

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

In the resubmission proceeding between

VICTOR PEY CASADO AND FOUNDATION “PRESIDENTE ALLENDE”

Claimants

AND

THE REPUBLIC OF CHILE

Respondent

ICSID Case No. ARB/98/2

AWARD

Members of the Tribunal

Sir Frank Berman KCMG QC, President of the Tribunal
Mr V. V. Veeder QC, Arbitrator
Mr Alexis Mourre, Arbitrator

Secretary of the Tribunal

Mr Benjamin Garel

Assistant to the President of the Tribunal

Dr Gleider I. Hernández

Date of dispatch to the Parties: 13 September 2016

REPRESENTATION OF THE PARTIES

Representing the Claimants:

Mr Juan E. Garcés
Garcés y Prada, Abogados
Calle Zorrilla no.11, primero derecha
28014 Madrid, Spain
Tel. + 34 91 360 05 36
100407.1303@compuserve.com

In cooperation with :

Ms Carole Malinvaud
Ms Alexandra Muñoz
Gide, Loyrette, Nouel,
22 cours Albert 1er
75008 Paris, France
Tel. +33 1 40 75 36 66
malinvaud@gide.com
alexandra.munoz@gide.com

Mr Samuel Buffone*
BuckleySandler LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
*† 3 April 2015

Representing the Respondent:

Mr Carlos Álvarez Voullième, Director
Ms Liliana Macchiavello
Ms Victoria Fernández-Armesto
Investment Promotion Agency – InvestChile
Ahumada 11, Piso 12
Santiago de Chile, Chile
Tel. +56 2 2663 9200
carlos.alvarez@investchile.gob.cl
lilianam@investchile.gob.cl
vfarmesto@investchile.gob.cl

Mr Paolo Di Rosa,
Ms Gaela Gehring Flores
Ms Mallory Silberman
Arnold & Porter LLP
601 Massachusetts Ave. NW
Washington, D.C. 20001, USA
Tel. +1 202 942 5060
Tel. +1 202 942 6505
Tel. +1 202 942 6809
Paolo.DiRosa@aporter.com
xPeyResubmission@aporter.com
Gaela.GehringFlores@aporter.com
Mallory.Silberman@aporter.com

Mr Jorge Carey
Mr Gonzalo Fernández
Mr Juan Carlos Riesco
Carey & Cia.
Isidoro Goyenechea 2800 Piso 43
Las Condes, Santiago, Chile
Tel. +56 2 2928 2200
jcarey@carey.cl
gfernandez@carey.cl
jcriesco@carey.cl

TABLE OF CONTENTS

I.	FACTUAL AND PROCEDURAL BACKGROUND.....	1
A.	Historical Context and Relevant Facts	1
B.	Previous Phases of the Dispute and Procedural History	3
II.	SUMMARY OF PARTIES’ POSITIONS.....	12
A.	Approach of the Tribunal	12
B.	Overview of the Claimants’ Submissions	12
(1)	Jurisdiction and Admissibility	13
a.	Ms Pey Grebe is the assignee of all the rights of Mr Pey Casado in the present resubmission proceeding.....	13
b.	The Claimants’ requests do not impinge on the unannulled portions of the First Award and are admissible	15
c.	In the alternative, the Claimants submit that they are entitled to compensation for the unjust enrichment that has benefited the Respondent.....	15
(2)	The Claimants’ submissions on the calculation of damages for the denial of justice	16
a.	Compelling reasons exist for revisiting and overturning certain unannulled portions of the First Award	16
b.	The Claimants’ submissions as to the validity of Decree No. 165.....	17
c.	The discontinuance proceedings are immaterial as regards the denial of justice.....	21
d.	The Respondent’s acts subsequent to the First Award constitute a new denial of justice under the BIT.....	22
e.	Reparation for the damage resulting from the denial of justice	23
f.	The Respondent attempted to subvert the arbitral proceedings through fraud.....	24
g.	The Respondent’s deceptive conduct persisted throughout the Revision Proceeding, the Annulment Proceeding and the present Resubmission Proceeding	25
(3)	The Claimants’ submissions on the injury resulting from the violation of the obligation to provide fair and equitable treatment resulting from Decision No. 43	27
a.	The Claimants have suffered from discrimination arising from the breach of the obligation to provide fair and equitable treatment.....	27
(4)	The <i>quantum</i> of damages	28
a.	Compensation due for the breaches of Article 4 of the BIT	28
b.	The Accuracy expert report	33

c.	The calculation of moral damages.....	38
d.	Tax gross-up.....	38
e.	Interest.....	39
f.	Incidental damages, costs and fees.....	40
C.	Overview of the Respondent’s Submissions.....	41
(1)	Jurisdiction and Admissibility.....	41
a.	The Tribunal lacks jurisdiction over Ms Pey Grebe and her claims.....	41
b.	The damage calculations offered by the Claimants and their expert are inadmissible, as they do not relate specifically to the two BIT violations identified in the First Award.....	44
c.	The claims based on expropriation value contradict unannulled portions of the First Award and are outside the scope of the Resubmission Proceeding.....	45
d.	The Claimants’ request for costs incurred in prior phases of the dispute is impermissible.....	46
e.	The Claimants’ claim for moral damages is improper.....	47
f.	The Claimants have failed to satisfy their burden of proving their damages, and thus are entitled to no compensation.....	47
(2)	Merits: calculating the <i>quantum</i> of damages.....	48
a.	All the Claimants’ arguments on damages are ill-founded.....	48
b.	The Claimants’ theory of damages for the denial of justice violation is untenable.....	48
c.	The Claimants’ theory of damages for the discrimination violation is unfounded.....	52
d.	The Claimants cannot identify any injury caused by the discrimination violation.....	53
(3)	The calculation of damages.....	54
a.	Accuracy’s damages calculations cannot be regarded as reliable.....	54
b.	The Claimants are not entitled to compensation on the basis of unjust enrichment.....	56
c.	A tax gross-up would not be appropriate.....	57
d.	Interest cannot be added to any award of damages.....	57
e.	The Respondent seeks an award of costs and fees, including legal fees.....	58
III.	ANALYSIS.....	59
A.	Introduction: the Role of a New Tribunal.....	59
B.	The Claimants in the Present Resubmission Proceedings.....	63
C.	The Claimants’ Requests for Relief.....	67

D.	The Admissibility of the Claimants’ Claims	68
E.	The Status of Decree No. 165	70
F.	Compensation under the First Award and International Law	72
G.	The Burden of Proving Damage.....	74
H.	The Interpretation of the First Award.....	75
I.	Have the Claimants met the Burden of Proving Injury?	88
J.	Have the Claimants Met the Burden of Proving Quantifiable Loss?.....	89
K.	The Unjust Enrichment Claim.....	89
L.	The Moral Damage Claim.....	91
M.	The Options Open to the Tribunal.....	92
IV.	COSTS	93
A.	The Claimants’ Cost Submissions.....	93
B.	The Respondent’s Cost Submissions	94
C.	The Tribunal’s Decision on Costs	96
V.	DECISION.....	98

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
CM	The Claimants' Memorial dated 27 June 2014
Exh. C-Mxx	The Claimants' Exhibits submitted with their Memorial dated 27 June 2014
Exh. C-Lxx	The Claimants' Legal Authorities submitted with their Memorial dated 27 June 2014
CR	The Claimants' Reply dated 7 January 2015
Exh. CRMxx	The Claimants' Exhibits submitted with their Reply dated 7 January 2015
Exh. CLxx	The Claimants' Legal Authorities submitted with their Reply dated 7 January 2015
First Award	Award rendered on 8 May 2008 in the original arbitration proceedings
Decision on Annulment	Decision rendered on 18 December 2012 in the annulment proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ND-xx	The Claimants' Exhibits submitted with their new Request for Arbitration dated 18 June 2013
RCM	The Respondent's Counter-Memorial dated 27 October 2014
RR	The Respondent's Rejoinder dated 9 March 2015
Exh. R-xx	The Respondent's Exhibits

Exh. RL-xx

The Respondent's Legal Authorities

CPP

Consortio Periodístico y Publicitario S.A.

EPC

Empresa Periodística Clarín, Ltda.

CDE

Council for the Defence of the State

Decision No. 43

Decision of the the Santiago court dated 28
April 2000

Hearings, Day [x], p.[x]

Transcript of the hearing held in London from
13 to 16 April 2015

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Historical Context and Relevant Facts

1. The Tribunal finds it useful to begin this Award with a brief summary of the factual and procedural background. In doing so, the Tribunal notes that the underlying dispute between the Parties goes back four decades, and has been pending before ICSID since 1997. It is therefore conscious of its duty to bring a final end to this long-running proceeding.
2. Mr Víctor Pey Casado was born in Spain in 1915, moved to Chile at the age of 24 in 1939, and lived there for 34 years until 1973. Though he has retained Spanish nationality, he acquired Chilean nationality by naturalization in 1958. Ms Coral Pey Grebe, his daughter, was born in Chile on 27 December 1953, and holds Spanish nationality.¹
3. Mr Salvador Allende, elected President of Chile on 4 September 1970, was a friend of Mr Pey Casado.
4. During the early 1970s, Mr Pey Casado became associated with a Chilean newspaper, *El Clarín*. The newspaper had been founded by Messrs Darío Sainte-Marie and Merino Liana, and was under the control of the company, *Consorcio Periodístico y Publicitario*, S.A. (“CPP”), through a wholly owned subsidiary, *Empresa Periodística Clarín*, Ltda. (“EPC”).
5. *El Clarín* had a left-leaning political orientation and lent strong media support to the broadly socialist coalition led by President Allende. After Mr Sainte-Marie left Chile for Spain, Mr Pey Casado acquired 40,000 shares in CPP² by purchase concluded on 2 October 1972.³
6. On 11 September 1973, President Allende was overthrown in a coup d’état led by General Augusto Pinochet, and on the same day military troops occupied the premises of *El Clarín*, seizing papers located in Mr Pey Casado’s office there.⁴

¹ Exh. ND-02, Spanish passport of Ms Coral Pey Grebe.

² Exh. R-154, Estoril Protocol of 13 May 1972; upheld as valid in the First Award, paras. 180-82.

³ Exh. R-27, Award, 8 May 2008, para. 68.

⁴ Exh. R-27, Award, 8 May 2008, para. 70.

7. On 8 October 1973, Decree-Law No. 77 declared unlawful and dissolved all ‘Marxist entities’ and their affiliates, with their property passing to the Respondent.⁵ The property thereafter remained under complete control by the military, and was subsequently confiscated formally by means of Decree No. 165 in 1975.⁶
8. On 27 October 1973, Mr Pey Casado was granted permission to leave Chile for Venezuela and went from there to Spain, where he remained until 1989, the year of the return of democratic government to Chile.
9. On 16 January 1990, the Foundation Presidente Allende (“the Foundation”) was established under Spanish law. Mr Pey Casado donated 90% of his stock holdings in CPP and EPC to the Foundation later that same year.⁷
10. On 6 September 1995, Mr Pey Casado wrote to the President of Chile, asking for restitution of the assets of *El Clarín*.⁸ By letter dated 20 November 1995, the Chilean Minister of National Assets replied that the Government of Chile was developing a reparations programme that would compensate persons whose assets had been confiscated by the military government.⁹ On 10 January 1996, Mr Pey Casado wrote again to the President of Chile, asking for immediate restitution.¹⁰
11. In October 1995, Mr Pey Casado filed in the First Civil Court in Santiago (“the Santiago court”) a request for restitution for the confiscation of a Goss printing press that had been on the premises of *El Clarín* when the property was seized during the coup d’état.¹¹ This claim is hereinafter referred to as “the Goss press case.”

⁵ Exh. ND-10, Decree-law No. 77, 8 October 1973.

⁶ Exh. ND-11, Supreme Decree No. 165, 10 February 1975.

⁷ Exh. R-27, Award, 8 May 2008, para. 98.

⁸ Exh. ND-14, Letter from Mr Pey Casado to the President of the Republic of Chile, 6 September 1995.

⁹ Exh. R-101, Letter from the Minister of National Assets to V. Pey Casado, 20 November 1995.

¹⁰ Exh. ND-15, Letter from Mr Pey Casado to the President of the Republic of Chile, 10 January 1996.

¹¹ Exh. R-27, Award, 8 May 2008, para. 78; Exh. ND-16, Request for restitution of the Goss printing press, 4 October 1995.

12. On 23 July 1998, Chile duly initiated, under Law No. 19.568,¹² a comprehensive reparations programme which was designed to compensate, through an administrative process, those persons who had suffered confiscations of property at the hands of the military government. Mr Pey Casado was notified of this programme by the Respondent and invited to participate in it.¹³
13. In a letter dated 24 June 1999, Mr Pey Casado and the Foundation Presidente Allende notified the Chilean Ministry of National Assets that they expressly waived the right to seek compensation under Law 19.568 for the expropriation of CPP and EPC.¹⁴
14. On 28 April 2000, the Chilean Ministry of National Assets issued Decision No. 43, by which it authorized compensation to four individuals (or, as applicable, their heirs) for the expropriation of CPP and EPC, on the basis that they had established, to the satisfaction of the Ministry, that they had owned assets belonging to these companies, and were thus entitled to reparations for the confiscation of *El Clarín*. The persons in question were Messrs Darío Sainte-Marie, Ramón Carrasco, Emilio González and Jorge Venegas.¹⁵

B. Previous Phases of the Dispute and Procedural History

15. Mr Pey Casado and the Foundation Presidente Allende submitted a Request for Arbitration to ICSID on 7 November 1997, in reliance on the Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments (“BIT”) which had entered into force on 29 March 1994, Article 10 of which provides:

1. Any dispute concerning investments, as defined in this Agreement, which arises between a Contracting Party and an investor of the other Contracting Party shall, to the extent possible, be settled by means of friendly consultations between the two parties to the dispute.
2. If the dispute cannot be settled within six months of the time it was initiated by one of the Parties, it shall be submitted, at the discretion of the investor, to:

¹² Exh. R-27, Award, 8 May 2008, paras. 79, 621; Exh. R-147, Law No. 19.568, 12 June 1998.

¹³ Exh. R-101, Letter from the Chilean Minister of National Assets to V. Pey Casado, 20 November 1995, para. 4.

¹⁴ Exh. R-27, Award, 8 May 2008, paras. 79, 595; Exh. R-1, letter from J. Garcés to the Chilean Minister of National Assets, 24 June 1999, pp. 3-4; see also Request for Revision, Exh. R-82, para. 30.

¹⁵ Exh. R-148, Decision No. 43, 28 April 2000, pp. 3-5.

- The national jurisdiction of the Contracting Party involved in the dispute; or
- International arbitration in the conditions described in paragraph 3.

Once the investor has submitted the dispute to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other procedure shall be final.

3. If the dispute is submitted to international arbitration, it may be brought before one of the following arbitration bodies, at the discretion of the investor:

- The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington, D.C., on 18 March 1965, when each State Party to this Agreement has acceded to it. As long as this condition remains unmet, each Contracting Party gives its consent to submit the dispute to arbitration in accordance with the rules of the Additional Facility of ICSID;

- An ad hoc court of arbitration established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. The arbitration body shall take its decision on the basis of the provisions of this Agreement, of the law of the Contracting Party that is a party to the dispute, including the rules relative to conflicts of laws, and of the terms of any specific agreements concluded in relation to investment, as well as of the principles of international law on the subject.

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

6. The Contracting Parties shall refrain from dealing, through diplomatic channels, with matters concerning arbitration or judicial proceedings already under way until the relevant procedures have been completed, unless the parties to the dispute have not complied with the award of the court of arbitration or the decision of the ordinary court pursuant to the terms of compliance established in the award or decision.¹⁶

The Request was registered on 20 April 1998,¹⁷ and a Tribunal was constituted on 14 September 1998, which will be referred to in this Award as “the First Tribunal”.

16. On 1 February 1999, the Respondent lodged an objection to the jurisdiction of the First Tribunal.¹⁸ An oral hearing on the jurisdictional objection was held in May 2000,¹⁹ and in

¹⁶ Exh. RL-029 / Exh. ND07, Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Chile, 2 October 1991.

¹⁷ Exh. R-27, Award, 8 May 2008, para. 8.

¹⁸ Exh. R-27, Award, 8 May 2008, para. 10; Exh. R-104, Letter from Respondent to ICSID, 1 February 1999.

¹⁹ Exh. R-27, Award, 8 May 2008, para. 19.

due course, by a Decision of 8 May 2002, the First Tribunal joined the jurisdictional objections to the merits.²⁰

17. On 6 May 2000, Dr Garcés wrote to the Minister of National Assets of Chile on behalf of Mr Pey Casado and the Foundation Presidente Allende asking the Ministry temporarily to suspend the execution of Decision No. 43.²¹ This letter was forwarded to the *Contraloría General*, which concluded on 22 November 2000 that the Ministry of National Assets had followed proper procedure, and that there was no legal basis for suspending execution of the Decision.²²
18. On 23 April 2001, Mr Pey Casado and the Foundation Presidente Allende submitted to the First Tribunal a request for the indication of provisional measures, seeking suspension of the execution of Decision No. 43 because of its incompatibility with the claim pending before ICSID.²³ In a decision of 25 September 2001, the First Tribunal rejected this request, finding no incompatibility between Decision No. 43 and the expropriation-related claims at ICSID.²⁴
19. On 4 November 2002, Mr Pey Casado and the Foundation Presidente Allende submitted an ancillary request to the Santiago court, seeking to suspend proceedings pending a decision on their request to transfer to ICSID the claim asserted before the Santiago court in relation to the Goss press.²⁵ The Santiago court rejected this request on 14 November 2002.²⁶
20. A hearing on jurisdiction and merits in the original arbitral proceedings was held in Washington in early May 2003. Following a number of changes to the composition of the First Tribunal and the rejection of a request from the Respondent for new written submissions,²⁷ a further hearing was held on 15-16 January 2007 in Paris.

²⁰ Exh. R-27, Award, 8 May 2008, para. 24 ; Exh. R-78, Decision on Jurisdiction of 8 May 2002, p. 51.

²¹ Exh. R-103, Letter from J. Garcés to the Chilean Minister of National Assets, 6 May 2000.

²² Exh. R-149, Contraloría General, Oficio No. 044770, 22 November 2000, pp. 6-7.

²³ Exh. R-74, Claimants' Provisional Measures Request, 23 April 2001.

²⁴ Exh. R-77, Decision on Provisional Measures, 25 September 2001, paras. 40, 60, 65.

²⁵ Exh. C-M05, V. Pey Casado's request for provisional suspension of the proceedings, 4 November 2002.

²⁶ Exh. C-M06, Decision of the Santiago Court rejecting the request for provisional suspension, 14 November 2002.

²⁷ Exh. R-121, Letter from Chile to the First Tribunal, 16 August 2006.

21. On 8 May 2008, the First Tribunal issued its Award (“the First Award”), in which it decided, *inter alia*: 1) that the expropriation of *El Clarín* was not covered *ratione temporis* by the substantive protections under the BIT;²⁸ 2) that the Respondent had committed two BIT violations distinct from the expropriation of *El Clarín*;²⁹ 3) that the absence for seven years of a decision on the merits in the Goss press case amounted to a denial of justice, in violation of Article 4 of the BIT;³⁰ and 4) the award of compensation under Decision No. 43 to other persons but not to Mr Pey Casado and the Foundation constituted discrimination contrary to the guarantee of fair and equitable treatment under Article 4 of the BIT.³¹ The Tribunal ordered the Respondent to pay Mr Pey Casado and the Foundation Presidente Allende \$10,132,690.18 (plus compound interest) in damages for the violations found, and in addition \$2,000,000 in legal fees and costs and \$1,045,579.35 in procedural costs, but rejected all other claims submitted by Mr Pey Casado and the Foundation Presidente Allende.³²
22. On 2 June 2008, Mr Pey Casado and the Foundation Presidente Allende submitted a request for revision of the First Award under Article 51 of the ICSID Convention, contending that certain new facts had emerged that would decisively affect the Tribunal’s ruling and justify an increase in the amount of damages to \$797,000,000. Mr Pey Casado and the Foundation Presidente Allende also requested the provisional suspension of the execution of the First Award.³³
23. On 24 July 2008, the Santiago court rendered its decision in relation to the Goss press case, in which it concluded that Mr Pey Casado did not have standing to sue, and that in any event his claim had become time barred.³⁴ On 16 June 2009, a motion *ex parte* was filed by the Council for Defence of the State (“CDE”) for the abandonment of the case,³⁵ which was

²⁸ Exh. R-27, Award, 8 May 2008, paras. 608, 610, 612.

²⁹ Exh. R-27, Award, 8 May 2008, paras. 621-22.

³⁰ Exh. R-27, Award, 8 May 2008, paras. 658-59.

³¹ Exh. R-27, Award, 8 May 2008, para. 652.

³² Exh. R-27, Award, 8 May 2008, *dispositif*.

³³ Exh. R-82, Claimants’ Request for Revision of the Award, 2 June 2008.

³⁴ Exh. ND-32, Decision of the Santiago court, 24 July 2008.

³⁵ Exh. C-M19, CDE’s motion for abandonment of the case, 16 June 2009.

rejected by the Santiago court on 6 August 2009.³⁶ On 12 August 2009, the CDE appealed against this decision,³⁷ and on 18 December 2009, the Court of Appeal of Santiago declared the proceedings to have been abandoned.³⁸

24. On 5 September 2008, while the request for revision was still pending, the Respondent filed a request for annulment of the First Award, on the grounds that procedural irregularities had tainted the arbitral proceeding, and that there were unexplained conclusions and characterizations in the First Award.³⁹ The Request was registered by the Secretary-General on 6 July 2009. An *ad hoc* Committee was constituted on 22 December 2009. On 4 May 2010, the *ad hoc* Committee issued a Decision rejecting Mr Pey Casado and the Foundation Presidente Allende's request to declare inadmissible the application for annulment. On 15 October 2010, Mr Pey Casado and the Foundation Presidente Allende put forward a request of their own for partial annulment,⁴⁰ which the *ad hoc* Committee rejected as plainly time-barred.
25. On 18 November 2009, the First Tribunal, ruling in the revision proceeding, denied the request for revision.⁴¹
26. Mr Pey Casado and the Foundation Presidente Allende contend that they first became aware of the decision of the Santiago court in relation to the Goss press case on 27 January 2011.⁴² Three days later Mr Pey Casado requested the Santiago court to annul the decision to declare the proceedings before that court abandoned,⁴³ which was rejected on 28 April 2011,⁴⁴ a

³⁶ Exh. C-M20, Decision of the Santiago court, 6 August 2009.

³⁷ Exh. C-M21, CDE's motion to appeal the Santiago court's decision of 6 August 2009, 12 August 2009.

³⁸ Exh. C-M22, Decision of the Santiago Court of Appeals, 18 December 2009.

³⁹ Exh. R-83, Chile's Request for Annulment, 5 September 2008.

⁴⁰ Exh. CRM101, Claimants' Reply in the Annulment proceedings, 15 October 2010.

⁴¹ Exh. R-86, Decision on Revision, 18 November 2009, paras. 52-53.

⁴² Exh. C-M18, Decision of the Santiago court, 27 January 2011.

⁴³ Exh. C-M25, Motion to annul the Decision of the Santiago Court of Appeals of 18 December 2009, 31 January 2011.

⁴⁴ Exh. CRM113, Decision of the Santiago Court, 28 April 2011.

decision that was upheld by the Court of Appeal of Santiago on 31 January 2012;⁴⁵ leave to appeal to the Supreme Court of Chile was denied on 11 July 2012.⁴⁶

27. On 18 December 2012, the *ad hoc* Committee rendered its Decision on Annulment, the dispositive part of which reads, in translation, as follows:

For the reasons set forth above, the Committee renders the following decisions:

1. Pursuant to Article 52(1)(d) and (e), decides to annul paragraph 4 of the *dispositif* of the Award of 8 May 2008 and the corresponding paragraphs in the body of the Award related to damages (Section VIII);
 2. Rejects the other grounds of the Republic’s Application for annulment;
 3. Rejects the Claimants’ request for the partial annulment of paragraph 8 of the *dispositif* of the Award;
 4. Finds that paragraphs 1 to 3 and 5 to 8 of the *dispositif* as well as the body of the Award but for Section VIII are *res judicata*;
 5. Decides that there is no need to order the temporary stay of enforcement of the un-annulled portion of the Award.
 6. Decides that each party shall bear one half of the ICSID costs incurred in connection with this annulment proceeding; and
 7. Decides that each party shall bear its own litigation costs and expenses incurred with respect to this annulment proceeding.
28. Following on from the above,⁴⁷ Mr Pey Casado and the Foundation Presidente Allende (“the Claimants”) lodged on 18 June 2013, pursuant to Article 52(6) of the ICSID Convention, a new Request for Arbitration (“the New Request”). The New Request was registered by the Centre on 8 July 2013. In accordance with the terms of Article 52(6), a new Tribunal was constituted on 24 December 2013 (“the Tribunal”) composed of Sir Franklin Berman (President), appointed by the Chairman of the Administrative Council of ICSID in accordance with Article 38 of the ICSID Convention, Mr Philippe Sands, appointed by the Claimants, and Mr Alexis Mourre, appointed by the Respondent. Following a challenge by

⁴⁵ Exh. CRM125, Decision of the Santiago Court of Appeals, 31 Janvier 2012.

⁴⁶ Exh. CRM130, Decision of the Chilean Supreme Court, 11 July 2012.

⁴⁷ There was a further request from Mr Pey Casado and the Foundation Presidente Allende on 1 February 2013 for a supplementary decision under Arbitration Rule 49, which the annulment Committee rejected on 11 September 2013.

the Respondent, Professor Sands informed the Centre by letter of 10 January 2014 that, while rejecting the grounds for the challenge, he took the view that the proper course was to allow the proceedings to continue without distraction, and accordingly relinquished his appointment as arbitrator. On 13 January 2014, following the resignation of Professor Sands, the ICSID Secretary-General notified the vacancy to the Parties and the proceeding was suspended pursuant to Arbitration Rule 10(2). On the same date, the Tribunal consented to the resignation of Professor Sands pursuant to ICSID Arbitration Rule 8(2), and on 31 January 2014 Mr V V Veeder was appointed to fill the vacant place on the Tribunal in accordance with Arbitration Rule 11(1) and the Tribunal was reconstituted on that date. Mr Paul-Jean Le Cannu was appointed Secretary of the Tribunal on the same date, and was later replaced in that office on 13 May 2014 by Mr Benjamin Garel. Following a proposal by the President, and with the agreement of the Parties, Dr Gleider Hernández was appointed as Assistant to the President on 12 December 2014.

29. On 11 March 2014, the Tribunal held its first session with the Parties by telephone. In addition to the Tribunal and its Secretary, the following participated:

For the Claimants:

Dr Juan E. Garcés	Garcés y Prada, Abogados
Ms Carole Malinvaud	Gide, Loyrette, Nouel
Ms Alexandra Muñoz	Gide, Loyrette, Nouel

For the Respondent:

Mr Paolo Di Rosa	Arnold & Porter LLP
Ms Gaela Gehring Flores	Arnold & Porter LLP
Ms Mallory Silberman	Arnold & Porter LLP
Mr Juan Carlos Riesco	Carey
Ms Victoria Fernández-Armesto	Republic of Chile
Mr Juan Banderas Casanova	Republic of Chile

30. On 18 May 2014, the Tribunal issued Procedural Order No. 1 laying down the procedure for the written and oral phases of the proceeding.
31. In accordance with the provisions of Procedural Order No. 1, the following written submissions were filed: the Claimants' Memorial on 27 June 2014, the Respondent's

Counter-Memorial on 27 October 2014, the Claimants' Reply on 9 January 2015, and the Respondent's Rejoinder on 9 March 2015.

32. On 10 November 2014, the Claimants submitted to the Tribunal a request for the production of documents under Procedural Order No. 1, to which the Respondent replied on 1 December 2014. A further response by the Claimants was received on 3 December 2014, to which the Respondent responded (with the leave of the Tribunal) on 8 December 2014. On 16 December 2014, the Tribunal issued Procedural Order No. 2, containing its reasoned decision on the document production requests.
33. On 9 February 2015, the Claimants sought the Tribunal's authorization to produce (a) two decisions rendered on 10 January and 3 February 2015 by the Santiago court, (b) the documents obtained through the search ordered by the Santiago court in these decisions, and (c) comments on such documents. On 13 February 2015 the Respondent expressed its consent to the Claimants' requests, and indicated that it would respond to the Claimants' comments in its Rejoinder. On 16 February 2015, the Tribunal granted leave to the Claimants to produce the documents in question, together with comments upon them, by 20 February 2015. On 20 February 2015, the Claimants submitted the documents in question and comments upon them.
34. On 2 April 2015, the Tribunal issued Procedural Order No. 3 laying down the arrangements for the oral hearing and communicating the hearing schedule.
35. From 13 to 16 April 2015, the Tribunal held an oral hearing in London. In addition to the Tribunal, its Secretary, and the President's Assistant, the following participated:

For the Claimants:

Dr Juan E. Garcés
Mr Michel Stein
Mr Hernán Garcés
Ms Carole Malinvaud
Ms Alexandra Munoz
Ms Natasha Peter
Ms Astrid Westphalen

Garcés y Prada, Abogados
Garcés y Prada, Abogados
Garcés y Prada, Abogados
Gide, Loyrette, Nouel
Gide, Loyrette, Nouel
Gide, Loyrette, Nouel
Gide, Loyrette, Nouel

Ms Coral Pey Grebe

Foundation Presidente Allende

Ms Francisca Durán Ferraz de Andrade	Foundation Presidente Allende
Ms Marie Ducrocq	Foundation Presidente Allende
Mr Christophe Schmit	Accuracy
Mr Eduard Saura	Accuracy

For the Respondent:

Mr Paolo Di Rosa	Arnold & Porter LLP
Ms Gaela Gehring Flores	Arnold & Porter LLP
Ms Mallory Silberman	Arnold & Porter LLP
Ms Shepard Daniel	Arnold & Porter LLP
Mr Kelby Ballena	Arnold & Porter LLP
Mr Jorge Carey	Carey
Mr Gonzalo Fernández	Carey
Mr Juan Carlos Riesco	Carey
Ms Liliana Machiavello	Republic of Chile
Ms Victoria Fernández-Armesto	Republic of Chile
Mr Brent C. Kaczmarek, CFA	Navigant Consulting, Inc.
Mr Andrew Preston	Navigant Consulting, Inc.
Dr Marcos Libedinsky Tschorne	

36. At the conclusion of the hearing, the President laid down the procedure to be followed by the Parties for the submission of statements of costs for the purposes of Arbitration Rule 28(2). On 18 and 29 May 2015 respectively, the Claimants and the Respondent filed statements of costs and the Claimants a supplemental statement of costs.
37. On 9 June 2015, the Tribunal took note of certain agreed corrections to the hearing transcripts, and decided on the remaining corrections on which the Parties could not agree.
38. On 18 September 2015, the Claimants sought the Tribunal's authorization to introduce into the record a judgment rendered by the Supreme Court of Chile on 14 September 2015, and on 28 September 2015 the Respondent submitted its comments on this request. On 9 October 2015, the Tribunal authorized the introduction of the judgment into the record.
39. On 17 March 2016, the Tribunal declared the proceeding closed under Arbitration Rule 38(1).

40. On 18 July 2016, the Tribunal informed the Parties that, in accordance with ICSID Arbitration Rule 46, it had extended for a further 60 days the period to draw up and sign the Award.

II. SUMMARY OF PARTIES' POSITIONS

A. Approach of the Tribunal

41. The account that follows of the Parties' arguments provides the essential background for the Tribunal's findings in the subsequent Sections of this Award. It is intended however as a summary only of the arguments both of fact and of law that the Tribunal has found to be of greatest relevance to the issues before it. At various times, accusations were put forward from both sides of bad faith or improper conduct on the other side. The Tribunal has not found these relevant to the issues before it and does not propose to consider them further. The Tribunal wishes to emphasize however that it has given full attention to all of the submissions put to it by the Parties both orally and in writing.

B. Overview of the Claimants' Submissions

42. The Claimants' submissions can be divided into two broad categories. The first represents their opposition to the Respondent's jurisdictional arguments in respect of Ms Pey Grebe. The second category goes to determining the nature and quantum of the compensation due for the denial of justice and for the failure to accord fair and equitable treatment. The Claimants expressly disclaim any request for compensation under Article 5 of the Chile-Spain BIT (expropriation), as foreclosed by the *res judicata* nature of the First Award in the light of the Decision on Annulment.⁴⁸

⁴⁸ CR, paras. 214-215.

(1) **Jurisdiction and Admissibility**

a. Ms Pey Grebe is the assignee of all the rights of Mr Pey Casado in the present resubmission proceeding

43. The Claimants submit that the First Tribunal recognized Mr Pey Casado in his quality of ‘investor’ under the Chile-Spain BIT.⁴⁹ They further submit that the First Tribunal recognized the nature of the ‘investment’ as broad, encompassing the shares in CPP and EPC held by Mr Pey Casado and the Foundation.⁵⁰
44. The Claimants argue that the jurisdictional conclusions in the First Award should apply to Ms Pey Grebe in her capacity as assignee of Mr Pey Casado’s shares in *El Clarín* and all rights in this arbitration.⁵¹ They point to the assignment of rights effected on 15 March 2013 between Mr Pey Casado and Ms Pey Grebe for the totality of his rights relating to his holding of the shares (10%) in CPP, as well as his position and his rights in the pursuance of the present arbitration, as well as any claims that flow from his ownership of shares in CPP and EPC.⁵² This assignment accordingly includes the right to reparation arising from the First Award.⁵³
45. The Claimants contend that the Respondent never objected to the assignment in 2013 and 2014, despite having been notified of it on 13 June 2013 and having since had several opportunities to do so.⁵⁴ They also contend that, because her situation is governed by the Chile-Spain Convention on dual nationality and the Chile-Spain BIT does not explicitly exclude dual nationals from the scope of its protection, the conditions in the First Award concerning application of the BIT are not opposable to Ms Pey Grebe.⁵⁵
46. The Claimants contend that, because the assignment of rights was effected after the date on which the First Tribunal established its jurisdiction over the dispute, the Tribunal need not

⁴⁹ ND06, First Award, paras. 431-433.

⁵⁰ Hearings, Day 4, pp. 31-32.

⁵¹ CM, paras. 107-109.

⁵² CM, paras. 110-112.

⁵³ CM, para. 113; CR, para. 17.

⁵⁴ CR, paras. 19, 46.

⁵⁵ Hearings, Day 4, pp. 14-15.

re-examine its jurisdiction simply because rights have been assigned from one person to another.⁵⁶ According to Article 25(2)(a) of the ICSID Convention, jurisdiction is established at the moment that the parties have consented to submit the application to arbitration, by reference to the date on which proceedings are instituted;⁵⁷ because Ms Pey Grebe is only acting as an assignee of assets, and did not put in a claim of her own, no legal question exists.⁵⁸ The Claimants contend that, where an assignee becomes a claimant during the course of arbitral proceedings, it is an established principle of international law that the assignee can be considered as the successor to a party to a dispute,⁵⁹ and that the same principle would apply in a resubmission proceeding following an annulment.⁶⁰

47. The Claimants further submit that the assignment of rights from Mr Pey Casado to Ms Pey Grebe is a juridically valid act opposable to the Respondent which should be upheld by the Tribunal. They recall that the earlier assignment of rights from Mr Pey Casado to the Foundation Presidente Allende was confirmed by the *ad hoc* Committee, and should thus be considered *res judicata*.⁶¹ They contend that the Respondent's objections to Ms Pey Grebe's standing would deprive Mr Pey Casado of his rights under the First Award.⁶²
48. The Claimants maintain that the assignment of rights was valid under Spanish law and does not require authorization under Chilean law to be opposable to the Respondent,⁶³ and that Chilean domestic law allows the assignment of rights relating to moral damages.⁶⁴ The Respondent's objection to Ms Pey Grebe's standing is a repetition of an unsuccessful objection to the First Tribunal's jurisdiction, in respect of an assignment which used similar wording and was upheld in the First Award.⁶⁵

⁵⁶ CR, para. 22.

⁵⁷ CR, para. 27; see also Hearings, Day 4, p. 12.

⁵⁸ Hearings, Day 4, p. 13.

⁵⁹ CR, paras. 29-33.

⁶⁰ CR, paras. 31-35.

⁶¹ CR, paras. 39, 41.

⁶² CR, para. 40.

⁶³ CR, paras. 42-45.

⁶⁴ CR, paras. 47-48.

⁶⁵ CR, paras. 50-52.

b. The Claimants' requests do not impinge on the unannulled portions of the First Award and are admissible

49. The Claimants maintain that their requests do not require the Tribunal to pronounce on points unaffected by the partial annulment of the First Award, and in particular on the jurisdiction of the Tribunal.⁶⁶ The sole purpose of the resubmission proceeding is to establish the damages due as a result of the denial of justice and the discrimination suffered by the Claimants.⁶⁷ The Claimants equate the harm suffered as a result of these two BIT violations with the harm suffered for the expropriation of *El Clarín*.⁶⁸ The appropriate remedy would be for the Tribunal to restore the situation the Claimants would have been in, had they been in a position to avail themselves of the judgment of the Santiago court in the Goss press case prior to the publication of the First Award, or in a situation where they would not have suffered from discriminatory treatment vis-à-vis other Chilean investors.⁶⁹
50. The Claimants submit that the behaviour of representatives of the Respondent during earlier phases of the case, and in particular during the post-First Award phase and relating to the Goss press, constitute a new violation of Article 4, and possibly Article 5, of the BIT.⁷⁰ Because the owners of other media companies were compensated for the expropriation of their assets, the fact that the Claimants were not compensated for the expropriation of *El Clarín* constitutes a violation of the obligation to guarantee 'national treatment'.⁷¹

c. In the alternative, the Claimants submit that they are entitled to compensation for the unjust enrichment that has benefited the Respondent

51. The Claimants submit that *res judicata* does not apply in this proceeding to their claim for unjust enrichment, because that was not the subject matter of a finding by the First

⁶⁶ CM, para. 59.

⁶⁷ CM, paras. 8, 118-19; CR, para. 64.

⁶⁸ CM, paras. 41, 147, 185, 374, 377.

⁶⁹ CR, para. 12; see also CR, para. 4.

⁷⁰ CM, para. 276; CR, paras. 171-90, 236-37.

⁷¹ CR, para. 352.

Tribunal.⁷² They recall that they had already made submissions on unjust enrichment in their first memorial before the First Tribunal in March 1999.⁷³

52. The Claimants base their claim of unjust enrichment on the 1970s dissolution of *El Clarín* and the Respondent's forcible seizure of the assets of CPP and EPC.⁷⁴ Unjust enrichment is prohibited both under Chilean domestic law⁷⁵ and under customary international law.⁷⁶ They maintain that, though unjust enrichment can also constitute a violation of the obligation to provide fair and equitable treatment, unjust enrichment is routinely awarded by international tribunals when the conditions for its existence are met.⁷⁷ Since in the present case the Respondent illicitly appropriated for itself the investment of a Spanish national and the benefits of that investment, without compensation, the unjust enrichment created by that seizure opens a right to reparation.⁷⁸

(2) The Claimants' submissions on the calculation of damages for the denial of justice

a. Compelling reasons exist for revisiting and overturning certain unannulled portions of the First Award

53. The Claimants recall that the denial of justice found in the First Award concerned the absence for seven years of a decision on the merits on the Goss press case, which was confirmed by the First Tribunal and the *ad hoc* Committee, and is *res judicata*.⁷⁹ The Claimants contend that the failure to decide deprived the Claimants, and also the First Tribunal, of a judgment on the merits that would have established both the nullity *ex tunc* under public law of Decree No. 165; and that Respondent committed this violation in full knowledge of its

⁷² CM, paras. 409-10, 415.

⁷³ CM, para. 415.

⁷⁴ CM, para. 417.

⁷⁵ CM, para. 414.

⁷⁶ CM, paras. 418-19; Exh. NDJ-7, *Chorzów Factory*, PCIJ Ser. A No. 17, pp. 47-48; *Azurix Corp. v. The Argentine Republic*, ICSID No. ARB/01/12, Award of 14 July 2006, para. 436; and *Sea-Land Services Inc. v. Iran* (Iran-US Claims Tribunal, Award no. 135-33-1, 22 June 1984), 6 IUSCTR 149, p. 168.

⁷⁷ CM, paras. 423-29.

⁷⁸ CM, paras. 430-1.

⁷⁹ CM, paras. 201-04; A summary of the facts constituting the breach is at CM, paras. 206-217.

consequences.⁸⁰ The Claimants argue that the Santiago court had its judgment on the merits ready as early as the start of 2001, but that its paralysis for several years deprived the Claimants of a crucial fact,⁸¹ and that the Respondent's recollection of events had struck out or omitted key facts in order to expunge this fact.⁸²

54. During the oral proceedings, the Claimants further submitted that the fact that constitutes the denial of justice, that is, depriving the First Tribunal and the Claimants of the evidence that the Santiago court had avoided applying Decree No. 165, can be distinguished from the consequences of that denial of justice, which was that the First Tribunal could not take into account the nullity of the Decree.⁸³
55. The Claimants acknowledge that unannulled parts of the First Award are *res judicata* and cannot be revisited, in particular those on the competence of the Tribunal to be seized of the dispute between the parties, and on the violations of the Respondent of its obligations under the BIT.⁸⁴ The Claimants maintain, however, that so long as there are no new requests, the introduction of new information or facts arising after publication of the First Award ('intervening effects') would be permissible.⁸⁵

b. The Claimants' submissions as to the validity of Decree No. 165

(i) Decree No. 165 is null under Chilean public law

56. The Claimants submit that the decision of the Santiago court took note of the reality of the nullity *ex tunc* under public law of Decree No. 165, and that this finding constitutes sufficient evidence of the fact that the decree is null and void.⁸⁶ The Claimants rely on Chilean domestic case law to establish that under Chilean law, nullity operates *ipso jure* and no judicial recognition is needed to constitute it.⁸⁷ The Claimants further submit that the nullity

⁸⁰ CR, paras. 55, 67.

⁸¹ CM, paras. 227, 236; see also Hearings, Day 1, p. 75.

⁸² CR, paras. 59-60.

⁸³ CM, paras. 237-38; Hearings, Day 4, pp. 1-4.

⁸⁴ CM, para. 59.

⁸⁵ CM, paras. 284-85.

⁸⁶ CM, paras. 230-1, 238, 245, 263-64, 281, 303; CR, paras. 65, 72, 133, 134-57, 161, 225, 259.

⁸⁷ CR, para. 66.

of Decree No. 165 operates *ex tunc* as a matter of Chilean public law, citing Chilean court judgments that have repeatedly taken note of the nullity of decree-laws issued pursuant to Decree No. 77.⁸⁸ According to the Claimants, Mr Pey Casado had already raised in 1995 the question of the nullity of Decree No. 165 before the Santiago court, which took note of the reality of the nullity of the decree under public law.⁸⁹

57. The Claimants contend that the Santiago court was duty bound to pronounce on the reality of the nullity of Decree No. 165, because of the judicial obligation to respond to extensive submissions by the Claimants and organs of the Respondent (the ‘Fisc’) before it.⁹⁰ Reacting to the Respondent’s expert report by Dr. Libedinsky, the Claimants deny that the matter was raised only as a subject to be resolved with respect to the debate over the prescriptibility period (‘statute of limitations’) of the nullity under public law action.⁹¹

58. The Claimants contend that, when the Santiago court decided explicitly that only CPP and EPC had the requisite standing in that case,⁹² it necessarily must have concluded that Decree No. 165 was null under public law, as there could be no other reason for the Santiago court to conclude that EPC remained in existence;⁹³ for them, such a finding entailed the continuity of the legal personality of CPP and EPC.⁹⁴

(ii) The Claimants’ submissions as to the effects on the First Award of the taking note of the nullity under public law of Decree No. 165

59. The Claimants contend that both the absence of a decision for seven years by the Chilean courts with respect to the Goss press case, and the absence of a decision with respect to the validity of Decree No. 165, constitute the denial of justice found by the First Tribunal in the First Award.⁹⁵

⁸⁸ CR, paras. 76-77.

⁸⁹ CR, paras. 78-79.

⁹⁰ CR, paras. 133-39.

⁹¹ CR, para. 140.

⁹² Hearings, Day 1, p. 69.

⁹³ CM, paras. 266-69; CR, para. 142.

⁹⁴ CR, paras. 149-53, 161.

⁹⁵ Hearings, Day 4, pp. 38-42, 57-58.

60. The Claimants maintain that, but for the denial of justice they have suffered, the nullity of Decree No. 165 would have been established before the First Tribunal, which would not have been able to conclude, as it did in the First Award, that the expropriation of CPP and EPC had been consummated with the entry into force of Decree No. 165, and that the said Decree was still in force.⁹⁶ The Claimants submit that, owing to the denial of justice, they were precluded from fully substantiating their claims for the injuries that continued to subsist for the *de facto* withholding of their investment after the entry into force of the BIT.⁹⁷ They take the view that the First Tribunal would not have dealt with compensation as it had done, as it would have regarded the expropriation claim as falling within the ‘continuing act’ exception at the time of the entry into force of the BIT.⁹⁸
61. The Claimants dispute the Respondent’s argument that paragraph 608 of the First Award extends also to the validity of Decree No. 165.⁹⁹ The Claimants submit that the validity of Decree No. 165 is to be distinguished from its legality, which concerns the respect of considerations such as public utility, due process, the absence of discrimination and the existence of compensation. The Claimants instead submit that paragraph 78 of the First Award demonstrates merely the awareness of the First Tribunal that to its knowledge, the validity of Decree No. 165 had never been put into question before the Chilean courts.¹⁰⁰
62. Finally, because the nullity of Decree No. 165 would have entailed its inexistence *ex tunc* and the invalidity also of the expropriation *de jure*, the Claimants argue that the expropriation *de facto* that had existed from 1973 would have continued until after the entry into force of the Chile-Spain BIT, and that the appropriate remedy to erase the effects of the denial of justice would not be to speculate as to what the First Tribunal would have concluded, but for the Tribunal to decide in the place of the First Tribunal.¹⁰¹ The Claimants further maintain that in the absence of the denial of justice, the First Tribunal would have made determinations with respect to the expropriation *de facto* of CPP and EPC; the Claimants

⁹⁶ CM, paras. 13-14, 240, 244, 304; CR, paras. 68-71, 206-7; CR, para. 160.

⁹⁷ CM, paras. 24, 241, 303-4; CR, paras. 68-69, 235; CM, para. 227.

⁹⁸ CR, paras. 191-94; see also CM, paras. 296-97.

⁹⁹ CR, paras. 201-204.

¹⁰⁰ CR, paras. 205-210.

¹⁰¹ CR, paras. 210-1; see also CM, paras. 246-49.

maintain that this approach would not call into question the principle of *res judicata*, as it would serve to acknowledge the consequences of the withholding of evidence with respect to the denial of justice.¹⁰² The Claimants suggest that case law from the European Court of Human Rights supports the idea that a denial of justice can be constituted through the operation of a continuously unlawful act.¹⁰³

(iii) The Claimants' objections with respect to the reliability of the testimony of the expert for the Respondent in relation to Decree No. 165

63. The Claimants submit that expert for the Respondent, Dr Marcos Libedinsky, has already participated in two judicial pronouncements in the *Pey Casado v. El Fisc* case, even participating in the denial of justice against the Claimants, and thus demonstrating a lack of independence. The Claimants further submit that Dr Libedinsky, by applying the 1977 auto-amnesty Decree so as to protect Chilean civil servants who had perpetrated international crimes, demonstrated the intention to uphold the impunity of the Respondent for its seizure of the Claimants' investment.¹⁰⁴
64. The Claimants suggest that Dr Libedinsky's expert report does not take into account the specificities of Decree-Laws No. 77 and 1726, the latter of which was confirmed as null by the Chilean Supreme Court. According to the Claimants, the nullity attaching to these two decrees, and any decrees made pursuant to them, differs from the administrative acts cited within his expert report as these are tainted with nullity *ipso jure*, the effects of which operate *ex tunc* and require no judicial intervention in order for the nullity to operate with full effect. The Claimants note that on 20 October 1999, Dr Libedinsky, then a judge on the Supreme Court, participated in a decision that made a general statement to the effect that if nullity operates *ipso jure*, it may be 'observed and declared indistinctly by a tribunal or administrative authority'.¹⁰⁵
65. The Claimants observe that Dr Libedinsky's expert report cited three cases from appellate tribunals in Chile that did not concern the nullity of confiscatory decrees taken in pursuance

¹⁰² CM, paras. 299-300; CR, paras. 213-15, 218-21; Hearings, Day 4, pp. 49-50.

¹⁰³ CM, para. 302; Hearings, Day 1, pp. 52-3.

¹⁰⁴ CR, paras. 82-86.

¹⁰⁵ CR, paras. 88-100. (Translated by the Tribunal)

of Government Decree No. 77 and Supreme Decree No. 1726; according to the Claimants, abundant case law exists that takes note of the nullity *ex tunc* of these decrees, and which also notes the imprescriptibility of actions in nullity under public law. The Claimants highlight a distinction between, on the one hand, the nullity of administrative or legislative acts, and on the other hand, civil or patrimonial actions which flow from the taking note of the nullity. They contend that, with respect to the former category, the passage of time can never cure nullity under public law.¹⁰⁶

c. The discontinuance proceedings are immaterial as regards the denial of justice

66. The Claimants contend that the claimed discontinuance by Mr Pey Casado, or the purported eradication of the judgment of 24 July 2008 and of its case file from the records of the Santiago court by the Respondent, do not affect the denial of justice resulting from the absence of decision in the Goss press case, as consummated by the First Award of 8 May 2008.¹⁰⁷ Though the Respondent has maintained that such discontinuance was purely for administrative ends, the Respondent in fact sought to paralyse the execution of the Santiago court's judgment.¹⁰⁸
67. The Claimants submit that the conditions for discontinuance prescribed under Article 152 of the Chilean Code of Civil Procedure, namely, that all parties must have ceased to participate for at least six months in a proceeding, and where the tribunal must also notify all concerned parties personally or by official act, have not been met in the present case.¹⁰⁹ The abandonment of proceedings, in such cases, is a sanction that arises from the passivity, lack of interest or inactivity of a party, and does not arise in cases where it falls to a tribunal to take the next steps towards resolving the dispute. The Claimants accordingly submit that no abandonment could arise before the Santiago court, as the case before it was ready for decision, and Mr Pey Casado was merely awaiting notification.¹¹⁰

¹⁰⁶ CR, paras. 96-132.

¹⁰⁷ CR, paras. 158-60.

¹⁰⁸ CM, paras. 290-293.

¹⁰⁹ CR, para. 166.

¹¹⁰ CR, paras. 167-69.

d. The Respondent's acts subsequent to the First Award constitute a new denial of justice under the BIT

68. The Claimants contend that, in breach of the principles of a fair hearing and due process, the Respondent sought to erase from the record the judgment of 24 July 2008 so preventing the First Tribunal and the Claimants from being informed of the existence of that judgment, thus committing a new violation of Article 4 of the Chile-Spain BIT.¹¹¹ Specifically, the Claimants point to a motion submitted by the Council for the Defence of the State to the Santiago court on 16 June 2009, which called for the proceeding to be declared abandoned so as to invalidate the judgment rendered.¹¹² The motion was denied on 6 August 2009, on the grounds that Mr Pey Casado had not been notified of the judgment, at which point the CDE appealed *ex parte* to the Court of Appeal of Santiago, which on 18 December 2009 acceded to the CDE's request, again *ex parte*.¹¹³ The Claimants contend that, despite the annulment proceedings having been in train since 5 September 2008, at no point did the Respondent notify the Claimants that the Santiago court had given judgment on the merits in the Goss press case.¹¹⁴ The Claimants were only notified of the existence of the judgment on 31 January 2011.¹¹⁵
69. These acts, taken together, constituted a further denial of justice and a new breach of Article 4(1) of the BIT, as they demonstrate a lack of good faith, and a breach of the obligation to maintain the existing position as far as possible for the duration of a dispute.¹¹⁶ The Claimants further contend that the decisions of the Chilean domestic courts, which have attempted to eradicate the Santiago court ruling, cannot produce legal effects on the international plane; and if they constitute a breach of international law, the principle of *restitutio in integrum* would apply to nullify their effects.¹¹⁷

¹¹¹ CM, paras. 265, 271-72; CR, para. 172.

¹¹² CR, para. 173.

¹¹³ CR, para. 174.

¹¹⁴ CR, para. 175.

¹¹⁵ CM, para. 265; see also Hearings, Day 1, p. 33, and Hearings, Day 4, p. 44.

¹¹⁶ CM, para. 276; CR, paras. 176-184.

¹¹⁷ CR, paras. 188-90.

e. Reparation for the damage resulting from the denial of justice

70. The Claimants submit that, though Article 4 of the BIT does not specify that reparation becomes due in case of breach, they may rely on the ‘most-favoured-nation’ (MFN) clause embodied in Article 7, and give as an example the Chile-Australia BIT (Articles 6-7) to justify a claim for reparation.¹¹⁸
71. The Claimants, recalling their argument that the consequence of concealing the ruling of the Santiago court was that the First Tribunal could not take note of the reality of the nullity of Decree No. 165, point to the fact that the objection based on extinctive prescription raised on 17 April 1996 by the CDE was not mentioned in paragraph 78 of the First Award.¹¹⁹ For the Claimants, this objection, upheld by the Santiago court, was only valid in relation to actions under the Chilean civil code, but was inapplicable before the First Tribunal.¹²⁰
72. Under international law, the *dies a quo* for the prescription of a claim may be extended in cases where the claimant has sound reasons for failing to raise such claims, and has not been negligent.¹²¹ The Claimants recall that Mr Pey Casado fled Chile to seek asylum in Venezuela, was banned from Chile between 1973 and 1989, and was only able to recover the share certificates proving his ownership of CPP and EPC through a judicial decision of 29 May 1995, which was the *dies a quo*.¹²²
73. The Claimants maintain that, because Mr Pey Casado filed an action for restitution of the Goss press on 4 October 1995, some four months after the *dies a quo*, the decision of the Santiago court—which concluded that extinctive prescription had run pursuant to Articles 2226, 2227 and 2236 of the Chilean Civil Code—is not opposable before the present Tribunal.¹²³ The Claimants contend that reparation for the denial of justice which prevented

¹¹⁸ CM, paras. 122-25.

¹¹⁹ CR, para. 226.

¹²⁰ CR, para. 227.

¹²¹ CR, paras. 228-229.

¹²² CR, para. 231.

¹²³ CR, paras. 232-33.

them from putting forward claims after the entry into force of the BIT, should be calculated on the basis of the fair market value of CPP and EPC prior to their *de facto* confiscation.¹²⁴

74. With respect to the moral injury suffered, the Claimants contend that during the seizure of CPP and EPC's assets in 1973, Mr Pey Casado's inclusion on a list of persons who needed to surrender immediately to the Ministry of National Defence, put him at serious risk of internment, torture, assassination or disappearance, which led him to seek asylum in Venezuela.¹²⁵ The Claimants further contend that since 1973, Mr Pey Casado has been subjected to continuous humiliation, injustice and uncertainty owing to the Respondent's refusal to provide reparation.¹²⁶

f. The Respondent attempted to subvert the arbitral proceedings through fraud

75. The Claimants assert that the Respondent's representatives have sought to frustrate the First Award in bad faith and to cause injury to the Claimants' investment, in further violation of Article 4 of the Chile-Spain BIT.¹²⁷ The annulment of Section VIII and clause 4 of the *dispositif* of the First Award opens the possibility for the Tribunal to take full cognizance of the Respondent's conduct, both prior and subsequent to the First Award.¹²⁸
76. The Claimants contend that, beyond the moral injury caused at the moment of the seizure of CPP and EPC in 1973 and thereafter, Mr Pey Casado has been subject to defamation through measures taken by Chilean authorities;¹²⁹ the reference to the Claimants as 'liars and impostors' in *El País* on 23 June 1999, upon publication of Decision No. 43;¹³⁰ insults to the Claimants and their counsel by the Chilean Ministry of National Assets;¹³¹ and the refusal by the Minister of the Interior to issue to Mr Pey Casado leave to enter in his capacity as a

¹²⁴ CM, paras. 372-79.

¹²⁵ CM, paras. 346-47, 506-7.

¹²⁶ CM, paras. 352-53.

¹²⁷ CR, para. 237.

¹²⁸ CR, paras. 238-39.

¹²⁹ CM, paras. 356-59, 508, including, *inter alia*, the deletion of the reference on the Civil Registry of Mr Pey Casado as an 'alien' on 24 June 1999: see CM, para. 359, and Hearings, Day 1, p. 25.

¹³⁰ CM, paras. 363, 509.

¹³¹ CM, paras. 363, 509.

Spanish national, thus imposing on him Chilean nationality *de facto*.¹³² The Claimants submit that because of the element of intentional misconduct that is inherent in fraud, arbitral tribunals may find indirect or circumstantial evidence of fraud to be sufficient.¹³³

77. The Claimants submit that the Respondent introduced into the case file of the First Tribunal a gravely misleading translation of Mr Pey Casado's *Demande* of 1995 which would have altered the *causa petendi* by omitting the claim that Decree No. 165 was null *ex tunc*, and by mistranslating a term in such a way that it was read to refer to the building where the Goss press was located, rather than to the press itself.¹³⁴ The Claimants maintain that these mistranslations were repeated exactly in the judgment of the Santiago court of 24 July 2008,¹³⁵ and that, in relation to Decision No. 43 of 28 April 2000, the Respondent falsely argued that ownership of the Goss press was attributed to EPC, rather than to CPP.¹³⁶
78. The Claimants further contend that the submissions of the Respondent before the First Tribunal were fraudulent in relation to the nullity *ex tunc* of Decree No. 165, as the Respondent was aware of Mr Pey Casado's request for restitution of the Goss press, and yet paralysed the progress of the proceeding before the Santiago court until the First Award had been rendered and attributed the ownership of CPP and EPC to third parties through Decision No. 43. This paralysis was particularly evident given the Respondent's argument that the First Tribunal lacked jurisdiction *ratione temporis* after Decree No. 165 was issued in 1975, and amounted to a wilful misconstrual of the framework in which the First Tribunal was to consider the Claimants' claims.¹³⁷

g. The Respondent's deceptive conduct persisted throughout the Revision Proceeding, the Annulment Proceeding and the present Resubmission Proceeding

79. The Claimants contend that the Respondent and its representatives deliberately withheld knowledge of the Santiago court judgment throughout the Revision Proceeding in which the

¹³² CM, para. 366.

¹³³ Hearings, Day 1, pp. 81-82.

¹³⁴ CR, paras. 250-252, 258-59.

¹³⁵ CR, para. 254.

¹³⁶ CR, paras. 255-257.

¹³⁷ CR, paras. 260-268.

continued absence of decision from the Santiago court figured prominently. The Claimants point to the Respondent's Response of 1 October 2008,¹³⁸ in which the Respondent rejected submissions as to the effects of the nullity under public law of Decree No. 165. The Claimants maintain that the fraudulent concealment of the domestic court judgment by the Respondent constituted a denial of justice, as it prevented them from submitting a request for annulment under Article 52, paragraph 2, of the ICSID Convention.¹³⁹

80. The Claimants maintain that the Respondent continues to act fraudulently in the present Resubmission Proceeding. The Claimants submit that from 22 May 2014, representatives of the Respondent successfully managed to unarchive the original case file in the Santiago court, and resorted to measures to conceal the file from the Claimants throughout 2014 through false pretences.¹⁴⁰ The Claimants allege that the Santiago court repeatedly ignored or refused Mr Pey Casado's requests for access in order to prevent the Claimants from demonstrating coordination between the Santiago court and agents for the Respondent in the present Resubmission Proceeding.¹⁴¹ The Claimants further complain that the Respondent has actively denied them access to the Goss file at the Santiago court.¹⁴²
81. The Claimants contend that, taken as a whole, the Respondent's fraudulent conduct and bad faith amounts to a further violation of Article 4 of the Chile-Spain BIT, as, for this reason, the First Tribunal could not properly establish the *quantum* of damages because of the presumption that the Respondent still had title over the investment.¹⁴³

¹³⁸ Exh. R-084, Chile's Opposition to Claimants' Revision Request, 1 October 2008.

¹³⁹ CR, paras. 270-274; see also CM, paras. 51, 365.

¹⁴⁰ CR, paras. 281-82.

¹⁴¹ CR, paras. 283-286.

¹⁴² Letter from the Claimants to the Tribunal dated 20 February 2015.

¹⁴³ CR, para. 291.

(3) The Claimants' submissions on the injury resulting from the violation of the obligation to provide fair and equitable treatment resulting from Decision No. 43

a. The Claimants have suffered from discrimination arising from the breach of the obligation to provide fair and equitable treatment

(i) The finding by the First Tribunal of the discrimination violation by the Respondent is *res judicata*

82. The Claimants contend that the First Tribunal's finding, that Decision No. 43 constituted a violation by the Respondent of the obligation to provide fair and equitable treatment under Article 4 of the BIT,¹⁴⁴ is *res judicata*, and constitutes recognition by the First Tribunal of both the existence of an investment by them which is protected under the fair and equitable treatment rule, and the breach of that rule.¹⁴⁵

83. The Claimants recall that the *ad hoc* Committee has already rejected the Respondent's request for annulment of that finding, concluding that i) it did not constitute a manifest excess of powers by the First Tribunal;¹⁴⁶ ii) that the First Tribunal had found that the violation of fair and equitable treatment consisted not only in the payment of compensation to third parties, but in the paralysis of the Claimants' requests for reparation;¹⁴⁷ and iii) that although the First Tribunal declined to order provisional measures with respect to the execution of Decision No. 43, that decision nevertheless represented a violation of Article 4 of the BIT.¹⁴⁸

(ii) The Respondent cannot deny the obligation to pay compensation

84. The Claimants reject the Respondent's argument that it is under no obligation to pay compensation to them because the Claimants voluntarily waived their rights under Law No. 19.568 through the exercise of the 'fork-in-the-road' clause in the BIT. The Claimants contend that the Respondent's paralysis of their claims in domestic proceedings was such that they had no choice but to turn to international arbitration, and that Law No. 19.568 was

¹⁴⁴ CM, paras. 317-18; CR, paras. 292-95.

¹⁴⁵ CR, paras. 301-05.

¹⁴⁶ CR, para. 306.

¹⁴⁷ CR, para. 311.

¹⁴⁸ CR, paras. 313-15.

not the exclusive source of their right to compensation.¹⁴⁹ They point to the optional character of Law No. 19.568, which provides in its Article 1, paragraph 6, for alternative proceedings, for example for restitution or compensation under Article 7 of the Chilean Constitution.¹⁵⁰ The Claimants also contend that, through Decision No. 43, the Respondent exhausted its obligation under Law No. 19.568, thus precluding the Claimants from being able to seek compensation, as the Respondent could not be forced to compensate twice for an asset.¹⁵¹

85. The Claimants invoke various provisions of Chilean domestic law, including Articles 10 and 18 of the Constitution which entrench the right to property and the obligation to pay compensation for the deprivation of property;¹⁵² Articles 2314 and 2329 of the Civil Code likewise provide for an obligation to pay reparation for injury caused by administrative acts;¹⁵³ and Article 1556 of the Civil Code, stipulates that compensation for injuries comprises both *lucrum cessans* and *damnum emergens*.¹⁵⁴ The Claimants assert that these provisions of domestic law also grant them a right to *restitutio in integrum*, irrespective of any specific protections in place at the time of the seizure.¹⁵⁵

(4) The quantum of damages

a. Compensation due for the breaches of Article 4 of the BIT

- (i) Fair market value is the appropriate standard of compensation for the injury inflicted upon the Claimants by the Respondent

86. The Claimants submit that the aim of compensation is to undo material harm inflicted by a breach of an international obligation, and that in the present case, damages and interests should be calculated on the fair market value of the investment, taking into account *damnum*

¹⁴⁹ CR, paras. 319-20.

¹⁵⁰ CR, paras. 321-323; Hearings, Day 4, pp. 53-4.

¹⁵¹ Hearings, Day 4, pp. 36-7.

¹⁵² CR, para. 323.

¹⁵³ CM, paras. 127-29; CR, para. 325.

¹⁵⁴ CR, paras. 326-27.

¹⁵⁵ Hearings, Day 1, pp. 107-8.

emergens, lucrum cessans and moral damages.¹⁵⁶ The Claimants submit accordingly that as the injury to them consisted in their loss of the right to compensation for the seizure of CPP and EPC, compensation should be equivalent to the fair market value of these two companies just prior to their seizure, and that the resulting sum must be adjusted up to the date of the present Award.¹⁵⁷

87. The Claimants argue that the reference in the *dispositif* to their entitlement to ‘compensation’ is a general reference to a right of reparation, and precludes neither reparation for moral injury nor a claim of unjust enrichment.¹⁵⁸
88. The Claimants point to domestic Chilean case law where compensation has been paid in situations where the relevant expropriatory decrees have been declared to be null under public law, and submit that similar treatment ought to apply to them.¹⁵⁹ The Claimants submit that the consequence of the seven-year delay in the Goss press case and resulting denial of justice was to deprive them of their ability to assert their rights against Chile.¹⁶⁰ They argue that, but for the concealment of the Santiago court judgment of 2008, the First Tribunal could not have concluded as it did in the First Award that Article 5 of the BIT was inapplicable *ratione temporis* to the expropriation,¹⁶¹ but would have accepted their ‘continuing act’ theory.¹⁶²
89. The Claimants contend that, in cases of expropriation, the critical date from which damages are calculated is the date of deprivation of the rights of ownership, in this case 11 September 1973.¹⁶³ Where successive violations of a BIT have occurred, the Claimants contend that the Tribunal may choose to fix a date other than the starting date of the expropriation in order to make fully operative the right to *restitutio in integrum*.¹⁶⁴ They submit that, in the present

¹⁵⁶ CM, paras. 156-163, 341, 440; CR, para. 345-351.

¹⁵⁷ CM, paras. 440-41, 452; CR, para. 357.

¹⁵⁸ CR, paras. 375, 377.

¹⁵⁹ CM, paras. 166-68; CR, para. 352.

¹⁶⁰ CM, paras. 280-83; CR, para. 235.

¹⁶¹ CR, para. 194.

¹⁶² CM, paras. 13, 24; CR, para. 353.

¹⁶³ CM, para. 443.

¹⁶⁴ CM, paras. 444-45.

case, the multiple violations committed by the Respondent favour the selection of the date of the First Award, 8 May 2008, as the critical date for establishing the fair market value of the companies.¹⁶⁵

90. The principal injury suffered by the Claimants remains, according to them, the value of the expropriated assets of CPP and EPC, both of which were ‘going concerns’ which were in full development, and thus more valuable than the value of their discrete tangible assets.¹⁶⁶

91. The Claimants contend that the appropriate standard to be used in calculating damages in the present proceedings is one based in international law, and not the law of the host State; therefore Law No. 19.568 and the value paid to investors under it would not be relevant for the calculation of damages here.¹⁶⁷ They reject the Respondent’s contentions on the burden of proof for establishing damages, pointing out that paragraph 689 of the First Award, which deals with the burden of proof in establishing damages, was annulled by the *ad hoc* Committee.¹⁶⁸

(ii) The injury suffered by reason of the violation of the obligation to provide fair and equitable treatment

92. Citing the *Chorzów Factory* case,¹⁶⁹ the Claimants submit that compensation is due for the expropriation value of *El Clarín* as, but for the discrimination suffered, they would have received reparation for the confiscation of the assets of CPP and EPC.¹⁷⁰ They contend that they should be placed in the situation in which they would have been but for the commission of the internationally wrongful act.¹⁷¹ The Claimants also suggest that the Tribunal enjoys the discretionary power to determine which standard of reparation is the most appropriate.¹⁷²

¹⁶⁵ CM, paras. 446-47.

¹⁶⁶ CR, paras. 360-62; see also CM, paras. 380-81.

¹⁶⁷ CR, paras. 363-4.

¹⁶⁸ Hearings, Day 4, p. 21.

¹⁶⁹ Exh. ND-J7, *Factory at Chorzów (Germany v. Poland)*, PCIJ Ser. A, No. 17, 47, reprised in Exh. CL320, *SD Myers v. Canada*, NAFTA, UNCITRAL Arbitration Rules, First Partial Award, 13 November 2000, paras. 309-311.

¹⁷⁰ CM, paras. 141-44; CR, para. 334.

¹⁷¹ CM, paras. 147-49, 333-336; CR, paras. 330-34.

¹⁷² CM, paras. 146-7, citing Exh. CL158, *CMS Gas Transmission v. Argentina*, ICSID Case No. ARB/01/08, Award of 12 May 2005, para. 409; Exh. CL187, *Enron and Ponderosa Assets v. Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007, paras. 359-60; Exh. CL320, *SD Myers v. Canada*, paras. 311-15;

They further contend that under ICSID case law, compensation can also be calculated on fair market value for BIT violations not constituting expropriation.¹⁷³ Finally, they reject the Respondent's contention that no harm resulted from the discrimination, on the ground that to do so questions the very existence of the violation, which is *res judicata*.¹⁷⁴

93. The Claimants contend that Decision No. 43 was in fact adopted as a deliberate manoeuvre by the Respondent during proceedings before the First Tribunal, with the sole purpose of constructing evidence that the Claimants were not the legitimate owners of CPP and EPC.¹⁷⁵ Recalling that Chilean domestic law recognizes that legal persons can also seek moral damages for injuries caused by administrative acts, the Claimants submit that the correct calculation of compensation for the violation of the obligation of fair and equitable treatment is the payment of the compensation that would be due to investors for the seizure of CPP and EPC, as well as the moral damages resulting to Mr Pey Casado and the Foundation.¹⁷⁶
94. The Claimants maintain that they are not bound by the calculation of the *quantum* of damages under domestic law, which under Decision No. 43 only awarded *damnum emergens* and omitted *lucrum cessans* entirely.¹⁷⁷ They contend that Law No. 19.568 was in any event only one particular means to implement the obligation to respect property, or to receive restitution and reparation for the deprivation of property, as embodied in the Chilean Constitution.¹⁷⁸ The Claimants further contend that they cannot be bound by the calculations issued pursuant to Decision No. 43, as they had no opportunity to make observations during the proceedings leading to that decision.¹⁷⁹

Exh. CL249, *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para. 122.

¹⁷³ CR, para. 349; see also Hearings, Day 1, pp. 109-113.

¹⁷⁴ Hearings, Day 4, p. 52.

¹⁷⁵ CM, paras. 22, 334-37; CR, paras. 336-38; Hearings, Day 4, p. 59, referring to Exh. R-27, Award, 8 May 2008, fn. 270.

¹⁷⁶ CR, paras. 339-43.

¹⁷⁷ CM, para. 322.

¹⁷⁸ CM, paras. 324-28.

¹⁷⁹ CM, paras. 333-34.

(iii) In the alternative, damages should be calculated on the basis of the Respondent's unjust enrichment

95. The Claimants submit that the Respondent's unjust enrichment should be used as the basis to calculate the compensation due to them, on the general principle in international law that no State has the right to enrich itself to the detriment of another State or legal person.¹⁸⁰ Accordingly, the Claimants' alternative contention is that they should be awarded the value of the unjust enrichment enjoyed by the Respondent through 40 years' use of the seized assets.¹⁸¹
96. The Claimants rebut the Respondent's argument that a claim for unjust enrichment represents a new claim, as it represents only a basis for the calculation of damages once liability has been established;¹⁸² moreover, new evidence may be introduced if it is for the sole purpose of calculating damages to be awarded.¹⁸³
97. According to the Claimants, the mention of compensation in the un-annulled portions of the First Award need not exclude other such forms of reparation, as the term refers to harm that is financially quantifiable.¹⁸⁴ They point out that the only passages in the First Award that excluded certain types of reparation are those passages where moral damages were excluded, which were however in the annulled sections of the First Award and cannot be considered before the present Tribunal.¹⁸⁵ The Claimants moreover contend that the term 'compensation' refers to all forms of financial reparation for the injury suffered, be it moral or material, and that the International Law Commission reached the same conclusion.¹⁸⁶
98. The Claimants also contend that, even if the Respondent's conduct was not fraudulent, and even if Decree No. 165 is not null under public law *ex tunc*, the Respondent must still

¹⁸⁰ CR, paras. 365-66.

¹⁸¹ CM, paras. 432-5; *Sea-Land Services Inc. v. Iran* (Iran-US Claims Tribunal, Award no. 135-33-1, 22 June 1984), 6 IUSCTR 149, p. 169, and *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award of 27 May 2007, para. 382; CR, para. 368.

¹⁸² CR, para. 370.

¹⁸³ CR, para. 372; *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision of 17 December 1997, para. 7.51.

¹⁸⁴ Hearings, Day 4, pp. 27-29.

¹⁸⁵ CR, para. 374.

¹⁸⁶ CR, paras. 375-77.

disgorge all the fruits of the confiscation of assets held in bad faith, on the basis that there exists a delictual act to the detriment of the Claimants and benefiting the Respondent.¹⁸⁷ The Claimants submit that aggravated damages arising out of the bad faith of the Respondent are also permitted under Chilean civil law.¹⁸⁸

b. The Accuracy expert report

99. The Claimants contend that the figures presented by Accuracy are pertinent and accurate, and take into account the differences between *El Clarín* and the chosen comparators, in particular through the use of the 20% discount.¹⁸⁹ The Claimants further contend that the facts subsequent to the critical date of 10 September 1973 are not relevant in the present case, as the objective of a comparative approach is to determine what the reasonable and well-informed businessman would have been prepared to pay on the critical date, using knowledge available at the time.¹⁹⁰
100. The Claimants recall that Accuracy considered that the analogical method was the most reliable method to establish the fair market value of CPP and EPC, and accordingly to substantiate an expropriation-based calculation of damages. They submit that the ‘Discounted Cash Flow method’ (‘DCF’) cannot be used in cases where there was insufficient financial information, and that, owing to the Respondent’s systematic refusal to produce the financial documents sought by the Claimants, it would not have been possible to use this method.¹⁹¹ Accuracy states that the method of assessment using fair market value is not expropriation-based, but applicable to a wider range of assessments.¹⁹² The Claimants further contend that in any event, the *ad hoc* Committee annulled Section VIII of the First Award, in which the First Tribunal rejected the use of expropriation-based damages, and

¹⁸⁷ CM, paras. 380, 394-5, 405, 407, 501(2); CR, para. 380; Hearings, Day 1, p. 135.

¹⁸⁸ CM, paras. 396-98, 402-03, 406.

¹⁸⁹ CR, paras. 450-52.

¹⁹⁰ CR, paras. 455-457; see also CM, paras. 386-90.

¹⁹¹ CM, para. 454; see also Hearings, Day 1, p. 114; and Hearings, Day 3, pp. 16-17.

¹⁹² Hearings, Day 3, p. 15.

therefore there would be no violation of *res judicata* in calculating compensation based on fair market value.¹⁹³

101. The Claimants submit that in calculating the compensation due for the expropriation of CPP, the price paid by Mr Pey Casado cannot be relevant, as fair market value is an abstract concept that does not take into account the particularities of a given situation.¹⁹⁴ They point to the fact that the price paid by Mr Pey Casado to Mr Sainte-Marie reflected the ‘fair value’, but not the ‘fair market value’, of CPP and EPC, as it reflected the specific positions of the two parties to the transaction, who were friends and long-standing colleagues, rather than the fair market value of the assets sold.¹⁹⁵
102. The Claimants defend the use by Accuracy of the US dollar in its calculations, on the basis that a prudent investor at that time would have used that currency, and that any differences in inflation between the US and Chile would have been counter-balanced by changes in the exchange rates between the two currencies. The exchange rate used by Accuracy was the average annual exchange rate published by the Bank of Chile, which corresponds to the rate that would have been applied to businessmen seeking to purchase United States dollars during that period.¹⁹⁶ With respect to the capitalization rates used, the Claimants defend Accuracy’s choice of the mid-rate of American ten-year Treasury Bonds, augmented by a national risk premium of 2% corresponding to the rate assigned to Chile from 1974 to 2000 and subjected to annual review from 2000-2014.¹⁹⁷
103. The Claimants contend that the expert report submitted by Navigant in support of the Respondent’s claim is based on an incorrect interpretation of the dispute as directed by the Respondent, and that Navigant’s entire report is outside its field of expertise, being based on a legal analysis of the consequences of a treaty violation and not on financial matters.¹⁹⁸

¹⁹³ Hearings, Day 4, pp. 61-62.

¹⁹⁴ CR, para. 464; see also CM, paras. 383-86.

¹⁹⁵ CR, paras. 465-69.

¹⁹⁶ CM, para. 457.

¹⁹⁷ CM, para. 459.

¹⁹⁸ CR, paras. 423-424.

104. The Claimants suggest that Accuracy's damages assessment should be used by the Tribunal as Navigant, the Respondent's expert, has not proposed an alternative damages assessment,¹⁹⁹ and because the Respondent has failed to produce the documents requested by the Claimants in their March and November 2014 requests for document production.²⁰⁰ The expert reports of Accuracy are reliable and trustworthy, even if a measure of uncertainty is present in the calculations, as there exists an inherent uncertainty in damages calculations, and the Tribunal possesses the discretion to make an approximate calculation as to the amount recoverable.²⁰¹
105. Moreover, given the particularly violent character of the expropriation in the present case, and the inability of the Claimants to obtain key information from the Respondent, Accuracy was only able to obtain incomplete information relating to its calculations. The Tribunal should give the Claimants the benefit of the doubt and consider the value range submitted by Accuracy.²⁰²
106. The Claimants explain that the EBITDA adjustment undertaken by Accuracy, which aims to establish the fair market value of the companies concerned, used a number of comparators from the American press sector: a high average of 12 x EBITDA, which excludes the New York Times and the Washington Post, and a low average of 9.9 x EBITDA, which includes them; the period under study is from 1988-2013, including a particular emphasis on the transactions of these comparator companies from 2000-2013.²⁰³ The Claimants recommend that the high average of 12x be retained, arguing that the New York Times and Washington Post present a notably different corporate profile of activity.²⁰⁴ Accuracy have also applied a 20% discount (*décote*) by reason of the absence of similar data for the press sector in Latin America, and using a range of multiples in line with the practice of other forecasters; after the discount, the 12x multiple would be converted to 9.6 x EBITDA.²⁰⁵

¹⁹⁹ CR, para. 427.

²⁰⁰ CR, paras. 436-38.

²⁰¹ CR, paras. 429-32.

²⁰² CR, paras. 435-38 and 441-44.

²⁰³ CM, para. 472*bis* (419).

²⁰⁴ CM, para. 473.

²⁰⁵ CM, paras. 463, 474-476; see also Hearings, Day 3, pp. 22-23.

They reject the Respondent's contention that the New York Times and the Washington Post should not have been excluded, as these two comparators are the least close to the situation of *El Clarín*.²⁰⁶ The Claimants contend that the EBITDA adjustment has been confirmed in the First Award and has the character of *res judicata*, and that the Respondent's objections to this adjustment are unfounded.²⁰⁷

107. The Claimants explain that Accuracy analysed the financial data of the seized companies prior to their seizure from 1970 to 1972, so as to determine the profitability of the operational activity of the group.²⁰⁸ Accuracy has concluded that the aggregate value (normalized EBITDA value) of the Group *El Clarín* was, in 1972, either US\$738,000 or US\$1,222,000.²⁰⁹ The Claimants contend that two figures were necessary given the claimed concealment by the Respondent of figures relating to 1973, and that the higher figure should be preferred.²¹⁰ Taking into consideration the *El Clarín* Group's debt of US\$535,000, the Claimants calculate that, according to the normalized EBITDA value of (US\$1,222,000 - US\$535,000), the value of the shares in CPP and EPC on the eve of their seizure *de facto* was US\$11,200,000.²¹¹
108. The Claimants contend that the material injury to the Claimants must be capitalized up to the date of the First Award, 8 May 2008, after which compound interest should apply until the date of payment.²¹² Capitalization should be at the rate of American 10-year Treasury bonds augmented by the risk premium pertaining to Chile, namely, fixed at 2% from 1973-1999 and revised each year from 2000-2008.²¹³ From 8 May 2008 until 27 June 2014, compound interest of 5% has been applied.²¹⁴ The injury suffered by the Claimants, valued on 27 June 2014, is thus US\$329,700,000.

²⁰⁶ CR, paras. 459-461.

²⁰⁷ CR, para. 445-449.

²⁰⁸ CM, paras. 465-67.

²⁰⁹ CM, paras. 468-69.

²¹⁰ CM, paras. 470-71.

²¹¹ CM, para. 480.

²¹² CM, para. 481; see also Hearings, Day 3, p. 15.

²¹³ CM, para. 482.

²¹⁴ CM, para. 483; see also Hearings, Day 3, p. 26.

109. The Claimants' request for relief, drawn from the second Accuracy Report, is therefore US\$338.3 million, which is equal to the compensation that would be due from the Respondent to the Claimants for the shares of CPP and EPC Ltda.²¹⁵

(i) The compensation calculation for unjust enrichment

110. With respect to the unjust enrichment calculation, the Claimants' alternative claim is for: 1) the value of the rents saved by the Respondent between 11 September 1973 and 22 April 2013, assessed at US\$3,800,000;²¹⁶ 2) the value of real estate and moveable property seized by the Respondent in 1973, adjusted for rises in property values,²¹⁷ assessed at US\$17,800,000;²¹⁸ 3) the Respondent's enjoyment and use of premises in Santiago, Viña del Mar and Concepción claiming the benefits of the savings accrued by the Respondent since 11 September 1973,²¹⁹ assessed at US\$1,500,000;²²⁰ and 4) the Respondent's enjoyment and use of the moveable property owned by CPP and EPC, in particular, the Goss and Plamag presses.²²¹ The Claimants contend that to achieve *restitutio in integrum* these should be capitalized annually, so that on 27 June 2014, the reparation due for unjust enrichment was US\$91,600,000.²²² Given the fact of confiscation, no evidence is required as to the actual use of the assets made by the Respondent.²²³

111. The Claimants conclude that, on the basis of unjust enrichment, they are entitled to the sum of US\$94.1 million,²²⁴ having regard to the profits or savings made by the Respondent from the seizure of the assets of CPP and EPC.²²⁵

²¹⁵ Second Accuracy Report, § 3.2.1, para. 21.

²¹⁶ CM, paras. 497-98.

²¹⁷ CM, para. 436.

²¹⁸ CM, para. 496.

²¹⁹ CM, para. 437.

²²⁰ CM, paras. 490-93.

²²¹ CM, para. 438.

²²² CM, paras. 489, 500-03; see also Hearings, Day 1, p. 140.

²²³ CR, paras. 470-74.

²²⁴ CR, para. 501(3).

²²⁵ Second Accuracy Report, § 3.2.2, para. 24.

c. The calculation of moral damages

112. The Claimants claim for the moral injury suffered by Mr Pey Casado and the Foundation Presidente Allende, for the injury endured by Mr Pey Casado through the seizure of CPP and EPC's assets and subsequently, as well as for the Respondent's misconduct during the arbitral proceedings.²²⁶
113. The Claimants submit that it falls outside the expertise of Accuracy to calculate moral damages, and that it is for them to provide detail as to the basis for compensation for such damages.²²⁷ Moral damages are not excluded by the *dispositif* of the First Award since 'compensation' refers simply to indemnification, whether for material or moral damages.²²⁸
114. The Foundation Presidente Allende and Ms Pey Grebe have standing to claim moral damages, because they are not claiming for any direct injury to them, but for the violation of Article 4 of the BIT, which includes moral injury, given the character assassination of Mr Pey Casado since 11 September 1973.²²⁹ The Claimants further submit that a causal link exists between the moral damages suffered and the violation of Article 4 recognized by the First Tribunal, as well as by the Chilean Supreme Court in its judgment of 21 June 2000.²³⁰
115. Given the gravity and recurring nature of the moral injuries suffered by Mr Pey Casado,²³¹ the Claimants have assigned the value of US\$10,000,000 to Ms Pey Grebe, and US\$500,000 to the Foundation Presidente Allende for this harm.²³²

d. Tax gross-up

116. The Claimants contend that any compensation must take into account the difference between the tax rate that would be paid at the time of any eventual award, and the tax rate applicable on the capital gains that would have been paid had compensation been awarded in 1973.²³³

²²⁶ CM, para. 344.

²²⁷ CR, para. 478.

²²⁸ CR, paras. 479-82.

²²⁹ CM, para. 512; CR, paras. 486-88.

²³⁰ CR, para. 484-85.

²³¹ CM, paras. 507-10.

²³² CM, paras. 511-13.

²³³ CR, paras. 489-91, citing to Second Accuracy Report, para. 31.

They thus request a tax gross-up on the damages awarded, so as to restore fully to them their patrimony had there been no violation of fair and equitable treatment.²³⁴ They calculate that the tax gross-up should be between US\$10 and 13 million (Accurracy’s Approach A), or between US\$18 and 22 million (Accurracy’s Approach B) for the principal claim, and more than US\$6 million for the ancillary claim.²³⁵

117. During the oral proceedings, the Claimants sought to introduce into the record new tax calculations, with respect to the rates of taxation applicable in Chile in 2015, on the basis that these were a simple update of document CM-48.²³⁶ The Respondent objected to the introduction of this new documentation, on the basis that these constituted an entirely new document that they have not had the opportunity to assess, rebut, or show to experts.²³⁷ By email dated 16 May 2015, the Tribunal informed the Parties that it would “rule on the Claimants’ request as and when it reaches the point of deciding on the relevance of tax rate schedules to its Award.”

e. Interest

118. The Claimants submit that the awarding of interest is an accepted practice in international dispute settlement,²³⁸ and that abundant international case law supports the award of compound interest from the date of the award.²³⁹ They recall that the rate used by Accurracy reflects the rate used by the First Tribunal and the *ad hoc* Committee of 5%,²⁴⁰ and deny any responsibility for the lapse of time since the Award, given the concealment by the Respondent of the Santiago court judgment.²⁴¹

²³⁴ CR, para. 492.

²³⁵ Hearings, Day 4, pp. 15-16.

²³⁶ Hearings, Day 2, pp. 166-167, and Hearings, Day 3, p. 7.

²³⁷ Hearings, Day 3, pp. 3-5, 10.

²³⁸ CM, paras. 182-84; citing Exh. CL317, *Compañía de Desarrollo de Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, para. 101, and Exh. CL234, *LG&E Energy Corp v. Argentina*, ICSID No. ARB/02/1, Award of 25 July 2007, para. 55.

²³⁹ CM, paras. 187-196, 392; CR, para. 342; Hearings, Day 1, pp. 125-30.

²⁴⁰ CM, para. 460; CR, para. 494.

²⁴¹ CR, para. 498.

119. The Claimants further request that, in the case of default, interest of 10% should be levied after 90 days from the date of the eventual Award.²⁴² They point to previous refusals by the Respondent voluntarily to execute the Award as justifying any forward-looking measures to establish post-Award interest.²⁴³

f. Incidental damages, costs and fees

120. The Claimants maintain that compensation may be claimed for the incidental costs of acts taken to remedy or mitigate the original injury, including the cost of pursuing judicial proceedings.²⁴⁴ They contend that the First Award in fact made provision for such costs in paragraphs 719 and 730,²⁴⁵ and that costs and fees, including legal fees, can be regarded as damages caused by the unlawful act, and thus as consequential damages under international law.²⁴⁶ The Claimants estimate the incidental costs of all acts taken to remedy or mitigate the original injury, including the total costs of arbitral and judicial proceedings, at €1,156,739 and \$US517,533 plus interest.²⁴⁷

121. Based on the same principle, the Claimants seek compensation for the additional costs imposed on them by the Respondent's refusal to execute the First Award without delay, namely €102,734.75 for the legal fees of Me Manuel Murillo, and €8,890.72 for those of Mr Bordallo.²⁴⁸ The Claimants recalled that, pursuant to the decision of 16 December 2014 of the Spanish tribunal, a portion of those sums, €69,545.67, may allow for enforced recovery against assets held *jure gestionis* by the Respondent in Spain. By letter of 22 April 2015, the Claimants took note of the fact that the Respondent had paid this sum, and in a written communication addressed to the Parties of 16 May 2015, the Tribunal took note of the Claimants' abandonment of their claim for that specific sum.

²⁴² CR, paras. 499-500.

²⁴³ CR, para. 397*bis*.

²⁴⁴ CR, paras. 382-404.

²⁴⁵ CR, para. 391.

²⁴⁶ CR, paras. 408-9; Hearings, Day 1, pp. 132-133.

²⁴⁷ CR, paras. 406-7; Hearings, Day 1, pp. 134-135.

²⁴⁸ CR, para. 409.

122. The Claimants' full request for costs totals €11,156,739.44 and US\$517,533.²⁴⁹ With respect to costs and fees relating specifically to the Resubmission Proceeding, the Claimants submitted figures of US\$4,534,826.60 and €3,332.19 in legal costs and translation costs.²⁵⁰

C. Overview of the Respondent's Submissions

123. The Respondent's submissions can be divided into three broad sections: challenges to the standing of Ms Pey Grebe, and to the admissibility of the Claimants' requests for relief; challenges to the Claimants' theory of damages, and in particular, the damages calculations presented by their expert; and challenges to the Claimants' requests for a tax gross-up, interest, and costs and fees.

124. The Respondent's principal submission in response to the Claimants' submission is that 'each and every one of the Claimants' requests for relief' exceeds the Tribunal's authority to award relief in the present proceedings,²⁵¹ as they contravene the two fundamental principles that characterize ICSID resubmission proceedings: first, the parties must be in complete identity with those that participated in both the original arbitration that yielded the award and the annulment proceeding that vacated the award in full or in part; and secondly, the parties and the resubmission tribunal remain bound by the un-annulled portions of the award, with the competence of the resubmission tribunal confined to deciding issues raised in the annulled portion(s) of the First Award.²⁵²

(1) Jurisdiction and Admissibility

a. The Tribunal lacks jurisdiction over Ms Pey Grebe and her claims

125. The Respondent considers that the Claimants' decision to substitute Ms Coral Pey Grebe for Mr Pey as Claimant generates three specific jurisdictional problems. The Respondent suggests instead that Mr Pey Casado be reinstated as Claimant in the proceeding, in lieu of

²⁴⁹ CR, para. 412.

²⁵⁰ See letter dated 29 May 2015 from the Claimants to the Tribunal.

²⁵¹ RR, para. 14.

²⁵² RR, para. 15.

Ms Pey Grebe, and that, in the light of Mr Pey Casado's advanced age, Ms Pey Grebe be regarded as her father's representative.²⁵³

126. In the Respondent's contention Ms Pey Grebe is not a proper party to the Resubmission Proceeding, since Article 52 of the ICSID Convention provides that only the same 'parties' who participated in both the arbitration and the annulment proceedings are entitled to seek resubmission of a dispute following the full or partial annulment of an award.²⁵⁴ The Respondent argues that because the First Award did not make any jurisdictional findings on claims of Ms Pey Grebe, she lacks standing to assert rights on the basis of the First Award's findings, as ICSID rules do not allow for representative claims.²⁵⁵
127. The Respondent further submits that the Tribunal lacks jurisdiction *ratione materiae* over Ms Pey Grebe as she does not have a qualifying 'investment'. Investors must not only hold some type of protected asset, but the asset must, under Article 1(2) of the BIT,²⁵⁶ have been obtained as a result of a personal contribution; the cession from Mr Pey Casado to his daughter does not qualify, as it was made without consideration (*à titre gratuit*). Moreover, the object of the cession is precisely what the First Award found to have been expropriated definitively during the 1970s.²⁵⁷
128. The Respondent further submits that jurisdiction has not been, and in all likelihood cannot be, established with respect to Ms Pey Grebe, as Article 25(2)(a) of the ICSID Convention prohibits claims by dual nationals if one of the nationalities is that of the respondent State; the Claimants have not denied that Ms Pey Grebe is a dual Spanish-Chilean national, was born in Chile, and continues to bear Chilean nationality.²⁵⁸
129. Finally, the Respondent maintains that the Tribunal is not empowered to award relief to Ms Pey Grebe for an injury sustained by another party, in particular those which by their

²⁵³ RCM, para. 195.

²⁵⁴ RCM, para. 179; RR, para. 18.

²⁵⁵ RCM, paras. 181-183.

²⁵⁶ Which expressly limits protection to claims, securities and rights 'arising from all types of contributions made for the purpose of creating economic value'.

²⁵⁷ RCM, paras. 186-189.

²⁵⁸ RCM, paras. 191-92; RR, para. 19.

nature are *in personam*, or for an injury occurring prior to her claimed investment.²⁵⁹ Because Ms Pey Grebe was not a party to the Chilean court proceeding that was the subject of the finding of a denial of justice in the First Award, the Respondent concludes that Ms Pey Grebe cannot recover any damages for that finding. In the alternative, the Respondent argues that even if the violations of the BIT found in the First Award relate only to the investment and not to the investor as such, Ms Pey Grebe cannot recover for harm caused before her claimed acquisition of the investment in March 2013.²⁶⁰

130. As to the more specific arguments made by the Claimants in support of Ms Pey Grebe's status as Claimant in the Resubmission Proceedings: (a) although it is right that jurisdiction is to be established at the moment that proceedings are instituted, the Respondent submits that if a new claimant joins the case, the Tribunal must evaluate its jurisdiction anew as to each such claimant; (b) the assignment of Mr Pey Casado's shares in *El Clarín* and rights in this arbitration does not suffice to establish Ms Pey Grebe's standing, because the requirement of the identity of the parties is not satisfied merely by virtue of a transfer of rights; (c) although the Claimants contend that the assignment constitutes a valid legal agreement that must be respected by the Tribunal, to uphold the Claimant's argument would be to permit a private agreement to supersede the limitations on jurisdiction imposed by the ICSID Convention; (d) the Respondent denies that it is merely repeating its earlier objection to the First Tribunal's jurisdiction over the Foundation, since the situation of Ms Pey Grebe has to be distinguished on the grounds set out above; (e) the Respondent denies that it is precluded from raising jurisdictional objections in the Counter-Memorial, as ICSID Arbitration Rule 41(1) allows a party to identify jurisdictional deficiencies until 'the expiration of the time limit fixed for the filing of the counter-memorial'; no ICSID tribunal has ever refused to examine jurisdictional deficiencies identified in a respondent's counter-memorial, but the Tribunal must in any event evaluate *sua sponte* any jurisdictional defects posed by Ms Pey Grebe's role as Claimant; (f) finally, the Respondent denies that its objections are designed to deprive Mr Pey Casado of the benefits of the First Award, since

²⁵⁹ RR, para. 29.

²⁶⁰ RCM, paras. 193-194.

the problems arise out of the Claimants' own unwillingness to reinstate Mr Pey Casado as Claimant.²⁶¹

b. The damage calculations offered by the Claimants and their expert are inadmissible, as they do not relate specifically to the two BIT violations identified in the First Award

131. The Respondent recalls that Procedural Order No. 1 identifies the scope of the Tribunal's authority as the matters identified in paragraph 359.1 of the Decision on Annulment, and submits that all the Claimants' requests for relief, in particular those relating to claimed post-First Award violations of Article 4 of the BIT, exceed the Tribunal's authority, as they either represent a variety of new claims or revisit prior failed claims.²⁶² The Respondent rejects in particular the following: the freestanding expropriation claim; the claim that various post-First Award events relating to the Goss press constitute a violation of Article 4 of the BIT; the claim that the behaviour of its representatives amounts to a new violation of Article 4 of the BIT; the claim that national treatment was denied to the Claimants when the owners of most other media companies were compensated for the expropriation of their assets; and the claim based on unjust enrichment.²⁶³
132. The Respondent contends that the Claimants' requests for relief are improper because they are inconsistent with the nature and scope of the Resubmission Proceeding, and directly contradict prior decisions which are *res judicata*.²⁶⁴ The Respondent points, in particular, to the three requests corresponding to the expropriation value of *El Clarín*, the requests for costs and legal fees that were declined by the First Tribunal and *ad hoc* Committee, and the request for moral damages;²⁶⁵ all of these are insufficiently connected²⁶⁵ to the two violations of the BIT that fall within the scope of the Resubmission Proceeding, and in any event Chile has already paid some of these costs and fees.²⁶⁶ The Respondent further contends that, because paragraph 3 of the First Award's *dispositif* was not annulled and remains binding, it precludes the Tribunal from ordering restitution or satisfaction; accordingly, it may not

²⁶¹ RR, paras. 22-32; see also Hearings, Day 2, pp. 3-4.

²⁶² RR, para. 37; RCM, paras. 240-42.

²⁶³ RR, paras. 39-40.

²⁶⁴ RCM, para. 172.

²⁶⁵ RR, paras. 41-42; see also Hearings, Day 2, p. 79.

²⁶⁶ RR, para. 43; see also Hearings, Day 2, p. 83.

consider any claims for unjust enrichment or moral damages, as these are not requests for compensation, compensation being understood as financially assessable damages.²⁶⁷

c. The claims based on expropriation value contradict unannulled portions of the First Award and are outside the scope of the Resubmission Proceeding

133. With respect to the requests corresponding to the expropriation value of *El Clarín*, the Respondent submits that un-annulled portions of the First Award preclude any assessment of damages that equates injury from the BIT violations with the injury from the expropriation of *El Clarín*. The Respondent submits that the un-annulled portions of the First Award declare that none of the BIT's substantive protections applied to the expropriation of *El Clarín*, and that the two BIT violations are distinct from any expropriation-based violation.²⁶⁸ Liability for a breach being a prerequisite for an award of damages as compensation, the Respondent concludes that the Claimants' request would entail it being obliged to pay damages for a BIT violation not found by the First Tribunal.²⁶⁹
134. The Respondent denies that any unjust enrichment gained by it can be awarded by the Tribunal, primarily because, whether or not unjust enrichment was argued before the First Tribunal but not considered in the First Award, the First Tribunal 'unambiguously concluded' that none of the BIT's substantive protections could apply either to the taking of control over the assets of *El Clarín*, or to the depriving of the Claimants of the benefits of them.²⁷⁰ The Respondent therefore submits that to grant any compensation for unjust enrichment would be 'completely arbitrary, inconsistent with binding conclusions from the Award, contrary to the Annulment Decision's clear and explicit guidance on the issues and findings that had been annulled ... and at odds with the ... tenet of international law that a State can be condemned to pay damages for particular conduct only if there has been a finding of liability for such conduct'.²⁷¹

²⁶⁷ RCM, paras. 224-27, 250-1, 331; Hearings, Day 4, pp. 96-97.

²⁶⁸ RCM, para. 229; RR, paras. 48-50; see also Hearings, Day 1, pp. 165-66.

²⁶⁹ RCM, paras. 230 and 232; RR, paras. 51-52; see also Hearings, Day 2, pp. 42-44.

²⁷⁰ RCM, para. 237, citing to First Award, paras. 429, 466, 608, 610.

²⁷¹ RR, para. 54; see also RCM, para. 238.

135. The Respondent submits in the alternative that even if the First Award had failed to address a claim for unjust enrichment, the appropriate proceeding would have been the filing of a request for supplementation pursuant to Article 49(2) of the ICSID Convention, but subject to a fixed time limit of 45 days after the date on which an award is rendered; having failed to observe that, the Claimants must now be deemed to have waived their rights to make such a claim.²⁷²

d. The Claimants' request for costs incurred in prior phases of the dispute is impermissible

136. The Respondent argues that the Claimants' request for costs incurred in prior phases of the dispute is outside the scope of the Resubmission Proceeding. The Respondent also contends that the Tribunal cannot entertain costs claims relating to violations of Article 3 of the BIT and of Articles 53(1) and 54(1) of the ICSID Convention, as it has not been found in breach of these provisions by any ICSID panel.²⁷³ As to claims for prior costs linked to the violation of Article 4 of the BIT, the Respondent maintains that these must be rejected in the present Resubmission Proceeding, as the First Tribunal, the Revision Tribunal, the *ad hoc* Committee, and the Spanish court in the enforcement proceeding in Spain had already ruled on the Claimants' costs requests in the context of each proceeding.²⁷⁴ Finally, the Respondent notes that it has already paid the cost amounts owed to the Claimants pursuant to the cost awards in the First Award and Supplementation Decision of 19 June 2013.²⁷⁵ The sum of US\$2,634.83 noted by the Claimants as missing is due to a commission that the Claimants' bank had deducted from the amount transferred by Chile.²⁷⁶

²⁷² RCM, para. 239.

²⁷³ RR, para. 57.

²⁷⁴ RR, paras. 58, 123-24; Hearings, Day 2, p. 83; Hearings, Day 4, pp. 108-09. See also letter to the Tribunal of 22 April 2015 from the Claimants, which acknowledges the Respondent's payment of sums relating to the Spanish enforcement proceeding.

²⁷⁵ The Respondent cites as evidence Exh. R-164, Supplementary Decision, 11 September 2013, para. 116, Exh. R-168, Letter from Chile to the Annulment Committee, 4 October 2013, and Exh. R-169, Letter from the Claimants to the Annulment Committee, 8 October 2013.

²⁷⁶ RR, para. 60.

e. The Claimants' claim for moral damages is improper

137. The Respondent submits that it would be impermissible to award moral damages, whether for the seizure of *El Clarín* or in compensation for any claimed misconduct on its part during the arbitration proceedings, on the basis that neither of them relates to the two BIT violations found in the First Award; it recalls in particular that the First Tribunal expressly rejected the Claimants' submissions concerning any misconduct during the arbitration proceedings. The Respondent contends that the Claimants are only entitled to compensation for the BIT violations, and then only to compensation which corresponds to 'financially assessable damage'; by contrast, moral damages cannot be quantified, so that the Claimants' request for US\$10.5 million in moral damages is arbitrary. Even if the Tribunal were authorized to award moral damages, it could still not do so for the benefit of Ms Pey Grebe or to the Foundation for injuries suffered by Mr Pey Casado, as the ICSID system only allows for claims for losses suffered personally, and the interests of Ms Pey Grebe and the Foundation were not acquired until 2013 and 1990 respectively, thus much later than when the purported injuries were sustained.²⁷⁷

f. The Claimants have failed to satisfy their burden of proving their damages, and thus are entitled to no compensation

138. The Respondent submits that, inasmuch as the Claimants have failed to identify any relief that can be granted by the Tribunal, no compensation can be awarded. The Claimants have instead claimed for the expropriation value of *El Clarín*, which is excluded by the unannulled conclusions of the First Award, and have neglected to advance any damages calculations or theories with respect to the BIT violations upheld by the First Award.²⁷⁸ The Respondent takes the view that even if a BIT violation is found to exist, a tribunal may decline to award any damages to a claimant if the claimant fails to meet its burden of proving them.²⁷⁹

139. The Respondent further submits that the Claimants' brought the harm on themselves by their own actions, by knowingly and voluntarily declining to participate in the relevant Chilean

²⁷⁷ RCM, paras. 333-337; RR, paras. 62-66.

²⁷⁸ RR, paras. 68-78, 146; RCM, paras. 244-48, 281, 293; Hearings, Day 2, pp. 86-88; Hearings, Day 4, p. 121.

²⁷⁹ Hearings, Day 2, pp. 91-93.

reparations process established by Law No. 19.568, instead opting to pursue their expropriation claims in an international forum, which, through the ‘fork-in-the-road’ clause in the Chile-Spain BIT, made it impossible for the Respondent to compensate them under Chilean law for the expropriation of *El Clarín*.²⁸⁰

(2) Merits: calculating the *quantum* of damages

a. All the Claimants’ arguments on damages are ill-founded

140. The Respondent disputes all of the Claimants’ arguments on damages, on the basis that they are irrelevant to the Resubmission Proceeding and exceed its scope. They create the risk of a contradiction between the First Award and the present Tribunal’s Award, or would represent a serious departure from a fundamental rule of procedure. The Respondent recalls its earlier submission that there is no causal link between the denial of justice and discrimination violations and the ability of the Claimants to obtain compensation for the expropriation of *El Clarín*, but that it was the Claimants’ own decision to eschew Chilean legal mechanisms in favour of an international claim.²⁸¹

b. The Claimants’ theory of damages for the denial of justice violation is untenable

141. The Respondent contends that, despite bearing the burden of proving causation, quantum and the recoverability of the loss claimed by the denial of justice violation, the Claimants have not presented any damages calculation that relates specifically to it, but instead, have presented a theory of damages that has already been rejected by the First Tribunal.²⁸²

142. The Respondent recalls that the First Tribunal confined the denial of justice purely to the absence of a decision on the merits in the Goss press case between September 1994 and 4 November 2002, and not the underlying issue relating to the confiscation itself,²⁸³ to accept the Claimants’ ‘continuing expropriation’ theory of compensation would, however, be to rule upon the substance of the confiscation claim, and to overturn or contradict the un-

²⁸⁰ RCM, para. 282; RR, para. 79, both citing Exh. R-1, letter from J. Garcés to the Chilean Minister of National Assets of 24 June 1999, pp. 3-4. See also Hearings, Day 2, pp. 33-4, and Hearings, Day 4, pp. 76-77.

²⁸¹ RR, paras. 82-92.

²⁸² RCM, paras. 312-15.

²⁸³ RCM, paras. 206, 316; see also Hearings, Day 1, p. 179.

annulled conclusions in the First Award.²⁸⁴ The Respondent also contends that the denial of justice is limited only to the absence of decision by the Chilean tribunals for more than seven years, and not to any other conduct by them;²⁸⁵ the only effect of the seven-year delay is that that court would have ruled earlier, but still against Mr Pey Casado, and in any event the Santiago court could not possibly have granted Mr Pey Casado the full expropriation value of *El Clarín*, as he was only asking for the value of the Goss printing press.²⁸⁶

143. Moreover, to substantiate their claim the Claimants would have had to prove that the denial of justice had prevented the First Tribunal from awarding compensation to the Claimants in the amount of the expropriation value of *El Clarín*, yet this is in fact the very portion of the First Award that was annulled.²⁸⁷ However, the First Tribunal based its conclusion purely on its determination that the expropriation of *El Clarín* was an instantaneous act, and the status of Decree No. 165 under Chilean law had no bearing on the issue of when the expropriation was consummated.²⁸⁸ Accordingly, the First Tribunal's reference to Decree No. 165 concerned its timing, and had no bearing on the legal status or validity of that document.²⁸⁹

144. The Respondent argues, relying on the two Expert Reports of Dr Libedinsky, that it is a requirement of Chilean domestic law that 'nullity under public law must be expressly and formally stated by a competent judicial or administrative authority'.²⁹⁰ However, Mr Pey Casado had never asked for the annulment of Decree No. 165 before the Santiago court, and there is no express declaration in its judgment that Decree No. 165 is rendered null and void.²⁹¹ The Respondent further denies that the Santiago court ruling's conclusion that only EPC, and not Mr Pey Casado, had standing to assert its property rights in that case, could be construed to constitute recognition that Decree No. 165 is null under public law. Instead,

²⁸⁴ RCM, paras. 208-9, 317.

²⁸⁵ Hearings, Day 2, pp. 17-19; Hearings, Day 4, pp. 99-100.

²⁸⁶ Hearings, Day 2, p. 55; see also Hearings, Day 2, pp. 98-99.

²⁸⁷ RR, para. 95.

²⁸⁸ RCM, paras. 198, 209-210; RR, para. 99; see also Hearings, Day 2, pp. 53, 58-59.

²⁸⁹ RCM, para. 199; RR, para. 100.

²⁹⁰ RCM, para. 215, and RR, para. 107. See also Hearings, Day 2, pp. 63-64; Hearings, Day 2, pp. 115-16; Hearings, Day 4, pp. 116-17.

²⁹¹ Hearings, Day 2, p. 71; Hearings, Day 2, p. 165.

the Respondent contends that Mr Pey Casado's claim was rejected purely on the basis that he lacked standing on the face of his own complaint, which was one for restitution of property belonging to a third party, and because the relevant five-year statute of limitations had run even before the claim was filed in 1995; there would accordingly have been no difference in the outcome of the case had the Santiago court issued its merits ruling earlier.²⁹² The Respondent concludes that Decree No. 165 remains in force under the Chilean legal system;²⁹³ in the alternative, even if null, the validity of Decree No. 165 had no impact on the effects of that expropriation under international law, which cannot be undone retroactively.²⁹⁴

- (i) The Claimants' submissions amount to the overturning of binding conclusions from the First Award

145. The Respondent submits that the Tribunal has no authority to grant either the Claimants' request to apply the BIT's substantive provisions to the expropriation of *El Clarín*, or their request for compensation in the amount of the expropriation value of *El Clarín*.²⁹⁵ To do so would require overturning several binding conclusions from the un-annulled portions of the First Award: (a) the inapplicability *ratione temporis* of the BIT's substantive provisions; (b) that the seizure and transfer of assets from CPP and EPC to the Chilean State were constitutive of a consummated fact that was distinct from violations occurring after the entry into force of the BIT; (c) that the Claimants' ancillary request of 4 November 2002 was not a request for restitution for the seizure of the Goss press, but a request for reparation for the injury suffered by Mr Pey Casado for the denial of justice. The Respondent reiterates that under Arbitration Rule 55(3), the present Tribunal cannot revisit any of the un-annulled passages of the First Award, which are *res judicata*.²⁹⁶

²⁹² RCM, para. 318; RR, para. 110; Hearings, Day 2, pp. 70-71, 73-4.

²⁹³ RR, para. 111, and Hearings, Day 2, p. 61, and p. 75.

²⁹⁴ Hearings, Day 4, pp. 102-03.

²⁹⁵ Hearings, Day 4, pp. 121-26.(Di Rosa)). Law No. 19.568 may be found at Exh. R-147;RR, para. 113.

²⁹⁶ RR, paras. 114, 118.

146. The Respondent further submits that, under Article 2.2. of the BIT, an investment may have been made prior to its entry into force, but must still be existing at the time of the entry into force; if the investment has already disappeared, it cannot be covered by the BIT.²⁹⁷
147. The Respondent argues that new evidence, e.g. in the form of the Santiago court ruling, allows for the reopening of an Award only in the context of a revision proceeding pursuant to Article 51 of the ICSID Convention, but not that of a resubmission proceeding under Article 52.²⁹⁸
148. According to the Respondent, the acts and omissions now complained of by the Claimants fall outside the temporal and substantive scope of the denial of justice found by the First Tribunal, which extends from 1995 and ended in 2002.²⁹⁹ In response to the allegations centring on the translation of the 2008 judgment of the Santiago court, the Respondent points to the original version of the document where there was a stamp over the three missing words, and suggests that this was the reason for the omission, not fraud.³⁰⁰ The Respondent further argues that the denial of justice found by the First Tribunal included only the conduct of Chilean domestic courts, and excluded any alleged misconduct by Chile's executive authorities in the prior phases of the present dispute.³⁰¹
149. The Respondent submits that the claim for restitution for the Goss press was dealt with in the Claimants' Ancillary Request of 2002, and that the finding that none of the substantive provisions of the Chile-Spain BIT applied to any of the expropriation-related claims, also encompasses claims relating to the Goss press, and is *res judicata*.³⁰²
150. The Respondent further submits that the Claimants have neglected to provide any evidence or argument to identify the compensation that was due for the denial of justice resulting from the seven-year delay in the Santiago court proceeding, and that in any event the delay did not cause any compensable injury to the Claimants, as they would not have received

²⁹⁷ Hearings, Day 4, pp. 87-91.

²⁹⁸ RR, para 116, contending that at CR, para. 162, the Claimants acknowledge this fact.

²⁹⁹ RR, para. 119, citing to Award, para. 659.

³⁰⁰ Hearings, Day 2, pp. 81-82.

³⁰¹ RR, para. 120, citing to Award, para. 659; see also Hearings, Day 2, pp. 19-20.

³⁰² RR, para. 125, citing to Award, para. 600; Hearings, Day 4, pp. 109-10.

compensation for the restitution value of the Goss press or for the expropriation value of *El Clarín* had there been no delay.³⁰³ The Respondent rejects the allegation that it had denied access to the Goss press case file at the Santiago court, in view of the evidence it has submitted that the Claimants only requested access to a small handful of pages from the case file, which they received.³⁰⁴

c. The Claimants' theory of damages for the discrimination violation is unfounded

151. The Respondent contends that the Claimants' theory of damages for the discrimination violation encounters the identical objections to the theory put forward for the denial of justice; in both cases, the compensation demanded is for the expropriation value of *El Clarín*.³⁰⁵ The Respondent accordingly submits that because the Claimants have not identified any injury caused by the discrimination, no compensation can be awarded.
152. The Respondent maintains that Mr Pey Casado was duly notified of the comprehensive reparations programme for military-era expropriations promulgated through Law No. 19.568, and invited to participate in it,³⁰⁶ but, under the 'fork-in-the-road' provision in the BIT that required a choice between international and domestic remedies, Mr Pey Casado and the Foundation chose to notify the Chilean Ministry of National Assets that they would not pursue any claims through the 1998 programme.³⁰⁷
153. With respect to Decision No. 43, which authorized the payment of compensation to the successors and representatives of four individuals who had established that they had owned assets belonging to CPP,³⁰⁸ the Respondent submits that the Claimants have mischaracterized the procedural history leading to the finding of discrimination; according

³⁰³ RR, para. 127, citing to Exh. ND32f, Decision of the First Civil Court of Santiago, p. 10.

³⁰⁴ RR, para. 130, citing to Letter from the Respondent to the Tribunal, 13 February 2015, p. 3.

³⁰⁵ RR, para. 132, citing to CR, para. 334.

³⁰⁶ RR, para. 133, citing Exh. R-101, Letter from the Chilean Minister of National Assets to V. Pey Casado, 20 November 1995, para. 4.

³⁰⁷ Exh. R-1, letter from J. Garcés to the Chilean Minister of National Assets, 24 June 1999, pp. 3-4; see also Hearings, Day 1, pp. 180, 184.

³⁰⁸ See Exh. R-148, Decision No. 43, 28 April 2000, pp. 3-5.

to the Respondent, no quantifiable injury stems from the events that constituted the discrimination violation.³⁰⁹

154. The 1998 Reparations Law was the only source of any right to compensation for the Claimants, but the right was extinguished by the express waiver of participation in the reparations programme;³¹⁰ once a decision had been made on a particular asset, it was no longer possible for other claims to be filed over that asset under the Law.³¹¹ The letter sent by Mr Pey Casado to the President of Chile in September 1995 did not create a ‘free-standing’ right to compensation for the expropriation of *El Clarín*; on that reasoning, a respondent State would be in violation of its BIT obligations every time it were to reject or deny any compensation request made by any claimant, regardless of the merits of any such request.³¹²
155. The Respondent also rejects the argument that, but for the paralysis and rejection of their claims within the Chilean domestic system, the Claimants would have received compensation for the expropriation of *El Clarín*.³¹³ According to the Respondent, the Claimants’ actions were confined to efforts to stop the execution of Decision No. 43, and did not at any point include any affirmative request for compensation for the full expropriation value of *El Clarín*.³¹⁴ The Respondent suggests that to put the Claimants in the position of there having been no violation of the BIT would only result in the suspension of Decision No. 43, and that no compensation for the expropriation value of *El Clarín* would have been awarded.³¹⁵

d. The Claimants cannot identify any injury caused by the discrimination violation

156. The Respondent argues further that, because Decision No. 43 does not address Mr Pey Casado’s rights, nor did it conflict with the then ongoing Goss press case or affect the ICSID

³⁰⁹ RR, para. 136; see also Hearings, Day 2, p. 27.

³¹⁰ RR, paras. 140-1, RCM, para. 260, and Hearings, Day 2, p. 23; see also RR, paras. 149-150.

³¹¹ Hearings, Day 4, pp. 101-02.

³¹² RR, paras. 137-40.

³¹³ RR, para. 137.

³¹⁴ RR, para. 142.

³¹⁵ RR, paras. 142-143.

dispute between the parties, it cannot be said to have caused any injury to the Claimants;³¹⁶ any injury that might be said to exist was caused by the Claimants' own conscious decision not to participate in the 1998 reparations programme.³¹⁷ Even if the administrative process that led to Decision No. 43 had been suspended, no benefit would have accrued to the Claimants.³¹⁸ Decision No. 43 was not issued with the aim of frustrating the Claimants' rights, notably the right to arbitration, and the First Tribunal has already rejected the Claimants' arguments on this point.³¹⁹

157. Finally, the Respondent submits that, though the *ad hoc* Committee did not annul the First Tribunal's conclusion that the Claimants are entitled to compensation, that does not endow the present Tribunal with a general discretion to award compensation, unless the Claimants can meet the usual requirements to prove causation and quantum.³²⁰ The Respondent recalls the finding of the First Tribunal that Decision No. 43 could only be considered a violation of Article 4 of the BIT, and not a violation of Articles 3 and 5.³²¹ As the Claimants had expressly waived their right to assert claims under the 1998 reparations programme, no harm is attributable to the discrimination engendered by Decision No. 43; therefore, no compensation is to be awarded.³²²

(3) The calculation of damages

a. Accuracy's damages calculations cannot be regarded as reliable

158. The Respondent asserts that, as shown by the Navigant Expert Reports, Accuracy's damages calculations cannot be relied upon, as they are methodologically and logically unsound, speculative and contrary to explicit determinations in the First Award and Annulment decision,³²³ particularly in that they have not calculated separately damages for the

³¹⁶ RCM, para. 281; RR, para. 147.

³¹⁷ RCM, paras. 282-83.

³¹⁸ RCM, paras. 250-51, 290, 293-4; RR, paras. 148, 151.

³¹⁹ RR, para. 154.

³²⁰ RCM, paras. 250-51; RR, para. 156.

³²¹ RCM, para. 274, citing to Exh. R-27, Award, 8 May 2008, para. 652.

³²² RCM, para. 269; RR, paras. 157-58.

³²³ RCM, paras. 321-22; RR, paras. 160-162.

discrimination violation or the denial of justice violation.³²⁴ The damages assessment presented by Navigant, the Respondent's expert, is thus entirely appropriate as an alternative assessment. In any event it is the Claimants who bear the burden of proof in demonstrating, for damages purposes, the situation that would have obtained but for the relevant violations of the BIT established by the un-annulled portions of the First Award.

159. The Respondent argues that adverse inferences cannot be drawn against it for the non-production of documents requested by the Claimants in March and November 2014; the IBA Rules on the Taking of Evidence in International Arbitration only permit adverse inferences to be drawn '[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal ...' but here the Tribunal had rejected the Claimants' requests in their entirety.³²⁵
160. The Respondent regards Accuracy's damages calculation as speculative because the Claimants have quantified the same injury with figures that have diverged substantially: US\$515 million in their Request for Arbitration;³²⁶ US\$397 million in their Counter-Memorial on Merits and Jurisdiction;³²⁷ US\$797 million during the Revision Proceeding;³²⁸ and in the present proceeding, US\$338 million.³²⁹ The Respondent suggests that these figures vary by more than 692 percent, and Accuracy provides five different damages estimates which range from US\$91,669,220 to US\$329,678,000.³³⁰
161. The Respondent contests the legitimacy of Accuracy adjusting their "Main Claims" calculations even though they know the actual figures for *El Clarín*'s earnings in 1970-1972; this 'adjustment' amounts to 90% of the amount claimed.³³¹ Moreover, Accuracy improperly relies on a comparison of *El Clarín* with large United States media

³²⁴ Hearings, Day 4, pp. 67-68, 107.

³²⁵ CR, para. 163, citing Procedural Order No. 2, 16 December 2014, paras. 6-7.

³²⁶ Exh. R-27, Award, 8 May 2008, para. 11.

³²⁷ Exh. R-27, Award, 8 May 2008, para. 27; Exh. R-30, Decision on Annulment, 18 December 2012, para. 43.

³²⁸ Exh. R-30, Decision on Annulment, 18 December 2012, para. 43.

³²⁹ Second Accuracy Report, paras. 10, 62.

³³⁰ RCM, para. 323, RR, para. 164.

³³¹ RCM, para. 324; see also Hearings, Day 3, pp. 125-29.

conglomerates, including an adjustment of 20% achieved by eliminating from the calculation two United States conglomerates that, according to the Respondent, were the most comparable to *El Clarín*.³³²

162. The Respondent further submits that Accuracy has ignored the particular circumstances of the economy of Chile in the 1970s by assuming that the Claimants would have been paid in US dollars and ignoring the rapid decrease in value of the assets of *El Clarín* that would have resulted in an economic environment in which inflation was as high as 341% from 1974 to 1975.³³³

163. The Respondent rejects the Claimants' argument that fair market value can serve as the standard of compensation for breaches of fair and equitable treatment and suggests that the application of the fair market value standard is not always an appropriate or logical measure of compensation for non-expropriation violations.³³⁴ The Respondent submits that the case law of investment tribunals shows that compensation based on fair market value has always involved a deprivation of the entire investment, or its value.³³⁵ The Respondent asserts that the Claimants have failed to establish any causal link between the compensation they seek and the two violations declared in the First Award.

b. The Claimants are not entitled to compensation on the basis of unjust enrichment

164. The Respondent submits that unjust enrichment is not a legitimate methodology for the quantification of damages in this proceeding, as it exceeds the scope of the Tribunal's authority,³³⁶ but also as a general matter of damages under international law.³³⁷ The Respondent submits, in the alternative, that even if a causal link did exist between the BIT violations found in the First Award and the damages assessments submitted by the Claimants, the Respondent has disgorged whatever enrichment it might have derived from

³³² RCM, para. 325; see also Hearings, Day 3, p. 122.

³³³ RCM, para. 326.

³³⁴ RR, para. 166.

³³⁵ RR, para. 168-69; Exh. RL-17, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 Award, 24 July 2008, para. 779; see also Hearings, Day 1, p. 155.

³³⁶ RCM, paras. 178, 224-25, 233.

³³⁷ RR, para. 169, fn. 430.

the expropriation of *El Clarín* in virtue of the payment made to Messrs Sainte-Marie, Carrasco, González and Venegas under Decision No. 43.³³⁸ In any case, the Respondent challenges the Claimants' estimates as involving several levels of conjecture, including the calculation of rental amounts from 1973 to 2013 using inappropriate valuation methodology, and in some cases the fact that the rental properties no longer existed.³³⁹

c. A tax gross-up would not be appropriate

165. The Respondent contends that a tax gross-up in any amount would be improper and unprecedented;³⁴⁰ any potential domestic tax obligations of the Claimants cannot be considered 'losses' for purposes of damage recovery under international investment arbitration, as they are not directly attributable to the opposing party in the investment dispute.³⁴¹ In the alternative, the Respondent argues that neither the Claimants nor their experts have invoked any legal provision currently in force in Chile or any other jurisdiction to sustain the proposition that the Claimants would be taxed on an eventual award in this case,³⁴² and have failed to account for the potential implications of multi-jurisdictional tax treatment.³⁴³ However, the Respondent submits that in any event the few tribunals that have addressed claims for a tax gross-up have uniformly rejected them.³⁴⁴

d. Interest cannot be added to any award of damages

166. The Respondent rejects outright any entitlement to interest on an award of damages in this case. The Claimants' claim to pre-award interest from September 1973 bears no relationship to the dates of the Article 4 BIT violations found in the First Award.³⁴⁵ The calculations are based on US dollars, despite the fact that the *El Clarín* Group's revenues and expenses were

³³⁸ RR, para. 170.

³³⁹ RCM, para. 327; see also Hearings, Day 3, pp. 152-54.

³⁴⁰ RR, para. 171.

³⁴¹ Exh. RL-53, *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4 (Award, 29 December 2004), para. 367.

³⁴² RR, para. 173.

³⁴³ RR, para. 176.

³⁴⁴ RR, para. 177.

³⁴⁵ RCM, paras. 338-340; RR, para. 181.

earned and incurred in Chilean escudos. The interest rate proposed is moreover an artificially inflated one.³⁴⁶

167. With respect to the post-Award phase, the Respondent contends that most of the time elapsed since the issuance of the First Award has been spent by the parties addressing issues raised or proceedings commenced by the Claimants, or awaiting the decisions of the First Tribunal and the *ad hoc* Committee, and that to allow interest to accrue during that period would reward the Claimants for their unsuccessful invocation of remedies while punishing the Respondent for its successful request for annulment.³⁴⁷ The Respondent also challenges the Claimant's request for a compounded interest rate of 10% on any future Award issued by the Tribunal, which has no basis in the actual purpose, intent or conventions regarding the application of interest rates. To propose, as the Claimants do, that post-Award interest compound on a monthly basis deviates from compounding convention, which requires that the compounding periodicity be dictated by the interest rate.³⁴⁸

e. The Respondent seeks an award of costs and fees, including legal fees.

168. The Respondent requests the Tribunal to order the Claimants to reimburse all costs and fees, including legal fees, incurred by it in this Resubmission Proceeding.³⁴⁹ It contends that the Claimants have distorted the contents of the Santiago court ruling to an extent that seems designed to mislead the Tribunal, and thus constitutes an abuse of process warranting penalization in the form of an award of costs.³⁵⁰

169. The Respondent further argues that the Claimants have resorted to improper and unduly convoluted claims and arguments; have publicly accused the Respondent's counsel of bad faith, by uploading pleadings and correspondence in which they challenged the impartiality of Dr Libedinsky and the conduct of Ms Macchiavello and Mr Di Rosa;³⁵¹ in addition, they have belaboured procedural points and improperly appealed certain issues; and generally

³⁴⁶ RR, para. 182.

³⁴⁷ RCM, para. 339.

³⁴⁸ RR, paras. 183-184.

³⁴⁹ RCM, para. 343.

³⁵⁰ RR, para. 112.

³⁵¹ Hearings, Day 4, pp. 121-26.

have exacerbated the dispute through vexatious litigation tactics. In the circumstances, and in the light of these tactics, the Tribunal should order the Claimants to meet all the Respondent's costs and expenses, including legal and expert fees.³⁵²

170. The Respondent's costs claim in respect of the present Resubmission Proceeding totals US\$3,919,887.56.³⁵³

III. ANALYSIS

A. Introduction: the Role of a New Tribunal

171. In coming to its decision on this case, the Tribunal is all too conscious (as it has been throughout the earlier phases of this resubmission proceeding) of how long it is since the events took place that gave rise to the dispute between the Parties, and indeed of the quite unusual length of the totality of the arbitral proceedings since their inception all of nineteen years ago. The Tribunal is aware, too, of the passion with which the case has been fought on both sides, and of the way in which the facts underlying the case entwine high politics with the personal fate of individuals, and commercial and economic relations with personal connections and family relationships.³⁵⁴ The Tribunal has therefore done its utmost to listen with careful and sympathetic attention to all of the arguments that have been brought before it by the Parties in writing and orally, without seeking to apply in advance any *a priori* criterion of selection as to which of them would ultimately prove relevant and material to its Award.

172. The time has however now come for these arbitral proceedings to be brought to their final end; reipublicae interest ut finis sit litium. The Tribunal will now proceed to do so, with an expression of gratitude to all Parties and their counsel for the thoroughness of their arguments, but a reminder that its function, as an arbitration tribunal under the ICSID Convention and the ICSID Arbitration Rules, is to decide according to the applicable law, in

³⁵² RCM, para. 342; RR, paras. 185-188.

³⁵³ See Letter of the Respondent to the Tribunal dated 29 May 2015.

³⁵⁴ As noted by the First Tribunal at paragraphs 690-691 of its Award.

its relation to the established facts. In the absence of any agreement to that effect between the Parties, the Tribunal has no power to decide their dispute *ex aequo et bono*.

173. The Tribunal thinks it as well to recall at the outset the limited nature of its task. These are resubmission proceedings, following the partial annulment of the First Tribunal's Award. They are thus governed by Article 52(6) of the ICSID Convention, which provides that: "If the award is annulled, the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter." The present Tribunal is of course that 'new Tribunal' and will address below what is to be understood as 'the dispute' in the context of the partial annulment of the First Award. For good measure, and because of its direct relevance to that question, it is noted that Rule 55(3) of the ICSID Arbitration Rules provides specifically: "If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled." The Tribunal will also address below what is meant by 'reconsider' in the circumstances of the present case.
174. It remains to recall, as the framework for what is to follow, the exact terms in which the *ad hoc* Committee brought about the partial annulment of the First Award, in its Decision of 18 December 2011:

Par ces motifs, le Comité rend les décisions suivantes :

1. décide d'annuler le paragraphe 4 du dispositif de la Sentence du 8 mai 2008 et les paragraphes correspondants dans le corps de la Sentence relatifs aux dommages-intérêts (Section VIII) conformément à l'article 52(1)(d) et (e) ;
2. rejette les autres fondements de la Demande en annulation de la République ;
3. rejette la demande des Demanderesses tendant à l'annulation partielle du paragraphe 8 du dispositif de la Sentence ;
4. estime que les paragraphes 1 à 3 et 5 à 8 du dispositif ainsi que le corps de la Sentence, à l'exception de la Section VIII, ont autorité de chose jugée.³⁵⁵

175. To understand the import of this Decision, it is of course necessary to recall as well the *dispositif* of the First Award to which it refers. This reads as follows:

³⁵⁵ There follow three further paragraphs, but they deal solely with costs and with the suspension of execution, and are thus immaterial for the purposes of the present resubmission proceedings.

1. décide qu'il est compétent pour connaître du litige entre les demanderessees et la République du Chili ;
2. constate que la défenderesse a violé son obligation de faire bénéficier les demanderessees d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice ;
3. constate que les demanderessees ont droit à compensation³⁵⁶ ;
4. ordonne à la République du Chili de payer aux demanderessees le montant de USD 10.132.690,18, portant intérêt au taux de 5%, composé annuellement, à compter du 11 avril 2002 jusqu'à la date d'envoi de la présente sentence ;
5. met à la charge de la défenderesse une contribution aux frais et dépens exposés par les demanderessees, d'un montant de USD 2.000.000,- (deux millions) ;
6. décide que les frais de procédure seront supportés par les parties dans la proportion de : 3/4 du montant total (soit USD 3.136.893,34) pour la défenderesse et 1/4 du montant total (soit 1.045.631,11) pour les demanderessees ; ordonne en conséquence à la défenderesse de payer aux demanderessees la somme de USD 1.045.579,35 ;
7. ordonne à la République du Chili de procéder au paiement dans un délai de 90 jours à compter de la date d'envoi de la présente sentence, des sommes figurant dans le présent dispositif (points 4, 5 et 6), faute de quoi le montant portera intérêts composés annuellement au taux de 5%, à compter de la date d'envoi de la présente sentence jusqu'à celle du parfait paiement ;
8. rejette toutes autres ou plus amples conclusions.

176. It will be evident, therefore, that the *ad hoc* Committee has been at great pains to delineate clearly the contours of the partial annulment brought about by its Decision of 18 December 2011. The reason, one may assume, was the entirely laudable desire to exclude any room for doubt as to the meaning and scope of its Decision, and the consequences that follow from it. The intention was also, no doubt, to ease the burden on the Parties by making it plain what remained open for re-litigation between them, and what (on the other hand) could not be re-opened because it had been finally determined with the quality of *res judicata* (or, in the French phrase used by the Committee, 'autorité de chose jugée'). To summarize, point by point, it has been finally determined: that the dispute falls within ICSID jurisdiction; that Chile (the Respondent) was in breach of its obligation to accord to the Claimants fair and equitable treatment (including to abstain from any denial of justice); that the Claimants have

³⁵⁶ The French term 'compensation' is translated in what follows, literally, as 'compensation'. The Tribunal is conscious that, in doing so, it is at risk of begging an important question, which will be discussed further below, but no better translation seems to be available.

a right to compensation;³⁵⁷ and finally that any further or other claims were rejected.³⁵⁸ All of that, in other words, has the quality of *res judicata* ('chose jugée'), including, notably, the definitive rejection of all the Claimants' claims in the dispute other than those covered by paragraphs 2 and 3 of the dispositive part of the First Award.

177. Conversely, what does remain open for re-litigation at the instance of the Claimants is the nature of the compensation due to them under paragraph 3 in consequence of the breach established in paragraph 2, following the annulment of the assessment made by the First Tribunal in paragraph 4. It must also be assumed (notwithstanding the incidental inclusion of a reference to paragraph 4 in paragraph 7, which is in turn expressly stated by the *ad hoc* Committee to be *res judicata*) that, if any monetary compensation was awarded by the present Tribunal, the due date for payment is also a matter that remains at large, to be established by the Tribunal in this Award.
178. The conclusion to be drawn from the above – and it is an inescapable one – is that the present Tribunal is absolved from any need to investigate afresh whether there was any breach of Chile's obligations towards the Claimants in respect of the present dispute, what that breach consisted in, or whether the breach gives rise to a right to compensation. All of those matters have been predetermined by the First Award and are binding on all Parties under Article 53(1) of the ICSID Convention. Not only is there no need for the Tribunal to go into these matters, but it would be a manifest excess of its own jurisdiction if the Tribunal purported to do so. That is the express consequence of Arbitration Rule 55(3), cited above. Before this Tribunal, all that remains in 'dispute' between the Parties in these resubmission proceedings (in terms of Article 52(6) of the ICSID Convention) is the nature of the compensation due for the breach or breaches already established by the First Tribunal, and, if the present Tribunal should find that that compensation should take a monetary form, the amount thereof.

³⁵⁷ See note 356 above.

³⁵⁸ The further paragraphs dealing with the allocation of costs and the rate of interest payable in default have not been included in this summary, as they are not material to the present resubmission proceedings.

179. The Tribunal will therefore confine itself strictly to noting and analysing the First Tribunal's finding of breach, and the principles of compensation that follow from that finding, and, having done so, to applying those findings so as to arrive, in the light of the arguments put before it by the Parties, at the proper compensation that is due, as well as any consequential matters which hinge on that.

B. The Claimants in the Present Resubmission Proceedings

180. Before proceeding to do so however, it will be convenient for the Tribunal to establish who should be understood as the Parties before it. In a normal situation, this question seldom arises; that it does so now is because of the doubts raised by the Respondent in respect of the appearance of Ms Coral Pey Grebe among those for whom counsel for the Claimants state that they are acting in these proceedings.

181. To recapitulate: the original Request for Arbitration was brought against the Republic of Chile in the name of Mr Victor Pey Casado and the Foundation 'President Allende'; it was registered by the Centre under that name as ARB/98/2, and that is the way it was known throughout the original proceedings. The First Award specifies that Mr Pey Casado and the Foundation are the Claimants in the proceedings, from which it necessarily follows that they are the beneficiaries of paragraphs 1, 2, and 3 of the *dispositif* of the First Award cited above. To be more precise, the finding in paragraph 1 must be understood as a determination of the Tribunal's jurisdiction over claims brought by Mr Pey Casado and the Foundation; and the findings in paragraphs 2 and 3 as to the existence of a breach, and the consequential entitlement to compensation, establish rights which vest in Mr Pey Casado and the Foundation.

182. The annulment proceedings were conducted in the same way, and in accordance with standard ICSID practice under the identical ICSID case reference; the Republic of Chile appears as Applicant, Mr Pey Casado and the Foundation as Respondents, and each are specified as such in the wording of the Decision on Annulment, including therefore the dispositive paragraphs cited in paragraph 174 above.

183. It follows automatically from this that, following the delivery to them of the *ad hoc* Committee's Decision on 18 December 2012, Mr Pey Casado and the Foundation became, along with the Republic of Chile, the beneficiaries of the entitlement under Rule 55(1) to request the resubmission of the annulled part of the dispute to a new tribunal, and this is indeed exactly what was done in the 'Nouvelle Requête d'arbitrage' lodged with the Secretary-General on 18 June 2013 and registered by the Secretary-General under the same title as before, namely *Victor Pey Casado and the Foundation Presidente Allende v. The Republic of Chile*, and the same case reference as before, ARB/98/2.
184. It remains only to note, in the interests of clarity, that – although the annulment had been sought by the Republic of Chile (Respondent in the Arbitration), and although there was a cross-application by Mr Pey Casado and the Foundation (Claimants in the Arbitration) – the net effect of the *ad hoc* Committee's upholding (in part) the Respondent's application, even while rejecting that by the Claimants, was nevertheless in practical terms to open up to the Claimants the opportunity to seek resubmission of the unresolved parts of the dispute, which indeed is the way matters turned out as indicated in paragraph 183 above. Nor is there anything untoward in this procedural state of affairs, given the reciprocal terms of Article 52(6) of the ICSID Convention (paragraph 173 above).
185. The Respondent now complains that the claims and requests for relief now pleaded by the Claimants in the name of Ms Pey Grebe are barred by the Convention and the Rules. This objection attaches itself to the Claimants' Memorial on Resubmission to which (although the case title remains as described above) counsel subscribes as 'Représentant de M. Victor Pey-Casado, Mme. Coral Pey Grebe et de la Fondation espagnole Président Allende', and more particularly it attaches itself to point (4) in the requests for relief contained in paragraph 514 of the Memorial which seeks a payment to Ms Pey Grebe in respect of moral damage. The Respondent says that this request is procedurally improper, and also lacks any factual basis as Ms Pey Grebe was neither party to the Chilean court proceedings at the heart of the denial of justice claim, nor could there have been moral prejudice to her from events taking place many years before she could assert any rights in relation to *El Clarín*. The Respondent adds that it is in any case not permissible for a newly named claimant to benefit from the First Tribunal's finding of jurisdiction without establishing jurisdiction *ratione personae* in

her own regard, and that doubts subsist as to whether Ms Pey Grebe would, on closer examination, so qualify (paragraphs 173-130 above).

186. The Claimants' answer is that jurisdiction is determined once and for all as of the date of the initiation of proceedings, and cannot be affected by events after that date; that Ms Pey Grebe is the beneficiary of the valid cession to her, recognized by the First Tribunal, of Mr Pey Casado's rights, which include the rights arising out of the First Award; and that the reason underlying the cession was simply Mr Pey Casado's very advanced age (paragraphs 43-48 above).
187. The Tribunal is sympathetic towards the points put forward on this matter by both sides, but feels, on mature consideration, that the matter has been taken beyond its real intrinsic importance in the argument that has developed between them. On the one hand, it is undoubtedly true that a new claimant party cannot simply freeloader on the back of the jurisdictional claims of others, but must establish jurisdiction in his or her own right under the usual criteria. On the other hand, there is no dispute between the two sides that there has been a cession of rights, in good faith, between Mr Pey Casado and his daughter, which has been made for good reason, or that both the cession itself and the reason for it were disclosed to the Tribunal, as they had been to the First Tribunal at an earlier stage. Nevertheless, if the cession of rights should be understood as transferring to Ms Pey Grebe her father's substantive rights, then the effect would be that Mr Pey Casado had lost standing and could not now appear as claimant; but even then the transfer would not have been such as to satisfy the normal requirement of an identity of parties. That said, the legal materials on the subject of cessions of rights, which have been debated between the Parties, are directed to ensuring that arrangements for the way in which investments are held cannot be used as a device for evading the jurisdictional requirements of either the ICSID Convention or (as the case may be) a particular investment treaty. That is not the case here. The jurisdictional link as between Mr Pey Casado and the Foundation, and the Republic of Chile, has been definitively established by the First Award, and is *res judicata*; those persons or entities continue to be the Parties under whose name the present proceedings are conducted, and the Tribunal notes that the claim for moral damages, to which the Respondent has referred, is in fact phrased as a claim "au titre de la réparation intégrale du préjudice moral

subi par M. Victor Pey Casado et la Fondation espagnole du fait des violations de l'API par la République du Chili" [emphasis added].³⁵⁹ There is no dispute that, whatever procedural inexactitudes there may be in the formulation of some of the pleadings, the substance of the arrangements in their actual operation is that Ms Pey Grebe, the daughter, acts in practice as the legal representative of her aged father. It may be that the formulations used were intended to signal to the Tribunal that counsel for the Claimants were in practice taking detailed instructions from Ms Pey Grebe on her father's behalf, rather than from Mr Pey Casado in person; and, if so, the Tribunal can see nothing in the least improper about that. By the same token, the Tribunal was gratified to note, in the Respondent's written pleadings,³⁶⁰ an indication that the Respondent too, for its part, would have no objection to a practical arrangement of that kind in the particular circumstances of the case. The Tribunal will accordingly proceed as set out in the next following paragraph.

188. The Tribunal is clear that the present proceedings are a continuation of the original arbitration, such that the title and case reference remain unchanged, as do the Parties to the proceedings. The only Claimants are therefore Mr Victor Pey Casado and the Foundation, and the Respondent is the Republic of Chile. Such compensation as may be awarded pursuant to the partial annulment will accordingly be awarded to these named Claimants, and will be in respect of the injury suffered by these Claimants as the result of the breaches identified, as *res judicata*, in the First Award. Ms Pey Grebe will be regarded as the representative of Mr Pey Casado for all purposes relating to the award of such compensation. Should the Tribunal decide that the compensation is to take a monetary form, the payment over of the moneys due to each of the two entitled Claimants will be a matter for internal arrangement between them in which their designated counsel will play their duly appointed role as counsel to Ms Pey Grebe as well. On that basis, the Tribunal can now proceed to analyse the admissibility of the claims for relief put forward by Mr Pey Casado and the Foundation.

³⁵⁹ CR, para. 501(1).

³⁶⁰ RCM, para. 195; RR, para. 21.

C. The Claimants' Requests for Relief

189. The Claimants' requests for relief can be found at paragraph 514 of their Memorial. They consist of seven claims for damages, or subsidiarily for unjust enrichment, which have remained to all intents and purposes intact throughout the subsequent proceedings, although they were subject to some further elaboration in the Reply Memorial. The first three claims relate to compensation for the damage suffered as a result of the Respondent's breaches of Article 4 of the BIT, together with lost profits, or failing that for reimbursement of the unjust enrichment enjoyed by the Respondent; the sums claimed are of the order of US\$330 millions or US\$92 millions, both at 2014 values. The fourth head is a claim to moral damages, in the order of something in excess of US\$10 millions. The remaining three heads are consequential claims to tax equalization, to interest, and for costs.
190. The claims to damages are, in other words, substantial. To understand the basis on which the main claims are put forward, it will be most convenient to look first at the methods adopted for their quantification in the expert report on which the Claimants rely and then to the legal reasoning on which the Claimants seek to justify them.
191. The expert report by Mr Eduard Saura of Accuracy (who also testified orally at the hearing, confirming his report³⁶¹) states that it takes as its starting point the First Tribunal's finding of a breach by the Respondent of its obligation to accord fair and equitable treatment and to refrain from discrimination. It includes under the former a denial of justice by the Respondent which deprived the Claimants of their possibility of obtaining indemnification for the true value of their assets seized since the *coup d'état* in 1973. It computes this true value by assessing the fair market value of the seized assets at the time of their seizure and then uprating that to current values, in a manner said to be consistent with normal practice in arbitration. The subsidiary method put forward in the alternative, under the rubric of unjust enrichment, consists in cumulating the assessed amounts of the capital value of the immovable properties expropriated by the Respondent, the rental income from those

³⁶¹ The report by Accuracy, and a supplementary report responding to the rebuttal report submitted by the Respondent, were co-signed by Mr Christophe Schmit but, as Mr Saura appeared on his own to testify at the hearing, the reports are referred to in his name alone; this is purely for convenience.

properties since their seizure, and the asset value of the movable property that had been seized together with the real property (notably the Goss printing press).

192. Mr Saura was not tasked with making an assessment of the claim to moral damages, which in turn is not quantified by the Claimants themselves either, save simply to state minimum figures in their Memorial and Reply Memorial (where the figures are amounts not less than US\$10 millions and US\$500,000 claimed in respect of Mr Pey Casado and of the Foundation). Mr Saura did not advance, either in his expert report or in his oral testimony at the hearing, any other methodology for assessing the Claimants' damages or compensation for unjust enrichment.

D. The Admissibility of the Claimants' Claims

193. The Respondent, for its part, rejects the basis for each of the above, though on different grounds in each case: as to the fair market value of the seized properties, the Respondent says that this is no more and no less than reverting to the claims for expropriation which were expressly rejected by the First Tribunal as outside its jurisdiction *ratione temporis*; as to the unjust enrichment alternative, the Respondent says once again that it harks back to the original expropriation, although on a theory of 'continuing expropriation' which is equally incompatible with the un-annulled portions of the First Award; and as to moral damage, the Respondent says that (quite apart from the fact that the argumentation adduced links this yet again to the original expropriation), the common understanding is that moral damage falls outside the scope of 'compensation' of the kind provided for in the First Award.
194. The Tribunal is thus confronted with what amount to objections to the admissibility of all of the main claims as formulated by the Claimants in their submissions, which it is therefore appropriate to determine first, before proceeding to any consideration that may be necessary of how the Claimants have themselves quantified these claims.
195. The Tribunal begins by recalling that the breaches found by the First Tribunal in its Award (see paragraph 175 above) consist in a violation of 'son obligation de faire bénéficier les demanderessees d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice'. In reaching this conclusion, the First Tribunal had already decided, in an

earlier section of its First Award, that the substantive protections of the BIT did not extend retroactively so as to cover the Claimants' dispossession by the Respondent in the period between 1973 and 1975: '[a]ussi le Tribunal considère que l'expropriation dont se plaignent les demanderesse doit être qualifiée d'acte instantané, antérieur à la date d'entrée en vigueur de l'API. Cette analyse est conforme à la position de principe de la Cour européenne des droits de l'homme qui considère l'expropriation comme un acte instantané et qui ne crée pas une situation continue de « *privation d'un droit* ».³⁶² These findings were left untouched in the decision on annulment. The ICSID Arbitration Rules explicitly prohibit the present Tribunal from reconsidering them. None of this is contested between the Parties. It would seem however, at first sight, to put an insuperable obstacle in the way of the Claimants now advancing a claim to damage which in its essence goes back to that original dispossession, by using the value of the then-expropriated property as its central element.

196. The Claimants' answer to this objection is somewhat complex. In certain places, the Claimants contend that elements of the non-annulled parts of the First Award need to be revisited and modified by the present Tribunal. That would however (as already indicated) be well beyond the Tribunal's functions and powers under ICSID Arbitration Rule 55 and will not be further considered in this Award. The main substance of the Claimants' answer is, however, different. It consists essentially in the contention that the central consequence of the denial of justice found by the First Tribunal to exist, as a result of the delays in the proceedings before the Santiago court over the Goss press, was that they (the Claimants) were disabled from invoking a conclusive argument that Decree No. 165 was absolutely null (*ex tunc*) and as such incapable of producing any legal effects. Had they been in a position to do so, the argument continues, they (the Claimants) would either have been able to recover their confiscated property in Chile, or at the least would have been able to establish before the First Tribunal that the expropriation of this property was not an instantaneous act taking final effect in 1975, but was not in fact completed until many years later, and the result of that would have been that the expropriation did indeed fall under the jurisdiction of the First Tribunal under the BIT, contrary to the findings in the First Award. From this it follows, so the Claimants' argument concludes, that the loss suffered by them arising out of the denial

³⁶² See also paragraphs 610, 620, and 622 of the First Award.

of justice is the loss of that right to compensation in the original arbitration, so that such loss is the one they can now claim in the present proceedings.

E. The Status of Decree No. 165

197. This might therefore be the convenient place for a brief excursus on the status of Decree No. 165 under Chilean public law, a subject that absorbed an appreciable portion of the argument between the Parties, both in the written phase and at the oral hearing. The burden of the Claimants' argument has already been given in paragraph 196 above. The Respondent countered it with the evidence of an expert witness on Chilean law, in the person of Dr Marcos Libedinsky Tschorne, formerly President of the Chilean Supreme Court and Member of the Constitutional Court of Chile. His evidence was, in essence, that the better view is that the absolute nullity of a legislative decree requires a judicial pronouncement to that effect, that in any event there was no request for a declaration of nullity by the claimant in the Goss press case, and finally that no such declaration of nullity can be inferred from the terms of the Santiago court's judgment of 2008 in that case. The Claimants produced no expert witness of their own, contenting themselves with offering, through counsel (none of them Chilean lawyers), their own interpretation of Chilean law, and casting aspersions on Dr Libedinsky's accuracy and *bona fides*. The Tribunal, for its part, can appreciate the good sense in Dr Libedinsky's explanation of the reasons why, both in logic and in the interests of good administration, as serious a matter as the nullity *ab initio* of a legislative act should presuppose an express judicial pronouncement to that effect, nor can it find any reason to doubt either Dr Libedinsky's good faith or his independence and objectivity. It takes note, finally, of the complex formula in which the Claimants have clothed their proposition, i.e. that a Chilean court 'would be under the obligation to take note of the reality of the nullity of Decree No. 165 *ex tunc*', and finds in the very contorted shape of this proposition the strong implication that it has more in it of the speculative than of the operational.

198. The above having been said, the Tribunal sees no need to go further into the matter as it has concluded that, even if the Claimants were able to establish the proposition for which they have been arguing, it would have no material bearing on these resubmission proceedings. What the Claimants wish to argue is that, inasmuch as Decree No. 165 was never (so they

allege) a valid legal act, there never was a legally effective expropriation of the investment at all, so that the legal ownership of *El Clarín* and the associated assets rested where it had been in 1973 and 1975 (subject only to the subsequent cession to the Foundation). The main difficulty resides, however, not in this proposition itself, as in the conclusions the Claimants would seek to draw from it, so far as the remedies available in the present proceedings are concerned. As the Tribunal sees it, there are only two: one is that the First Tribunal was wrong in its finding that the expropriation was excluded *ratione temporis* from the scope of the BIT; the other is that what amounted in effect (if not in form) to the expropriation took place with Decision No. 43. Each of these has figured, in various forms, in the submissions of the Claimants in the course of these resubmission proceedings. Both of them, however, encounter insuperable difficulties. As to the first, the Tribunal is in no doubt that the First Tribunal, although it used slightly different forms of words in different parts of its Award, was of the view that the expropriation was completed (*fait consommé*) with the physical seizure in 1975 and thus fell outside the scope of the BIT. More to the point, however, the present Tribunal is simply not empowered to hear an appeal against that finding, or to substitute a view of its own for that of the First Tribunal, or to award any relief of any kind whatsoever on that account. As to the second (i.e. that the effective expropriation did not take place until Decision No. 43), it is also in its turn incompatible with the First Tribunal's findings as to the chronology of the expropriation, but it is equally incompatible with Decision No. 43 itself, the whole tenor of which is that it was an award of compensation in respect of a confiscation *that had already occurred*.³⁶³ The Tribunal's final observation before leaving the subject, is that, if the alleged nullity under Chilean law of Decision No. 43 did indeed have decisive significance, the consequence would surely be that the investment continued to be, in law, the property of Mr Pey Casado and/or the Foundation – the remedy for which could lie in the domestic sphere but clearly not before this Tribunal in these resubmission proceedings.

³⁶³ At p. 3 of the Decision, it is noted expressly that 'les biens identifiés ci-dessus furent confisqués ... en application du D.L. No. 77 de 1973 ... lequel a dissous les sociétés considérées prête-noms de partis politiques déterminés qui y étaient spécifiés, et a disposé de leurs biens.'

F. Compensation under the First Award and International Law

199. The Tribunal must revert at this point to the question raised earlier in this Award as to the meaning of the word ‘compensation’ in the First Award. As the Tribunal pointed out above in paragraphs 174 and following, the original and authentic text of the First Award is French, and it establishes, in paragraph 3 of the *dispositif*, with the effect of *res judicata*, that the Claimants ‘ont droit à compensation’. The Tribunal has given consideration to the question whether this formulation should be understood to mean, in and of itself, that the Claimants have an accrued right to monetary compensation, and that the only question remaining for decision in these resubmission proceedings is the assessment of the appropriate amount of such compensation. The Tribunal has however come to the conclusion that that would not be the correct way to understand the meaning and effect of the First Award.
200. There are various reasons for this conclusion, which reinforce one another. One is that both terms, the English as well as the French, have a broader dictionary connotation not restricted to making good in a purely financial sense. Another is that, taken in its context, paragraph 3 of the *dispositif* plainly states only the general principle of reparation; but neither this paragraph, nor paragraph 2 which precedes it, seeks to determine the nature of the injury or damage caused by the Respondent’s breach, which would be the essential precursor for then determining the kind as well as the extent of the reparation required to remedy the breach. The Parties have expressed strongly divergent views on this question, which can best be summarized through their responses to the question posed by the Tribunal during the oral hearing, namely whether paragraph 3 should be regarded as having an independent meaning, separate from paragraph 4, and whether the Tribunal should understand the term ‘compensation’ as referring only to monetary compensation, or more generally to the forms of reparation recognized in international law in the case of international wrongs. The response for the Claimants was that paragraph 4 represented the mere quantification of the right to be compensated; but that, starting from the authentic French language text of the First Award, the right to be compensated “exclusively refers to a financial notion, harm that is quantifiable financially, and nothing else; for instance, reparation or satisfaction in public international law”.³⁶⁴ The Respondent, for its part, agreed with much of the Claimants’

³⁶⁴ Hearings, Day 4, pp. 26-27.

answer, namely that paragraphs 3 and 4 do have independent meanings, that under paragraph 3 “Claimants are entitled to the form of reparation comprised by damages that are financially assessable” but that this form of reparation, or other forms of reparation under international law, “would be available so long as Claimants (1) establish causation – that is, establish the necessary link between the BIT violation and the form of monetary damages they seek – and (2) meet their burden of proving their specific monetary damages.”³⁶⁵

201. The Tribunal takes note of these views, but does not subscribe fully to the reading that the First Tribunal was using (to reprise the original French) the term *compensation* in paragraph 3 as a specific, limiting term of art, intended to be differentiated from the more general *indemnisation* or *réparation*. The Tribunal sees in the First Award no sign that the First Tribunal was setting out to make a conceptually systematic usage of these various terms that would justify treating paragraph 3 as a deliberate determination that monetary damages must necessarily follow (provided of course that their amount was properly established). Taking the paragraph in its context, the Tribunal reads paragraph 3 as stating the entitlement to reparation that necessarily follows from the determination of the breach of an international obligation, but without predetermining what form or nature that reparation must take, except perhaps the non-explicit assumption that in the normal case it may take the form of monetary damages. But it does not read the paragraph as absolving a party claiming monetary damages from its normal obligation to prove such damage, including its causation.³⁶⁶
202. It remains, then, for this Tribunal to determine what nature and form of ‘compensation’ is thus due, in the wake of the annulment of the First Tribunal’s assessment, as laid down in paragraph 4 on the basis of the reasoning in the corresponding part (Section VIII) of the First Award.
203. To do this, the Tribunal must apply, in the absence of any specific rules in the BIT, the applicable rules of general international law.

³⁶⁵ Hearings, Day 4, pp. 95-96

³⁶⁶ Cf. the First Tribunal’s view expressed in paragraph 690 of its Award, although this is not *res judicata*, appearing as it does in Chapter VIII.

204. Both sides have invoked in this respect the provisions of Part Two of the Articles on Responsibility of States for Internationally Wrongful Acts drawn up by the International Law Commission (ILC) and commended to States by the UN General Assembly in Resolution 56/83 of 12 December 2001. As stated in Article 31, the principal obligation of the responsible State is “to make full reparation for the injury caused by the internationally wrongful act.” The Article goes on to specify that ‘injury’ in this context includes “any damage, whether material or moral, caused by the internationally wrongful act of a State.” In the Commentary to this Article, the ILC indicates that it based itself on the classic formulations given by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case, according to which the responsible State must endeavour to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” Both sides in the present proceedings have, once again, relied on this *dictum* and discussed its application to the circumstances of the case. The Tribunal, for its part, notes that what both the PCIJ, and the ILC in turn, had in their direct contemplation was the legal consequences of an internationally wrongful ‘act’ – as opposed to the more complex situation here, which (as indicated above) is one in which the breach is constituted not by a single act but by a course of conduct.³⁶⁷ It notes, secondly, that the operation of the primary rule enunciated by the ILC depends upon injury, and that injury in turn depends on causation; both of these terms, ‘injury’ and ‘causation’, appear in each of the two paragraphs of Article 31. It becomes necessary, therefore, for the Tribunal to isolate what conduct was held by the First Tribunal to constitute in the present case the ‘wrongful act’, and then to determine, in the light of the submissions of the opposing Parties, how the rule reflected in Article 31 is to be applied to that set of circumstances.

G. The Burden of Proving Damage

205. It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights. This is partly a consequence of the general principle in international judicial

³⁶⁷ The ILC does foresee, in draft Article 15, a breach brought about by a composite act, though in the context of when the breach is deemed to occur; there is no reason to think, however, that Article 31 does not also apply *mutatis mutandis* to composite acts.

proceedings that each party bears the burden of establishing the allegations on which it relies. The International Court of Justice refers to this as a well-established rule which has been consistently upheld by the Court.³⁶⁸ The same rule has regularly been followed by investment tribunals.³⁶⁹ But equally it follows directly from the principles of State responsibility in international law reflected in Article 31 of the ILC Articles, under which the duty to make reparation is ‘for the injury caused by’ the internationally wrongful act; and ‘injury’ for these purposes is damage ‘caused by’ the internationally wrongful act. The International Law Commission explains that this definition is deliberately limitative, excluding merely abstract concerns or general interests, and further that material damage has to be understood as damage which is assessable in financial terms.³⁷⁰

206. It is thus axiomatic that this Tribunal (like the First Tribunal before it) is only competent to award reparation in the form of financial compensation to the extent that it has been duly established before it that the compensation represents a fair assessment of the alleged damage suffered by the Claimants that has actually been caused by the Respondent’s breach of its international obligation towards them under the BIT.³⁷¹

H. The Interpretation of the First Award

207. Although, as already indicated, the Tribunal is required under the ICSID Arbitration Rules, in these resubmission proceedings, to refrain from reconsidering any portion of the First Award that had not been annulled, this does not, in the Tribunal’s opinion, prevent the

³⁶⁸ See *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010 (ICJ Reports 2010), para. 162, and the long list of authorities there cited.

³⁶⁹ See e.g. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 177; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, paras. 58, 81; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 95; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, para. 83.

³⁷⁰ See Exh. RL-34, Commentaries to draft Article 31, paragraph (5) and to draft Article 36, paragraph (1).

³⁷¹ Exh. RL-17, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award of 24 July 2008, para. 779. See also Exh. RL-52, *Nordzucker AG v. Republic of Poland*, UNCITRAL (Third Partial and Final Award), 23 November 2009; Exh. RL-25, *The Rompetrol Group N.V. v. Romania*, ICSID Case No ARB/006/3, Award, 6 May 2003; and *Mohammad Ammar Al-Bahloul v. Republik of Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010; see also Exh. RL-32, M. Kinneer, ‘Damages in Investment Treaty Arbitration’ in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) at p. 556.

present Tribunal from proceeding to an interpretation of the First Award for the purposes of carrying out its mandate under the ICSID Convention and the ICSID Arbitration Rules. Indeed, it could hardly be otherwise; the essence of the Tribunal's mandate consists in giving effect, in the light of the arguments marshalled by the Parties, to certain paragraphs in the *dispositif* of the First Award, and this the Tribunal can hardly do without first understanding what those paragraphs mean. In other words, the Tribunal construes the injunction under ICSID Arbitration Rule 55(3) not to 'reconsider any portion of the award not so annulled' as laying down that the resubmission tribunal may not re-open such un-annulled portions or the reasoning on which they are based, but not as excluding the effort to arrive at a correct understanding of the meaning of the un-annulled portions for the purpose of putting them properly into effect. This interpretation of ICSID Rule 55(3) seems logically necessary, and is supported by the French text of the Rule, which employs the term 'nouvel examen' to describe what a new tribunal may not do. The Tribunal will accordingly proceed to consider what meaning should properly be attributed to paragraphs 2 and 3 of the *dispositif* of the First Award, notably the First Tribunal's finding in paragraph 2 that the Respondent "a violé son obligation de faire bénéficier les demanderessees d'un traitement juste et équitable, en ce compris celle de s'abstenir de tout déni de justice" to remedy which "les demanderessees ont droit à compensation" under paragraph 3. This is the question which lies at the heart of these resubmission proceedings.

208. The question is nevertheless not without some considerable difficulty. It has occupied a large part of the argumentation of both Parties; and the Tribunal has some sympathy with the problems the Parties have faced over what exactly the First Tribunal should be understood as having meant with its findings recited above. Having given the most careful consideration to the submissions made to it by all of the Parties, the Tribunal arrives finally at the following answer.

209. The first point, in the Tribunal's view, is that the breach of the BIT established in paragraph 2 is a single composite breach. Although, as will appear, the breach was the product of more than one item of conduct (action or omission) attributable to the Respondent, they amount in the aggregate to the failure to accord to the investor the 'fair and equitable treatment' required under the BIT. There is nothing uncommon in this; on the contrary, it corresponds

to the typical case in investment protection, since the entire concept of ‘treatment’ is one that can and often does envisage something in the nature of a course of action. That this was the understanding of the First Tribunal is clear from the language used (“de faire bénéficier les demanderessees d’un traitement juste et équitable”) and in particular from the words that follow: “en ce compris celle de s’abstenir de tout déni de justice.” It is clearer still from the First Tribunal’s reasoning in paragraph 623 of its Award: “[e]n réalité, la seule qualification susceptible d’être retenue serait celle d’un acte composite comprenant une série d’atteintes au traitement juste et équitable de l’investissement des parties demanderessees, résidant essentiellement dans la Décision n°43 et le déni de justice allégué qui lui est lié concernant la rotative Goss.” This establishes plainly, for example, that there was no separate breach consisting of a denial of justice, but that all of the failings identified by the First Tribunal, including the denial of justice, amount together, globally, to a failure to accord fair and equitable treatment, and thus constitute a breach of the BIT. It follows that it is this single composite breach which gives rise to the ‘right to compensation’ laid down in paragraph 3.

210. It is not in dispute between the Parties that the two passages in which the First Tribunal determines conduct by the Respondent falling short of the requirements of Article 4 of the BIT are to be found at paragraphs 653 – 674 of its First Award. As the *ad hoc* Committee puts the matter in its Decision on Annulment, citing the First Award:

57. Le raisonnement et la conclusion du Tribunal en ce qui concerne la violation par le Chili de l’article 4 de l’API sont bien illustrés par les paragraphes suivants de la Sentence. Le Comité les reprend *in extenso* :

653. La question se pose en particulier de savoir si le comportement des autorités chiliennes, législatives, administratives et judiciaires, peut ou non être considéré comme constituant un « déni de justice » et une violation du devoir d’accorder à l’investissement étranger une protection suffisante, soit plus précisément, un « traitement juste et équitable » au sens de l’article 4 (1) de l’API ainsi conçu : « Chaque Partie garantira dans son territoire, en accord avec sa législation nationale, un traitement juste et équitable aux investissements réalisés par des investisseurs de l’autre Partie, sous des conditions non moins favorables que pour ses investisseurs nationaux ».

[...]

658. Dans le contexte spécifique du présent litige, tel qu’il a été résumé dans la présente sentence dans sa partie Faits et dans les considérations juridiques qui précèdent, l’application de la notion de « déni de justice » et celle de l’obligation de « traitement juste

et équitable » n'appellent pas de longue analyse. Elles se laissent résumer à deux questions relativement simples :

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

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

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

[...]

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

211. These paragraphs in the First Award were not annulled by the *ad hoc* Committee and constitute *res judicata*. What the Committee did annul was the defective method by which the First Tribunal arrived at the compensation due for the breach so found. For all that the present Tribunal finds difficulty in extracting precisely what consequences the First Tribunal regarded as flowing from the findings in paragraphs 659, 665, and 674 just cited, it is not empowered or permitted to reopen the matter or to substitute its own conclusions for those of the First Tribunal. Its mandate is limited (see above) to identifying the injury proven to have been caused to the Claimants by the above breach, and then determining the appropriate reparation for it in accordance with international law.

212. The Tribunal finds it instructive to begin this process by revisiting the method adopted by the First Tribunal and the reasons why this was annulled by the *ad hoc* Committee. So far

as the present Tribunal can judge (drawing also on the Decision of the *ad hoc* Committee), the process followed by the First Tribunal consisted of the following steps:

- the existence of injury resulting from the original expropriation of the investment required no demonstration, since the Respondent had fixed its quantum in order to award it to persons other than the Claimants;
- the Claimants had not produced any proof, or at least any convincing proof, of any kind for the existence of damage caused by the facts falling within the competence of the First Tribunal *ratione temporis*;
- in the absence of proof, and the unavailability in the circumstances of alternative expert evidence, the First Tribunal was empowered to make its own evaluation by reference to “objective elements” given that a quantum had been fixed by the Respondent (see above);
- this evaluation could not be of the damage suffered by reason of the original expropriation, but had instead to be of the damage resulting from the breach of the guarantee of fair and equitable treatment under the BIT;
- the object was to put the Claimants into the position they would have been in if the authorities of the Respondent had compensated the Claimants instead of third persons who (in the judgement of the First Tribunal) were not the owners of the assets in question; and
- it followed therefore that the amount awarded to these third persons was the correct measure of the damages.

213. The Tribunal passes then to the reasons why this analysis was found faulty, and in consequence annulled, by the *ad hoc* Committee.

214. The *ad hoc* Committee begins by saying that, having reviewed the entire record, it can only conclude that the Parties never pleaded the damages claims arising from the breaches of Article 4 of the BIT (the guarantee of fair and equitable treatment). It goes on to conclude

that the Parties had no fair opportunity to discuss the remedy for breach of Article 4. This constituted grounds for annulment under Article 52(1)(d) of the ICSID Convention. The *ad hoc* Committee further expresses its agreement with the Respondent's submission that the First Tribunal ended up, in its own conclusions, going beyond the standard it had itself established, i.e. placing the Claimants in the position they would have been but for the breaches of the BIT, because in fact it left them far better off. It further concludes that when the First Tribunal adopted the expropriation-based calculation of damages used by the Chilean authorities, this contradicted the Tribunal's own determination that this basis of calculation was irrelevant, and that the allegations, discussion and evidence related to such damages could not be considered; this contradiction set up a manifest inconsistency within the terms of the First Tribunal's Award and constituted grounds for annulment under Article 52(1)(e) of the ICSID Convention.

215. It will thus be evident that the First Tribunal's method of arriving at the compensation due for the breach of the BIT was found faulty, and annulled, on two separate grounds, one of procedure and one of substance. The procedural ground was the failure to allow the Parties (and in particular, one must assume, the Respondent) to be heard; the substantial ground was that the method which the First Tribunal decided of its own motion to adopt, in order to remedy the breach, stood in direct contradiction to its findings on the nature of the breach itself. Given that the first of these defects has been expunged in the present resubmission proceedings, by the full and comprehensive opportunities offered to both Claimants and Respondent to advance their arguments on damages as recorded above, the Tribunal will focus its attention on the second, with the essential aim of ensuring that its findings in respect of compensation follow from, and do not contradict, the findings of the First Tribunal on the nature of the breach, as recorded in the First Award. The Tribunal might, in addition, register at this point that there is a further criticism that might potentially have been levelled against the annulled portions of the First Award, namely the way in which they tend to elide the distinction between injury (and the associated question of causation) and the assessment of the compensation due for that injury. As indicated above (see paragraph 204 above), this distinction is fundamental to the operation of Article 31 of the ILC Articles. The point was no doubt irrelevant in the context of the annulment proceedings once the *ad hoc* Committee had in any event determined that the relevant parts of the First Award were to be annulled

on other grounds. But it is a point that must stay in the forefront of the present Tribunal's consideration as it approaches the question of compensation afresh, on the basis of the First Tribunal's un-annulled findings in paragraphs 2 and 3 of the *dispositif* of its Award.

216. The Tribunal should also interpolate at this point that part of the argument addressed to it by the Claimants in these resubmission proceedings was to the effect that the actions of the Respondent, since the handing down of the First Award, constituted a new denial of justice for which compensation is due, and can be awarded in these resubmission proceedings. This is an argument that the Tribunal must reject outright. The reason is not only that allegations of that kind would have to be subjected to a proper process of evidence and proof before they could properly come to decision in an arbitral process (which indeed they would); it is quite simply that the entire argument falls plainly outside the jurisdiction of the present Tribunal, which (as already indicated) is limited, under Article 52 of the ICSID Convention and Rule 55 of the ICSID Arbitration Rules, exclusively to 'the dispute' or such parts of it as remain in being after the annulment. That can only be taken to refer to 'the dispute' that had been submitted to arbitration in the first place, the critical date for which was the Claimants' original request for arbitration. Issues arising between the Parties after that date – and still more so issues arising out of post-Award conduct – cannot by any stretch of the imagination fall within the scope of resubmission proceedings under the provisions cited above, and the Tribunal sees no need to say more about the matter in this Award.

217. To recapitulate therefore: the assessment of the reparation due under international law for the breach of an international obligation consists of three steps – the establishment of the breach, followed by the ascertainment of the injury caused by the breach, followed by the determination of the appropriate compensation for that injury. The three-stage process can be seen with particular clarity where, as in the present case, the claims are for monetary damages.³⁷² Since the first stage, the establishment of breach, has already been determined with binding effect by the First Award, the Tribunal can begin with the second, the ascertainment of the injury caused by the breach. In doing so, however, it notes that the First Tribunal has established the breach negatively as well as positively. That is to say, it

³⁷² The First Tribunal recognizes the distinction between the fact of injury and the quantification of damage in paragraph 690 of its Award; see fn. 364 above.

is *res judicata* both (positively) that the breach consists in the composite failure to accord fair and equitable treatment (including the avoidance of denial of justice), and also (negatively) that the expropriation of the original investment is outside the temporal scope of the BIT, so that all evidence and argument related to that expropriation is to be excluded as not relevant to the dispute other than as background facts.

218. The Tribunal starts with the fact that the injury in question has to be that caused by the specific breach. Causation is of the essence. What must be proven is both the existence of an injury to the claimant and that that particular injury is the sufficiently proximate consequence of the specific breach.³⁷³ On the basis of the somewhat incomplete indications which the First Tribunal offers in its Award, the Parties have argued the matter in front of the present Tribunal as follows.
219. For the Claimants, the argument comes in two alternative versions,³⁷⁴ the first of which separates into two parts. The first part has it that the consequence of the excessive delay in the Goss press proceedings before the Santiago court was that it prevented the Claimants from demonstrating to the First Tribunal that the Decree expropriating the *El Clarín* investment was absolutely null from the outset (*ex tunc*). Had the Claimants been in a position to do so, the argument continues, they would have been able to convince the First Tribunal that the expropriation was not in fact *un fait consommé* in the 1970s, and the First Tribunal would in consequence have decided that there was a continuing expropriation extending beyond the entry into force of the BIT for which the Claimants were indeed entitled to compensation under the BIT.
220. In its second part, the Claimants' argument is that, had the authorities of the Respondent not insisted on pressing ahead with Decision No. 43 in the domestic restitution proceedings, by which compensation for the expropriation was awarded to other persons while the original arbitration was in train, it would still have been open to the Claimants to avail themselves of other potential remedies under Chilean law; in other words, the injury the Claimants suffered

³⁷³ Exh. CL49, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd ed., 1987), pp. 241–253.

³⁷⁴ See paragraphs 59 ff above.

from the discrimination as established by the First Tribunal was the loss of the right to recover, however belatedly, compensation for the expropriation, since the Chilean legal system would not have been able to accommodate the concept of a second compensation for a wrong that had already been compensated once.³⁷⁵

221. The alternative argument on behalf of the Claimants is that, whatever the difficulties lying in the way of establishing a directly compensable injury, the loss suffered by the Claimants and the benefit that accrued to the Respondent can be seen as the two sides of a zero-sum game. The consequence would be that the injury to the Claimants and its monetary evaluation are simply established by calculating the enrichment flowing to the Respondent (sc. arising out of the continuing and uncompensated expropriation).³⁷⁶

222. The Respondent has interposed a series of objections to these various alternative arguments by the Claimants. At the heart of the Respondent's objections lies the repeated assertion that all of the Claimants' submissions, in one way or another, represent attempts to reinstate their original claim for the expropriation of *El Clarín*, despite the fact that it was definitively rejected by the First Tribunal as lying outside its jurisdiction under the BIT. In addition, and more specifically, the Respondent contends:

- that the length of the Goss press case in the Santiago court could not have been the cause of any relevant injury to the Claimants, both because the value of the press became part of the Claimants' expropriation case in the original arbitration, and because the only bearing which the proceedings in that case was asserted to have on the Arbitration was via the Claimants' theory as to the nullity *ex tunc* of Decree No. 165, which leads back in turn to the rejected expropriation claim;
- that the Claimants likewise suffered no direct, or financially assessable, injury as a result of Decision No. 43, and that such disadvantage as the Claimants suffered was the direct consequence of their own voluntary decision not to participate in the

³⁷⁵ See paragraph 84 above.

³⁷⁶ See paragraphs 95-96 above.

domestic compensation scheme.³⁷⁷

223. In order to decide between these competing submissions, the Tribunal needs itself to revisit the First Award, in its annulled as well as its un-annulled portions. The key passages for this purpose are paragraphs 600/610/615; 601-603; 608; 620-623/652; 629/633; 635-636; 645; 658/659/665; 666/669; and 670/674. All of these paragraphs fall within the un-annulled portions of the First Award and are thus *res judicata*. The Tribunal takes account as well of paragraphs 675, 677, and 680, which, although they form part of Section VIII of the First Award, and therefore stand annulled, nevertheless illuminate the reasoning of the First Tribunal in the un-annulled portions of its Award.
224. In paragraphs 600 and 610, together with paragraph 615, the First Tribunal finds that the expropriation of *El Clarín* under Decree No. 165 was not a continuing breach and therefore lay outside the protection of the BIT *ratione temporis*, by contrast with Decision No. 43 and the claimed denial of justice, and that “le fait illicite composite invoqué par les parties demanderesses n’existe pas en l’espèce”; in paragraphs 601-603, it rejects the argument to the contrary raised by the Claimants on the basis of their claim that Decree No. 165 was invalid *ab initio* and that a decision of the Chilean Supreme Court could be applied by analogy; in paragraph 608, it holds that the expropriation “était consommée” on the date of Decree No. 165 “quelle que soit l’appréciation que l’on peut porter sur sa licéité”; in paragraph 620, it holds that the expropriation was not merely “un fait consommé” but also “distinct des violations postérieures à l’entrée en vigueur de l’API [=BIT] dont font état les demanderesses”; in paragraph 621, it decides that the initial refusals of Mr Pey Casado’s requests for compensation were not in themselves contrary to the BIT, since the sole right of compensation subsequent to the BIT was that brought into being by the Chilean legislation in 1998. In paragraphs 622-623, the Tribunal holds that Decision No. 43, which had to be understood as a discriminatory application of a post-BIT law and the rights created under that law, was “une question distincte et non pas ...un fait identique à l’expropriation

³⁷⁷ See paragraph 139 above, and Exh. R-1, Letter from Me Garcés to the Chilean Minister of National Assets, 24 June 1999, pp. 3–4, concluding: “Que eu égard à ce qui vient d’être dit je vous signifie que la présente partie ne vas pas invoquer la Loi 19.568.”

susceptible de former l'un des ingrédients du fait composite allégué” and that the only admissible analysis was that of “un acte composite comprenant une série d’atteintes au traitement juste et équitable de l’investissement des parties demanderesses, résidant essentiellement dans la Décision no 43 et le déni de justice allégué qui lui est lié concernant la rotative Goss” – this last being complemented by the holding in paragraph 652 that the discrimination alleged under Decision No. 43, as well as the alleged denial of justice, were to be assessed against Article 4 of the BIT, since the application of Articles 3 and 5 was incompatible with the Tribunal’s rejection of the ‘continuing act’ thesis.

225. When it moves on, against that background, to assessing the claims that do fall within the scope of the BIT, the First Tribunal decides, in paragraph 629, that the first potential breach concerned the compensation under Decision No. 43 of persons who were not the owners, and in paragraph 633, that the second potential breach concerned the absence of a decision by the Chilean courts on the restitution of the Goss press; in paragraphs 635-636, it notes as matters of fact that the Claimants undertook several attempts, all without success, to establish before the Chilean authorities incompatibilities between Decision No. 43 and the domestic court proceedings over the Goss press; and in paragraph 645, it summarizes the position as being that the Claimants’ allegations of ‘denial of justice’ took various forms and had various very different factual bases. The decision therefore reduces itself, so the First Tribunal holds in paragraph 658, to two relatively simple questions, namely whether the absence of a decision from the Chilean courts for a period of seven years, coupled with the lack of response by the Presidency to Mr Pey Casado’s requests, constituted a denial of justice, and secondly whether the investments that had been recognized by the First Tribunal as having been made by Mr Pey Casado had enjoyed the ‘fair and equitable treatment’ prescribed by the BIT. To the first of these two questions, the First Tribunal responds, in paragraph 659, that, on the established facts and the legal precedents, the delay of seven years had to be adjudged a denial of justice; and to the second, in paragraph 665, that, given that it had been established that Mr Pey Casado was the owner of the confiscated properties, these investments had not enjoyed fair and equitable treatment; this was on the basis (paragraph 666) that the Chilean authorities were aware of Mr Pey Casado’s claims and of a judicial decision recognizing his ownership and that it had never been shown with any degree of credibility (paragraph 669) that his role was limited to that of intermediary or nominee for

the true owners; moreover, it was firmly established in international jurisprudence that discriminatory treatment of foreign investors is a breach of the guarantee of fair and equitable treatment under bilateral investment treaties.

226. And then finally, against that background, the First Tribunal decides, in paragraph 674,

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

227. All these paragraphs come from the un-annulled part of the First Award. The present Tribunal completes this summary of the key passages in the First Award by noting in addition (though on the basis indicated in paragraph 223 above) the First Tribunal's indication (paragraph 675) of its finding that Mr Pey Casado was the owner of the confiscated property, and its indication (paragraph 677) of the recognition by the Chilean State of the illegality of the original confiscation and the accompanying duty to provide compensation, disputing only to whom it should be paid. The Tribunal notes also, though on a somewhat different, and non-factual level, the First Tribunal's holding, in paragraph 680, that the existence of damage “résultant de la confiscation” [emphasis added] follows automatically by itself, as well as from the decision (sc. Decision No. 43) to award compensation in favour of other persons.

228. The present Tribunal draws the following conclusions from the above, which represent its interpretation of the *res judicata* portions of the First Award for the purposes of carrying out its own mandate of deciding on the “compensation” due under paragraph 3 of the dispositif of the First Award for the breach determined in paragraph 2 thereof:

- a) that the original expropriation of *El Clarín* and the related assets belonging to Mr Pey Casado was consummated in 1975 and consequently lies outside the scope of the BIT; that all arguments based on or arising out of the expropriation may not be taken into consideration, except in so far as they constitute factual background to matters that are properly within the scope of the dispute under the BIT; and that the Claimants' theory of a 'continuing act' linking post-BIT conduct to pre-BIT conduct must be rejected;

- b) that the issues properly within the scope of the dispute under the BIT, namely the Claimants' allegations of breach of Article 4 of the BIT (fair and equitable treatment) resulting from the delays in the Goss press litigation and from Decision No. 43, are distinct, both factually and legally, from the original expropriation; and
- c) that there was a breach of the guarantee of fair and equitable treatment under Article 4, which consisted of the totality of the conduct of the Chilean authorities resulting in the seven-year delay in the Goss press litigation and Decision No. 43, and manifested itself in the award of compensation to persons who were not the owners of the assets confiscated while Mr Pey Casado's claims were rejected.

229. The Tribunal believes this analysis to be entirely consistent with the findings of the *ad hoc* Committee in its Annulment Decision, notably its paragraph 261, in which the *ad hoc* Committee draws from the First Award the holdings by the First Tribunal that the Claimants' arguments as to damages were strictly limited to ones founded on the expropriation; that these were not relevant to the claims for denial of justice and discrimination; and that the Claimants had not produced any convincing proof of damage in respect of these claims. The same is true of paragraphs 282-285 of the Annulment Decision, in which the *ad hoc* Committee stigmatizes the First Tribunal's use of the amount awarded to the third parties by Decision No. 43 as a contradiction of the reasoning summarized above.

230. The consequence of this interpretation of the First Award is, in the opinion of the Tribunal, as follows:

- a) that, beyond its description, in somewhat Delphic terms, of what constituted the breach of the guarantee of fair and equitable treatment, the First Tribunal made no finding as to what injury was caused to the Claimants by that breach or its constitutive elements;
- b) that it remains therefore outstanding to determine the nature and extent of that injury;
- c) that, having failed to meet the corresponding burden of proof in the original arbitration, the burden rested with the Claimants to do so now in these resubmission proceedings;

d) that any assessment of injury and damage based on the original expropriation is inconsistent with the First Award and must therefore be rejected.

231. The question remaining for the Tribunal, and it is the central question in these resubmission proceedings, is whether, and to what extent, the Claimants have met that burden of proving what injury was caused to either or both of them by the Respondent's breach of the standard of fair and equitable treatment in the BIT, and then of establishing the corresponding assessable damage in financial terms.

I. Have the Claimants met the Burden of Proving Injury?

232. Once the question is reduced to the terms in the preceding paragraph, it becomes plain that the Claimants have not met this burden; indeed, it could be said that in some senses they have not even set out to do so, in as much as they have focussed their submissions on the evaluation of damage, without undertaking the prior step of showing the precise nature of the injury, causation and damage itself. The Respondent submits that, in truth, if one focusses on the actual breach (and its component parts) established by the First Award, the Claimants have suffered no demonstrable material damage at all. None from the Goss press case, because what was sought in that case was restitution of the press or compensation for its confiscation, which was in due course rolled into the extended version of the Claimants' claims in the original arbitration, and was rejected by the First Tribunal as outside the scope of the BIT; and none from Decision No. 43, because the Claimants could not possibly have benefited from a compensation process in which they had deliberately and explicitly elected not to participate (on account of the fork-in-the-road clause in the BIT). Or the Respondent puts the matter a different way, by submitting that, if the Claimants could be assumed to have suffered some damage, the proximate cause of the damage was the Claimants' own actions, thus breaking the chain of causation required for the award of financial compensation under the ILC's draft Articles 31 and 36.

233. The Tribunal finds much merit in the Respondent's submissions. It is not, however, required to pronounce formally on them; given the Claimants' failure to address their own burden of proof, there is no *prima facie* case for the Respondent, as the opposing party, to rebut.

234. The Tribunal has therefore no option but to find that the Claimants have failed to prove any material injury caused to either of them as the sufficiently direct result of the Respondent's breach of Article 4 of the BIT. The Tribunal cannot therefore, on principle, make any award of damages.

J. Have the Claimants Met the Burden of Proving Quantifiable Loss?

235. Given its finding in paragraph 234 above, the Tribunal can dispose of this question shortly by saying that, in the absence of any sufficient proof of injury or damage caused to the Claimants by the breach of the BIT established in the First Award, the question of the assessment or quantification of that damage does not arise. The Tribunal has accordingly no need to analyse in further detail the expert reports of Mr Saura for the Claimants and Mr Kaczmarek for the Respondent, although it would like to register its appreciation for the reports and oral testimony of both expert witnesses, which was of material assistance in clarifying the issues before the Tribunal in these proceedings.³⁷⁸

236. The Tribunal adds – though this is necessarily *obiter* – that, had the matter arisen for decision, it would have been disposed to accept the Respondent's objection to the admissibility of all those parts of the Claimants' damages submissions which were based directly or implicitly on the expropriation value of the original investment, as diametrically inconsistent with the *res judicata* portions of the First Award and the Annulment Decision of the *ad hoc* Committee.

K. The Unjust Enrichment Claim

237. As already indicated, the Claimants put forward at various stages of their written argument a claim to monetary compensation based on unjust enrichment. Unjust enrichment also features in the expert Report of Mr Saura as an alternative basis for his calculation of damage.

238. There are two possible ways of analysing the unjust enrichment claim. One is to regard it as a freestanding claim in its own right. This is how the Tribunal interprets paragraph 380

³⁷⁸ For similar reasons, the Tribunal has no reason to pursue further the issue as to taxation reserved as noted in paragraph 117 above.

of the Claimants' Reply, which is based on the simple allegation that, through its possession and use of the confiscated assets, the Respondent has been enriched 'sans juste cause' to the detriment of the Claimant investors, which gives rise in and of itself to an obligation to disgorge the assets and the fruits of their use. The Respondent counters that this is tantamount to de-linking the claim from the BIT entirely, since it would result in awarding compensation without any prior finding of breach from which the injury to be compensated flowed. The Respondent adds that this interpretation of the Claimants' argument is shown by the way in which paragraph 380 is expressly linked to the 'hypothèse' (although it is one the Claimants reject) of the absence of any of the circumstances which generate liability for breach of the BIT.

239. In the view of the Tribunal, the Respondent is correct on this point. As demonstrated above, the operative finding of liability is already fixed for all purposes by the (un-annulled) paragraph 2 of the *dispositif* of the First Award, and the right to compensation ('droit à compensation') specified in paragraph 3 can only properly be understood as referring to compensation for the injury suffered from the breach identified in paragraph 2. This reading of these two paragraphs – both of them *res judicata* – is what logic demands; and it is also consistent with the entire tenor both of the First Tribunal's own assessment of compensation that follows, and of the *ad hoc* Committee's criticism of that assessment in its Decision. This version of the unjust enrichment claim must therefore be rejected.
240. The alternative way of looking at the unjust enrichment claim would be to regard it as no more than a method, a technique, for arriving at an acceptable quantification of a right to compensation established by other means. This corresponds, as the Tribunal understands it, to the methods through which Mr Saura conceived the calculations contained in his Report. Expert valuations of damage are, however, essentially secondary, or derivative; it is not simply a question of whether the calculation correctly values what it sets out to measure, but also (at the primary level) whether it is setting out to measure the right thing. The Respondent is critical of Mr Saura's calculations at both the primary and the secondary level. Specifically, the Respondent contends that, whatever the merits or demerits of Mr Saura's particular calculations, they all fall at the hurdle that they are nothing more than alternative approaches to measuring the capital value of the confiscated assets and the profits

from their use, which would only be admissible in the presence of a valid expropriation claim.³⁷⁹ Once again, the Tribunal accepts this criticism. A claim for the expropriation of *El Clarín* and associated assets is precluded, with the effect of *res judicata*, by the First Award and the Decision on Annulment; the only compensation open to be awarded in these resubmission proceedings is for the particular breaches established by paragraph 2 of the *dispositif* of the First Award which, as the Tribunal has concluded above³⁸⁰ may not be used as a cloak for reintroducing under another guise the precluded expropriation claim.

L. The Moral Damage Claim

241. In addition to the claim for compensation for material damage, the Claimants put forward in these proceedings, as in the original proceedings before the First Tribunal, a claim to moral damages on behalf of Mr Pey Casado and separately of the Foundation. The claim was absent from the request for resubmission, but in the subsequent procedure appeared as follows.
242. In the Claimants' Memorial, the claim was linked to Mr Pey Casado's treatment at the time of the *coup d'état*, his exile abroad, and a subsequent campaign of denigration; it was linked also to the Respondent's conduct in the original arbitration and subsequently.³⁸¹ The claim is repeated in the Reply, with additional authority on the question of proof, and a final suggestion that, if the Tribunal was not ready to grant compensation for moral damage, it should at least bring the corresponding facts into play in order to enhance the amount of the assessed material and financial damage.³⁸² These submissions were developed to a limited extent during the oral hearing.
243. In the view of the Tribunal, two facts stand out from this summary account. The first is that no attempt was made to advance, or to justify, a specific claim that moral damage had been suffered by the Foundation; this claim can therefore immediately be set aside, without any further investigation as to whether moral damages are in fact available to corporate or like

³⁷⁹ See paragraph 164 above.

³⁸⁰ At paragraph 230.

³⁸¹ See paragraph 76 above.

³⁸² CR, paras. 476-488.

entities, as opposed to natural persons. The second is that the claim to damage caused by the Respondent's conduct in the arbitral proceedings must also fall *in limine*, for the reasons given in paragraph 216 above. But the most decisive factor of all is that a claim to damages of a moral character does not escape the burden of proof resting on a claimant, as described in paragraphs **Error! Reference source not found.**-206 above. The Tribunal notes, in this context, the clear expression of view by the First Tribunal on two occasions, at paragraphs 689 and 704 of the First Award, that the Claimants had simply failed to meet this burden, and that a mere likelihood that damage might have been suffered does not suffice. Admittedly, both paragraphs fall within Section VIII of the First Award, but, as they relate to matters of factual evidence and proof, they are not tainted by the criticisms of the *ad hoc* Committee relating to the assessment of material damages; and they accord, moreover, entirely with the opinion of the present Tribunal on the basis of the written and oral submissions made to it by the Claimants. The claim to moral damages must therefore be rejected. Had the Tribunal found the claim to material damage to have been established, it would have been prepared to consider the Claimants' subsidiary and alternative submission that moral injury (assuming it to be made out) was a factor to be taken into account in assessing the appropriate reparation for the breach of fair and equitable treatment; but, as the claim to material damages has itself been rejected, this submission, too, must fail.

M. The Options Open to the Tribunal

244. The Tribunal regrets that the Claimants did not set themselves to the specific task of showing what particular injury and damage could be proved to have been caused to them by the breach of the guarantee of fair and equitable treatment under Article 4 of the BIT determined in the First Award, which the First Tribunal had also established was legally and factually distinct from the original expropriation claim that had been dismissed *ratione temporis*. The present resubmission proceedings, which were thorough and complete, allowed the Claimants the fullest opportunity to do so, an opportunity of which they did not avail themselves. Given the seniority, skill and experience of Claimants' counsel and their long familiarity with the case, together with the unambiguous and repeated arguments on want of proof advanced by the Respondent, this omission cannot be regarded as inadvertent. The Tribunal has given anxious consideration to the options open to it in these circumstances. Despite the

difficulties in understanding some parts of the First Award, the Tribunal could plainly not permit the original expropriation claim to be reintroduced by the back door in the guise of a breach of fair and equitable treatment suffered many years later; this was not justifiable on the facts or the law, and was in any case formally excluded by the combined effect of the First Award and the Annulment Decision. The Tribunal could equally not have devised a theory of damages of its own, separate from the arguments of the Parties; this is what the First Tribunal had done, and for which it was rightly overruled by the *ad hoc* Committee in the annulment proceedings. Nor could the Tribunal have awarded moral damages as a form of consolation where actual damages had not been proved. Nor, finally (as already indicated in paragraph 172 above), was the Tribunal empowered to decide the Claimants' claims *ex aequo et bono*. There was thus no other course open to it than to dismiss, virtually in their entirety, the Claimants' monetary claims. In doing so, it wishes however to make the following observation. The Tribunal's Award does not touch the finding in the First Award that the Respondent had committed a breach of Article 4 of the BIT by failing to guarantee fair and equitable treatment to the Claimants' investments, including a denial of justice; that finding is *res judicata* and was not part of the present resubmission proceedings. It thus represents a subsisting obligation on the Respondent and one which, as the First Tribunal found, arose out of a failure in the operation of the Chilean internal system for the redress of acknowledged past injustices. The Tribunal has no doubt that, these resubmission proceedings once out of the way, the Respondent will remain conscious of that obligation, and will weigh its consequences appropriately.

IV. COSTS

A. The Claimants' Cost Submissions

245. In their Reply, the Claimants request from the Tribunal:

Qu'il condamne l'Etat du Chili à supporter l'intégralité des frais de la présente procédure, y compris les frais et honoraires des Membres du Tribunal, les frais de procédure (utilisation des installations, frais de traduction, etc.) et, en conséquence, qu'il condamne l'Etat du Chili à rembourser, dans les 90 jours qui suivent l'envoi de la Sentence à intervenir, les parties Demanderesse les frais et coûts de procédure avancés par elles et qu'il rembourse aux parties Demanderesse l'ensemble des frais et honoraires des avocats, experts et autres personnes ayant été appelées à intervenir pour la défense de leurs intérêts, portant, en cas de non remboursement dans ce délai, intérêts capitalisés mensuellement à un taux de 10% à compter de la date de la

Sentence à intervenir jusqu'à complet paiement, ou à toutes autres sommes que le Tribunal arbitral estimera justes et équitables.³⁸³

246. In their Statement of Costs dated 18 May 2015 and Supplemental Statement of Costs dated 29 May 2015, the Claimants have submitted the following claims:

En conséquence, et conformément au paragraphe 501 (9) du Mémoire en Réplique des Demanderesses du 9 janvier 2015, les parties Demanderesses sollicitent du Tribunal arbitral qu'il condamne la République du Chili à leur verser sur le compte bancaire de la Fondation demanderesse indiquée par celle-ci, dans un délai de 90 jours à compter de la reddition de la Sentence à intervenir, le montant de :

- (1) 3.159.743,24 euros (T.V.A. 21% comprise) correspondant aux frais et honoraires du Cabinet Garcés y Prada, Abogados;
- (2) 1.132.231,59 euros correspondants aux frais et honoraires du Cabinet Gide Loyrette Nouel ;
- (3) 241.159,77 euros correspondant aux frais et honoraires du Cabinet Accuracy;
- (4) 1.692 dollars US correspondant aux frais et honoraires du Cabinet d'experts Aninat, de Santiago du Chili
- (5) 33.332,19 euros de frais de traduction
- (6) l'ensemble des sommes payées au Centre par les parties Demanderesses dans le cadre de la nouvelle soumission concernant l'affaire No. ARB-98-2 telle qu'elles seront établies par le Centre ;
- (7) ou à toute autre somme que le Tribunal arbitral jugera équitable ;
- (8) rejette les demandes de la République du Chili au titre du remboursement de ses dépenses et frais.

Les Parties Demanderesses sollicitent du Tribunal qu'il ordonne qu'à défaut de paiement de ces sommes par la République du Chili dans le délai de 90 jours ci-dessus indiqué, ces sommes porteront intérêts à un taux de 10%, capitalisés mensuellement, à compter de la date de la Sentence à intervenir, jusqu'à complet paiement.

B. The Respondent's Cost Submissions

247. In its Rejoinder, the Respondent contends that :

Claimants' consistent pattern of accusing Chile's counsel of bad faith at every turn; making such accusations public by uploading all of their pleadings and most of their correspondence on their website; belaboring every procedural point; appealing every issue (*see, e.g.*, Claimants' 10 submissions on Chile's arbitrator appointment) have all acutely exacerbated the dispute and

³⁸³ CR, para. 501(9).

have implied a massive waste of time and resources. As a result of Claimants' vexatious litigation tactics, and the fact that the entirety of Claimants' Resubmission claims are impermissible in the first place, the Tribunal should impose on Claimants the obligation to cover all of Chile's costs and expenses, including legal and expert fees. It would certainly seem inappropriate— in light of the foregoing discussion — to award costs to Claimants, as they have requested.³⁸⁴

[...]

For the reasons set forth in this Rejoinder, as well as those articulated in the Counter-Memorial, Chile respectfully requests that the Tribunal:

[...]

b. Particularly in light of Claimants' vexatious tactics, misleading and repetitive argumentation, and defamatory accusations, grant Chile a full award of any and all expenses and costs incurred during this Resubmission Proceeding (including legal fees and expert fees);³⁸⁵

248. In its Costs Quantification dated 29 May 2015, the Respondent has submitted the following claims:

COST CATEGORY	TOTAL IN US DOLLARS	TOTAL IN CHILEAN PESOS¹
Arnold & Porter (Fees and Costs)	3,093,589.76	1,921,119,240.96
Navigant Consulting (Fees and Costs)	432,352.94	268,491,175.74
Redina S.A. (Expert Fees for Marcos Libedinsky Tschorne)	51,093.08	31,728,800.00
ICSID Costs (Advance Fees)	275,000.00	170,775,000.00
Republic of Chile Administrative Costs (e.g., photocopying, scanning, courier and banking costs)	918.78	570,560.00
Republic of Chile Travel Expenses (e.g., airfare, local transport, lodging, meals)	66,933.00	41,565,393.00
TOTAL	USD 3,919,887.56	CLP 2,434,250,169.70

¹ The exchange rate, which was used to convert each respective category of cost, is 1 USD = 621 CLP.

³⁸⁴ RR, para. 185.

³⁸⁵ RR, para. 189(b).

C. The Tribunal's Decision on Costs

249. The Tribunal is of the view that, as a general principle, a successful litigant, whether claimant or respondent, ought to be protected against the cost and expense of having to litigate. The principle conduces to economy and efficiency, and is as applicable to investment arbitration as to other forms of litigation. The Tribunal notes in this context that the First Tribunal took a similar view, and ordered the Respondent to make a contribution to the costs of the Claimants, while also deciding on an unequal division of the costs of the arbitration in favour of the Claimants.
250. The present proceedings, being resubmission proceedings, are somewhat out of the ordinary run of ICSID arbitrations. They are also rather complex in their outcome, when taken together with the original proceedings. It is nevertheless the case that, in the resubmission, the Respondent was plainly the successful party overall and the Claimants the losing party overall. This would under normal circumstances have justified an order for substantial costs in favour of the Respondent. That would have derived in particular from the consequences that flowed from the Claimants' reluctance to deviate from the claims they had originally put to the First Tribunal (even where those claims were not upheld in the First Award or were not treated with approval in the Decision on Annulment) and the Claimants' consequent unwillingness to bring their attention to bear instead on isolating, proving and quantifying a claim to injury and damage focussing specifically on the breach of the BIT that had been decided by the First Tribunal. Against this must however be set against the fact that, following the partial annulment, the Claimants had good reason to bring the resubmission proceedings as such, as well as the fact that the ambiguities and uncertainties remaining even in those parts of the First Award that had not been annulled created real difficulties for both Claimants and Respondent in handling the proceedings.
251. In these very particular circumstances, the Tribunal proposes to make full use of the discretion left to it under ICSID Convention Article 61(2) and ICSID Arbitration Rule 47 and orders that the arbitration costs of the proceedings will be borne by the Parties in similar, but opposite proportions to those decided by the First Tribunal, i.e. three quarters of the total amount to be borne by the Claimants and the remaining one quarter by the Respondent. It will make no further order as to costs; with the result that each side will bear in full its own

legal costs and expenses (including the fees and expenses of its counsel, witnesses and experts).

252. The arbitration costs of the proceedings include: (i) the fees and expenses of each Member of the Tribunal and the President of the Tribunal's Assistant; (ii) payments made by ICSID for other direct expenses, such as court reporting, interpretation, the charges of the International Dispute Resolution Centre in London for hosting the hearing on 13 to 16 August 2015, and courier services, as well as estimated charges related to the dispatch of this Award; and (iii) ICSID's administrative fees.

253. These costs amount to (in US\$):

Arbitrators' fees and expenses	
Sir Franklin Berman QC	157,440.24
Mr V. V. Veeder	40,559.50
Mr Alexis Mourre	92,720.20
President of the Tribunal's Assistant's fees and expenses	57,242.16
Other direct expenses (estimated)	194,075.65
ICSID's administrative fees	96,000.00
Total	<u>638,037.75</u>

254. The above costs have been paid out of the advances made to ICSID by the parties in equal parts. Once the case account balance is final, the ICSID Secretariat will provide the parties with a detailed financial statement; any remaining balance will be reimbursed to the Parties in equal shares.

255. In consequence of paragraphs 251 to 254 above, the respective shares to be borne by the Parties in the direct costs of the proceeding amount to US\$478,528.29 for the Claimants, US\$159,509.43 for the Respondent, and the Claimants are accordingly under an obligation to reimburse to the Respondent the amount of US\$159,509.43.³⁸⁶

³⁸⁶ This amount includes an estimate of the other direct expenses as indicated at paras. 252 and 253 above.

V. DECISION

256. On the basis of the reasoning above, the Tribunal decides, unanimously:

- 1) That Ms Coral Pey Grebe cannot be regarded as a claimant in her own right in these resubmission proceedings;
- 2) That, as has already been indicated by the First Tribunal, its formal recognition of the Claimants' rights and its finding that they were the victims of a denial of justice constitutes in itself a form of satisfaction under international law for the Respondent's breach of Article 4 of the BIT,³⁸⁷
- 3) That the Claimants, bearing the relevant burden of proof, have failed to prove any further quantifiable injury to themselves caused by the breach of Article 4 as found by the First Tribunal in its Award;
- 4) That the Tribunal cannot therefore make any award to the Claimants of financial compensation on this account;
- 5) That the Claimants' subsidiary claim on the basis of unjust enrichment is without legal foundation;
- 6) That there are no grounds in the circumstances of the case for the award of moral damages either to Mr Pey Casado or to the Foundation;
- 7) That the arbitration costs of these resubmission proceedings are to be shared in the proportion of three quarters to be borne by the Claimants and one quarter by the Respondent, with the result that the Claimants shall reimburse to the Respondent the sum of US\$159,509.43;
- 8) That all other claims are dismissed.

³⁸⁷ Exh. R-27, First Award, 8 May 2008, para. 704: "... le Tribunal arbitral estime que le prononcé de la présente sentence, notamment par sa reconnaissance des droits des demandereses et du déni de justice dont elles furent victimes, constitue en soi une satisfaction morale substantielle et suffisante."

[Signed]

Mr V.V. Veeder QC
Arbitrator
Date: August 22, 2016

[Signed]

Mr Alexis Mourre
Arbitrator
Date: August 31, 2016

[Signed]

Sir Franklin Berman QC
President of the Tribunal
Date: August 25, 2016