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New Developments in the Dispute between Pey Casado and Chile

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The dispute

In the last few months, the long-lasting dispute between Mr Pey Casado and the Foundation Presidente Allende (the “**Claimants**”) and the Republic of Chile (the “**Respondent**”) has seen numerous developments. The case concerns the occupation and confiscation of the newspaper *El Clarín* by the Respondent following General Augusto Pinochet’s coup d’état in 1973 and related measures taken by the Respondent since then in order to provide compensation to those who suffered losses while General Augusto Pinochet was in power. As noted by the tribunal in one of the awards in the case, “the facts underlying the case entwine high politics with the personal fate of individuals, and commercial and economic relations with personal connections and family relationships”.

Currently, there are two sets of arbitral proceedings relating to this dispute. The first set of proceedings is before the International Centre for the Settlement of Investment Disputes (“**ICSID**”). This is the longest-running case in ICSID history. The Claimants, however, recently requested to discontinue the ICSID proceedings. The second set of proceedings was commenced by the Claimants in April 2017 under the UNCITRAL rules.

The ICSID proceedings

The ICSID case has been running for approximately 19 years. The ICSID Secretariat registered the case in April 1998. The tribunal, in that original proceeding, (the “**First Tribunal**”) rendered its award in May 2008 (the “**First Award**”). The First Tribunal concluded that the Respondent had violated the fair and equitable treatment provision of the Spain-Chile BIT (the “**BIT**”) in two ways. First, it committed a denial of justice by not deciding Mr Pey Casado’s claims for seven years. Second, it acted in a discriminatory manner by paying compensation for the expropriation of the newspaper to third parties and not to Mr Pey Casado.

In the following months, the parties initiated a number of post-award proceedings. One of those proceedings resulted in the annulment of the First Award’s *dispositif* on damages. In June 2013, the Claimants filed a new request for arbitration that led to the issuance of another Award in September 2016 (the “**Second Award**”), more than 18 years after the institution of the original proceeding. The tribunal in the Second Award (the “**Second Tribunal**”) rejected the Claimants’ claims for damages. The Second Tribunal explained that its function was limited to deciding those parts of the original dispute that had remained unresolved following the partial annulment of the First Award. The Second Tribunal rejected all claims outside that scope. Given that the *ad hoc* Committee had annulled the specific damages awarded by the First Tribunal, the Second Tribunal’s task was limited to analysing the nature and amount of compensation due as a result of the breaches found by the First Tribunal. The Second Tribunal concluded that the Claimants had failed to prove any damage, either material or moral, caused to them specifically by the Respondent’s breach of the standard of fair and equitable treatment. On that basis, the Tribunal concluded that it could not make any award of damages.

Following the Second Award, the Claimants filed a number of requests with ICSID. On 7 October 2016, the Claimants registered a request for an official interpretation of the First Award under Article 50 of the ICSID Convention. In this request, the claimants sought *inter alia* to clarify the meaning of the findings that the Respondent had violated the fair and equitable treatment standard and that the Claimants are entitled to compensation. According to the Claimants, these findings entail that they are entitled to monetary compensation. On 27 October 2016, the Claimants filed a request for rectification of the Second Award in accordance with Article 49 of the ICSID Convention. However, in the request for rectification, the Claimants requested the tribunal to stay the procedure until a decision in the interpretation proceedings is issued.

In addition to the above requests, the Claimants also filed two disqualification proposals. On 22 November 2016, the Claimants filed a request for the disqualification of arbitrators Franklin Berman and VV Veeder, both barristers at Essex Court Chambers, on the grounds that they failed to disclose that one of their colleagues at Essex Court Chambers had represented the Respondent in an international dispute. On 21 February 2017, ICSID Administrative Council Chairman Jim Yong Kim rejected the challenges since they had not been filed promptly, as required by Rule 9 of the ICSID Arbitration Rules. According to the decision issued by Mr Kim, the Claimants had known or should have known the reason underlying the disqualification proposals since 2014.

Following the dismissal of the double challenge, the Claimants filed two further requests for disqualification. On 23 February 2017, the Claimants requested the disqualification of VV Veeder on the basis of alleged omissions in his responses in the context of the previous disqualification proposal. On 1 March 2017, one of the other arbitrators, Mr Berman, requested ICSID that the new challenge be decided by the Chairman of the Administrative Council, rather than the two remaining arbitrators. Mr Berman explained that, since he and VV Veeder are barristers at the same chambers and they had been subject to a previous challenge in these proceedings, a decision issued by him could be seen as lacking in impartiality. On 4 March 2017, the Claimants filed a request for the disqualification of Mr Berman, which is related to its request not to decide on VV Veeder's disqualification proposal. On 13 April 2017, Mr Kim, ICSID Administrative Council Chairman, dismissed both challenges.

Following the rejection of the disqualification proposals, on 21 April 2017, the Claimants requested ICSID to discontinue both the interpretation and the rectification proceedings on the ground that two members of the tribunal lack impartiality and neutrality. If the Respondent does not object to the requests in accordance with Rule 44 of the ICSID Arbitration Rules, the longest case in the history of ICSID will come to an end.

The UNCITRAL proceedings

The request to discontinue the ICSID proceedings, however, is not the end of the dispute between the Claimants and the Respondent. A few days before requesting to discontinue the ICSID proceedings, the Claimants—joined by Mr Pey Casado's daughter, Ms Coral Pey Grebe—filed a new request for arbitration against the Respondent, this time under the UNCITRAL rules. In their request, the Claimants and Ms Pey Grebe allege that the case relates to facts different from those addressed by the ICSID tribunals. In particular, the Claimants and Ms Pey Grebe argue that the Respondent violated multiple provisions of the BIT—including those on expropriation and fair and equitable treatment—in relation to a judgment issued by a Chilean court in 2008. The Claimants requested that the case be decided by a sole arbitrator and proposed Mr Luis Moreno Ocampo, former Prosecutor of the International Criminal Court, for this role. It remains to be seen how this newly submitted case will develop.