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")

PROCEDURAL ORDER NO. 2

dated: 29 November 2017

The Arbitral Tribunal

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

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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 ("Claimants' Submission" and "Respondent's Submission", respectively).

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

7. This Procedural Order deals with Respondent's Request for Bifurcation. The Tribunal first sets out Claimants' case, as currently pleaded. The summary is made only to the extent that it is 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. CLAIMANTS' PLEADED CASE

8. 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.

[1] Notice of Arbitration, at 8.

9. Claimants submit that, in September 1973, a military *coup d'Etat* toppled the Allende government and *de facto* seized the assets of CPP and EPC. Subsequently, by means of Decree No. 165 of 10 February 1975 ("Decree No. 165"), the military government dissolved CPP and EPC and transferred their assets to the Chilean State. Mr. Pey Casado left Chile for Spain and only returned to Chile after the reinstatement of democracy, in 1990.

10. Claimants add that, 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. Claimants stipulate that, in September 1995, upon his return to Chile, Mr. Pey Casado made a request to the President of Chile for the restitution of the *El Clarín* assets, and subsequently filed a formal request to this effect before a civil court in Santiago. On 7 November 1997, Mr. Pey Casado and the President Allende Foundation (the "Foundation") commenced arbitration proceedings before the International Centre for the Settlement of Investment Disputes ("ICSID") on the basis of the Treaty.

11. Claimants add that, on 8 May 2008, the ICSID tribunal constituted to hear Mr. Pey Casado's and the Foundation's claims (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 it had consummated in 1975, before the entry into force of the Treaty. 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 the Santiago civil court case and awarded the claimants damages.

12. Claimants further submit that, on 24 July 2008, the Santiago civil court seized with Mr. Pey Casado's request for restitution rendered its judgment on the merits. The court held that Decree No. 165 was null and void *ab initio*, and that its finding to this effect was not subject to any statute of limitations. According to Claimants, the court also concluded that the seizure of the plaintiff's assets had been ineffective and that the plaintiff had remained at all times the rightful owner of the confiscated assets.

13. Claimants argue that, if the First Tribunal had had before it the judgment of the Santiago civil court, it could have decided on the dispute in full knowledge of the relevant facts. However, due to Respondent's denial of justice, Mr. Pey Casado and the Foundation were unable to prove in the original ICSID arbitration that the transfer of property from CPP and EPC to the Chilean State was illegal.

14. Claimants complain that they were not timely notified of the Santiago civil court's judgment due to machinations by the Chilean Government. *Inter alia*, they allege that

Chile sought to deprive the judgment of any legal effect by filing an application with the Santiago civil court for a ruling *inaudita parte* which purported to establish that Mr. Pey Casado had abandoned his claim. Claimants argue that, due to the efforts to prevent the notification of the judgment, Mr. Pey Casado only became aware of its 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.

15. Claimants submit that at present they have exhausted all local remedies that could have led to the recognition and enforcement of their rights.

16. On this basis, Claimants conclude:

> « 17. L'absence de moyens effectifs permettant à l'investisseur d'exercer, d'affirmer et de protéger les droits de propriété dont le Tribunal de Santiago a reconnu l'existence pendant la période pertinente de temps, droits qui continuent à exister, de même que l'absence d'un remède à la privation de ces droits depuis la saisie de la propriété par le régime Pinochet le 11 Septembre 1973, constitue une violation de l'obligation d'un traitement juste et équitable dans le cadre de l'API Chili-Espagne. La négation en question constitue un déni de justice ; en fait, certains éléments du gouvernement du Chili ont activement et intentionnellement utilisé tous les moyens pour fermer toute voie d'accès à l'affirmation effective des droits en question.
>
> 18. En l'absence d'autres recours au Chili pour que l'investisseur puisse exercer ou récupérer le bénéfice des droits de propriété qui continuent à exister, les obstacles que le Chili a mis en place, pour rendre effectif le constat du Tribunal de Santiago en 2008, constituent une saisie indirecte et une violation des dispositions relatives à l'expropriation dans l'API Chili-Espagne.»[2]

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

> "i. Il ordonne que l'État du Chili apporte un moyen effectif de mise à disposition des investisseurs de la valeur des droits de propriété que le Jugement du 1er Tribunal civil de Santiago a reconnu dans la Sentence du 24 juillet 2008 en constatant la nullité de droit public du Décret confiscatoire du Ministère de l'Intérieur n° 165 de 1975,
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> ii. Il ordonne que l'État du Chili compense la perte du bénéfice de ces droits depuis la date de la saisie de l'investissement, de même que la somme qui découle du fait d'avoir nié aux demanderesses la capacité d'exercer leurs droits de propriété jusqu'à maintenant,
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> iii. Il ordonne en l'absence de i) que l'État du Chili paye aux investisseurs la *full value* des droits dont ils ont été privés de l'exercice de manière permanente, conformément aux principes de droit international en matière de dommages, dont l'estimation actuelle correspond à celle établie dans le Rapport *Accuracy* le 27 juin 2014 et mise à jour selon les critères établis dans ce Rapport, majorée du montant du dommage moral,

[2] Notice of Arbitration, at 17, 18.

> iv. Il condamne l'État du Chili à supporter l'intégralité des frais de la présente procédure, y compris les frais et honoraires du Membre (ou des Membres) du Tribunal arbitral, les frais de procédure (utilisation des installations, frais de traduction etc.), et, en conséquence, qu'il condamne l'État du Chili à rembourser, dans les 90 jours qui suivent l'envoi de la Sentence arbitrale à intervenir, aux investisseurs les frais et coûts de procédure avancés par eux, et qu'il rembourse aux investisseurs l'ensemble des frais et honoraires des avocats, experts et autres personnes ayant été appelées à intervenir pour la défense de leurs intérêts, portant, en cas de non remboursement dans ce délai, intérêts capitalisés trimestriellement à un taux de 10% à compter de la date de la Sentence à intervenir jusqu'à complet paiement, ou à toutes autres sommes que le Tribunal arbitral estimera justes et équitables,
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> v. Qu'il accorde tout autre remède que le Tribunal considérerait approprié. »[3]

III. RESPONDENT'S POSITION

18. Respondent argues that Claimants are attempting to resubmit to this Tribunal the same dispute that has already been submitted and adjudicated by prior ICSID tribunals.

19. Respondent makes a number of supplementary remarks with respect to the factual background of this case. Respondent notes that, following Mr. Pey Casado's September 1995 letter to the President of Chile, the Chilean Minister of National Assets informed him that the Chilean Government was developing a reparations program that would address requests such as his. However, at the time, the details of the program were still being finalized and requests for restitution could not be processed until such time as the program was formally enacted. Respondent argues that Claimants were unwilling to wait and so initiated the arbitration before ICSID, alleging *inter alia* the expropriation of the assets of CPP and EPC (the "First Proceeding").

20. According to Respondent, part of the claim for the expropriation of *El Clarín* that was submitted to ICSID was pending at the same time before the Santiago civil court. Mr. Pey Casado and the Foundation represented before ICSID that they were carving out from their consent to ICSID arbitration the claims for the confiscation of the Goss-brand printing press that were pending before the Santiago civil court.

21. Respondent adds that, in the First Proceeding, Chile raised several jurisdictional objections, including the lack of jurisdiction *ratione temporis* over events that had occurred in the 1970s, two decades before the entry into force of the Treaty. Respondent submits that, in answer to this objection, Mr. Pey Casado and the Foundation put forward a continuing expropriation theory, arguing that Decree No. 165 was null and void *ab initio* as a matter of Chilean public law and that the

[3] Notice of Arbitration, at 44.

expropriation of their investment was a continuing act that had not yet consummated and that fell under the sphere of application of the BIT.

22. Respondent adds that, in July 1998, while the First Proceeding was pending, Chile enacted Law No. 19.568 which established the reparations program referenced in the letter from the Minister of National Assets to Mr. Pey Casado. Respondent submits that, in a formal letter to the Government of Chile, Mr. Pey Casado and the Foundation indicated that they were waiving their rights to participate in the reparations program, citing the BIT's fork-in-the-road clause. According to Respondent, other shareholders of record of *El Clarín* took part in the program and were compensated. On this basis, Mr. Pey Casado and the Foundation alleged before the First Tribunal that, by compensating third parties, Chile had subjected their investment to a new expropriation that contravened the provisions of the BIT.

23. Respondent further submits that, in 2002, Mr. Pey Casado and the Foundation sought to amend their claim before the First Tribunal by requesting damages for the seizure of the Goss printing press – the claim that was then pending before the Santiago civil court.

24. Respondent adds that, in May 2008, the First Award dismissed Mr. Pey Casado's and the Foundation's continuing expropriation theory, finding that the expropriation of their investment was an instantaneous act that had consummated in 1975 and that *ratione temporis* fell outside the scope of application of the BIT. The First Award found that the BIT only applied to: (i) the compensation by the Chilean Government, pursuant to the reparations program, of third parties for the expropriation of *El Clarín*; and (ii) the lack of a judgment on the merits by November 2002 in the Santiago civil court case. The First Tribunal held on the basis of these two events that Respondent had breached the Fair and Equitable Treatment standard, including the obligation not to deny justice. The First Tribunal ordered Chile to pay to the claimants the amount of USD 10,132,690.18, bearing 5% interest, compounded annually, to be calculated from 11 April 2002 until the date of the notification of the First Award.

25. Respondent adds that, following the issuance of the First Award, Mr. Pey Casado and the Foundation attempted through various means to challenge its findings on the merits.

26. In 2008, they commenced revision proceedings, 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.* The claimants' request was rejected on 18 November 2009 as an attempt to appeal the First Award.

27. In October 2010, Mr. Pey Casado and the Foundation invoked the Santiago civil court judgment and raised the continuing expropriation theory in the annulment proceedings

initiated by Chile (the "Annulment Proceeding"). Respondent notes that, when the *ad hoc* Committee ruled that their argument and the evidence presented in support were inadmissible, Mr. Pey Casado and the Foundation appealed that ruling four times until the Committee sent them a "cease and desist" letter.

28. Respondent adds that, following the annulment of the damages section of the First Award, Mr. Pey Casado, Ms. Coral Pey Grebe[4] and the Foundation sought to rely upon the Santiago civil court judgment and the continuing expropriation theory in the resubmission proceeding (the "Resubmission Proceeding"). Respondent also contends that, in the Resubmission Proceeding, Claimants argued that Chile had attempted, in violation of the BIT, to conceal and erase the Santiago civil court judgment. In the September 2016 award (the "Resubmission Award"), the new tribunal (the "Resubmission Tribunal") dismissed this new claim for lack of jurisdiction.

29. Respondent argues that, while Claimants' case on the merits is not yet entirely clear, it is nevertheless clear from the Notice of Arbitration that Claimants are repeating the same arguments that they previously invoked in the ICSID arbitration. In particular, Respondent contends that:

i. Claimants are arguing for the sixth time that Decree No. 165 was null and void *ab initio*, citing the Santiago civil court judgment that they previously invoked in the Annulment and Resubmission Proceedings;

ii. Claimants are requesting, on the basis of the same continuing expropriation theory, that the Tribunal render an award ordering Chile to provide them with an effective means to benefit from the value of their ownership rights, which the Santiago civil court has recognized;

iii. Claimants' third request for relief in this arbitration is a request to be awarded the expropriation value of *El Clarín*, a claim that the First Award rejected as being outside the temporal scope of application of the BIT and that the Resubmission Award declared to have been finally adjudicated;

iv. the 27 June 2014 Accuracy Report referenced in Claimants' third request for relief was the expert report on damages that Claimants presented in the Resubmission Proceeding;

v. Claimants' second request for relief in this arbitration is a request for the same relief that had been requested, and denied, in the First Proceeding, the Revision Proceeding and the Resubmission Proceeding; and

vi. Claimants' allegations in this arbitration that Chile violated the BIT as a result of alleged irregularities in the proceedings before the local Chilean courts are the same allegations that were previously made in the Resubmission Proceeding.

[4] Respondent submitted that, in June 2013, Ms. Coral Pey Grebe joined Mr. Victor Pey Casado and the Foundation in the Resubmission Proceeding (Respondent's Submission, at 20).

30. Respondent acknowledges that the Resubmission Award found that Claimants' allegations relating to post-First Award events were outside the remit of the Resubmission Proceeding. However, Respondent argues that the First Award dealt with and adjudicated various issues relating to the Santiago civil court proceedings. Respondent considers that, to the extent that there was some post-First Award aspect of the local proceeding that caused new and independent harm to Claimants, Claimants should have asserted new claims on that basis in ICSID revision proceedings.

31. On the basis of the above, at this point, Respondent raises the following jurisdictional objections based on *res judicata*:[5]

1. Claimants are attempting to seek resolution of the same dispute that they previously submitted to ICSID

32. Respondent argues that, in breach of Article 10 of the Treaty, Claimants are seeking to re-litigate the same dispute that was previously submitted to ICSID, relating to the expropriation of *El Clarín* and to certain events in the Santiago civil court case.

33. In this respect, Respondent contends that Article 10 of the BIT ("if a dispute … between a Contracting Party and an investor of the other Contracting Party" is "submitted to international arbitration, it may be brought before one of the following arbitration bodies") prevents the same dispute being submitted both to an ICSID and an UNCITRAL tribunal. In Respondent's view, the same prohibition is enshrined in Article 26 of the ICSID Convention, pursuant to which "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".

34. Respondent takes exception to Claimants' statement in the Notice of Arbitration that the dispute before ICSID is conceptually distinct from the dispute before this Tribunal. In this respect, Respondent argues that:

i. The parties to the present dispute (Mr. Pey Casado, Ms. Pey Grebe and the Foundation) are the same as in the most recent ICSID proceeding (i.e., the Resubmission Proceeding);

ii. The State acts complained of in this proceeding are exactly the same as in the most recent ICSID proceeding (the expropriation of *El Clarín* and the alleged irregularities in the Santiago civil court proceeding);

[5] At paragraph 33 of its Submission, Respondent explicitly reserved its right to advance additional jurisdictional objections in future submissions, including, *inter alia*: (i) that Claimants did not have an "investment" in Chile at the time of the BIT violations that are alleged; and (ii) that Ms. Pey Grebe and the Foundation are attempting to assert claims in connection with a Chilean court proceeding to which they were not parties.

iii. The BIT provisions alleged to have been breached are the same in both the ICSID and UNCITRAL proceedings (Articles 3, 4 and 5); and

iv. The damages claim asserted in both the ICSID and UNCITRAL proceedings are exactly the same (i.e., the amount calculated in the Accuracy Report of June 2014).

35. Respondent adds that the "property rights" referred to by Claimants in their first request for relief are the property rights associated with *El Clarín* and the "value" of those rights is their expropriation value, which is being sought on the basis of the alleged nullity of Decree No. 165 – the exact same claim that was made before ICSID. Further, Claimants' reference to the "confiscation of the investment" in their second request for relief also unequivocally refers to the expropriation of *El Clarín*, which was adjudicated before ICSID. Finally, Respondent contends that Claimants' third request for relief seeks damages in the same amount as in the Resubmission Proceeding, where Claimants submitted the June 2014 Accuracy Report.

2. Claimants are seeking to challenge binding conclusions from the First Award and the Resubmission Award

36. Respondent adds that the Notice of Arbitration purports to re-litigate a number of binding conclusions from the First Award and the Resubmission Award, most notably the conclusion that the BIT does not apply to the expropriation of *El Clarín*. Respondent considers that Claimants should be prevented not only by the principle of *res judicata* to seek to re-open these claims, but also by the fact that it was their own choice to pursue a BIT claim instead of participating in the reparations program established by the Chilean Government.

37. On these bases, Respondent pleads that Claimants should be prevented from continuing their "abusive campaign of arbitral harassment"[6] against Chile by the summary dismissal of their claims and the imposition of an appropriate penalty for "their wanton abuse of the investment arbitration system".[7]

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38. Respondent argues that its jurisdictional objections above warrant the bifurcation of these arbitral proceedings.

39. Respondent considers that the Tribunal should follow the presumption established in Article 21(4) of the UNCITRAL Rules in favor of deciding objections to jurisdiction as preliminary questions.

[6] Respondent's Submission, at 41.
[7] Respondent's Submission, at 42.

40. Respondent adds that, in any event, bifurcation should be granted when the objections raised are serious rather than frivolous, if the early resolution of the objections has the potential to save time or money, to reduce or simplify the scope of a tribunal's task, and/or to provide clarity on a key question. According to Respondent, all of these conditions are satisfied in the present case.

41. First, Respondent considers that its objections are serious and not frivolous.

42. Second, Respondent argues that bifurcation would greatly increase efficiency in the present case. If the Tribunal were to uphold any one of Respondent's objections to jurisdiction, the Parties would no longer be required to address the full spectrum of issues that would normally be addressed during a full merits proceeding, which, in this case, would be extremely numerous.

43. Third, Respondent contends that bifurcation would not be inefficient, as the relationship between the present arbitration and the previous ICSID proceedings would have to be briefed by the Parties and decided by the Tribunal regardless of how the proceedings are structured. In addition, the Tribunal should not be guided solely by the fact that there is a risk that bifurcation could lengthen these proceedings, as that risk exists in all cases where a request for bifurcation is made. Respondent adds that "given the history of this dispute, at a minimum Chile should be entitled to an opportunity to avoid yet another protracted and expensive full-fledged arbitral proceeding".[8]

IV. CLAIMANTS' POSITION

44. Claimants are of the view that the Request for Bifurcation should be dismissed.

45. First, Claimants argue that Respondent's objections to jurisdiction are frivolous and bifurcation would only result in an increase of the time and costs of these proceedings.

46. In this respect, Claimants contend that all the Parties to this dispute have given their unconditional consent to arbitrate: Respondent by entering into the Treaty and Claimants by giving such consent formally, in writing, upon the initiation of this arbitration.

47. Claimants add that the *res judicata* triple identity test is not met.

[8] Respondent's Submission, at 52.

48. In their view, there is no identity of subject matter or cause of action, as the dispute before the Tribunal is entirely distinguishable from the dispute previously submitted before ICSID.

49. Claimants acknowledge that the factual background to the two disputes – the expropriation of *El Clarín* by the military government installed in Chile after the *coup d'Etat* – is the same. However, in their view, that background only serves as context for the series of Treaty breaches that are at issue in this arbitration, all of which post-date the entry into force of the Treaty and the notification of the First Award.

50. More precisely, Claimants argue that the jurisdiction of all prior ICSID tribunals was necessarily limited to events that occurred before the issuance of the First Award, on 8 May 2008. In particular, the First Award could not have addressed the judgment of the Santiago civil court or the events which succeeded its issuance, these being subsequent to the notification of the First Award. The First Award found that « à la connaissance du Tribunal, la validité du Décret n° 165 n'a pas été remise en cause par les juridictions internes et ce décret fait toujours partie de l'ordre juridique interne chilien »[9] and relied upon the continued validity of Decree No. 165 as factual support for its finding that it lacked jurisdiction *ratione temporis* over the expropriation claim. In the Annulment Proceeding, Chile successfully demonstrated that the *ad hoc* Committee was not competent to rule on the dispute that arose upon the issuance of the Santiago civil court's judgment of 24 July 2008. In the Resubmission Proceeding, the Resubmission Tribunal found that it lacked jurisdiction over any dispute between the parties having arisen after the filing of the request for arbitration on 6 November 1997. This included the Santiago civil court's finding that Decree No. 165 was null and void and any dispute between the parties that was subsequent to the rendering of this judgment.

51. Claimants argue that, on the other hand, the dispute before this Tribunal concerns conduct that occurred after the issuance of the Santiago civil court judgment of 24 July 2008, and in particular, conduct by Respondent seeking to effectively prevent any attempt by Claimants to affirm the rights recognized in the Santiago civil court judgment. In Claimants' submission, this conduct occurred in 2010, at a time when the First Award had already been rendered, and represents a new and separate breach of the Treaty. To deny them access to an UNCITRAL tribunal for these separate breaches would be to compound the denial of justice to which they have already been subjected.

52. As further support for their contention that the dispute before this Tribunal was never heard before ICSID, Claimants refer to the Resubmission Award, which found as follows:

[9] *Victor Pey Casado et Fondation "Président Allende" c : République du Chili* (Affaire CIRDI N°ARB/98/2), Sentence, 8 mai 2008, para. 603.

> « Le Tribunal relève également à ce stade qu'une partie de l'argument qui lui est présenté par les Demanderesses dans la présente procédure de nouvel examen consiste à soutenir que les actions de la Défenderesse, depuis la transmission de la Sentence Initiale, ont constitué un nouveau déni de justice, au titre duquel une compensation est due et peut être accordée dans la présente procédure de nouvel examen. Le Tribunal doit rejeter cet argument purement et simplement. La raison en est non seulement que des allégations de cette nature devraient faire l'objet d'un processus de production d'éléments de preuve en bonne et due forme avant de pouvoir convenablement donner lieu à une décision dans une procédure arbitrale (et elles seraient effectivement soumises à un tel processus) ; mais aussi, tout simplement, que l'ensemble de cet argument n'entre clairement pas dans le champ de compétence de ce Tribunal, qui (comme cela a déjà été indiqué) est limité, en vertu de l'article 52 de la Convention CIRDI et de l'article 55 du Règlement d'arbitrage du CIRDI, exclusivement au « différend » ou aux parties de celui-ci qui demeurent après l'annulation. Ces termes ne peuvent être interprétés que comme une référence au « différend » qui avait été initialement soumis à l'arbitrage, différend pour lequel la date critique était la requête d'arbitrage initiale des Demanderesses. Les questions qui ont surgi entre les Parties après cette date – et a fortiori les questions découlant d'une conduite postérieure à la Sentence – ne peuvent pas, même avec un gros effort d'imagination, entrer dans le champ de la procédure de nouvel examen en vertu des dispositions citées ci-dessus, et le Tribunal estime qu'il n'est pas nécessaire d'en dire plus sur cette question dans la présente Sentence. »[10]

53. Claimants add that, because the ICSID tribunals never ruled on the merits of their expropriation claim and merely declared to have no jurisdiction to entertain it, this should not prevent this Tribunal from hearing it.

54. Claimants further submit that Respondent's *res judicata* objections cannot be upheld as there is no identity of parties between this arbitration and the prior ICSID proceedings. They note in this respect that the Resubmission Award ruled that Ms. Pey Grebe did not have standing in the Resubmission Proceeding.

55. Claimants add that, because the dispute before this Tribunal is distinct from the ones adjudicated by prior ICSID tribunals, Article 10 of the Treaty allows them to choose between submitting their new dispute to ICSID or UNCITRAL arbitration.

56. Claimants add that Respondent's reliance upon Article 10(3) of the BIT's reference to "one of the following arbitration bodies" is inapposite. In their view, the term "one" performs the function of an indefinite article, not that of a numeral. In addition, Article 10(3) cannot serve to exclude the jurisdiction of an UNCITRAL tribunal for a dispute that is conceptually distinct from the dispute previously adjudicated by an ICSID tribunal. Claimants consider that their interpretation of Article 10(3) of the Treaty is in conformity with fundamental principles of treaty interpretation established in the Vienna Convention on the Law of Treaties (the "VCLT"). Claimants argue that, in contravention to these principles, Respondent purports to add

[10] *Victor Pey Casado et Fondation "Président Allende" c : République du Chili* (Affaire CIRDI N°ARB/98/2), Sentence, 13 Septembre 2016, para. 216.

to Article 10(3) of the Treaty a condition which is not stated therein and which would effectively block access to an UNCITRAL tribunal for a dispute that is distinct from the one previously adjudicated by an ICSID tribunal.

57. Claimants further argue that, equally, Article 26 of the ICSID Convention does not assist Respondent's case. Claimants contend that Article 26 of the ICSID Convention contains a rule of interpretation of parties' consent to ICSID arbitration, but this rule can be displaced. In the case of dispute settlement provisions that offer a choice between ICSID arbitration and other dispute settlement procedures, Article 26 does not exclude an investor's right to choose a forum different from ICSID.

58. Second, Claimants argue that the Request for Bifurcation should be dismissed as Respondent's jurisdictional objections are intertwined with, and cannot be heard separately from, the merits. In this respect, Claimants submit that the Santiago civil court's finding that Decree No. 165 was null and void is a central point of this arbitration and its examination touches upon both jurisdiction and the merits. Bifurcating Respondent's objections would therefore only result in an increase of the duration and costs of these proceedings.

59. For all these reasons, Claimants request that the Tribunal dismiss the Request for Bifurcation and join Respondent's objections to the merits.

60. In the alternative, Claimants propose that the Parties file their first round of memorials and then, based on their full submissions and the evidence in the record, the Tribunal decide whether or not to bifurcate.

61. Finally, Claimants take exception to Respondent's allegation that these proceedings are abusive. Claimants argue that they have not sought to fabricate jurisdiction under an investment treaty, and the consent of the Parties is clearly established and governed by international law. In their view, the disputes brought before the ICSID and UNCITRAL tribunals are distinct and they are not seeking to multiply arbitral proceedings in order to increase their chances of success. Claimants add that, by filing this claim, they are not seeking to obtain a benefit that is incompatible with the investment arbitration system but only to seek a remedy for the Treaty violations that they have been subjected to.

V. THE TRIBUNAL'S ANALYSIS AND DECISION

62. At the outset, the Tribunal emphasizes that its task at this stage of the proceedings is not to decide or take any position on the procedural objections raised by Respondent. 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.

63. The Tribunal agrees with Respondent that Article 21(4) of the UNCITRAL Rules creates a presumption in favor of bifurcation:

> "(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."

64. 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.

65. The Tribunal is sensitive to the fact that the Parties to this arbitration have been on opposing sides in a number of arbitral and judicial disputes during the last twenty years. Both Parties agree and the Tribunal is keenly aware that considerable care has to be taken in order to ensure that these proceeding are administered efficiently. The history of the legal disputes between the Parties is both lengthy and complex, involves a number of interconnected rulings and the Tribunal must ascertain the precise relationship between them and their connection with the present arbitral proceedings.

66. The Parties agree and the Tribunal concurs 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.

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".[11] 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"[12] and that Claimants' Notice of

[11] Respondent's Submission, at 1.
[12] Respondent's Submission, at 31.

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.[13]

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.

69. The Tribunal considers that postponing a decision on Respondent's Request for Bifurcation until after the Parties have filed their first round of memorials would better guarantee the efficient administration of these proceedings. By that time, the Tribunal will have more information before it with regard to the substance of Claimants' claims and Respondent will have set out all of its jurisdictional objections, not just the two it has raised thus far.

70. For these reasons, the Tribunal hereby postpones rendering a decision on Respondent's Request for Bifurcation until after the Parties have filed their first round of submissions. The Parties are directed to confer and agree on a calendar for their first round of memorials, bearing in mind that they are instructed to set out their complete case on both the merits and jurisdiction.

71. The Parties are to revert to the Tribunal with a proposal for such a calendar within 14 days of the notification of the present Procedural Order.

On behalf of the Arbitral Tribunal
Bernard HANOTIAU
President of the Tribunal

[13] The Tribunal recalls that, pursuant to Article 21(3) of the UNCITRAL Rules, "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim."