to answer immediately. **I have observed that the Claimant party, essentially as a principal contention, contemplates the article of the Treaty that deals with expropriation, illegal nationalization (Article 5).** *When you invoke the violations of international law or the violations of the Treaty, do you also refer to other substantive provisions of the Treaty, apart from the provisions on jurisdiction and the dispute settlement mechanism, particularly in Article 4 [i.e., the BIT’s “fair and equitable treatment” provision], on which you have been a lot more discreet, at least in your written submissions?*

Today, I observe that you invoke denial of justice. The question of denial of justice, what is its legal source in the Treaty? That is the question that I pose to you. Of course, I pose it to the two parties, but since **it is a question of clarification of the claims**, it is rather to the Claimant party that I address myself, but the Respondent party may answer too.⁷⁷

352. It is useful to deconstruct the Tribunal’s statements and questions in the foregoing passage. First, it is precisely because Claimants had invoked “denial of justice” merely as a jurisdictional basis for the transfer of the Goss machine claim, but never as a

⁷⁷ Emphasis added.

substantive claim, that the Tribunal explicitly asked “. . . [D]o you also refer to other substantive provisions of the Treaty, *apart from the provisions on jurisdiction and the dispute settlement mechanism, particularly in Article 4 . . . ?*” This statement was simply a veiled suggestion to the Claimants that they broaden their use of the concept of “denial of justice,” by repackaging it as a substantive BIT claim — and in particular as an Article 4 claim (*i.e.*, as a “fair and equitable treatment” claim); hence the Tribunal’s specific reference to Article 4. Further, the Tribunal’s reference to the Claimants’ theretofore “discreet” treatment of Article 4 was essentially an elegant way of drawing to Claimants’ attention the fact that they had not asserted a claim under that Article, but rather only under Article 5 (expropriation).

353. The second question presented by the Tribunal had a similar purpose: “*The question of denial of justice, what is its legal source in the Treaty? That is the question that I pose to you.*” By the very act of posing this question, the Tribunal was essentially inviting — indeed, inducing — the Claimants to articulate explicitly a separate “denial of justice” claim under the BIT, predicated on a violation of one of the BIT’s substantive clauses.
354. Having been perspicacious enough to discern the purpose of the question, Claimants’ counsel naturally came back the next day — the very last day of the very last hearing of the 10 year-long proceeding — and for the very first time in the arbitration, asserted “denial of justice” as a free-standing BIT claim, separate from the confiscation-related claims which they had consistently and exclusively raised throughout the arbitration. Just to be safe, in that final session the Claimants wrapped all of their claims in a blanket denial-of-justice blanket under Article 4 of the BIT:

As it was said, it is Article 4(1) of the Treaty that deals with the fair and equitable treatment, and we consider that denial of justice is a notion that belongs to the notion of fair and equitable treatment... That allows us to assert that the repeated rejection of compensation from 1995 on is also *a denial of justice that is an act of the State in reality distinct from the expropriation invoked on the basis of Article 5 of the Treaty, and which is applicable to all claims* presented in front of this Tribunal.

355. And thus was born the Claimants' substantive claim for "denial of justice," which was to become one of the two sole bases on which the Tribunal concluded there had been a BIT violation by Chile. It was a substantive claim that had never been articulated by the Claimants in the Request for Arbitration or in any Ancillary or Incidental Claim, that had never been briefed by the parties, that had never been discussed by the parties on the merits at any hearing, and with respect to which Claimants had never presented any damages assessment. It was a claim that, in essence, was born orally, on the last day of a decade-long arbitration, at the inducement of the Tribunal itself.

356. Given the foregoing, it seems pertinent here to recall the following statement made in a different context by Professor P. Lalive: "*ICSID tribunals are not at liberty to develop new arguments or claims that the parties did not.*"⁷⁸ Professor Lalive has also stated:

. . . [A]lthough ICSID arbitrators (and arbitrators in general) do not, strictly speaking, have the obligation to warn counsel about the likely basis of their decision, it is considered by many that they would be well advised to offer the parties an opportunity to address an issue before deciding on a ground not discussed or not adequately covered by them. Avoiding any kind of surprise is not only good arbitral policy but may also be considered, perhaps, as a consequence of the famous judicial pronouncement that "it is not enough that justice be done, it must be seen manifestly to be done."⁷⁹

⁷⁸ "Concluding Remarks," in Annulment of ICSID Awards, at 307 (emphasis added). In the same remarks, Mr. Lalive also approvingly referred to Professor C. Schreuer's observation — in regard to the *Klockner I*, *Wena*, and *Vivendi II* annulment decisions — that "the *ad hoc* committees uniformly respected the idea that tribunals are restricted to the arguments presented by the parties"

⁷⁹ "Concluding Remarks," in Annulment of ICSID Awards, at 307-308.

357. Since this Paris hearing was the last hearing of the arbitration, and since the Tribunal did not allow any further written submissions thereafter, the Republic had no real opportunity to be heard on the alleged “denial of justice” claim after such claim was articulated for the first time as a separate BIT claim. Further, the Tribunal did not explain how it could possibly have based its Award on an alleged claim that had never really been addressed by the parties, and that was not even clearly identified as a substantive claim until long *after* the parties had already made all of their written submissions on the merits and had held their only merits hearing.
358. These actions would seem to have no logical explanation other than a desire by the Tribunal to find some post-entry into force BIT basis upon which to provide a modicum of compensation to the Claimants. However, it was not permissible for the Tribunal to “engineer” a basis for liability.
359. In sum, the Tribunal’s handling of the issue of “denial of justice,” and its decision in the Award to base its finding of responsibility by Chile under the BIT in large part on a claim that was created by the Tribunal itself, constitutes an unequivocal basis for annulment on a number of grounds under Article 52 of the ICSID Convention: manifest excess of powers (Article 52(1)(b)); serious departure from a fundamental rule of procedure (Article 52(1)(c)); and failure to state reasons (Article 52(1)(e)).

(ii) The Tribunal’s Substantive Analysis of “Denial of Justice”
Issue Reveals Failure to Apply Proper Law and Failure to
Explain Reasons

360. It was not only from a formal and procedural standpoint that the Tribunal committed gross injustices in connection with its finding of denial of justice. The Tribunal also

reached its conclusion without articulating even a minimal substantive analysis or explanation.

361. Notably, the Tribunal’s analysis of the factual basis for its determination of denial of justice takes up only one paragraph of the Award. The determination is based on a single fact: that at the time Mr. Pey decided to transfer to ICSID his Chilean court claim for the restitution or value of the Goss printer to ICSID, the relevant lawsuit had been pending in the Chilean courts for seven years. Without looking beyond this single fact, the Tribunal determined that Chile had committed a denial of justice.
362. In other words, the Tribunal concluded that a seven year lawsuit *ipso facto* implied a “denial of justice.” Remarkably, the Tribunal never undertook any analysis of the reasons the proceeding had been ongoing for seven years, or of whether the delay was undue, instead simply declaring, by fiat, that seven years constituted an actionable delay.⁸⁰
363. However, the few international courts and tribunals that have ascribed to a State a denial of justice for undue delay have done so only after inquiring into all relevant circumstances, not just the amount of time the claim has been pending. In fact, the very legal sources cited by the Tribunal require that analysis, sometimes in text adjacent to that quoted by the Tribunal, and which the Tribunal inexplicably suppressed. For example, when quoting from Jan Paulsson, *Denial of Justice in International Law*, the Tribunal omitted the text the Republic reproduces in bold type below:

Freeman stated that “ever since the era of private reprisals it has been axiomatic that unreasonable delays are properly to be

⁸⁰ Award ¶ 659.

assimilated to absolute denials of access ... attempts to deny that continuous unwarranted postponements of judicial action violate international law are now of the rarest occurrence.” As he noted, delays may be “even more ruinous” than absolute refusal of access, because in the latter situation the claimant knows where he stands and take [sic] action accordingly, whether by seeking diplomatic intervention or exploring avenues of direct legal action.

What constitutes “unreasonable delay” depends on a number of factors

To determine whether the duration was reasonable, the [French] Conseil d’Etat emphasised the need to evaluate the matter concretely and in its entirety, taking into account its degree of complexity, the conduct of the parties in the course of the proceedings, as well as any known facts pointing to a legitimate interest in celerity.⁸¹

364. Significantly, the Tribunal did not evaluate the “number of factors” that the very legal source it quoted indicates is necessary before a determination of denial of justice may be made. It did not examine whether there had been any “continuous unwarranted postponements of judicial action,” nor did it assess the “degree of complexity,” “conduct of the parties,” or the existence of “facts pointing to a legitimate interest in celerity.” It focused solely on the passage of time, which does not inherently establish the existence of a delay as such, much less the undue character of any delay, and even less still an undue delay in relative terms in the context of other cases within the relevant judiciary system as a whole.

365. In much the same manner, the Tribunal omitted the key language requiring it to look beyond mere passage of time in its quotation from the award of the Anglo-Mexican Special Claims Commission in *El Oro Mining & Railway Co. (Great Britain v. Mexico)*.

The language excluded from the Tribunal’s quotation appears below in bold type:

⁸¹ J. Paulsson, *Denial of Justice in International Law* 177-78 (2005) (citations omitted).

Nine years have elapsed since the Company applied to the Court to which the law directed it, and during all those years no justice has been done. There has been no hearing; there has been no award. **Not the slightest indication has been given that the claimant might expect the compensation to which it considered itself entitled, or even that it might be granted the opportunity of pleading its cause before that Court.**

The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter. It will often be difficult to define the time limit between a careful and conscientious study and investigation, on the one hand, and procrastination, undue postponement, negligence and lack of despatch on the other. The Commission have, in their Decision No. 53 (*Interoceanic Railway*), laid down their opinion that a court with which a claim for an enormous amount had been filed in November 1929 could not be blamed for undue delay if it had not administered justice by June 1931. It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.

But it is equally obvious that a period of nine years by far exceeds the limit of the most liberal allowance that may be made. Even those cases of the very highest importance and of a most complicated character can well be decided within such an excessively long time. A claimant who has not, during so many years, received any word or sign that his claim is being dealt with is entitled to the belief that his interests are receiving no attention, and to despair of obtaining justice.⁸²

366. Here, in contrast, the Tribunal did not analyze the circumstances surrounding the Goss proceedings, contrary to what was suggested by the language it suppressed from the quotation above. Unlike in the case referenced above, where there had been a total absence of action by the local authorities (“*Not the slightest indication* has been given that the claimant might expect the compensation to which it considered itself entitled, or even that it might be granted the *opportunity of pleading* its cause”), in the Goss machine

⁸² *El Oro Mining & Railway Co. (Great Britain v. Mexico)*, 5 R.I.A.A. 191, 198 (1931).

proceedings, the Chilean courts had been active during the seven years of proceedings.⁸³

The Tribunal itself recognized this in the Award. In fact, while in the local proceeding in *El Oro Mining & Railway Co.* there had “been no hearing,” in the Goss proceeding the matter had advanced to the point of a formal declaration that the case was ready for final judgment.

367. Similarly, the Tribunal relied on the European Court of Human Rights judgment in *Ruiz-Mateos v. Spain*. But the European Court clearly held in *Ruiz-Mateos* that “[t]he reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court’s case law and in the light of the circumstances of the case.”⁸⁴ The Court then went on to examine each of the following criteria: complexity of the case, applicant’s conduct, and conduct of the competent authorities, reiterating that its conclusion was made “in the light of all of the circumstances of the case.”⁸⁵

368. The Tribunal also quoted a passage from Ibrahim F.I. Shihata, *MIGA and Foreign Investment*, which indicated that the scenarios enumerated in Article 11(a)(iii) of the MIGA Convention — including absence of decision by a local court within a reasonable period of time — “represent situations which the Regulations correctly group under the term ‘denial of justice.’” But the Tribunal omitted to note that the next page of the book states that

[s]ince the reasonableness of such a period will to a great extent depend on such factors as the *complexity of the [case] and the swiftness of the machinery of justice in individual host countries*, Article 11(a)(iii) of the

⁸³ See Award ¶¶ 457-59 and footnote 409.

⁸⁴ *Ruiz-Mateos v. Spain*, App. No. 12952/87, 16 Eur. H.R. Rep. 505 ¶ 38 (Eur. Ct. H.R. 1993).

⁸⁵ *Id.* ¶¶ 39-53.

Convention leaves the precise period to “be prescribed in the contracts of guarantee pursuant to the Agency’s regulations.”⁸⁶

369. Again, the Tribunal failed to evaluate the factors required by its own legal source: it did not evaluate the complexity of the Goss case, or whether seven years was in fact so disproportionately long a period for a judicial case in Chile as to constitute a “denial of justice.”

370. As the legal sources relied on by the Tribunal evidence, and as elementary logic dictates, an undue delay cannot be determined solely on the basis of the length of a proceeding. If that were the case, then the fact that it took the Tribunal over ten years to arrive at a final award in this ICSID proceeding would *ipso facto* amount to a denial of justice. Strangely enough, the Tribunal seemed to apply the correct standard of evaluation in the context of its own arbitration, excusing the case’s aberrant duration by reference to “different reasons, including the unusual complexity of the disputed issues and the conduct of the parties itself.”⁸⁷ By contrast and incongruently, when considering the proceedings in the Chilean courts, the exclusive factor the Tribunal took into account was the sheer amount of time that had elapsed, declaring that a period of seven years inherently configured a denial of justice.

371. The Tribunal’s failure to evaluate the relevant factors for a finding of denial of justice in the context of the Goss machine proceeding in Chile constitutes a failure to apply the relevant law (in this case, international law). Accordingly, its determination of a BIT violation by Chile on that basis was a manifest excess of power, which renders the Award subject to annulment under Article 52(1)(b) of the Convention. Similarly, its failure to

⁸⁶ Ibrahim F.I. Shihata, *MIGA and Foreign Investment* 133 (1988) (emphasis added).

⁸⁷ Award ¶ 691.

articulate reasons for not following the criteria of international law applied in the sources that the Tribunal itself invoked constitutes a failure to explain reasons that is contrary to Article 52(1)(e) of the Convention.

(b) *Annulable Features of Award on Issues of “Fair and Equitable Treatment”*

372. The only other BIT violation found by the Tribunal was an alleged “fair and equitable treatment” violation relating to Decision 43 of the Ministry of National Assets. That claim, too, among other deficiencies described below that render the Award annulable, was never formally asserted by the Claimants.
373. The relevant portion of the Award concluded that Decision 43 had violated the BIT’s “fair and equitable treatment” clause by discriminating against Mr. Pey.⁸⁸ That section of the Award reflects, once again, the Tribunal’s strained effort to find an act by the Republic subsequent to the BIT’s entry into force upon which it could base an award of damages.
374. First of all, Claimants never asserted any formal claim under the BIT that Decision 43 itself was discriminatory or that it violated the BIT’s “fair and equitable treatment” clause. Claimants’ Request for Arbitration filed in November 1997 naturally does not mention Decision 43, which was not adopted until 28 April 2000. But Claimants also did not — at any subsequent point in the arbitration — formally assert a new or ancillary BIT claim for unfair or inequitable treatment or discrimination in accordance with Article 46 of the ICSID Convention and Rule 40 of the ICSID Rules of Arbitration.

⁸⁸ Award ¶¶ 670-671.

375. This failure by the Claimants is all the more significant given that they were fully aware of the required formalities for claim supplementation, as is proven by the fact that they resorted three separate times to such mechanism: (1) Incidental Claim dated 20 May 2002; (2) Ancillary Request dated 4 November 2002; and (3) Incidental Claim dated 23 February 2003 (all of which were presented formally pursuant to Article 46 and Rule 40, but none of which raised BIT claims for discrimination and/or violations of “fair and equitable treatment” in connection with Decision 43).
376. Although the Claimants did mention Decision 43 in the Ancillary Request dated 4 November 2002, they did so only — once again — in the context of an argument that the Decision 43 proceeding would interfere or overlap with the Claimants’ local court claim relating to the confiscation of the Goss machine, and that such interference or overlap constituted a “denial of justice” that justified *transferring* to the ICSID Tribunal the local court claim.
377. Thus, Claimants did not assert in their Ancillary or Incidental Requests any independent claim based on Decision 43. Curiously, in their Reply dated 23 February 2003, the Claimants addressed Decision 43 as if a BIT claim in connection therewith had already been formally raised at an earlier point, which was not the case. Moreover, the treatment of the issue in the Reply was — at best — confusing, as the contours of the grievance relating to Decision 43 were not defined or delineated, thereby preventing the Republic from having a specific and clearly articulated claim against which to defend itself. As Professor Lalive has stated, “a distinction must be drawn between ‘questions’ (not always clearcut) or arguments, of fact or law on the one hand, and formal submissions or ‘petita’,

on the other. . . .”⁸⁹ Here, neither Decision 43 nor the judicial and administrative actions related thereto were ever formally asserted as a *causa petendi* under the BIT.

378. This is especially relevant given the fact that, as we have explained, the alleged “denial of justice” BIT claim on which the Tribunal based its other finding of responsibility by Chile *also* had not been formally raised by the Claimants. *Thus, neither of the two BIT violations ultimately found by the Tribunal were based on claims that were actually and formally asserted by the Claimants.*

379. Beyond this threshold infirmity, which is critical for purposes of annulment, the Tribunal’s finding of discriminatory treatment upon which it based its conclusion of violation of the “fair and equitable treatment” clause is entirely murky, as it is not clear from the Award what it is that rendered Decision 43 (or any related administrative and judicial decisions) “discriminatory.” The Tribunal’s reasoning on this point is limited to the statement that Decision 43 discriminated against Mr. Pey

. . . in granting compensation — for reasons that are of [the Republic’s] own and remain unexplained — to persons that, in the Arbitral Tribunal’s opinion, were not the owners of the confiscated property, at the same time that it paralyzed or rejected Mr. Pey Casado’s vindications concerning the confiscated property.⁹⁰

380. However, the Tribunal failed to explain what specific acts by the Chilean State were deemed to be discriminatory or how they discriminated against the Claimants. The Tribunal does not describe precisely how it is that the Republic treated Mr. Pey

⁸⁹ “Concluding Remarks,” in *Annulment of ICSID Awards*, at 307.

⁹⁰ Award ¶ 674. The Republic notes that the finding of discrimination was thus predicated entirely on the Tribunal’s finding that Mr. Pey owned the CPP shares. Since the latter finding in itself creates a basis for annulment for the reasons articulated earlier in this Petition, the derivative discrimination finding is likewise annulable on that basis.

differently than the persons who were compensated under Decision 43.⁹¹ Nor did it explain why the mere fact of not awarding compensation to the Claimants was inherently discriminatory. If that were so, every administrative or judicial decision that grants compensation to one party but not another could be subject to challenge based on discrimination. There is a significant difference between a merely adverse ruling and a discriminatory one.

381. Quite apart from the Tribunal's utter failure to state its reasons for this finding in the merits, it so happens that Decision 43 could not under any circumstances have been discriminatory, for the simple reason that Mr. Pey had affirmatively, expressly, and voluntarily *chosen* not to avail himself of the administrative procedure established by Law No. 19.568 pursuant to which the third parties were compensated by Decision 43.
382. The history of correspondence between Mr. Pey and the Republic on the issue of his possible application for compensation under Law 19.568 is revealing. Mr. Pey had sent a letter dated 6 September 1995 addressed to Chile's President requesting restitution of the confiscated CPP property. In response, the Republic's Minister of National Assets had informed Mr. Pey in a letter dated 20 November 1995 of the following:

. . . A bill is pending in the House of Deputies, which has as its object to regulate these situations, with the aim of restituting or compensating both individuals and legal entities distinct from Political Parties for the property that was confiscated from them during the years of the Military Government.

⁹¹ The Republic notes that Mr. Pey was in fact successful in obtaining compensation in the context of other proceedings that he initiated in the Chilean courts in connection with personal property that had been confiscated from him by the military during the 1970's. For example, and as mentioned earlier, on 13 January 1997, the 21st Court of Santiago ruled in Mr. Pey's favor on his request for the annulment of decrees 276, 580 and 1200, and ordered compensation to Mr. Pey, in an amount of over US\$100,000, which was paid out to him by the Chilean Treasury on 24 December 2002.

383. The letter informed Mr. Pey of the procedural status of the bill, and encouraged him to apply for compensation once the law entered into force.
384. In a communication dated 10 January 1996, again addressed to the President, Mr. Pey insisted that restitution should be accorded to him before the law was passed. Once again such letter did not yield the result he wanted. Therefore, as noted above, rather than wait for the law to enter into force, he decided to resort to international arbitration.
385. For this reason, through the rest of 1996 and much of 1997, Mr. Pey rushed to lay the groundwork for his arbitration claim at ICSID (including strenuous efforts at shedding his Chilean nationality, as described earlier). He filed the Request for Arbitration on 3 November 1997 — a few months prior to the enactment of Law 19.568, on 23 July 1998.
386. Following promulgation of Law 19.568, Mr. Pey expressly notified the Republic by a communication dated 24 June 1999 that, because of his pending arbitration claim at ICSID, and in light of the BIT’s “fork in the road” clause and the exclusive remedy provision in Article 26 of the ICSID Convention, he “[would] not seek the protection of Law No. 19.568.” Thus, it is abundantly clear that Mr. Pey affirmatively chose not to avail himself of Law No. 19.568, and that his status as a non-applicant was entirely voluntary.
387. Accordingly, there could not have been any discrimination against Mr. Pey. If anything, it was Mr. Pey who had sought a preferential treatment for himself that was not available to other Chileans by resorting to international arbitration. Mr. Pey chose to take his chances in international arbitration in 1997 rather than wait for the compensation mechanism that he knew was in the process of being established under Chilean law for all victims of the military government’s confiscations. Such being the case, it was

manifestly an excess of power for the Tribunal to base its finding of discrimination on Chile's failure to provide compensation to Mr. Pey *in the Decision 43 administrative proceeding*.

388. Since discrimination is the unequal treatment of equally situated persons, perhaps a finding of discrimination would have been possible if Mr. Pey had in fact participated in the Chilean proceedings that yielded Decision 43, and compensation had been awarded to others for improper motives. But that was not the case, because Mr. Pey was not an applicant.
389. Persons were compensated, the Award asserts, "that, *in the Arbitral Tribunal's opinion*, were not the owners of the confiscated property." But since Mr. Pey had clearly excluded himself from consideration it would have been impossible for the administrative process to yield a result favorable to Mr. Pey. In essence, the Tribunal held the Republic liable on the basis that, in a procedure in which party "x" had asserted a claim but party "y" had not, the Republic failed to award compensation to party "y" on the basis of party "y"'s non-asserted claim, thereby discriminating against party "y".⁹²
390. Further, the Tribunal's determination seems to imply that, in order to avoid the alleged discriminatory treatment, the Republic should have compensated *both* the third parties *and* Mr. Pey. But the Ministry of National Assets faced a legal impossibility in doing that, since Mr. Pey had not presented a claim. Such being the case, under the Tribunal's apparent reasoning the only other way that a discriminatory finding could have been

⁹² It bears noting that even if Mr. Pey had in fact presented a claim to the Ministry of National Assets (along with the others), the Republic had no reason to discriminate against Mr. Pey. He and those who were ultimately compensated pursuant to Decision 43 were all friends of President Allende's, for which reason there would have been no basis to favor one over the other, other than the objective evidence presented by each of their ownership of CPP. Nor would there have been any basis for discriminating against Mr. Pey on the basis of his nationality, because — as argued by Chile *ad nauseam* in the proceedings — he was and remains a Chilean.

avoided would have been for the Ministry to compensate *neither* the true nor the false owners. But that too cannot be right.

391. Ultimately, the Award’s finding of discrimination is unintelligible. The Tribunal’s failure to explain its “discrimination” finding constitutes a “failure to state reasons” which renders the Award annulable under Article 52(1)(e). Moreover, the Tribunal manifestly exceeded its powers by making a finding on discrimination without any basis — whether objective or subjective — for doing so, for which reason the Award is therefore also annulable under Article 52(1)(b).

392. Given that the determination of discrimination was one of only two bases on which the Tribunal imposed responsibility by Chile under the BIT, the least that the Republic could expect from the Award was to understand why it was found liable. As Mr. Lalive himself once stated in connection with ICSID Awards and their annulability, “[a]ny award or decision should in principle be self-explanatory”⁹³

393. The Tribunal’s conclusion that Decision 43 discriminated against the Claimants is all the more striking in light of an earlier — and inconsistent — finding of the Tribunal that had specifically addressed the issue of Decision 43 and its effect (or, more precisely, the lack thereof) on Claimants’ rights. In 2001, when the jurisdiction of the Tribunal was still being discussed, Claimants had submitted to ICSID a request for provisional measures dated 23 April 2001. The purpose of the request was precisely to have the Tribunal order the Republic to stay the execution of Decision 43, on the basis that execution of Decision 43 by Chilean authorities had “as its aim depriving the Claimants *of their rights* in Chile and denying the exclusive jurisdiction of the Arbitral Tribunal.”

⁹³ P. Lalive, “Concluding Remarks” in Annulment of ICSID Award, at 303.

394. The Tribunal ruled on Claimants' request in a Decision dated 25 September 2001, declining to stay Decision 43's execution, *inter alia* because "Ministerial Decision No. 43 and its execution in Chile *do not have consequences such that they can affect* either the jurisdiction of the ICSID Arbitral Tribunal or *the rights alleged* by the Claimants in their request for provisional measures"
395. After the Decision of 25 September 2001, the Republic proceeded with execution of Decision 43. On 8 May 2008, the Tribunal issued its final Award, this time however concluding that Decision 43 was not an irrelevant local administrative proceeding which could not affect Claimants' rights — as it had concluded in its earlier Decision on Provisional Measures — but rather one of the two central pillars of the Tribunal's finding of a breach of the BIT by Chile. In fact, Decision 43 is arguably *the* central pillar of the Award, insofar as the Tribunal directly "borrowed" from the Decision 43 administrative proceeding the calculation of compensation that it granted to the Claimants in the Award.
396. The Tribunal fails to explain what changed between 25 September 2001 and 8 May 2008, or why a local administrative decision that the Tribunal had stated in 2001 could not affect Claimants' rights, all of a sudden could become the principal basis for a finding of a BIT violation by Chile. The Republic submits that the only thing that in fact did change was the Tribunal's finding of lack of jurisdiction *ratione temporis* over the "El Clarín" confiscation, which rendered the Tribunal unable to compensate the Claimants for the only state act with respect to which Claimants genuinely had asserted a BIT claim: the act of expropriating "El Clarín." This, in turn, evidently forced the Tribunal to reverse its position on Decision 43, as part of its dedicated effort to find some basis to provide the Claimants with compensation.

397. One final note: Paradoxically, Mr. Pey is far better off now than he would have been had the Tribunal granted his request for provisional measures in 2001. For if the Tribunal had granted such request, Decision 43 would have been suspended, and the Tribunal would not have had any basis to find a BIT violation by Chile predicated on the Republic's actions in connection with Decision 43. Moreover, had Decision 43 been suspended, the Tribunal would not have had a convenient damages analysis on which to base its Award.

(c) *Reasoning Inconsistent with Tribunal's Ratione Temporis Finding*

398. In the Award, the Tribunal recognizes the basic principle, articulated in Article 15 of the ILC Articles of State Responsibility and its commentary, that an expropriation must be deemed to have occurred at the point in time in which the relevant state acts were committed, and that it is not a continuing act for purposes of State responsibility, even if the *effects* of the expropriation continued in time.⁹⁴

399. The Tribunal correctly concluded that the expropriation itself of “El Clarín” was not actionable under the BIT because it occurred prior to the BIT's entry into force.⁹⁵ Nevertheless, as we have seen the Tribunal concluded that Chile had violated the BIT by committing certain acts and omissions *after* entry into force. It follows necessarily from this conclusion — although the Award does not articulate it expressly — that the Tribunal had determined that these post-entry into force acts and omissions by Chile did *not* constitute mere “effects” of the original expropriation that the Tribunal had deemed to be outside its *ratione temporis* jurisdiction.

⁹⁴ Award ¶ 617.

⁹⁵ See Award ¶¶ 601-611.

400. However, the Tribunal entirely failed to explain why it reached that conclusion. After all, the alleged “denial of justice” by the local courts and administrative agencies had occurred in connection with a claim asserted in a local court for the expropriation of one of the assets of “El Clarín” (the Goss printing machine). Any aspect of the treatment of such claim was therefore necessarily an *effect* of the original expropriation of “El Clarín”. Similarly, the Ministry of National Assets’ Decision 43 (which compensated other individuals for the expropriation of “El Clarín” and on the basis of which the Award found a violation by Chile of the “fair and equitable treatment” obligation under the BIT) also ultimately was derived from the same pre-BIT expropriation that the Tribunal had deemed to be outside the BIT’s *ratione temporis* scope.
401. Thus, the *entirety* of the acts and omissions by Chile on which the Tribunal predicated its finding of responsibility under the BIT related directly to the expropriation of “El Clarín,” and were therefore “effects” of such expropriation. The local court proceedings initiated by the Claimants in the case of the Goss machine proceedings, and by third parties in the case of Decision 43, formed the context in which the alleged BIT violations took place. But none of those proceedings would have happened if the expropriation of “El Clarín” itself had not happened in the 1970’s and all of them followed directly from such expropriation; as such they are merely “effects” of that expropriation for purposes of state responsibility analysis. The Tribunal’s failure to explain this key (and, once again, outcome-determinative) point constitutes a failure to state reasons for purposes of Article 52.

(d) *Reversal of Burden of Proof on Key Merits Issues*

402. Although the Tribunal ultimately did not reach the only claims that Claimants genuinely had asserted, its findings on the merits claims on which it did rule were premised on Mr. Pey's ownership of the relevant shares of stock. Therefore, the Tribunal should have articulated and applied the relevant standard of proof in this context. However, as mentioned earlier in connection with the jurisdictional issue of the existence of an "investment," the Tribunal failed altogether to articulate any standard for the burden of proof on the issue of ownership.
403. Had Chile actually had an opportunity to be heard on the merits claims on which the Tribunal ultimately based its finding of liability under the BIT, the Republic would have asserted as a merits defense with respect to the Goss printing machine that Mr. Pey was not the owner of that machine. Independently of Chile's defense, the Tribunal still had the obligation of assessing whether Claimants had borne the burden of proof of ownership of the Goss machine.
404. On that issue, however, the Tribunal's statements clearly indicate that it in fact imposed the burden of proof on Chile. For example, the Award states: ". . . *the Tribunal notes that the Respondent did not present any shareholding sales contract to which any of the alleged shareholders was a party, nor did it provide proof of a possible payment issued by such persons.*"⁹⁶ Thus, the Tribunal remarkably based its decision at least in part on the fact that the Republic had not presented contracts or payment information proving that parties other than Mr. Pey were the legitimate owners of CPP. But it was not Chile's burden in the ICSID proceeding to prove that third parties were the owners. Rather, it was Mr. Pey's burden — as the Claimant — to prove that he was the owner of

⁹⁶ See Award ¶ 199 (emphasis added).

the property for which he was claiming. Accordingly, it should have been sufficient to attain dismissal of the claim for Chile to establish that Mr. Pey had *not* been the owner. However, the Tribunal set the bar far higher, by requiring that the Republic prove that others had been the genuine owners.

405. The same applies with respect to the Tribunal’s other finding of liability — concerning Decision 43. Had it been provided a full opportunity to defend itself on that issue, Chile would have argued that the reason Mr. Pey was not compensated pursuant to Decision 43 — aside from the fact that Mr. Pey was not an applicant under Law 19.568 and that therefore it would have been illegal for Chile to compensate him in that context — is that Mr. Pey in fact was not the owner of any CPP shares. In that context, too, Claimants would have borne the burden of proof. Thus, on both merits issues on which the Tribunal based its finding of BIT liability by Chile, the Tribunal imposed the burden of proof on the Respondent, thereby directly contravening the universal precept that Claimants bear the burden of proving their claims on the merits.
406. The Tribunal’s failure to identify the appropriate burden of proof standard on the merits issues on which it based its finding of liability, as well as its *de facto* reversal of this burden of proof in application, constitute a manifest excess of power, which render the Award annulable under Article 52(1)(b) of the ICSID Convention. Moreover, the Tribunal’s failure to articulate the relevant standard, or indeed to address the issue of burden of proof at all in the merits context, also constitutes a “failure to explain reasons” under Article 52(1)(e).

(2) Annulable Features of Award on Issues of Valuation of Damages

407. Since the Claimants never really asserted “denial of justice” or discrimination claims with respect to the particular alleged State acts on which the Tribunal ultimately — and exclusively — predicated its determination of responsibility by Chile under the BIT, it is not surprising that the Claimants also never purported to set forth a valuation or claim for damages for the particular BIT violations that the Tribunal ultimately concluded that Chile had committed.

408. Thus, the problem encountered by the Tribunal when it reached the point of assessing damages is that, because the Claimants’ claim had been based exclusively on expropriation, at no point in the proceedings had the parties addressed the issue of damages for any alleged “denial of justice” or discrimination.

409. In fact, the Tribunal expressly conceded that the Claimants had not presented any evidence of damages on those particular BIT violations:

Claimants did not present any evidence, or at least none that was convincing, whether through documents, testimony, or expert statements, of the important damages alleged and caused by the acts that lie within the ambit of the Tribunal’s *ratione temporis* jurisdiction . . .⁹⁷

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

The simple fact of the dismissal from consideration by the Arbitral Tribunal of the expropriation that took place prior to the treaty’s entry into force, means that the allegations, discussions and evidence concerning damages suffered by the Claimants due to the expropriation lack relevance and cannot be admitted for the purpose of establishing

⁹⁷ Award ¶ 689.

the harm, which is derived from another cause, both factual and legal: the denial of justice and refusal of “fair and equitable treatment.”⁹⁸

411. Moreover, the Tribunal also recognized expressly that it was Claimants that shouldered the burden of proof “on the issue of the alleged damages and their amount.”⁹⁹
412. Notwithstanding the Claimants’ failure to present any expert evidence on the issue of damages regarding the BIT violations, the Tribunal stated in the Award that it was disinclined to name an independent expert to render an assessment on damages, because “such expert reports tend to increase, sometimes considerably, the duration and costs of an arbitration” and “the arbitral Tribunal is conscious of its duty to put an end . . . to a proceeding that has exceeded the average duration”¹⁰⁰
413. Thus, concerned about the already unprecedented delay in issuing its Award, the Tribunal essentially decided to dispense with rigor in the damages assessment phase of the case, so as to be able to issue its Award as soon as possible. Faced with the practical problem, however, that the Claimants had not presented any claim for damages and that an independent expert would take too long, the Tribunal resorted to the expedient of seizing upon the damages assessment of the value of “El Clarín” that had been prepared — *in the context of an expropriation analysis* — pursuant to Decision 43 by the Ministry of National Assets. This assessment, the Tribunal said, provided an “objective element” of evaluation of the relevant damages:

Although the Claimants had not provided convincing evidence, and excluding the possibility of relying on one or several expert reports, the Arbitral Tribunal may proceed to evaluate the damages based on objective elements, since, according to the unquestionable data

⁹⁸ Award ¶ 688.

⁹⁹ Award ¶ 690.

¹⁰⁰ Award ¶ 691.

contained in the case file, it was the Chilean authorities themselves who, through the adoption of Decision No. 43, fixed the compensation amount due to those, according to them, who had rights to compensation.¹⁰¹

414. Accordingly, the Tribunal decided simply to substitute the *confiscation* valuation of “El Clarín” (as determined pursuant in the context of Decision 43) for a valuation of the damages specifically attributable to the “denial of justice” and “fair and equitable treatment” violations that the Tribunal alleged Chile had committed.
415. The Tribunal purported to justify this facile solution by stating that even though “the harm for which compensation is sought is not the harm suffered as a result of the expropriation . . .,” its award of damages “must serve to place the Claimants in the situation in which they would have been had the violations at issue not occurred, *that is, if the Chilean authorities in the context of Decision 43 had compensated the Claimants instead of third parties who were not the owners of the assets at issue.*”¹⁰²
416. The Tribunal failed to explain, however, a number of key aspects of this determination. First of all, it did not explain why it considered that “placing the Claimants in the situation in which they would have been” was the proper standard for determining the value of the harm suffered by the Claimants as a result of the alleged “denial of justice” and failure to provide “fair and equitable treatment.”
417. Nor did the Tribunal explain why it considered that to meet that standard it was sensible for it to award to the Claimants an amount based on a valuation that had been carried out in a *confiscation* context — particularly since in doing so the Tribunal would in essence be compensating the Claimants for the very BIT claim that the Tribunal had concluded

¹⁰¹ Award ¶ 392.

¹⁰² Award ¶ 693 (emphasis added).

lay outside its *ratione temporis* jurisdiction, *i.e.*, the claim for the expropriation that had occurred in the 1970's.

418. Moreover, the Tribunal does not explain why it believed that providing the Claimants with what amounted to damages for the expropriation of “El Clarín” would “serve to place the Claimants in the situation in which they would have been had the violations at issue not occurred . . .”¹⁰³
419. After all, in terms of *compensation*, the Claimants had not requested anything in the Chilean courts other than compensation for the Goss machine. All of the other judicial and administrative decisions that formed the basis of the Tribunal’s “fair and equitable treatment” determination concerned denials of Claimants’ requests that all relevant Chilean proceedings be suspended pending resolution of the ongoing ICSID arbitration.
420. Accordingly, if the Tribunal had really intended simply to place the Claimants in the position they would have been absent the alleged violations, they would merely have provided compensation to the Claimants solely for the Goss machine.
421. Further, the harm suffered by the Claimants as a result of the Chilean authorities’ failure to suspend the proceedings in Decision 43 was zero, because such suspension would have achieved only the purpose of allowing the ICSID Tribunal to rule first, so as to not prejudice the Claimants’ rights. But this was a factor that the Tribunal, in its Provisional Measures Decision of 25 September 2001, had specifically determined was irrelevant.
422. In other words, had the alleged BIT violations not existed — which is the restitution standard used by the Tribunal — there would have been a full suspension of all Chilean

¹⁰³ Award ¶ 693.

proceedings relating to the confiscation of “El Clarín.” That, in turn, would have meant simply that the Tribunal would have been able to issue its Award prior to the resolution of any competing local claims in Chile. But what would this have meant in practice? It would also have meant that the Award could not have found any “fair and equitable treatment” violation based on the non-suspension of the Chilean proceedings, because under the standard used by the Tribunal, the analysis must be based on a scenario in which the relevant BIT violations did not occur.

423. The circularity and lack of logic of this outcome simply underscores the fact that the restitution standard used by the Tribunal made no sense in the context of the particular BIT violations that it found. The Tribunal’s failure to explain why it chose the standard and its failure to explain why, having chosen that standard, it deemed that the confiscation amount calculated in connection with Decision 43 was the appropriate figure to use to meet the restitution standard, render the Award annulable under Article 52(1)(e) of the Convention.
424. Finally, the Tribunal also committed a failure to state reasons in connection with its determination that the situation in which the Claimants would have been had the BIT violations not occurred was “if the Chilean authorities in the context of Decision No. 43 had compensated the Claimants instead of third parties who were not the owners of the assets at issue.”¹⁰⁴ The Tribunal did not explain how it came to the conclusion that the Chilean authorities in the context of Decision 43 should have compensated the Claimants instead of third parties, given that the Claimants had voluntarily excluded themselves,

¹⁰⁴ Award ¶ 693 (emphasis added).

and that therefore it would have been illegal under Chilean law for the Ministry of National Assets to award the Claimants any compensation in that context.

425. In the end, the real issue underlying the Tribunal’s decision was its legal inability — due to *ratione temporis* constraints — to compensate the Claimants *under the BIT* for that confiscation. Hence the Tribunal’s effort to find a BIT violation in Decision 43, even though the Chilean authorities faced a legal impossibility in compensating the Claimants in that particular context.
426. The foregoing failures not only constitute a “failure to state reasons” pursuant to Article 52(1)(e) of the ICSID Convention, but also a manifest excess of powers pursuant to Article 52(1)(b), insofar as the Tribunal was not at liberty to arbitrarily incorporate a damages assessment conducted in an entirely different context.
427. In addition, the Tribunal committed a serious departure from a fundamental rule of procedure pursuant to Article 52(1)(d), because the Respondent was never given an opportunity to be heard on the appropriateness of the methodology used by the Tribunal to calculate its damages, nor on the appropriateness of the amount decided upon. And because the Claimants had never provided any analysis of damages on the particular BIT violations found by the Tribunal to have existed — as opposed to expropriation-related damages — in the end the Republic never had an opportunity at any point in the proceedings to provide views on the appropriate methodology and amount of damages with respect to any of the particular alleged BIT violations on which the Tribunal ultimately based its award of damages.
428. In other words, for all practical intents and purposes, the Republic was entirely deprived in this arbitral proceeding of the opportunity to be heard on the issue of damages.

VI. GROUNDS FOR ANNULMENT DUE TO DEFICIENCIES IN THE ARBITRAL PROCEDURE

429. The Republic has described above at Section III the highly anomalous procedural history of this case. That section identifies a number of extraordinary incidents and measures that individually in and of themselves constitute sufficient grounds for annulment, inasmuch as they constitute serious departures from a rule of fundamental procedure. These include procedural inequities in the discovery process, denials of an opportunity to be heard on outcome-determinative issues, reversals of the burden of proof, and other serious denials of due process. The relevant deficiencies will be described and explained in greater detail in the course of the annulment proceedings once they are instituted.
430. Furthermore, whether or not one or more of the referenced procedural inequities individually are ultimately deemed by the *ad hoc* Committee to constitute a serious departure from a fundamental rule of procedure, collectively these violations rendered the arbitral proceeding fundamentally unfair, and deprived the Republic of basic due process. No departure from a fundamental rule of procedure can be more serious than that which results in an adjudicatory proceeding lacking the basic twin elements of fairness and impartiality. Accordingly, the Award should be annulled on the basis of Article 52(1)(d) of the Convention.

VII. REQUEST FOR PROVISIONAL STAY OF THE 8 MAY 2008 AWARD

431. The Republic hereby requests that the execution of the Award be suspended temporarily, in accordance with Article 52(5), which provides as follows: “If the applicant requests a stay of enforcement of the award in his application [for annulment], enforcement *shall* be

stayed provisionally until the Committee rules on such request.”¹⁰⁵ Accordingly, and in light of the mandatory nature of the above-cited provision of the ICSID Convention, the Republic shall deem the enforcement of the Award of 8 May 2008 to be provisionally suspended as of this date, 5 September 2008, until such time as the *ad hoc* Committee may be constituted and can rule on the Republic’s request.¹⁰⁶

VIII. CONCLUSION

432. As Professor Christoph Schreuer has observed, “In the framework of ICSID arbitration, annulment was designed as an extraordinary remedy for unusual and important cases.”¹⁰⁷

The Republic respectfully submits that if there has ever been an ICSID case that truly merited annulment, this one must be it. Given the multiple anomalies and deficiencies that have afflicted both the proceeding and the Award itself, logic and fairness compel annulment of the Award — as do, ultimately, the integrity of the international arbitration system and of ICSID as an institution.

433. The Republic wishes to conclude this Request by stating that it trusts that the *ad hoc* Committee members will evaluate the matter presented here not through the prism of the distinguished careers of the different arbitrators who may have served on the ever-changing Tribunal in this case, but rather through that of the reality of what happened in this particularly difficult arbitration — much like Mr. Lalive himself did as President of

¹⁰⁵ Emphasis added. Further, paragraph 2 of Rule 54 (“Stay of Enforcement of the Award”) of the ICSID Arbitration Rules provides as follows: “If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary General shall, together with the notice of registration, inform both parties of the provisional stay of the award. “

¹⁰⁶ The Republic notes that on 5 August 2008, the Tribunal in the Revision Proceeding in this case granted a stay of enforcement until a decision on the Claimants’ Request for Revision is issued. To the extent that such decision may be issued prior to the *ad hoc* Committee’s determination on the stay, the Republic shall deem enforcement of the 8 May 2008 Award to remain stayed by Article 52(5) of the ICSID Convention until such time as the *ad hoc* Committee pronounces itself on that issue.

¹⁰⁷ C. Schreuer, “Three Generations of ICSID Annulment Proceedings”, in Annulment of ICSID Awards, at 17 (emphasis added).

the *ad hoc* committee that annulled the *Klockner v. Cameroon* ICSID Award in 1985.

Mr. Lalive's reflections — many years later — on his decision in that case seem especially apt here:

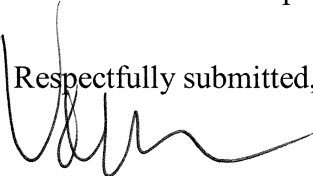
. . . [T]he Decision annulling the first *Klockner* Award was undoubtedly a difficult (and in fact unexpected) decision to reach, all the more so since the Tribunal's chairman was a distinguished judge of the International Court of Justice and a personal friend. He was indeed a highly esteemed friend, but his Award did not withstand careful scrutiny; if one may paraphrase Lord Nelson: "ICSID expects every *ad hoc* committee member to do his duty." "*Amicus Plato sed magis amica Veritas.*" ["Plato is a friend, but Truth is an even greater friend"].¹⁰⁸

IX. REQUEST FOR RELIEF

434. For the reasons articulated above, the Republic of Chile requests that the *ad hoc* Committee:

(A) annul in its entirety, in accordance with Article 52(1) of the ICSID Convention, the Award dated 8 May 2008 issued by the Tribunal in the case of *Victor Pey Casado and Fundación Presidente Allende v. Republic of Chile*; and

(B) order the Respondent to assume all fees and costs of the proceedings before the *ad hoc* Committee, including the costs of the Republic's legal representation and other costs incurred by the Republic in connection with such proceedings.

Respectfully submitted,

Paolo Di Rosa

5 September 2008
Exhibits to the Request for Annulment
- Award dated 8 May 2008
- Chile-Spain BIT

¹⁰⁸ P. Lalive, "Concluding Remarks" in *Annulment of ICSID Awards*, at 303.