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Pey Casado files a new UNCITRAL arbitration against Chile; meanwhile, arbitrator challenge is rejected in parallel long-running ICSID claim

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While a long-running ICSID case against Chile remains ensnarled in interpretation, rectification and challenge proceedings – with ICSID rejecting today the claimants' latest effort to disqualify certain arbitrators* – an indefatigable set of claimants are now opening up a new legal front.

Victor Pey Casado, Coral Pey Grebe, and the President Allende Foundation have circulated a request for arbitration, that purports to commence new UNCITRAL-based proceedings against the Republic of Chile.

The April 12, 2017 request [click to download: French or Spanish] refers to the same Spain-Chile bilateral investment treaty (BIT) at the basis of the ICSID claim Mr Casado and his foundation started twenty years ago.

The new proceedings center on the claimants' stake in the Consorcio Publicitario y Periódico S.A. (CPP), a Chilean company that owned a newspaper shut down by the Pinochet Government on account of its sympathies for the previous president, Salvador Allende. Mr Pey Casado owned 10% of CPP, which were assigned to his daughter, Ms Pey Grebe, in 2013;** the President Allende Foundation owns the remaining 90%.

Readers will recall that the ICSID dispute, filed in 1998, resulted in a 2008 award that found that the alleged *expropriation* of the claimants' investment was beyond the BIT's temporal scope. Arbitrators did award compensation for Chile's breaches of the BIT's fair and equitable treatment standard, but the award was partly annulled in 2012, when an *ad hoc* committee found that Chile had been not been able to present arguments with respect to the damages. A second tribunal was thus tasked with hearing the resubmitted claim and last September ruled that the claimants had failed to prove any damages under the BIT. As noted, interpretation, revision and challenge proceedings are still ongoing.

Santiago court's 2008 judgment at the basis of the new claim

The new claim appears to seize upon a local court judgment in Chile that arose shortly after the 2008 merits award in the ICSID case.

In July 2008, shortly after the ICSID tribunal concluded that the alleged expropriation was beyond the BIT's temporal scope, a Santiago civil court judgment finally answered Mr Pey Casado's efforts to recover one physical asset: a Goss printing press seized during the coup d'état. (While the 2008 ICSID award deemed the expropriation claim to be outside its jurisdiction, arbitrators had found that delays in resolving this Chilean case constituted a denial of justice).

The claimant's shares in CPP, and the assets of the company, had been taken by the Chilean government through a 1975 decree signed by the Pinochet government. According to the claimants, the Santiago court in the 2008 judgment found the 1975 decree to be void. (However, as we have noted, the 2016 award recorded the arbitrators' doubt as to the claimants' interpretation of this local judgment.)

Notably, the Santiago court also found that the five-year limitations period under Chilean law applied from 1975 and that, therefore, Mr Pey Casado could not succeed in a claim for recovery. In the newly-filed RFA, the claimants challenge the Santiago court's findings in this respect, stressing that Mr Pey Casado had to enter into exile following the coup d'état, and could not bring his domestic court claim until democracy had been restored in Chile.

The claimants also allege that later wrongful actions by Chile hobbled the Chilean proceedings; in particular, Chilean officials allegedly prevented the judgment from being sent to Mr Pey Casado personally. Mr Pey Casado became aware of the 2008 judgment only in January 2010,*** after Chile had already successfully moved for the local case to be deemed to have been "abandoned" and thus discontinued..

Claimants seek remedy for breaches of discrimination, FET and indirect expropriation

In the claimants' view, the Santiago court's 2008 judgment therefore confirmed the existence of the claimants' rights over the confiscated property. That they were nonetheless eventually denied a remedy constitutes a denial of justice and a breach of the fair and equitable treatment standard. The lack of remedy, as well as Chile's efforts to bar the claimants from obtaining such remedy, themselves amounted to an indirect expropriation of the claimants' rights.

Without further elaboration, the claimants also cited articles 3 and 10(5) of the Spain-Chile BIT. The former provides for the prohibition of unjustified and discriminatory measures impairing the investment. The latter provides that arbitral awards obtained in investor-state proceedings should be "final and binding" for the parties.

Claimants allege that first investor dispute not a bar to the new one

The connection between the ICSID claims and the new request for arbitration being apparent, the RFA also expounds on what allegedly distinguishes this new claim from the previous one. Such explanation seems important given the *res judicata* effects of the 2008 and the 2016 ICSID awards, but also in view of article 26 of the ICSID Convention which provides that consent "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."

According to the claimants, the 2016 award did not rule on the consequences of the 2008 judgment from the Santiago Court, nor on Chile's allegedly wrongful actions that followed this judgment.

Moreover, the request for arbitration emphasizes the 2016 award's finding that the conclusions of the tribunal did "not touch the finding in the First Award that the Respondent had committed a breach of Article 4 of the BIT by failing to guarantee fair and equitable treatment to the Claimants' investments, including a denial of justice; that finding is *res judicata* and was not part of the present resubmission proceedings. It thus represents a subsisting obligation on the Respondent and one which, as the First Tribunal found, arose out of a failure in the operation of the Chilean internal system for the redress of acknowledged past injustices."

Same damages are sought as in the first arbitration

In terms of compensation, the RFA sheds limited light on the claimants' new case. The RFA briefly indicates that the claimants are seeking the sums listed in a 2014 valuation report compiled by Accuracy, "of which Chile owns a copy," and as updated to current value, and including moral damages. In all likelihood, this refers to the expert report filed in the context of the claimants' resubmitted ICSID claim, and discussed in the 2016 award.

Claimants favour sole arbitrator to hear the claim

The Request records the claimants' preference for Montreal as the seat of arbitration, and French as the language of the proceedings. The claimants also propose that Luis Moreno Ocampo, a former prosecutor before the International Criminal Court, but a figure not typically associated with investment law disputes, be designated as a sole arbitrator.**** The claimants also propose the Secretary General of the Permanent Court of Arbitration as appointing authority.

We hope to get Chile's observations on the newly-filed UNCITRAL claim in the coming days.

* ICSID indicated today that the claimants' challenge to arbitrators Berman and Veeder had been rejected by the chairman of ICSID's administrative council. However, the reasoned decision was not published as of press time.

** Mr Pey Casado's 10% stake in CPP was assigned to his daughter in 2013. The possibility of allowing both individuals to be claimants nevertheless had been acknowledged by the most recent award in the ICSID claim (see here).

*** The same allegations, in the context of the 2016 ICSID award, referred to January 2011, and not 2010.

**** The Request, in both its Spanish and French version, refers to "Luis Moreno *Campo*" and not "Ocampo."

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