IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF CHILE ON THE RECIPROCAL PROTECTION AND PROMOTION OF INVESTMENTS DATED 2 OCTOBER 1991

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976 (the "UNCITRAL Rules")

PCA CASE NO. 2017-30

-between-

"PRESIDENT ALLENDE" FOUNDATION, VICTOR PEY CASADO, CORAL PEY GREBE (Spain)

("Claimants")

-and-

THE REPUBLIC OF CHILE

("Respondent")

DECISION ON RESPONDENT'S REQUEST FOR BIFURCATION

dated: 27 June 2018

The Arbitral Tribunal

Prof. Bernard Hanotiau (Presiding Arbitrator)
Prof. Dr. Hélène Ruiz Fabri
Mr. Stephen L. Drymer

Tribunal Secretary
Ms. Iuliana Iancu

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I. PROCEDURAL HISTORY

1. By Notice of Arbitration dated 12 April 2017, Claimants commenced arbitration proceedings against Respondent pursuant to Article 10 of the Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments dated 2 October 1991 (the "Treaty" or the "BIT").

2. On 12 April 2017, Respondent received the Notice of Arbitration.

3. On 18 October 2017, the Tribunal and the Parties participated in the first procedural hearing, which took place by means of a telephone conference. During the procedural hearing, Respondent made a request for the bifurcation of these proceedings (the "Request for Bifurcation").

4. On 3 November 2017, the Tribunal issued Procedural Order No. 1, concerning the languages of the proceedings, the applicable procedural rules and the case administration.

5. On 8 November 2017, the Parties filed simultaneous submissions in which they set out their positions with regard to the possible bifurcation of these arbitration proceedings.

6. On 20 November 2017, the Parties and the Tribunal signed the Terms of Appointment.

7. On 29 November 2017, the Tribunal rendered Procedural Order No. 2, postponing a decision on Respondent's Request for Bifurcation until after the Parties had filed their first round of submissions on jurisdiction and the merits. The Tribunal justified its decision as follows:

> "67. At this time, the Tribunal only has before it Claimants' Notice of Arbitration, which does not present with a sufficient degree of detail what Claimants' contentions in this arbitration are. Respondent accepts this and states that Claimants' 'specific claims are not entirely discernible, since they are described only in cursory and opaque terms in the UNCITRAL Notice'. Nevertheless, at the same time, Respondent is arguing that the substance of Claimants' claims before this Tribunal, while purporting to challenge events which post-date the First Award, is in actuality a transparent attempt to reverse legally binding conclusions of prior ICSID tribunals that settled the same dispute. Respondent adds that 'various issues relating to the [Santiago civil court proceedings] had already been submitted to the First Tribunal' and that Claimants' Notice of Arbitration purports to challenge various but apparently not all – binding conclusions of prior ICSID awards. Finally, Respondent reserves the right to raise additional jurisdictional objections at a future point in these proceedings, which means that, possibly, Respondent could file a second request for bifurcation.
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> 68. At this initial stage of the arbitration proceedings and with the limited information before it, the Tribunal cannot make an informed decision as to whether bifurcation

> would assist in, or effectively hamper, the efficient conduct of this arbitration. In addition, the Tribunal is reluctant to decide on Respondent's Request for Bifurcation now, considering that any decision risks being only a partial solution if further jurisdictional objections are raised and a second request for bifurcation is filed." [internal citations omitted]

8. The Tribunal directed the Parties to agree on a procedural calendar and to set out their complete case on both the merits and jurisdiction in their submissions.

9. On 30 November 2017, Claimants communicated to the Tribunal that they would file their Memorial at the latest on 6 January 2018 and argued that Respondent should file its Counter-Memorial within a 40-day deadline following receipt of the Memorial.

10. On 7 December 2017, Respondent indicated that it had no objections to Claimants' proposed deadline for the submission of the Memorial, but that it objected to the 40-day deadline proposed by Claimants for the Counter-Memorial. Respondent requested that the Tribunal fix the deadline for the Counter-Memorial to 3 July 2018.

11. On 9 December 2017, the Tribunal decided that Claimants' Memorial should be filed on 6 January 2018, and that Respondent's Counter-Memorial should be filed on 21 May 2018.

12. On 6 January 2018, Claimants filed their Memorial, accompanied by exhibits, witness statement and expert reports.

13. On 21 May 2018, Respondent filed its Counter-Memorial, accompanied by exhibits and expert reports.

14. On 24 May 2018, the Tribunal invited the Parties to update their submissions concerning the possible bifurcation of these proceedings.

15. On 31 May 2018, Respondent filed its supplementary submission concerning bifurcation.

16. On 7 June 2018, Claimants filed their supplementary submission concerning bifurcation.

17. This Procedural Order deals with Respondent's Request for Bifurcation. The Tribunal first summarizes certain elements of the background of the dispute, as it now appears to result from the Parties' submissions. This summary is not intended to be exhaustive and is limited to matters deemed relevant for purposes of the Request for Bifurcation. The Tribunal makes no findings with regard to any possible disputed facts or legal issues (**II.**). The Tribunal then presents Respondent's arguments in support of its Request for Bifurcation (**III.**), followed by Claimants' arguments in opposition (**IV.**). Finally, the Arbitral Tribunal sets out its considerations and its ultimate decision (**V.**).

II. THE BACKGROUND OF THE DISPUTE

1. The expropriation of *El Clarín* and Chile's return to democracy

18. Claimants contend that they are the shareholders of the Chilean company *Consorcio Publicitario y Periodístico S.A.* ("CPP"), which in the early 1970s was the owner of the Chilean newspaper *El Clarín*, a publication established in 1952[1] and incorporated under the name *Empresa Periodística Clarín Ltda.* ("EPC"). Claimants state that *El Clarín* was the most widely read newspaper in Chile in 1973 and a vocal supporter of former Chilean president, Dr. Salvador Allende, elected on 4 September 1970.

19. In September 1973, a military *coup d'État* toppled the Allende government and *de facto* seized the assets of CPP and EPC. The military government then enacted Decree Law No. 77 in which it declared unlawful, and legally dissolved, all Marxist entities, political parties and their affiliates, and transferred title of their property to the State. Subsequently, by means of Decree No. 165 of 10 February 1975 ("Decree No. 165"), the military government applied Decree Law No. 77 to *El Clarín.* Decree No. 165 dissolved CPP and EPC and transferred their assets to the Chilean State. Mr. Pey Casado left Chile for Spain.

20. Following the fall of the military regime, Chile adopted a series of measures in order to make reparations for the crimes and illegal acts committed during the dictatorship, including for politically motivated takings of property. In April 1990, the newly-elected President Aylwin created "the National Truth and Reconciliation Commission", the purpose of which was to disclose the human rights violations under the Pinochet regime. Around the same time, the Chilean Parliament adopted a law creating a National Office for Returning Exiles.

21. Mr. Pey Casado returned to Chile in May 1989 and began focusing on obtaining the restitution of his properties, both his personal properties and *El Clarín* property. He successfully obtained the restitution of personal property in the Chilean courts.

2. The initiation of the ICSID arbitration and of local proceedings in the Santiago courts

22. In September 1995, Mr. Pey Casado initiated judicial proceedings before the First Civil Court of Santiago against the Chilean Treasury, seeking restitution of a Goss-brand printing press that had been seized by the military authorities in 1973. Also in September 1995, Mr. Pey Casado made a request with the President of Chile for the restitution of several other *El Clarín* assets. This request was forwarded by the Chilean President to the Chilean Ministry of National Assets, who responded to Mr. Pey Casado in November 1995. According to the Ministry, a bill seeking to establish

[1] Notice of Arbitration, at 8.

the appropriate remedy (compensation or restitution) for the expropriations during the Pinochet regime was at that time before the Chilean Parliament. The Ministry of National Assets represented that, until such time as the law was adopted, it was not possible to order the restitution of the requested assets.

23. On 3 November 1997, Mr. Pey Casado and the President Allende Foundation (the "Foundation") commenced arbitration proceedings against Chile before the International Centre for the Settlement of Investment Disputes ("ICSID") on the basis of the Treaty (the "First Arbitration"). In these proceedings, Mr. Pey Casado and the Foundation invoked the seizure in February 1975 of the entirety of EPC's and CPP's rights, interests and assets. However, they carved out of the proceedings the seizure of the Goss Machine printing press.

24. In July 1998, Chile passed Law No. 19,568 which established a reparations program for the expropriations which had occurred during the Pinochet regime.

25. In June 1999, Mr. Pey Casado and the Foundation wrote to the Chilean Ministry of National Assets declaring that they were waiving their right to apply for reparations under Law No. 19,568. Mr. Pey Casado and the Foundation referred in this respect to their submission of an arbitral dispute before ICSID and the existence of a fork-in-the-road clause in the BIT.

26. In April 2000, by means of Decision 43, the Chilean Ministry of National Assets ruled on an application filed by six individuals seeking compensation for the expropriation of *El Clarín*. The Ministry of National Assets concluded that, under Chilean law, the genuine owners of CPP at the time of the military *coup* had been four individuals whose names appeared in the shareholder registry. By means of Decision 43, the Ministry of National Assets awarded compensation to these four individuals. Decision 43 did not mention either Mr. Pey or the Foundation.

27. In November 2002, Mr. Pey Casado and the Foundation submitted to the ICSID tribunal constituted to hear their claims (the "First Tribunal") an ancillary claim seeking damages for the seizure of the Goss printing press.

28. On 8 May 2008, the First Tribunal rendered its award (the "First Award"). The First Tribunal ruled that it lacked jurisdiction *ratione temporis* over Mr. Pey Casado's and the Foundation's expropriation claim, finding that the expropriation of their investment had consummated in 1975 upon the entry into force of Decree No. 165, and thus before the entry into force of the Treaty. The First Tribunal dismissed the claimants' continuing expropriation theory and stated that, to its knowledge, the validity of Decree No. 165 had not been successfully contested in the Chilean courts and Decree No. 165 thus remained a part of the Chilean legal order. The First Tribunal dismissed the claimants' contention that Chile's refusal to award compensation in 1995 had been part of a composite expropriatory conduct. The First

Tribunal however upheld jurisdiction and found in favor of the claimants in respect of their claim for breach of the Fair and Equitable Treatment standard. In this latter regard, the First Tribunal concluded that Chile had committed a denial of justice as a result of its delay in rendering a judgment on the merits in Mr. Pey Casado's case before the Santiago civil court, coupled with its decision to award compensation by means of Decision 43 to individuals who in the Tribunal's view were not the real owners of *El Clarín*. The First Tribunal however found that the claimants had not put forward any evidence for the damages relating to this FET breach and stated that it would proceed to an evaluation of damages based on objective elements. The First Tribunal determined that the compensation to be awarded the claimants for the FET breach would be equal to the amount that Chile had awarded to third parties under Decision No. 43.

29. On 2 June 2008, Mr. Pey Casado and the Foundation commenced revision proceedings against the First Award, arguing that they had uncovered new evidence and requesting that the First Tribunal revise the First Award by accepting their "continuing expropriation" theory and awarding them USD 797 million in damages for the expropriation of *El Clarín*.

30. On 18 November 2009, the Revision Decision was rendered, dismissing Claimants' application for revision of the First Award as inadmissible on the grounds that it was a disguised appeal.

3. The Santiago civil court judgment of 24 July 2008 and the ensuing abandonment proceedings

31. On 24 July 2008, the Santiago civil court seized with Mr. Pey Casado's request for restitution rendered its judgment on the merits. The precise extent of the court's findings is disputed by the Parties. However, it is not disputed by the Parties that the Santiago court dismissed Mr. Pey Casado's claim for restitution of the Goss printing press due to his lack of standing to sue and on account of the expiry of the applicable statute of limitations. While Claimants take issue with the courts' decision on the question of statute of limitations, they add that the Santiago court, in making its findings on *ius standi*, "n'a donc pas pu éviter de mettre en cause le Décret n° 165 en constatant … la nullité de droit public en écartant tacitement l'exception principale du Fisc quant à la prétendue validité du Décret n° 165, la propriété de l'Etat et, par conséquent, le droit à agir de celui-ci".[2] Claimants consider that the judgment conclusively established that Decree No. 165 is inoperative, did not legally dissolve EPC and CPP, which continue to exist, and did not lawfully transfer title over these entities' assets to the State. For its part, Respondent argues that Mr. Pey Casado explicitly declared that it was not seeking a ruling on the Decree No. 65's nullity before the Santiago court due to the fork-in-the-road clause included in the BIT and in

[2] Memorial, at 109.

light of the ICSID arbitration.[3] Further, Respondent is of the view that the 24 July 2008 judgment "did not declare, or in any way recognize, the nullity of Decree No. 165"[4] and said decree remains in force to this day, as part of the administrative order of Chile.

32. In June 2009, the Chilean State agency representing the Chilean Treasury in court proceedings filed a request with the Santiago court for a declaration of abandonment of the proceeding by the claimant, invoking his failure to notify the judgment to the defendant for more than six months. The Santiago first instance court rejected the request in August 2009, but this decision was overturned by a court of appeals in December 2009. In the present arbitration, Claimants complain that, due to machinations by the Chilean Government, they were not notified of the Santiago court's judgment of 24 July 2008 or made aware of the abandonment proceedings. They submit that the abandonment proceedings were conducted without notice thereof being given to Mr. Pey Casado and without Mr. Pey Casado having had an opportunity to present his case. Claimants submit that Mr. Pey Casado only found out about the Santiago civil court judgment's existence in January 2011. Claimants add that, despite Mr. Pey Casado's subsequent efforts to exercise and obtain damages for the forty-year long deprivation of the rights that had been recognized by the Santiago civil court, those efforts were systematically rejected by Respondent.

33. For its part, Respondent argues that it is implausible that Claimants were not aware of the 24 July 2008 Santiago civil court judgment considering their eagerness to pursue their claims. In its view, the far more likely scenario is that Mr. Pey Casado viewed the judgment as unfavorable so decided not to move the case forward by notifying it to the defendant, as would have been required under Chilean law. Respondent adds that, in any event, following the decision of the court of appeals finding that the proceedings had been abandoned, the Santiago civil court judgment no longer has any effect under Chilean law.

34. Claimants submit that they only learned of both the existence of the 24 July 2008 Santiago civil court judgment and the ensuing abandonment proceedings on 24 January 2011 and, four days later, filed an appeal against the decision finding that the proceedings had been abandoned. This appeal was dismissed by the Santiago Tribunal on 28 April 2011, and was subsequently maintained on appeal by the Court of Appeal on 31 January 2012. A subsequent effort by Mr. Pey Casado to have this latter judgment set aside was dismissed by the Chilean Supreme Court in July 2012.

[3] Counter-Memorial, at 136, citing from Revision Request, 2 June 2008, at 30 (Exhibit R-0025): "En effet, ayant choisi de faire valoir leurs droits devant un tribunal arbitral international, comme leur en donnait le droit l'API signé entre l'Espagne et le Chili en 1991, Monsieur Pey Casado et la Fondation ne pouvaient plus, en application de l'article 10.2 de l'API, saisir les jurisdictions chiliennes pour demander la nullité *ex officio* de ce Décret".

[4] Counter-Memorial, at 311.

4. The first annulment and the ensuing resubmission proceedings before ICSID

35. In parallel with these developments before the Chilean courts, on 5 September 2008, Chile submitted a request for annulment of the First Award before an ICSID *ad hoc* Committee (the "First Committee"). On 15 October 2010, Mr. Pey Casado and the Foundation also submitted a claim for annulment of the First Award, arguing that the First Award had neglected provisions of the Chilean Constitution that supported the argument of Decree No. 165's nullity *ab initio*. In support of this argument, in March 2011, Mr. Pey Casado and the Foundation submitted a number of exhibits, including the July 2008 Santiago court judgment. On 18 April 2011, the First Committee issued Procedural Order No. 2, declaring these new documents inadmissible and directed Mr. Pey Casado and the Foundation to resubmit their Rejoinder without any reference to any exhibit that had not been part of the original record of the arbitration.

36. On 18 December 2012, the First Committee rendered its decision on annulment (the "First Annulment Decision"), partially annulling the First Award and specifically the section on damages. The First Committee found that Chile had been denied the right to be heard on the issue of damages and that the First Tribunal gave contradictory reasons for its damages findings.

37. On 1 February 2013, Chile requested that the First Committee supplement the First Annulment Decision by identifying the interest that was due by Chile to Mr. Pey Casado and the Foundation on the portion of the costs that had been incurred in the First Arbitration by Mr. Pey and the Foundation.

38. On 18 June 2013, Mr. Pey Casado, the Foundation and Ms. Coral Grebe filed a request for resubmission with ICSID (the "Resubmission Proceedings"). Claimants appointed Mr. Philippe Sands and Respondent appointed Mr. Alexis Mourre as party-nominated arbitrators. On 18 December 2013, Chile requested the disqualification of Prof. Sands, who then resigned. Claimants then appointed Mr. V.V. Veeder as replacement arbitrator. On 24 December 2013, Mr. Franklin Berman was appointed as president by the Chairman of ICSID Administrative Council.

39. On 11 September 2013, the First Committee issued its Supplementary Decision, identifying the amount of interest due.[5]

40. In the Resubmission Proceedings, Claimants argued that Respondent had committed a denial of justice by concealing the existence of the 24 July 2008 Santiago Civil Court judgment and requested compensation for the expropriation of their assets, which had occurred in 1973.

[5] Respondent submits that it has paid both the portion of the costs that it was ordered to pay by the First Tribunal and the interest on this amount that was determined by the First Committee (Counter-Memorial, at 168).

41. On 13 September 2016, the Resubmission Award was issued by the Resubmission Tribunal. The Resubmission Tribunal concluded that Ms. Pey Grebe could not be considered an independent Claimant because she had not been a claimant in the first arbitration. The Resubmission Tribunal found that the only issue properly before it was the nature of the compensation due for the breaches established by the First Award. The Resubmission Tribunal ruled that Claimants' allegations pertaining to the 24 July 2008 Santiago Civil Court judgment were outside of its jurisdiction, which was limited to the dispute that had originally been submitted to ICSID arbitration. The Resubmission Tribunal confirmed that the First Tribunal's ruling that it lacked jurisdiction *ratione temporis* over Claimants' expropriation claim had *res judicata* effects and that Claimants' request for damages resulting from the original expropriation were to be rejected on that basis. Finally, the Resubmission Tribunal concluded that Claimants had only put forward evidence that sought to calculate damages based on the expropriation claim, but not on the violation of the FET standard. The Resubmission Tribunal thus concluded that the only relief to which Mr. Pey Casado and the Foundation were entitled was satisfaction.

42. On 20 September 2016, Claimants wrote to ICSID, submitting that they had just discovered that barristers who were members of the same set of chambers as Messrs. Berman and Veeder (*viz.*, Essex Court Chambers) had worked on a number of other matters involving Chile. Claimants argued that this issue raised questions about Mr. Berman's and Mr. Veeder's independence and impartiality and requested a detailed account of any relationships that any Essex Court Chambers barristers may have had with Chile.

43. On 27 October 2016, Claimants initiated a Rectification Proceeding and asked the Resubmission Tribunal to suspend the Rectification Proceeding so that they could pursue interpretation proceedings in relation to the First Award. The Resubmission Tribunal dismissed this request.

44. On 22 November 2016, Claimants requested the disqualification of Messrs. Berman and Veeder, invoking Chile's representation by other barristers from Essex Court Chambers in other proceedings.

45. On 21 February 2017, the Chairman of the ICSID Administrative Council, Dr. Kim issued a decision rejecting Claimants' challenges to Messrs. Berman and Veeder, finding that the challenges were untimely. Dr. Kim concluded that the information which formed the basis for the challenges had been publicly available in the media since 2012 but that no concerns had been raised at that time in the arbitral proceedings.

46. On 23 February 2017, Claimants filed a second challenge against Mr. Veeder. The following day, Claimants asked Mr. Berman to recuse himself from deciding the challenge against Mr. Veeder. Mr. Berman recused himself on 1 March 2017. On 4

March 2017, Claimants also challenged Mr. Berman and requested that the two challenges be submitted to the Permanent Court of Arbitration for a decision.

47. On 6 March 2017, ICSID informed the parties that it would treat Claimants' second requests to disqualify Messrs. Veeder and Berman as a proposal to disqualify the majority of the Tribunal, to be decided by the Chairman of the ICSID Administrative Council.

48. On 13 April 2017, Dr. Kim issued a second decision dismissing Claimants' challenges to Messrs. Berman and Veeder.

49. On 21 April 2017, Claimants requested the discontinuance of the Rectification Proceeding but, following Chile's opposition, the request was dismissed.

50. On 9 June 2017, Claimants (i) asked the Resubmission Tribunal to order Chile to disclose any information not publicly available relating to any payments made to Essex Court Chambers barristers by Chile's Ministry of Foreign Affairs; and (ii) asked the Resubmission Tribunal and ICSID to investigate this issue and disclose the results to the Parties.

51. On 15 June 2017, the Resubmission Tribunal rejected Claimants' request on the basis that it lacked any connection with the rectification requested.

52. On 29 June 2017, the Foundation initiated legal proceedings in the Santiago Civil Court seeking documents regarding the retainer by Chile of barristers from Essex Court Chambers.

53. On 6 October 2017, the Resubmission Tribunal issued its Rectification Decision in which it corrected three clerical errors in the Resubmission Award.

5. The second annulment proceedings before ICSID

54. On 10 October 2017, Claimants submitted an annulment request to ICSID in respect of the Resubmission Award. In their application, Claimants also requested that the Second Committee suspend the Resubmission Award's binding effect.

55. On 15 March 2018, the Second Committee dismissed Claimants' application for a stay of the Resubmission Award's binding effect, finding that an award remains binding and its *res judicata* effect remains untouched unless the award is annulled.

6. Claimants' arguments in these proceedings

56. The Tribunal summarizes below Claimants' arguments in these proceedings. This summary is not meant to be an exhaustive or detailed account of Claimants' contentions and is focused solely, and briefly, on matters directly germane to the issue of bifurcation.

57. Claimants argue that Respondent breached the Treaty in several respects.

58. First, Claimants contend that Chile breached Articles 10(5), 3, 4 and 5 of the BIT by failing to comply with its obligations under the First Award. Claimants argue that Respondent refused to accede to their requests, dated February 2013 and April 2017, that Respondent enforce the First Award, recognize their ownership over their investment and pay damages for the Treaty violations it had committed.[6]

59. Second, Claimants take the view that Respondent breached Article 4 of the Treaty on account of its failure to put an end to the Treaty violations established in the First Award, including denial of justice.[7]

60. Third, Claimants contend that Respondent breached Articles 3, 4 and 10(5) of the Treaty through its conduct concerning two of the members of the Resubmission Tribunal, Messrs. Berman and Veeder, members of the Essex Court chambers. In particular, Claimants take exception to what they allege are close and secretive financial connections between Chile and several members of Essex Court chambers, and to Respondent's alleged refusal to disclose such connections. Claimants consider that this amounts to fraudulent conduct which had the direct effect that the Resubmission Award « a entièrement, radicalement, altéré le sens litéral, le contexte, l'intention et la finalité systématiques des paras. 1, 2 et 3 du Dispositif et de tous les paragraphes de la Sentence du 8 mai 2008 ayant l'autorité de la chose jugée ».[8] In Claimants' view, this conduct by Respondent consolidated the denial of justice established by the First Award and is a separate breach of the Treaty.[9]

61. Fourth, Claimants argue that Respondent breached Articles 3(1), 4, 5 and 10 of the BIT by dismissing Mr. Pey Casado's claim before the Santiago Civil court for the restitution of the Goss Machine printing press on account of the expiry of the applicable statute of limitations. Claimants submit that this holding stands in marked contrast with other decisions taken in similar cases by the Chilean courts with respect to Chilean investors, where the statute of limitations was not an issue. Claimants add that the application of the statute of limitations in circumstances where Mr. Pey

[6] Memorial, at 15-31.
[7] Memorial, at 44-48.
[8] Memorial, at 63.
[9] Memorial, at 49-68.

Casado was prevented by the restrictions imposed by the military regime to return to Chile and enforce his rights is in breach of principles of international law.[10]

62. Fifth, Claimants submit that Respondent breached Articles 1, 3(1), 4, 5, 10(2) and 10(5) of the BIT through a complex and composite act consisting of a series of actions and omissions in relation to the Santiago civil court judgment and the ensuing abandonment proceedings. Claimants submit that a first element of this composite legal act is a procedural fraud committed by Respondent, which consisted of Respondent unilaterally changing the cause of action of the claim submitted by Mr. Pey Casado before the Santiago court in order to then dismiss the claim for lack of *ius standi* and expiry of the applicable statute of limitations. In Claimants' view, a second element of this complex and composite act consisted of Respondent's machinations that prevented the notification of the 24 July 2008 judgment of the Santiago civil court to Mr. Pey Casado, in breach of the requirements of Chilean procedural law. Due to these machinations, Mr. Pey Casado only learned of the existence of this judgment in January 2011. A third element of this act, in the view of Claimants, is represented by the subsequent decisions of the Chilean courts finding *inaudita parte* that Mr. Pey Casado had abandoned the proceedings, despite the fact that the legal requirements had not been met, and subsequently dismissing his efforts to have those judgments set aside.[11]

7. The Parties' requests for relief

63. Claimants request that the Tribunal render an award in which:

> « (1) Qu'il condamne la République du Chili à payer aux Demanderesses une somme comprise entre 315,7 et 385,9 millions USD, valeur au 31 août 2017, à actualiser au jour de la Sentence à intervenir, au titre de la réparation intégrale du préjudice matériel subi du fait des violations des articles 3(1), 4, 5 et 10(5) de l'API par la République du Chili.
>
> (2) Qu'il condamne également l'Etat du Chili à restituer aux Demanderesses la valeur de tous les *fruits naturels et civils de la chose possédée* de mauvaise foi, avec les intérêts correspondants, actualisée au jour de la Sentence à intervenir.
>
> (3) Qu'il condamne la République du Chili à restituer aux investisseurs demandeurs la valeur des dommages consécutifs, en particulier tous les frais encourus dans la défense des droits au titre de l'API relatifs à leur investissement auprès des cours de justice et des Tribunaux d'arbitrage relatifs aux procédures arbitrales, celle où a été prononcé [sic] la Sentence arbitrale du 8 mai 2008 et celle requise pour l'exécution forcée des paras. 5 à 7 du Dispositif de cette dernière, de même qu'à la procédure arbitrale initiée en juin 2013 en vue de l'exécution des paras. 2 et 3 du Dispositif (cfr § 530 *supra*) ;

[10] Memorial, at 32-43, 118-159.
[11] Memorial, at 185-240.

(4) A titre subsidiaire, qu'il condamne l'Etat du Chili à payer aux Demanderesses la somme de 75,6 millions USD, valeur 31 août 2017, à actualiser au jour de la Sentence à intervenir, au titre de l'enrichissement sans cause de l'Etat du Chili à leur détriment ;

(5) A titre très subsidiaire, qu'il condamne l'Etat du Chili à payer aux Demanderesses la somme indiquée au § 540 *supra*, au titre d'indemnisation des préjudices résultant du manquement à l'obligation pour laquelle il a été condamné dans la Sentence arbitrale du 8 mai 2008 en rapport avec le 3ème alinéa de l'article 1553 du Code civil chilien ; subsidiairement, la somme indiquée au § 545 *supra*, au titre d'indemnisation des préjudices causés pour son manquement continu à l'obligation de mettre fin au traitement des investisseurs demandeurs de manière injuste et inéquitable, en ce compris le déni de justice, établis dans la Sentence arbitrale du 8 mai 2008, en rapport avec les 2ème et 3ème alinéas de l'article 1555 du Code civil chilien ;

(6) Qu'il condamne l'Etat du Chili à payer à Mme. Coral Pey Grebe et à la Fondation espagnole Président Allende une somme non inférieure à US$5.000.000 et US$500.000, respectivement, 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 l'Etat du Chili ;

(7) A titre subsidiaire, dans le cas où le Tribunal ne serait pas prêt à accorder un dédommagement au titre de la réparation intégrale du préjudice moral, le Tribunal est prié de tenir compte des faits allégués comme dommage moral pour accroitre le montant destiné à compenser les dommages matériels et financiers subis par les Demanderesses.

(8) Qu'il dise que le montant alloué sera majoré à hauteur de l'éventuelle différence entre l'impôt payé, le cas échéant, sur l'indemnisation reçue par l'une ou l'autre des Demanderesses, et tout autre impôt qui étant légalement exigible aurait été versé si, en l'absence de manquement aux obligations établies dans l'API Espagne-Chili, les biens saisis avaient fait l'objet d'une indemnisation, afin que, après la taxe applicable, le patrimoine des Demanderesses soit effectivement rétabli ;

(9) Qu'il dise que l'Etat du Chili devra effectuer le paiement des sommes dues aux parties Demanderesses à la banque indiquée par celles-ci dans un délai de 60 jours au plus tard à compter de la réception de la Sentence à intervenir ; à défaut, dire que le montant de la réparation alloué aux parties Demanderesses portera intérêts capitalisés mensuellement à un taux au moins égal à 5% à partir de la Sentence jusqu'à complet paiement ;

(10) 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 Demanderesses les frais et coûts de procédure avancés par elles, et qu'il rembourse aux parties Demanderesses l'ensemble des frais et honoraires des avocats, experts, témoins et autres personnes dont elles ont sollicité l'intervention pour la défense de leurs intérêts, portant, en cas de non remboursement dans ce délai, intérêts capitalisés mensuellement à un taux de 5%) 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. »[12]

[12] Memorial, at 717.

64. For its part, Respondent requests that the Tribunal:

> "a. Immediately dismiss all of Claimants' claims (for lack of jurisdiction, inadmissibility, lack of legal merit, and/or lack of a basis upon which relief can be granted); and
>
> b. Order Claimants to pay all costs of this UNCITRAL proceeding (including arbitrator and institutional fees and expenses), as well as the totality of the fees and expenses incurred by Chile in connection with this proceeding (including, but not limited to, legal fees and expenses, expert fees and expenses, and translation costs), with compounded interest until the date of payment.
>
> 390. In the event that the Tribunal declines to dismiss the totality of Claimants' claims immediately, Chile asks, alternatively, that the Tribunal (1) suspend its consideration of the merits, and (2) order the immediate bifurcation of the proceeding, for the purpose of having the Parties and the Tribunal address Chile's jurisdictional and admissibility objections in a separate, preliminary phase."[13]

III. RESPONDENT'S POSITION ON BIFURCATION

65. Respondent argues that Claimants cannot establish jurisdiction in respect of any of the core strands of their case. In this respect, Respondent raises the following jurisdictional objections:

i. Objection No. 1: the Tribunal lacks jurisdiction to grant Claimants' requests for relief;
ii. Objection No. 2: the BIT does not apply to any of the claims asserted;
iii. Objection No. 3: the Tribunal lacks jurisdiction to entertain claims for the alleged non-performance of the First Award;
iv. Objection No. 4: the Tribunal lacks jurisdiction to entertain claims related to the Essex Court Chambers Issue;
v. Objection No. 5: the Tribunal lacks jurisdiction to entertain claims based on the Goss Machine case.

66. The Tribunal will briefly summarize Respondent's arguments with respect to each one of these objections in the paragraphs below, it being noted that, as with Claimants' arguments, this summary is not intended to be a comprehensive or detailed restatement of all of Respondent's arguments. However, before doing so, the Tribunal notes that Respondent bases its objections on the following three arguments.

67. The first is the exclusivity of ICSID proceedings established in Article 26 of the ICSID Convention. Respondent argues that, once consent to ICSID arbitration has been given by the parties to a dispute, the parties have lost the right to seek relief in another forum, be it national or international, and are restricted to pursuing their claims through ICSID. Respondent considers that the Parties in this arbitration have

[13] Counter-Memorial, at 389, 390.

not opted out of the ICSID exclusivity rule by means of Article 10(3) of the BIT. In Respondent's reading, Article 10(3) of the Treaty ("If the dispute is submitted to international arbitration, it may be brought before one of the following arbitration bodies…") in effect reinforces the exclusivity of ICSID proceedings.[14]

68. Respondent's second argument is that Article 10(3) of the BIT, a forum selection clause employing the wording "one of the following arbitration bodies", necessarily implies that an investor cannot submit a particular dispute to both ICSID and UNCITRAL arbitration, but must choose between them. Respondent considers that this reading is supported both by the authentic Spanish version of the Treaty ("En caso de recurso al arbitraje internacional la controversia podrá ser llevada ante uno de los órganos de arbitraje designados a continuación"), as well as by the French translation ("devant l'un des organismes").[15]

69. Respondent's third argument is that, pursuant to Article 53(1) of the ICSID Convention and Article 10(5) of the BIT, once an ICSID award has been rendered, the award is final and binding upon the parties and not subject to an appeal.[16]

1. Objection No. 1: the Tribunal lacks jurisdiction to grant Claimants' requests for relief

70. Respondent argues that Claimants are seeking four types of relief in this arbitration, all four of which the Tribunal cannot grant.

71. First, Respondent notes that Claimants are seeking compensation under the BIT for the expropriation of *El Clarín*. In Respondent's view, such a request for compensation must necessarily be based on a valid expropriation claim. Respondent considers that, however, Claimants are not permitted to argue that the expropriation of *El Clarín* amounted to a violation of the BIT because the First Award conclusively determined that such expropriation was outside the temporal scope of the Treaty. Respondent adds that *res judicata* principles preclude Claimants from challenging the conclusion in the First Award that the expropriation of *El Clarín* occurred instantaneously in the 1970s and was not the result of a continuous act. Respondent further submits that Claimants cannot divorce the value of the expropriated property from the expropriated property itself by claiming that the value of the property was not lost until compensation was denied by Chile. The First Award likewise prevents this argument from being made, since it found that a post-BIT refusal to indemnify Claimants for an expropriation which had occurred prior to its entry into force is not an independent basis for an expropriation claim.[17]

[14] Counter-Memorial, at 224-231.
[15] Counter-Memorial, at 233, 234.
[16] Counter-Memorial, at 235.
[17] Counter-Memorial, at 241-245.

72. Second, Respondent considers that the Tribunal does not have jurisdiction to hear Claimants' claim that Chile failed to comply with the obligations imposed upon it by the First Award, a claim which they classify as "shockingly abusive".[18] In this respect, Respondent argues that the exclusivity rule that attaches to ICSID proceedings precludes Claimants from arguing before an UNCITRAL tribunal that Respondent failed to comply with a final ICSID award. Respondent considers that such a claim can only be made – and was made – before an ICSID tribunal and Claimants should not be allowed to appeal before an UNCITRAL tribunal the findings of that ICSID tribunal. Respondent adds that, in any event, the Resubmission Award concluded with *res judicata* effect that Claimants were owed no compensation.[19]

73. Third, Respondent notes that Claimants are requesting reimbursement of their costs incurred in the First Arbitration, the Revision Proceeding, the First Annulment Proceeding, the Supplementation Proceeding and an enforcement proceeding in Spain relating to the First Award. Respondent states that Claimants have already requested this remedy from the Resubmission Tribunal. In Respondent's view, Claimants' claims relating to these ICSID proceedings are barred by the *res judicata* effects that attach to the decisions on costs rendered in each proceeding by the respective ICSID tribunals. These decisions may not be revisited here. The claim for costs of the Spanish enforcement proceedings are, in Respondent's opinion, likewise barred by the *res judicata* principle, as the relevant Spanish court ruled that only a portion of the attorneys' fees were recoverable. Respondent adds that it has already paid to Claimants the cost amounts that were established by the ICSID tribunals, as well as by the judgment of the Spanish court.[20]

74. Fourth, Respondent notes that Ms. Pey Grebe and the Foundation are seeking moral damages for acts that are either outside the temporal scope of application of the Treaty (the expropriation of *El Clarín*) or for various other acts (the treatment of Mr. Pey Casado by the military dictatorship; statements by Chilean officials that Mr. Pey Casado was not the true owner of *El Clarín*; the conduct found by the First Award to be in breach of the Treaty; Chile's alleged attempt to conceal the 24 July 2008 judgment; and the alleged non-performance of the First Award) for which similar claims for moral damages were submitted before ICSID. Respondent argues that these claims are barred by the exclusivity of ICSID proceedings and the BIT's forum selection clause.[21]

[18] Counter-Memorial, at 246.
[19] Counter-Memorial, at 246-251.
[20] Counter-Memorial, at 252-260.
[21] Counter-Memorial, at 261-264.

2. Objection No. 2: the BIT does not apply to any of the claims asserted

75. Respondent argues that the Treaty texts relied upon by Claimants (Articles 3, 4 and 5)[22] all presuppose the existence of an investment in Chile's territory on the date of the BIT violations alleged. Respondent submits that, based on Claimants' characterization of their claims, it appears that the events which give rise to the present arbitration occurred after 24 July 2008, the date of the Santiago civil court judgment. However, in Respondent's submission, Claimants did not have a qualifying investment as at 24 July 2008.[23]

76. In this respect, Respondent argues that the First Award established with finality that that the assets of CPP and EPC were definitively expropriated in 1975, when CPP and EPC were dissolved. Respondent maintains that, according to the First Award, these events occurred prior to the entry into force of the BIT. In Respondent's submission, no investment of Mr. Pey Casado remained after the definitive confiscation of *El Clarín* in the 1970s. Respondent takes issue with Claimants' submission, according to which their investment consists of the protections set forth in the BIT. In Respondent's view, such an interpretation is untenable, particularly in light of the express definition of an "investment" in the Treaty. Finally, Respondent disputes that the 24 July 2008 Santiago civil court judgment resurrected Mr. Pey Casado's investment in *El Clarín*.[24]

3. Objection No. 3: the Tribunal lacks jurisdiction to entertain claims for the alleged non-performance of the First Award

77. Respondent notes that Claimants seek to establish in these proceedings that Chile breached the Treaty by failing to comply with the obligations imposed upon it in the First Award. Respondent argues that this Tribunal lacks the authority to decide the issue of what relief was due by Chile for the BIT violation identified in the First Award, as this was the purpose of the Resubmission Proceeding before ICSID. The Resubmission Tribunal concluded with *res judicata* effect that Claimants were not owed compensation for the breaches identified in the First Award, and that satisfaction was sufficient reparation. Respondent argues that this conclusion cannot be revisited here.[25]

[22] Respondent contends that Article 10 of the BIT, the dispute resolution clause, cannot form the basis of a BIT merits claim (Counter-Memorial, at 269).
[23] Counter-Memorial, at 267-271.
[24] Counter-Memorial, at 272-277.
[25] Counter-Memorial, at 279-283.

4. Objection No. 4: the Tribunal lacks jurisdiction to entertain claims related to the Essex Court Chambers issue

78. Respondent argues that Claimants' contentions pertaining to the Essex Court Chambers issue have already been submitted to ICSID in the Rectification Proceeding and in the Second Annulment Proceeding. Respondent is of the view that the exclusivity which attaches to ICSID proceedings and the BIT's forum selection rule preclude Claimants from seeking a second opinion here, as do the principles of *lis pendens* and *ne bis in idem*.[26]

5. Objection No. 5: the Tribunal lacks jurisdiction to entertain claims based on the Goss Machine case

79. Respondent takes the view that Claimants are prevented from advancing before this Tribunal the argument that the 24 July 2008 Santiago civil court judgment was favorable to them but that Chile prevented them from reaping its attendant benefits. Respondent bases this argument on Claimants having already raised this argument before several ICSID tribunals: during the First Annulment Proceeding, the Resubmission Proceeding and the Second Annulment Proceeding.[27]

80. In Respondent's submission, the exclusivity of ICSID proceedings and the BIT's forum selection clause act as bars to the reiteration of these claims. In this respect, Respondent notes that, in 2002, Mr. Pey Casado and the Foundation amended their claims before the First Tribunal by transferring the substance of the Goss machine case before ICSID. Respondent considers that the First Tribunal accepted jurisdiction over this claim, which permitted it to then find that Chile had committed a denial of justice in the Santiago civil court proceedings. Respondent adds that the First Award's finding that Chile had denied Mr. Pey Casado justice in the Santiago civil court proceedings amounts to a finding of a complete failure by the Chilean justice system. Consequently, in its view, any subsequent deficiencies in the same proceeding cannot amount to a new BIT claim, as unfair and inequitable treatment and discrimination are lesser offences encompassed within the more serious finding of a denial of justice.[28]

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81. As a remedy, Respondent first requests that the Tribunal exercise its authority under Article 22 of the UNCITRAL Rules allowing it to limit written submissions to one round of pleadings, and dismiss Claimants' claims outright, without any further submissions from the Parties.[29]

[26] Counter-Memorial, at 284, 285.
[27] Counter-Memorial, at 286-289.
[28] Counter-Memorial, at 290-299.
[29] Chile's Supplementary Submission on Bifurcation, at 3.

82. Second and in the alternative, Respondent requests the bifurcation of the above-listed objections from the merits of this case.

83. Respondent notes that, in Procedural Order No. 2, the Tribunal concluded that "in deciding whether to hear jurisdictional objections with priority or to join them to the merits, the following considerations are notably relevant: (a) whether the objections to jurisdiction are *prima facie* substantial and not frivolous; (b) whether bifurcation would result in substantial cost savings and efficiency gains and the sound administration of these proceedings; (c) whether the jurisdictional objections are closely intertwined with the merits of the case; and (d) whether bifurcation would preserve the Parties' procedural rights."[30] Respondent considers that its jurisdictional objections above warrant the bifurcation of these arbitral proceedings.[31]

84. First, Respondent contends that its objections are serious and not frivolous.[32]

85. Second, Respondent argues that bifurcation would greatly increase efficiency in the present case. In its submission, each one of its objections has the potential to dispose of the entire case and dispense with the need to discuss a multitude of complex factual issues and merits theories that would require a full-fledged merits proceeding. Respondent adds that bifurcation would not generate inefficiencies in light of the fact that the jurisdictional objections need to be heard in any event.[33]

86. Third, Respondent contends that bifurcation would not be inefficient, as the jurisdictional objections above are not closely intertwined with the merits. In its submission, each objection poses a threshold question that can be separated from the merits without difficulty: (i) whether the Tribunal has authority to grant the relief requested; (ii) whether Claimants had an investment on the critical dates; and (iii) whether Claimants are permitted to assert specific claims.[34]

87. Fourth, Respondent maintains that bifurcation would have the effect of preserving Chile's procedural right to immunity from repeat and parallel litigation. In Respondent's submission, this principle holds especially true in the case of UNCITRAL proceedings, which expressly contain a presumption in favor of bifurcation, but no screening mechanism or express opportunity for summary judgment to protect against abusive claims.[35]

[30] Procedural Order No. 2, at 66.
[31] Chile's Supplementary Submission on Bifurcation, at 3.
[32] Chile's Supplementary Submission on Bifurcation, at 4.
[33] Chile's Supplementary Submission on Bifurcation, at 5.
[34] Chile's Supplementary Submission on Bifurcation, at 6.
[35] Chile's Supplementary Submission on Bifurcation, at 7-9.

IV. CLAIMANTS' POSITION ON BIFURCATION

88. Claimants are of the view that the Request for Bifurcation should be dismissed, as the dispute submitted to arbitration in the present proceeding is conceptually distinct from the First Arbitration. In this respect, Claimants refer to the Second Committee's holding of 15 March 2018, according to which:[36]

> « Le Comité confirme que les effets de l'autorité de la chose jugée et de la litispendance interdisent aux Demanderesses d'exercer « tout autre recours » en rapport avec les demandes soumises à l'arbitrage CIRDI, comme le prévoit expressément l'article 26 de la Convention. (…) Toutefois, ces principes ne s'appliquent pas à de nouvelles demandes, c'est-à-dire à des demandes qui résultent prétendument de violations du TBI qui se sont produit après le début de la procédure arbitrale dans la présente affaire. Pour reprendre les termes employés par le Tribunal du Nouvel Examen, la « date critique » est la date de la requête d'arbitrage initiale des Demanderesses, soit le 3 novembre 1997. »[37]

89. First, Claimants argue that the jurisdictional objections raised by Respondent are in breach of Article 26 of the Vienna Convention on the Law of Treaties and the principles of international law codified in Article 30 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"). Claimants maintain that the Resubmission Tribunal confirmed that it lacked jurisdiction to hear disputes that arose between the Parties after the date when the Request for Arbitration was filed with ICSID, *i.e.*, November 1997. Claimants submit that, in conformity with Article 31 of the ILC Articles and the First Award, Respondent was under an obligation to make full reparation for the damage it caused by means of its unlawful acts. In their view, the present Tribunal has jurisdiction to entertain such a claim.[38]

90. Second, Claimants argue that this Tribunal has jurisdiction to hear claims based on breaches that are subsequent to the First Award. Claimants submit that their claims in this arbitration are based on Treaty breaches posterior to 8 May 2008, the date of the First Award. Claimants argue that Article 10(3) of the Treaty does not prevent them from bringing new claims before an UNCITRAL tribunal. Claimants add that, in any event, Article 10(3) of the Treaty does not represent a fork-in-the-road clause, as the word "uno" in Spanish is intended to be an indefinite article.[39]

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[36] Observations sur la demande complémentaire de procéder à une bifurcation, at 3, 4.

[37] *Víctor Pey Casado et Fondation Président Allende c. République du Chili* (Affaire CIRDI ARB/98/2 Deuxième procédure en annulation), Décision sur la demande de suspension de l'exécution de la sentence, 15 mars 2018, paragraphes 79, 80 (Pièce C-461).

[38] Observations sur la demande complémentaire de procéder à une bifurcation, at 5-9.

[39] Observations sur la demande complémentaire de procéder à une bifurcation, at 12-14.

91. Third, Claimants submit that this Tribunal has jurisdiction to hear a new claim against Chile, which is based on the fact that Respondent did not put an end to the breaches established in the First Award. Claimants consider that such a claim is founded on Article 10(5) of the Treaty and customary international law.[40]

92. Fourth, Claimants add that the Tribunal has jurisdiction to set the quantum of the damages owed by Respondent for its breaches of Article 4 of the Treaty and that Articles 26 and 52(6) of the ICSID Convention do not act as a bar to this Tribunal's jurisdiction. In this respect, Claimants argue that the question of the damages owed by Respondent for the breaches committed in 2000 and 2002 has not been decided on the merits by ICSID tribunals. Claimants consider that the First Commission annulled the damages section of the First Award on account of the fact that the parties had not been heard on the question of « l'équivalence du montant du dommage pour les violations commises à l'article 4 de API en 2000 et 2002 – infraction au traitement juste et équitable – avec ce qu'aurait été le montant pour violation à l'article 5 – expropriation indirecte des droits des investisseurs existant en 2000 et 2002 ».[41] According to Claimants, the Resubmission Tribunal made it impossible for Mr. Pey Casado and the Foundation to demonstrate this equivalence when it concluded that the issues that had intervened between the parties subsequent to 3 November 1997 were outside of its jurisdiction. Claimants contend that, for this reason, when determining the compensation due to Mr. Pey Casado and the Foundation, the Resubmission Tribunal did not take into consideration the evidence put forward by the claimants on the damage suffered beginning with May 2000. Claimants thus conclude that Articles 26 and 52(6) of the ICSID Convention are inapposite in this case.[42]

93. Fifth, Claimants maintain that the Tribunal has jurisdiction to establish the damages suffered as a result of the indirect expropriation of their investment and of other breaches that occurred after 8 May 2008. In this respect, Claimants argue that, after 8 May 2008, Respondent engaged in a series of actions and omissions meant to indirectly expropriate « de droits qui sont actuellement couverts par l'API avec l'autorité de la chose jugée ».[43] As support, Claimants refer to a series of rights which they argue were established by the First Award and the First Annulment Decision.[44]

94. Sixth, Claimants argue that the Tribunal has jurisdiction to hear the dispute which arose on 28 January 2011 as a result of the delay in the notification of the 24 July 2008 Santiago civil court judgment and the subsequent denial of justice in the ensuing court proceedings.[45]

[40] Observations sur la demande complémentaire de procéder à une bifurcation, at 16, 17.
[41] Observations sur la demande complémentaire de procéder à une bifurcation, at 19.
[42] Observations sur la demande complémentaire de procéder à une bifurcation, at 18-22.
[43] Observations sur la demande complémentaire de procéder à une bifurcation, at 23.
[44] Observations sur la demande complémentaire de procéder à une bifurcation, at 23, 24.
[45] Observations sur la demande complémentaire de procéder à une bifurcation, at 25-29.

95. Finally, Claimants submit that the Tribunal has jurisdiction to hear a claim for denial of justice which resulted from Respondent's concealment of the extent of its connections with barristers from Essex Court Chambers, including two arbitrators on the Resubmission Tribunal. Claimants contend that this concealment has prevented them from having access to an impartial international arbitral tribunal, a question which has not been decided so far.[46]

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96. Turning more specifically to the issue of bifurcation, Claimants argue that Respondent's Request for Bifurcation should be dismissed as Respondent's jurisdictional objections are too closely intertwined with the merits. In Claimants' view, Respondent is responsible for the overlap between the questions pertaining to jurisdiction and the questions going to the merits of the case, on account of its concealment of certain elements of fact and the manipulation undertaken by its State institutions. Claimants maintain that bifurcating these proceedings would lead to a waste of time and financial resources, whereas joining Respondent's jurisdictional objections to the merits would preserve the rights of both Parties to the dispute.[47]

97. For these reasons, Claimants request that the Tribunal decide the following:

> "1. Qu'il rejette les exceptions à la compétence du Tribunal que soulève l'Etat au motif qu'il enfreigne a) les principes de droit international cités *supra* (§§8-11, 13), b) la forclusion, c) la *res judicata*, c) les articles 2(2), 10(1), 10(3), 10(5) de l'API, d) pour abus de procès, e) et mauvaise foi ;
> 2. Qu'il rejette la demande de bifurcation compte tenu que celle-ci, loin d'entraîner des économies de temps et de ressources, favoriserait des confusions requérant le recours à des considérations réitérées sur le fond, et augmenterait la durée et les frais de la procédure,. Alors que la non-bifurcation préserverait les droits procéduraux de toutes les Parties.
> 3. Qu'il condamne l'Etat à supporter l'intégralité des frais de l'incident relatif à sa demande de bifurcation, de même qu'à rembourser aux parties Demanderesses l'ensemble des frais et honoraires des avocats et des personnes dont elles ont sollicité l'intervention pour la défense de leurs intérêts, portant, en cas de non remboursement, intérêts capitalisés jusqu'à complet paiement, ainsi qu'à toute autre somme que le Tribunal arbitral estimerait juste et équitable. »[48]

V. THE TRIBUNAL'S ANALYSIS

98. First, the Tribunal rejects Respondent's request to dispense with further submissions from the Parties and dismiss the case outright. The written submissions of the Parties filed thus far have made it abundantly clear that the present dispute involves a number

[46] Observations sur la demande complémentaire de procéder à une bifurcation, at 30-34.
[47] Observations sur la demande complémentaire de procéder à une bifurcation, at 35.
[48] Observations sur la demande complémentaire de procéder à une bifurcation, p. 10.

of complex legal and factual issues that require further development. The Tribunal is not prepared to limit the Parties' right to make submissions as requested by Respondent.

99. Turning now to Respondent's Request for Bifurcation, the Tribunal reiterates that its task at this stage of the proceedings is not to decide or take any position on the merits or lack thereof of Respondent's preliminary objections. The Tribunal's task is to determine whether it would be conducive to an effective administration of these arbitral proceedings to hear Respondent's objections separately from the merits.

100. The Tribunal agrees with Respondent that Article 21(4) of the UNCITRAL Rules[49] creates a presumption in favor of treating the issue of jurisdiction as a preliminary question:[50]

> "(4) In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."

101. However, as accepted by Respondent, that presumption is not absolute. The Tribunal retains a significant degree of discretion when determining whether the efficient administration of the proceedings counsels in favor of hearing an objection to jurisdiction separately from, or joined to, the merits.

102. The Tribunal has already established in Procedural Order No. 2 that the following considerations are to be weighed in deciding for or against bifurcation: (a) whether the objections to jurisdiction are *prima facie* substantial and not frivolous; (b) whether bifurcation would result in substantial cost savings and efficiency gains and the sound administration of these proceedings; (c) whether the jurisdictional objections are closely intertwined with the merits of the case; and (d) whether bifurcation would preserve the Parties' procedural rights.

1. Objection No. 1: the Tribunal lacks jurisdiction to grant Claimants' requests for relief

103. The Tribunal has carefully considered the Parties' positions and, in light of the circumstances of this case, finds that it is appropriate and would promote procedural efficiency to bifurcate Objection No. 1 from the merits of this case.

[49] The Tribunal notes that the 2010 version of the UNCITRAL Arbitration Rules no longer includes such a presumption.

[50] *See, Glamis Gold, Ltd. v. The United States of America* (UNCITRAL), Procedural Order No. 2 (Revised), 31 May 2005, at 9; *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India* (PCA Case No. 2016-7), Procedural Order No. 4 – Decision on the Respondent's Application for Bifurcation, 19 April 2017, at 70.

104. In this respect, the Tribunal first observes that Objection No. 1 is *prima facie* serious and substantial, as it goes to the very basis of this Tribunal's power to award the relief sought by Claimants.

105. Second, if upheld, this objection will result in the dismissal of Claimants' entire case, thereby ensuring that economies of time and costs are made. The Tribunal acknowledges that, because the Parties have already submitted their first round of pleadings on jurisdiction and the merits, the efficiencies gained by bifurcation will necessarily be more limited than in a situation where bifurcation would have been ordered at the outset of the proceedings. However, the Tribunal considers that, if efficiencies can be gained in terms of time and costs by deciding at least some of the issues in this complex case with priority bifurcation is warranted. Bifurcation will permit the Parties to better structure their pleadings and carefully distill the salient issues that need to be decided by the Tribunal.

106. Third, the Tribunal considers that deciding Objection No. 1 will involve answering legal questions which are not closely intertwined with the merits of this case. Indeed, the Tribunal will not have to decide whether Claimants' requests for relief should be granted, or, in other words, whether *inter alia* Respondent failed to comply with the obligations imposed upon it by the First Award, or whether Respondent committed a denial of justice in the Santiago civil court proceedings. The Tribunal will only have to determine whether it has the legal authority to grant the relief requested. The Tribunal does not exclude that, in this analysis, it will have to examine some evidence that is also relevant to the merits of this case, for instance some findings made by the First Tribunal, the First Committee or the Resubmission Tribunal. However, the Tribunal is of the view that the existence of some degree of overlap between the evidence relevant for answering jurisdictional questions and evidence relevant for answering questions pertaining to the merits is not an obstacle to bifurcation. What would be required in order to join an objection to the merits is a more substantial overlap[51], such that a jurisdictional question could not be decided efficiently without also ruling on the merits of the case.

107. Finally, the Tribunal considers that bifurcation does not affect the principle of equality of the Parties. The jurisdictional objections raised by Respondent would need to be decided whether the Tribunal bifurcates or not. Both Parties will have opportunities to present their arguments and evidence, and will be heard by the Tribunal.

108. As a result, the Tribunal will deal with Objection No. 1 as a preliminary question.

[51] *See, Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/16/2) (ICSID Case No. ADHOC/17/1), Procedural Order No. 2 (Decision on Respondent's Applications of 18 September 2017), 23 October 2017, at 45.

2. Objection No. 2: the BIT does not apply to any of the claims asserted

109. The Tribunal considers that Objection No. 2 can and should also be heard separately from the merits.

110. The Tribunal finds that this objection is *prima facie* serious and substantial as it questions the very basis of Claimants' claims before this Tribunal. Second, this objection, if upheld, will result in the dismissal of Claimants' entire case, thus resulting in economies of time and costs.

111. The Tribunal also finds that this question can be answered separately from the merits of the case. Indeed, in order to rule on Objection No. 2, the Tribunal will only have to determine whether the Treaty required that Claimants have an investment at the time of the alleged breaches and, only in the eventuality of an affirmative answer to this question, determine whether Claimants are correct that the 24 July 2008 Santiago civil court judgment established the nullity of Decree No. 165. The Tribunal will not have to establish whether Respondent failed to comply with its obligations under the First Award, whether Respondent committed a denial of justice in the Santiago civil court proceedings or in the subsequent abandonment proceedings. Those inquiries will properly be left for the merits of the case, should the proceedings advance to that stage. The Tribunal reiterates that it is not altogether excluded that some of the evidence that is pertinent for deciding the merits of this case will also be pertinent to rule on Objection No. 2. However, the Tribunal is of the view that the two questions can be sufficiently separated from each other so that hearing Objection No. 2 with priority will not also involve deciding Claimants' claim for denial of justice.

112. Finally, the Tribunal considers that bifurcation does not affect the principle of equality of the Parties, as the jurisdictional objections placed before the Tribunal by Respondent would need to be decided whether the Tribunal bifurcates or not.

113. For these reasons, the Tribunal will thus address Objection No. 2 as a preliminary question.

3. Objection No. 3: the Tribunal lacks jurisdiction to entertain claims for the alleged non-performance of the First Award

114. The Tribunal shall deal with Objection No. 3 as a preliminary question. The Tribunal finds that this objection is *prima facie* serious and substantial, as it goes to the power of the Tribunal to hear one of Claimants' claims. Moreover, hearing Objection No. 3 separately would result in efficiencies of time and costs, as the objection, if admitted, would result in a decrease of the number of claims that the Tribunal needs to address. Finally, the Tribunal is persuaded that the objection can be heard without implicitly ruling on the merits of this case.

4. Objection No. 4: the Tribunal lacks jurisdiction to entertain claims related to the Essex Court Chambers issue

115. The Tribunal shall deal with Objection No. 4 as a preliminary question. The Tribunal considers that this objection is *prima facie* serious and substantial, as it goes to the power of the Tribunal to hear one of Claimants' claims in this arbitration. Moreover, hearing Objection No. 4 separately would result in efficiencies of time and costs, as the objection, if admitted, would result in a decrease of the number of claims that the Tribunal needs to address. Finally, the Tribunal is persuaded that the objection can be heard without touching on the merits of this case.

5. Objection No. 5: the Tribunal lacks jurisdiction to entertain claims based on the Goss Machine case

116. The Tribunal decides to join Objection No. 5 to the merits of this case.

117. The Tribunal considers that this objection is very closely connected to the merits of Claimants' claims such that it would be difficult to separate the substance of Claimants' claims pertaining to the Santiago civil court proceedings from the various arguments made by Mr. Pey Casado and the Foundation before prior ICSID tribunals and the decisions taken by those prior tribunals. Moreover, in order to answer Respondent's jurisdictional objection, the Tribunal would also have to assess Respondent's argument pursuant to which the denial of justice identified in the First Award encompasses what Respondent deems to be the lesser offences of unfair and inequitable treatment and discrimination. The Tribunal considers that this inquiry goes to the heart of the substance of Claimants' Treaty claims and requires the Tribunal to make a decision on the contents of various standards of protection under the Treaty. These are analyses that are better suited to the merits stage of the arbitration.

VI. DECISION

118. For the reasons set out above, the Tribunal decides as follows:

i. Determines to deal with Objections Nos. 1, 2, 3 and 4 as preliminary questions;

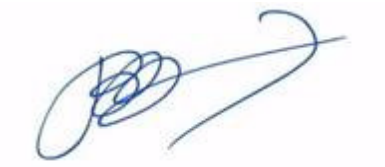
ii. Rejects Respondent's application to deal with Objection No. 5 as a preliminary question and joins it to the merits of the dispute;

iii. Rejects Respondent's request to dispense with further submissions from the Parties and to dismiss the case outright;

iv. Reserves all other issues to a further order, decision or award, including any question as to costs;

v. Directs the Parties to confer and agree on a procedural calendar dedicated to hearing Objections Nos. 1, 2, 3 and 4 and revert back to the Tribunal by 9 July 2018.

On behalf of the Arbitral Tribunal,



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Professor Bernard Hanotiau
Presiding Arbitrator