

APPLICATION FOR ANNULMENT OF THE AWARD OF 13 SEPTEMBER 2016

**Claimants' request for the production of documents**

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The Claimants request that the Chilean State produce the documents or categories of documents indicated below.

For the avoidance of doubt, each of these requests relates to specific documents or specific categories of documents which exist and are in the Respondent's possession, custody or control.

The following terms are used in relation to this request as defined:

"Respondent" or "State" means the Republic of Chile, including its ministries, departments, agencies and dependent bodies, along with wholly State-owned companies such as the public corporation CODELCO<sup>1</sup> and other firms in which it has holdings,<sup>2</sup> as well as their representatives and managers.

"Document" means all recorded material of any kind, whether recorded on paper or by electronic means, audio or video recordings or any other mechanical or electronic means of storing or recording data (including but not confined to all communications, letters and emails or fax correspondence), notes, minutes of meetings, transcriptions, talking points, booklets, speeches, financial statements and proposals.

The use of headings below is for convenience and does not limit or alter the nature of the requests as detailed.

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<sup>1</sup> **Corporación Nacional del Cobre (CODELCO)** is a wholly State-owned Chilean mining, industrial and trading company set up by a law of constitutional rank of the government of Dr Salvador Allende in 1971, passed unanimously by both chambers of parliament, with its own legal personality and assets, linked to the government through the Ministry of Mining, all of whose earnings are paid to the Chilean Treasury. See Chile: [Documents Concerning Nationalization of Copper Companies](#), *International Legal Materials*, Vol. 10, No. 6 (November 1971), pp. 1235-1253, at <https://bit.ly/2LOZncN>

<sup>2</sup> See **CODELCO Companies Subsidiaries and Associates**: <https://www.codelco.com/memoria2016/en/pdf/mem2016codelco-companies.pdf>

No.	Document/category of documents requested	Relevance and materiality of the documents requested		Responses/ Objections to document requests <sup>3</sup>	Replies to the Objections to document requests	Decisions of the Committee
		Ref. to submissions	Comments			
1.	Any government documents (supreme decree, decree, decision or document of any other kind) issued by the State or one of its dependent bodies , or any contract entered into by the State or one of its dependent bodies, demonstrating the commissioning of legal services, to act in the capacity of counsel, expert, “asesor” or otherwise for the Respondent or one of its dependent bodies, from <b>3 November 1997</b> to the present, directly or indirectly, from any of the members of Essex Court	Document C138, of 12 April 2017  Order of the 28th Civil Court of Santiago, of 24 July 2018, to the Foreign Ministry for it to produce documents relating to the links which the State acknowledged in document C138. The State has objected on grounds of national interest, until on 20 April 2018 it got the Court to accept this claim. (Documents C110, C191, C208, C212, C242, C242bis, C243, C283, C284, C290, C292)	The documents whose production is requested exist:  - The purchase of legal services by the Chilean State from members of ECCh since 2005 was acknowledged by Chile in the document submitted in item C138.  - <b>Act No. 18,834 of 23 September 1988 (Administrative Statute)</b> provides in its article 11: <i>“Professionals and specialists with higher-level qualifications or experts in particular fields may be hired on a fee basis where occasional work not normally performed by the institution is to be carried out, by decision of the corresponding authority. Likewise,</i>	Chile objects to this Request in its entirety, for at least the following reasons (each of which serves as an independent basis for rejecting the Request):  <b>I. This Document Production Request Poses an Unreasonable Burden on Chile</b> Given the breadth of Claimants’	The objections misrepresent the grounds and contents of the request.  <b>I. The Respondent’s assertion that the production of the requested documents would represent an</b>	

<sup>3</sup> The responses set forth in this column build upon, and should be viewed in the light of, the general comments set forth in Chile’s cover letter dated 9 August 2018. Further, none of the responses herein should be construed as a waiver of any type of legal privilege.

	<p>Chambers (ECCh), or anyone who has been a member thereof, in particular but not exclusively Messrs Alan Boyle, Lawrence Collins, Christopher Greenwood, Samuel Wordsworth, Vaughan Lowe, Simon Bryan, Stephen Houseman.</p>	<p>Memorial for annulment of 27 April 2018, §§ 135, 149, 159, 168-202, 231-235, 237-245</p> <p>Hearing of 16 February 2018, transcription, pp 20-23, 163-167, 212-216</p> <p>Application for annulment of 16 September 2016, Grounds III.1 and III.2, in particular §§ 95, 98, 115-123, 157, 159</p> <p>Respondents' communications to the <i>ad hoc</i> Committee of 21 December 2017, 11 and 15 January, 2 February, 16 and 29 March 2018</p> <p>Counter-Memorial, §§ 174, 244, 249, 260, 312, 313, 317, 320, 323-336, 417,</p>	<p><b><i>foreign nationals holding the corresponding qualifications in the field concerned may be hired on a fee basis.</i></b></p> <p><i>Moreover services for specific tasks may be hired on a fee basis in accordance with general regulations.</i></p> <p><i>Persons hired for a fee shall be subject to the rules provided by the respective contract and the provisions of this Statute shall not apply to them.”<sup>4</sup></i></p> <p>- Likewise <b>Act No. 19,880 of 23 May 2003</b> establishing the bases of the administrative procedures governing the acts of national government bodies, whose article 3 provides that the decisions adopted by government bodies are expressed by <b>administrative acts which will take the form of supreme decrees and decisions.</b> A supreme decree is an order issued</p>	<p>definitions of “documents” and “State,” complying with this Request would require Chile to search and review the files of every single Chilean entity and agency, every single State-owned corporation, and every single affiliate of every State-owned corporation, for all “recorded material” relating to a period of more than 20 years. The sheer quantity of</p>	<p><b>unreasonable burden is wholly unfounded.</b></p> <p>The documents requested, under the State’s control on paper and in structured and searchable digital format, clearly identify administrative acts reflecting:</p> <p>a) the amount of payments to ECCh members, and</p> <p>b) their date.</p> <p>They are specific – easy to find in the Finance and Foreign Ministries as evidenced by official document</p>	
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<sup>4</sup> **Ley N° 18.834, Estatuto Administrativo, de 23 de septiembre de 1988:** Art. 11: “Podrá contratarse sobre la base de honorarios a profesionales y técnicos de educación superior o expertos en determinadas materias, cuando deban realizarse labores accidentales y que no sean las habituales de la institución, mediante resolución de la autoridad correspondiente. Del mismo modo se podrá contratar, sobre la base de honorarios, a extranjeros que posean título correspondiente a la especialidad que se requiera. Además, se podrá contratar sobre la base de honorarios, la prestación de servicios para cometidos específicos, conforme a las normas generales. Las personas contratadas a honorarios se regirán por las reglas que establezca el respectivo contrato y no les serán aplicables las disposiciones de este Estatuto.”

		418(d), 441	<p>by the President of the Republic or by a Minister “By order of the President of the Republic” on matters coming under their remit.<sup>5</sup></p> <p>- The existence of these documents is also indicated by <b>Exempt Decision No. 1,485 of 1996</b> [exempt from review of legality by the Comptroller General’s Office] whose letter b) states that transactions “<i>must be recorded as soon as they arise so that the information remains relevant and of value to the senior staff overseeing operations and taking the relevant decisions</i>”,<sup>6</sup> as well as by</p>	documents implicated would create an unreasonable burden on Chile. <sup>9</sup>	C293e <sup>15</sup> as regards the Foreign Ministry. In each State body, and also in CODELCO, <sup>16</sup> the relevant departments keep information on payments made to specified foreign external counsels and the dates thereof in searchable electronic files.	*
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<sup>5</sup> **Ley N° 19.880, de 23 de mayo de 2003**, que establece las Bases de los Procedimientos Administrativos que Rigen los Actos de los Órganos de la Administración del Estado, el Artículo 3º, que preceptúa que las decisiones que adopten las entidades de la Administración se manifiestan mediante actos administrativos que tomarán la forma de decretos supremos y resoluciones. El decreto supremo es la orden escrita que dicta el Presidente de la República o un Ministro « *Por orden del Presidente de la República* », sobre asuntos propios de su competencia.

<sup>6</sup> **Contraloría General de la República. Resolución Exenta N° 1.485, de 1996**, letra b), que dispone que las transacciones “*deben registrarse en el mismo momento en que ocurren a fin de que la información siga siendo relevante y útil para los directivos que controlan las operaciones y adoptan las decisiones pertinentes.*”

<sup>9</sup> See Working Group Commentary on the IBA Rules, p. 26 (“This unreasonable burden . . . may involve the production of documents pursuant to a request to produce which . . . would because of their sheer quantity create an unreasonable burden on the receiving party to produce”).

<sup>15</sup> Document **C293e**, official report on payments by the State to foreign attorneys in the ICJ proceedings of which the Claimants were informed in August 2018 and whose production is requested pursuant to article 16.5 of Procedural Order No 1 since the identity of the beneficiaries and the amounts paid are blacked out:

Attorney name	Amount paid 2011 \$	Amount paid 2012 \$	Total \$
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			<p>- Exempt Decision No. 1,600 of 2008 providing rules on the legality review process, and in particular its article 6: <i>“Decrees and decisions subject to legality review must be submitted together with their supporting documents, except for those which are electronically accessible through institutional systems. Administrative acts endorsing agreements, including fee-based contracts with individuals, must be transcribed in the body of the decree or</i></p>	<p><b>II. Claimants Fail Altogether to Address Materiality</b> Claimants have not even attempted to explain why the requested documents should be considered material to the outcome of this proceeding, as</p>	<p><b>II. The assertion that the Claimants have not explained the materiality of the requested documents to the outcome of the proceeding is likewise unfounded.</b> In the third column of this table the Claimants fully explain the documents’ materiality, both to the matters in dispute and to the outcome of</p>
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Attorney 1	██████████	██████████	██████████
Attorney 2	██████████	██████████	██████████
Attorney 3	██████████	██████████	██████████
Attorney 4	██████████	██████████	██████████
Attorney 5	██████████	██████████	██████████
Attorney 6	██████████	██████████	██████████
Attorney 7	██████████		██████████
Attorney 8	██████████	██████████	██████████
<b>Total</b>	<b>2,567,728,675</b>	<b>1,229,694,598</b>	<b>3,797,423,273</b>

<sup>16</sup> The Chair of CODELCO’s executive board heads the world’s top copper-producing group, with daily prices set on the London Metal Market.

			<p><i>decision...</i>"<sup>7</sup></p> <p><b>These documents are relevant to the resolution of this case. For as the Claimants state in their Memorial for Annulment, the existence of close, continuous and material ties, not disclosed, between one of the Parties and certain members of the Arbitral Tribunal is such as to create, in the unique circumstances of this case, an apparent objective conflict of interest incompatible with the principles of independence and impartiality which should prevail in any arbitral tribunal, constituting a departure from a fundamental rule of procedure. Documents bearing out the factual and legal circumstances that make the tests relating to apparent objective conflicts of interest applied by <i>ad hoc</i> Committees and ICSID Tribunals to arbitrators applicable</b></p>	<p>required under § 15.1 of Procedural Order No. 1, and Arts. 3.3(b) and 9.2(a) of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules").</p>	<p>the proceeding. These passages have been highlighted in red for easy identification. In short, the documents are requested in order to demonstrate the merits of grounds III.1 and III.2 of the Application for Annulment, so that the <i>ad hoc</i> Committee may take a fully informed decision, as well as the merits as regards article 52(1)(a) of the Convention (Tribunal not properly constituted). All the supporting documents are in the §§ quoted in the 2nd column of this table and refer to the</p>	
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<sup>7</sup> **Resolución exenta N° 1.600, de 2008**, de la Contraloría General de la República, que fija Normas sobre Exención del Trámite de Toma de Razón, cuyo artículo 6º dispone: "Los decretos y resoluciones afectos a toma de razón deberán remitirse conjuntamente con los antecedentes que les sirven de fundamento, salvo aquéllos a los que se pueda acceder electrónicamente a través de sistemas institucionales. Los actos administrativos que aprueben convenios, incluso contratos a honorarios con personas naturales, deberán transcribirlos en el cuerpo del decreto o resolución..."

			<p><b>to Messrs Berman and Veeder.</b></p> <p>Indeed, Chile acknowledged on 12 April 2017 (document C138) the existence of ties between the State and members of ECCh, <b>albeit without precisely disclosing their identities or how long these ties have existed or the nature thereof, or the amounts of any payments made. Its reply seems to be confined to services provided concerning disputes over the State’s borders, whereas information brought to the Claimants’ knowledge since 20 September 2016<sup>8</sup> shows that Chile has used the advice and expertise of ECCh members, or persons who have been its members, in other fields and tribunals, including at ICSID.</b></p> <p><b>So the production of these documents is necessary in order for the Claimants to have the same information as the Chilean State on the commercial and legal ties that have existed or still exist</b></p>	<p><b>III. The Requested Documents Are Not Material to the Outcome of this Proceeding</b></p> <p>Even if Claimants had attempted to establish materiality, their arguments would fail, as the reality is that the requested documents are <b>not</b> material — for the following four reasons.</p>	<p>Memorial on Annulment, the transcription of the hearings, the Application for Annulment and the communications mentioned in the same column.</p> <p style="text-align: center;">*</p> <p><b>III. The documents requested are in fact material to the outcome of the proceeding and the State’s objection in this regard again shows its bad faith</b> in having concealed and continuing to conceal information vital to the Claimants’ presentation of evidence in relation to</p>	
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<sup>8</sup> See documents C125, C174bis, C132, C133, C135

			<p><b>between the State or State bodies and one or more members or ex-members of ECCh, so as to be able to demonstrate the existence of relations between the State and ECCh members that are incompatible with the principles of no apparent objective conflict of interest, independence and impartiality.</b></p>	<p><i>First</i>, Claimants have made it clear that they hope to use the requested documents in support of an argument that the Essex Court Chambers Issue amounts to a conflict of interest.</p>	<p>article 52(1)(a) of the Convention.</p> <p style="text-align: center;">*</p> <p>1st. The requested documents show the extent of the financial contributions made by the State and State bodies to ECCh members, and accordingly their proportional contributions to the costs of the offices, resources and marketing from which all ECCh members benefit. Which must affect the members tasked with determining the amount which the State is to pay to</p>	
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				<p>Claimants who have not contributed to the Chambers' coffers. This may evidently constitute major influence.</p> <p style="text-align: center;">*</p> <p><b>Second</b>, as discussed in Chile's cover letter of 9 August 2018, and its Counter-Memorial on Annulment,<sup>10</sup> Claimants have already advanced arbitrator challenges on the basis of such an argument.</p>	<p>2nd. The cover letter was not dealt with as it falls outside the instruction of 24-07-2018.<sup>17</sup></p> <p>The Counter-Memorial §§ quoted do not relate to the grounds for annulment based on article 52(1)(a) of the Convention, i.e. the State's concealment of the amounts received by ECCh</p>	
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<sup>10</sup> Chile's Counter Memorial on Annulment, ¶¶ 314–25.

<sup>17</sup> "The request must be made in one package. The Committee is not minded to rule on any request and objection that do not respect the extent and the format specified in Article 15.1" [emphasis added].

					<p>members, and the corresponding dates thereof, thereby contributing to their shared budget. For example, when Mr Lowe is paid by Chile in <i>Vieira v. Chile</i> and by Bolivia in the latter's case against Chile before the ICJ, he has both States as ECCh clients, both contribute proportionally to ECCh's shared costs and the publicity of each case attracts other States as clients. As regards ECCh, neither Mr Pey nor the President Allende Foundation have made contributions, or</p>	
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					<p>could compare with the State. As the Claimants were kept by the State ignorant of these relations, ECCh likewise failed to answer the Claimants' letters of 23 and 30 March and 16 April 2018<sup>18</sup> and subsequently of 24 May. This shows a full objective cooperation in the reciprocal interests of the State and of ECCh, disregarding the transparency, neutrality and independence which should prevail in the ICSID arbitral system.</p>	
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<sup>18</sup> See the documents attached to the Claimants' communication of 17 April 2018. The letter sent to ECCh on 24 May 2018 will be produced when the *ad hoc* Committee so authorises.

					Such coordination is reminiscent of the Chilean State's objection <sup>19</sup> to a request by the Kingdom of Belgium to a British court <sup>20</sup> for it to order the Home Office to disclose the confidential documents with which the State defrauded British and Spanish justice, <sup>21</sup> to the detriment of the President	
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<sup>19</sup> See "[Valdés presiona a Bélgica](https://bit.ly/2KHu4Mh)", *El País* (Spain), 27 January 2000, viewable at <https://bit.ly/2KHu4Mh>, or in English: "**Valdés puts pressure on Belgium.** Chile has formally asked Belgium to discontinue its appeal to the London courts, according to Belgian foreign minister Louis Michel. "The Chileans asked me to drop it" said Michel to Reuters, hours after his meeting on Tuesday in New York with his Chilean counterpart Juan Gabriel Valdés. But "this is a highly important and exemplary case. It is vital to send a message to all of the world's dictators, past and future," the Belgian minister said. "We told him we don't wish to damage a relationship which to date has been clearly positive," said Valdés for his part to the EFE news agency. The Chilean minister said it was incomprehensible that a friendly country should take this line."

<sup>20</sup> See **document C234**, [Kingdom of Belgium, R \(on the appl. of\) v Sec. of the Home Department](https://bit.ly/2KQ2P2f) – Judgment of 15 Feb 2000, viewable at <https://bit.ly/2KQ2P2f>

<sup>21</sup> See Application for Annulment § 181(d): Jack Straw's words in 2017 to the BBC and to Chilean State television complaining of this fraud by the Chilean State.

					<p>Allende Foundation's request for the extradition of General Pinochet (the British court granted nevertheless the Belgian request for disclosure, allowing the fraud to be exposed after the event).</p> <p>In asserting that the request for the production of documents should be dismissed pursuant to a decision that a lack of conflict of interest has supposedly been established (in an administrative, non-judicial determination), and/or pursuant</p>	
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					<p>to a supposed waiver by the Claimants, the Respondent is really asking the <i>ad hoc</i> Committee to refrain from ruling on matters of law and of fact for which it alone is competent and which are crucial to the outcome of the dispute – to which the Committee could not consent.</p> <p>In all events the Respondent's argument is unfounded. In this case, (1) the evidence sought was not available either to the Claimants or to the Chairman of the ICSID Administrative</p>	
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					<p>Council when taking his decision of 21 February 2017;<sup>22</sup> (2) the Committee is not bound by the Centre's decision, especially if it has information which the Centre did not; (3) contrary to what was deemed by the Centre, the public information was not sufficient to assert, without unreasonable further research by the Claimants, that Chile had regularly and constantly been advised by ECCh members for several years on many cases (as is</p>	
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<sup>22</sup> Document C119, Decision by the Chairman of the ICSID Administrative Council of 21 February 2017.

					<p>moreover confirmed by the two arbitrators in their declaration when they say that they were not and could not have been informed of links between ECCh members and Chile).<sup>23</sup> <b>If ECCh members themselves were not informed, how can the Claimants be asserted to have known of this and to have thus waived invoking a conflict?</b> <i>La boucle était bouclée...</i> The Committee has the competence</p>	
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<sup>23</sup> See **document C254**, communication by Mr Berman of 17 October 2016: *"it would be prohibited for me to make enquiries of fellow members of chambers about the work undertaken by them"*; **document C148**, email from Mr Veeder of the same date: *"ces informations confidentielles, quelles qu'elles soient, ne peuvent être ni ne sont connues de moi."*



				<p><i>Third</i>, these challenges were rejected by the Chairman of the ICSID Administrative Council, who concluded: (1) “that information concerning Chile’s representation by Essex Court Chambers barristers in ICJ proceedings had been publicly available since December 2012,”<sup>11</sup> <i>i.e.</i>,</p>	<p>and the duty to open it</p> <p style="text-align: center;">*</p> <p>3rd. The State withheld all information on the extent of its financial and commercial links with ECCh members from ICSID and from the Claimants when the resubmission Tribunal was constituted and during the proceeding, and has continued to do so since on 20/09/2016 the Claimants first learned of the scope and duration of these “secret” relations.<sup>24</sup></p>	
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<sup>11</sup> Ex. RA-0029, First Disqualification Decision, ¶ 88.

<sup>24</sup> See documents C125, C216, C174bis.

				before the Resubmission Proceeding even began; (2) that “[i]f the Claimants were concerned about potential conflicts of interest arising out of the client relationships of other barristers at Essex Court Chambers, they could have raised this point at the time the Challenged arbitrators were appointed”; <sup>12</sup> (3) that “[f]or the	The State has declined to inform ICSID and the Claimants of the amounts paid by it or its dependent bodies, and the dates thereof, to current or past ECCh members in proceedings involving the ICJ or otherwise, as in the case of Mr Vaughan Lowe. <sup>25</sup>  Proof was provided on 12/04/2017 <sup>26</sup> that in its	
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<sup>12</sup> Ex. RA-0029, First Disqualification Decision, ¶ 92.

<sup>25</sup> No mention of Mr Vaughan Lowe, Chile’s expert in the case [SA Eduardo Vieira v. Republic of Chile](#), ICSID ARB-04-7, identified in the Award of 21 August 2007, as an ECCh member (see in <https://bit.ly/2AvzXfL> §§ 136, 137, 205, 285, page 48 (§72) and footnotes Nos 15 28, 65, 88). Yet whereas the Claimants learned in July 2018 that Mr Lowe was a member of ECCh’s during the *Vieira* case, the State already knew it since its attorney in the *Pey* case, Mr di Rosa, was also involved in the *Vieira* case (see page 2), but the State did not disclose the link with ECCh through Mr Lowe either when the Tribunal was constituted or afterwards. When the State notified the Chairman of the ICSID Administrative Council on 16 December 2016 that Mr Lowe was a member of ECCh, it identified him as «*representing Bolivia in the Bolivia v. Chile matter*» (document C117, § 9). The State’s concealment of material information from ICSID and the Claimants has been systematic so far.

<sup>26</sup> Document C138.

				<p>challenge [to Messrs. Berman and Veeder] to have been filed <i>promptly</i> in this case, it should have been filed early in the resubmission proceeding, and in any event before the closure of those proceedings”;<sup>13</sup> and (4) that since Claimants did not advance a challenge until after the Resubmission Award had been issued, “the [challenge] cannot be considered as</p>	<p>communication of 16 December 2017<sup>27</sup> the State deliberately misled the ICSID Administrative Council Chairman into deeming, on 21 February 2017,<sup>28</sup> that the information on the relations between ECCh members and the State was in the public domain when the arbitral Tribunal was constituted, whereas in fact that information was not readily available and was even secret.<sup>29</sup></p>	
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<sup>13</sup> Ex. RA-0029, First Disqualification Decision, ¶ 94 (emphasis in the original).

<sup>27</sup> Document C117, § 9.

<sup>28</sup> Document C119, §§ 88, 91.

<sup>29</sup> See document C138 and the communications sent by the State to the 28th Civil Court of Santiago, documents C110, C191, C208, C212, C242, C242bis, C243, C283, C284, C290, C292.

				<p>having been filed 'promptly' for the purposes of ICSID Arbitration Rule 9(1), and must be dismissed."<sup>14</sup> These conclusions cannot be appealed.</p> <p><b>Fourth</b>, the implication of the above-referenced conclusions by the Chairman of the Administrative Council is that Claimants have waived any argument to the effect that a conflict of interest exists due to the Essex</p>	<p>4th. The State thereby knowingly vitiated the ICSID Administrative Council Chairman's decision process in February 2017, as it did when the Tribunal was constituted in 2013-2014, by not disclosing that it had regularly</p>	
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<sup>14</sup> Ex. RA-0029, First Disqualification Decision, ¶ 94 (original emphasis omitted).

				<p>Court Chambers Issue. It follows necessarily from this that any documents relating to such argument — like those that Claimants seek here — would not have any bearing at all on the outcome of the present proceeding. Moreover, since Chile readily concedes that it did indeed engage the services of other Essex Court Chambers barristers, on unrelated matters, the documents are unnecessary, since they would not serve to</p>	<p>and for many years and even at the time of the proceeding used the services of ECCh members.</p> <p>By concealing the requested documents, the State damaged the parties' equality of access to necessary information in the debate before the <i>ad hoc</i> Committee on the ground for annulment referred to in article 52(1)(a) of the Convention. Such information is indispensable to gauging the extent, in these particular circumstances, of the State's</p>	
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				<p>prove anything above and beyond the fact already conceded by Chile.</p>	<p>objective means of influence over the two ECCh member arbitrators.</p> <p>The Respondent's argument that the documents are not material to the outcome of the proceeding because Chile has now acknowledged that it has used the services of other ECCh members is likewise baseless. What matters here is the duration and extent of the links between the Respondent and ECCh and the financial flows between the Chambers and the State.</p>	
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				<p><b>IV. Claimants Have Not Demonstrated that They Do Not Have the Requested Documents</b></p> <p>Article 3.3(c) of the IBA Rules requires a party to include in any request for</p>	<p>This is not just any client of ECCh but a large customer that entrusts all its major cases to ECCh members. It is in particular this significant strategic and financial link that makes the relationship a source of apparent objective conflict of interest.</p> <p style="text-align: center;">*</p> <p>IV. The Claimants have shown that the State regards the material information requested as secret, and indeed has treated it as such so that, contrary to the Respondent's</p>	
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				<p>production a statement that the documents are not within the possession, custody, or control of the requesting party. Here, however, Claimants have failed to make such a statement, and it would seem that some of the documents in this Request (<i>e.g.</i>, “decrees” and “supreme decrees”) are publicly available. Chile should not be put the burden of gathering documents that Claimants can access on their</p>	<p>assertions, the Claimants were not able to access it with the research reasonably to be expected of them when the arbitrators were appointed. This is evidenced by <b>documents C138, C293e</b> quoted above, and also (as we reiterate) by the State’s continual refusal, between 5 December 2017 and 20 April 2018, to produce documents as directed by the injunction of the 1st Civil Court of Santiago of 24 July 2017.<sup>30</sup></p> <p>The press articles to which</p>	
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<sup>30</sup> See documents C110, C242, C208, C220, C221.



				own.	<p>the Respondent says it drew the attention of the Claimants and of the ICSID Administrative Council Chairman on 16/12/2016<sup>31</sup> do not mention the fact that Chile's representatives at the ICJ were ECCh members, and nor does the Vieira Award identify Mr Lowe, the State's expert, as an ECCh member.</p> <p>Without a full knowledge of ECCh members – which cannot be expected of the Claimants – the information available could not allow direct links to be traced between</p>	
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<sup>31</sup> See documents R-037, R-038.

					<p>the State and ECCh members, let alone the close ties which gradually became evident from the information brought to the Claimants' attention from 20 September 2016 and the signs attesting to these ties, constituting a source of apparent objective conflict of interest.</p> <p>The State has however acknowledged that some documents are under its legal control.<sup>32</sup></p> <p>A refusal to produce the</p>	
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<sup>32</sup> See documents C138, C293e.

				<p><b>V. This Request Covers Potentially</b></p>	<p>requested documents infringes substantive peremptory norms and binding principles of international law, most notably article 5 of the Constitution,<sup>33</sup> or the American Convention on Human Rights (articles 1(1) and 8(1)) and ICCPR articles 2(3) and 14(1), which form part of Chilean law, as well as the fair and equitable treatment protected by article 4 of the BIT.</p> <p style="text-align: center;">*</p> <p>V. The Claimants wish</p>	
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<sup>33</sup> *Ibid.*, §§ 131(b), 203, footnote 273.

				<p><b>Privileged Documents</b></p> <p>At least some of the documents encompassed by this Request may be covered by doctrines of legal privilege. Accordingly, although it is not at present asserting such privilege with respect to any particular document or category of documents, Chile reserves the right to do so at the appropriate time, in the event that the Committee were ultimately to order Chile to produce documentation pursuant to this Request.</p>	<p>to know nothing that is covered by attorney-client privilege (unless ECCh members have advised Chile in the Pey case), but rather to learn of the financial and legal links between the State, ECCh and its members.</p> <p>The documents requested will not <i>a priori</i> contain any information subject to attorney-client privilege, as they will be statements of a merely financial nature. Otherwise, the State could produce a digital record of the documents for which it</p>	
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					<p>claims attorney-client privilege and/or particular political or institutional sensitivity. The Committee could then decide as it saw fit on any editing of information or prior review of the documents by a neutral third party, case by case after hearing the Claimants' observations and discovering each document's content.</p> <p>The only privilege that the State has sought to substantiate to date is that invoked before the 28th Civil Court of</p>	
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					<p>Santiago,<sup>34</sup> which is plainly without legal basis and abusive.<sup>35</sup></p> <p>To avoid any doubt, we recall that neither the State nor its dependent bodies have immunity from legal process (art. 55 of the Convention), and nor may it invoke, under VCLT article 27, provisions of domestic law as justifying the non-execution of its obligations under the BIT (in this case, guaranteeing investors'</p>	
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<sup>34</sup> See in **document C220f** the translation of the relevant paragraphs of **document C220**, the State's request of 5 January 2018 for the lifting of the injunction to the Foreign Ministry to disclose to the President Allende Foundation (the Claimant) the details of payments made to ECCh members.

<sup>35</sup> **Document C227**, Rosenne (S.), *The Agent in Litigation in the I.C.J.*, in §§ 45, 56 and 57, analyses article 42(3) of the ICJ Statute and Article IV(section 11) of the [Convention on the Privileges and Immunities of the United Nations](#), and exposes the groundlessness of the State's claim that the privileges and immunities granted by this article to the parties' counsels before the Court supposedly entail that the counsels' identity and the amount of fees received were secret, and consequently that the 28th Court of Santiago should set aside the injunction of 24 July 2017.

					access to justice in an impartial court).	
2.	Any correspondence between an external counsel, expert or “asesor” of the State or one of its dependent bodies and a member of ECCh with a view to hiring the latter’s legal services for the benefit of the State or one of its dependent bodies between 3 November 1997 and the present, in particular but not exclusively Messrs Alan Boyle, Lawrence Collins, Christopher Greenwood, Samuel Wordsworth, Vaughan Lowe, Simon Bryan, Stephen Houseman.	See 1 above	See 1 above	Chile objects to this Request in its entirety, for the same reasons set forth above, in connection with Request No. 1.  In addition, with respect to the issue of privilege, Chile objects to this Request, on the grounds that it seeks documents that are plainly protected by attorney-client privilege <sup>36</sup> — namely, correspondence between Chile and its lawyers that were made	The Claimants reiterate their replies to the Respondent’s objections in section 1 above.  This information concerning cases other than this one is not <i>a priori</i> covered by attorney-client privilege or litigation privilege as it is just correspondence establishing an advisory relationship and settling administrative aspects (retainer letters	

<sup>36</sup> IBA Rules, Art. 9.2(b) (“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: . . . legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable . . .”).

				<p>for the purpose of obtaining legal advice.</p>	<p>or similar). And even supposing it were covered by privilege (<i>quod non</i>), the Committee is inherently empowered to order its disclosure,<sup>37</sup> in order in the case in hand to make an informed decision on the ground for annulment provided in article 52(1)(a) of the Convention.</p> <p>The State could produce a digital record of the documents for which it claims attorney-client privilege and/or particular political or institutional</p>	
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<sup>37</sup> See the precedents in the *Pope & Talbot v. Canada* and *Biwater* cases, quoted in the Claimants' communication of 23 December 2017 (§§ 23,33).



					sensitivity. The Committee could then decide as it saw fit on any editing of information or prior review of the documents by a neutral third party, case by case after hearing the Claimants' observations and learning of each document's content.	
3.	Any government documents or documents of any other kinds issued by the General Treasury or any other State entity (including the Foreign Ministry) or one of its dependent bodies, or any bank transfer, issued by the State or a State body, corresponding to payments made to ECCh or a member of ECCh, or to payments for legal services rendered by one or more members of	Memorial for annulment §§ 174-182 and §§ 241 et seq.	The existence of such documents is demonstrated by the following legislation:  - <b>Article 100 of the Chilean Constitution</b> , which states: <i>"The State's Treasuries shall make payments only by virtue of a decree or decision issued by a competent authority indicating which law or part of the budget authorises the payout. Payments shall moreover be made according to the established legally chronological</i>	Chile objects to this Request in its entirety, for the same reasons set forth above, in connection with Requests Nos. 1 and 2.  In addition, Chile notes that this Request appears to be based on the notion that it	The reasons asserted by the State are countered by the arguments in sections 1 and 2 above.  There is no reason in the ICSID system not to treat these Chambers members as lawyers	

	<p>ECCh, showing the date, the beneficiary and the amounts of any payments thus made between 3 November 1997 and the present.</p>		<p><i>order and after budgetary endorsement of the document ordering the payment.”<sup>38</sup></i></p> <p><b>-Decision No. 759 of 2003</b> on accountability procedures, issued by the Comptroller General’s Office, whose point 3.3 provides as follows: <i>“Accounts documentation file. ‘Accounts documentation file’ shall mean an ordered series of documents on paper or in electronic format recording the accounts corresponding to a specific reporting item, as required of the reporting entity by the Comptroller General’s Office, for examination and the issue of the corresponding report in accordance with Act No. 10,336. In the case of an electronic accounts documentation file, the file’s authenticity and integrity, along with the non-repudiation thereof, must be assured by the electronic signature of the reporting official, person or entity</i></p>	<p>somehow is relevant to this proceeding whether or not there is a “significant commercial relationship” between Chile and Essex Court Chambers (see next-to-last paragraph of Claimants’ comments on this Request, in the third column from the left). As best Chile can discern, Claimants’ theory is that such a relationship would amount to a conflict of interest under the IBA Guidelines on Conflict of</p>	<p>belonging to a firm, case by case.<sup>41</sup></p> <p>The international ICSID system does not allow the peculiarities of a national bar to justify draping a cloak of secrecy over the relations between one of the parties and the group of lawyers to which a majority of a Tribunal’s arbitrators belong.<sup>42</sup></p> <p>The State’s arguments do not alter the fact that in the ICSID system the ECCh member arbitrators are</p>	
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<sup>38</sup> **Constitución, Artículo 100:** *“Las Tesorerías des Estado no podrán efectuar ningún pago sino en virtud de un decreto o resolución expedido por autoridad competente, en que se exprese la ley o la parte de l presupuesto que autorice aquel gasto. Los pagos se efectuarán considerando, además, el orden cronológico establecido en ella y previa refrendación presupuestaria del documento que ordene el pago.”*

			<p><i>in keeping with general regulations.”<sup>39</sup></i></p> <p>These documents are relevant in that they will allow us to demonstrate the financial flows between the Respondent and ECCh and its members, vital to showing that ECCh “<i>derives significant financial income therefrom</i>” and that ECCh has had in the past, and still has currently, “<i>a significant commercial relationship with one of the parties</i>”, which, for the Claimants, “<i>may give rise to doubts as to the arbitrator’s impartiality or independence.</i>”</p> <p><b>The documents requested concern freelance professionals operating in the framework of ECCh, which</b></p>	<p>Interest in International Arbitration. However, that is not the case. Although the IBA Guidelines provide that a conflict of interest might exist when there is a “significant commercial relationship” between a party and an arbitrator’s <b>law firm</b>,<sup>40</sup> such Guidelines expressly clarify that “barristers’ chambers should <b>not</b> be equated with law firms for</p>	<p>subject to the same tests relating to apparent objective conflicts of interest that ICSID <i>ad hoc</i> Committees and Tribunals normally apply to all arbitrators for the purposes of article 52(1)(a) of the Convention, as substantiated in the Application for Annulment (§§ 102, 103, 130, 135-140), the Memorial (§§ 210), the communications</p>
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<sup>41</sup> See the Claimants’ Memorial of 27 April 2018, §§ 188-201, and the attached communication concerning the 1st ground for annulment of the Award.

<sup>42</sup> See the Claimants’ Memorial of 27 April 2018, § 199.

<sup>39</sup> **Resolución N° 759, de 2003**, sobre Procedimientos de Rendición de Cuentas, de la Contraloría General de la República, cuyo numeral 3.3 dispone: “*Expediente de documentación de cuentas. Se entenderá por expediente de documentación de cuentas la serie ordenada de documentos en soporte de papel o electrónico, que comprueban las cuentas correspondientes a una rendición específica, requerido por el fiscalizador de la Contraloría General al cuentadante, para su examen y el correspondiente informe, de acuerdo con lo dispuesto en la ley N°10.336. En el caso de un expediente de documentación de cuentas electrónico, la autenticidad e integridad de éste, como asimismo el no repudio de estas características, deberán estar garantizadas por la firma electrónica del funcionario, persona o entidad responsable de dicha rendición, de conformidad con las reglas generales.*”

<sup>40</sup> **RA-0052**, IBA Guidelines on Conflicts of Interest in International Arbitration (23 October 2010), §§ 2.3.6, 3.2.1.

			<b>involves a proportional sharing of costs and material resources by ECCh members receiving remuneration for the services being provided to a major State client such as Chile and/or its dependent bodies.</b>	the purposes of conflicts .	of 21 December 2017 (§ 18(102)) and of 2 February 2018 (§§ 9-11) and the jurisprudence quoted..	
4	Any documents issued by the Secretariat of the International Court of Justice (ICJ), especially certificates from the ICJ Registry issued to the Chilean State recording expenses for pleadings at the ICJ by any ECCh members in a case in which he/she/they represented the Chilean State, for the purposes of settling hearing fees.			Chile objects to this Request in its entirety, as it is wholly unsupported. As indicated by the blank cells to the left, Claimants have not made <b>any</b> effort whatsoever to justify this Request. They have not asserted that the requested documents are material; they have not asserted that the requested documents are relevant; and they have not	The Claimants reiterate the arguments in section 3 of columns 2 and 3 above.  The amounts corresponding to pleadings before the ICJ are normally a tiny part of the total fees paid to a State counsel or expert. Certification by the Registry of the ICJ is required for them to be paid, according to the State's competent	

				asserted that the documents are in Chile's possession.	authorities. <sup>43</sup> This certification whose production is requested constitutes proof of the groundlessness of the main reason cited by the State for refusing to produce the documents, viz. that keeping the amounts paid to ECCh members secret is supposedly necessary to preserving national interest and security.	
5	Any invoices for fees made out by one or more ECCh members for services rendered to the State or one of its dependent bodies between 3 November 1997	See 3) above	See 3) above	Chile objects to this Request in its entirety, and incorporates by reference the objections	The Claimants reiterate their replies to the Respondent's objections in sections 1 and 2 above.	

<sup>43</sup> Document C293, page 20, for whose production authorisation is requested.

	and the present.			<p>advanced above in connection with Request No. 1.</p> <p>In addition, Chile also objects on the basis that the requested documents are protected by attorney-client privilege. Chile notes in this regard that invoices for services rendered by attorneys typically include a detailed description of the services rendered, and for that reason are considered privileged</p>	<p>The State could produce a digital record of the documents for which it claims attorney-client privilege and the Committee could then decide as appropriate on the deletion of any portions not corresponding to the requested information, namely payments to ECCh or to a member of ECCh, or to payments for legal services rendered by one or more ECCh member(s), showing the date, the beneficiary and the amounts of payments thus</p>	
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					made between 3 November 1997 and the present.	
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