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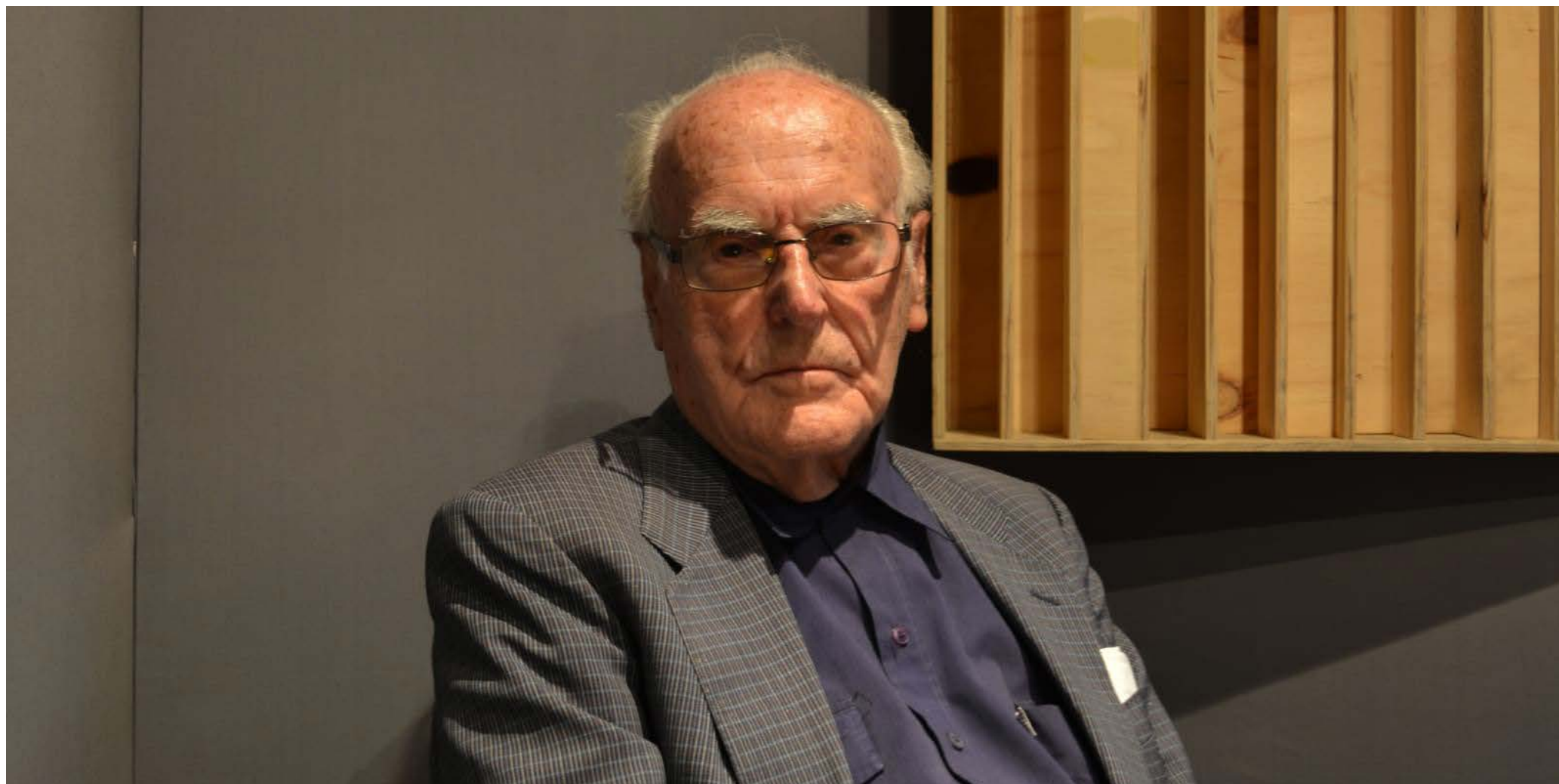
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From ICSID to UNCITRAL: Pey Casado saga to continue in different guise

24 April 2017



Victor Pey Casado, Wikimedia Commons

On 21 April, Pey [filed requests](#) to terminate ICSID interpretation and rectification proceedings he began late last year in respect of a pair of awards in his 20-year-long dispute with Chile over the seizure of his newspaper, *El Clarín*, during a 1973 coup by dictator Augusto Pinochet.

The requests were filed with his longstanding co-claimant the Salvador Allende foundation, which is named after Pinochet's democratically elected predecessor as president who was killed during the coup.

They came a few days after Pey, his daughter Coral Pey Grebe and the foundation sent a [notice](#) of arbitration to Chile's president Michelle Bachelet informing her of a new UNCITRAL claim against the state.

The UNCITRAL claim could give a new lease of life to the 102-year-old Pey's pursuit of Chile. In the words of his counsel **Juan Garcés** of Garcés y Prado in Madrid, it is "conceptually distinct" from the ICSID claim, which focused on the confiscation of Pey's property and Chile's subsequent failure to compensate him.

Instead, the new claim relates to a 2008 court ruling in Santiago that Pinochet's confiscation decree was a "nullity in public law" and that Pey and his foundation remained the rightful owners of the property.

Pey alleges that "agents of the Chilean state" prevented him from learning of the court ruling for two-and-a-half years and have continued to block him from exercising his rights, in breach of the fair and equitable treatment, denial of justice and expropriation provisions of the Chile-Spain bilateral investment treaty.

In his notice of arbitration, he alleges that individuals implicated in Pinochet's tyrannous regime continue to hold high office in the military, media and justice system in Chile and "highly motivated to undermine the ambitious efforts at transitional justice inspired by the new democracy".

He makes numerous references to "the deep dictatorial state," in what may appear a conscious echo of the term "deep state" used by Donald Trump's adviser Stephen Bannon to evoke a permanent network of personnel and interests embedded in the US government.

Pey and his co-claimants have requested the UNCITRAL claim be heard by a sole arbitrator in Montreal, with the secretary general of the Permanent Court of Arbitration as appointing authority, and have proposed the appointment of former International Criminal Court prosecutor **Luis Moreno Ocampo** of Argentina.

If selected, he would join a lengthy rollcall of over 15 arbitrators that have heard parts of the case since it was first filed at ICSID in 1997.

After 10 years and multiple arbitrator changes, the case reached its first award in 2008, when a tribunal chaired by the late **Pierre Lalive** rejected Pey's expropriation claim on jurisdictional grounds but ruled that Chile had denied him justice by taking over a decade to conclude a restitution claim he filed in the Santiago courts in 1995 and by awarding compensation to parties who were not owners of the newspaper.

The Lalive tribunal awarded Pey US\$10 million but an annulment committee chaired by **Yves Fortier QC** struck down the damages portion of the award in 2012, while leaving the finding of liability for breach of justice intact.

Pey tried his luck at ICSID again in 2013, filing a US\$340 million claim against the state in relation to the breach of justice alone. This time, a tribunal chaired by **Sir Franklin Berman QC** rejected the claim, ruling that the publisher and foundation had not proved "any further quantifiable injury to themselves" since the 2008 award.

The ongoing rectification request at ICSID relates to the 2013 award and is being heard by Berman, alongside co-arbitrators VV Veeder QC appointed by Pey and Alexis Mourre appointed by Chile.

The interpretation request relates to the 2008 award and the tribunal which will hear it is yet to be finalised. Chile has appointed Canadian arbitrator Stephen Drymer, while Pey has nominated Helene Ruiz Fabri. ICSID has nominated French-Lebanese arbitrator **Raïd Fathallah** to chair the panel but his appointment has yet to be confirmed.

In seeking to terminate both proceedings, Pey alleges that the majority of the tribunal has a conflict of interest that warrants their termination. In the first, he says that Berman and Veeder lack independence and impartiality due to their membership of London barristers' set Essex Court Chambers, other members of which have advised Chile in disputes in the past. The chair of ICSID's administrative council has already dismissed two challenges to Berman and Veeder on those grounds

In the second proceeding, he says both Drymer and Fathallah are conflicted because Fathallah's firm, Bredin Prat, is appearing as counsel for Croatia in an ICSID case filed by Dutch energy claimant Amlyn Holding, with Drymer as chair of the tribunal.

If there are no objections by Chile, ICSID will terminate the proceedings. The state's counsel, Paolo Di Rosa of Arnold & Porter, has not responded to requests for comment.

In the UNCITRAL claim

President Allende Foundation, Victor Pey Casado, Coral Pey Grebe v Chile

Counsel to claimants

- Garcés y Prada

Partner **Juan Garcés** in Madrid

Victor Pey Casado and Foundation Presidente Allende v Chile (ICSID Case No. ARB98/2)

In the resubmission proceedings

Tribunal

- **Franklin Berman QC** (UK) (Chair)
- **VV Veeder QC** (UK) (replaced **Philippe Sands** in 2014)
- **Alexis Mourre** (France)

Counsel to Victor Pey Casado and Foundation Presidente Allende

- Garcés y Prada

Partner **Juan Garcés** in Madrid

Gide Loyrette Nouel

Partner **Carole Malinvaud** and counsel **Alexandra Munoz** in Paris

- Buckley Sandler

Partner **Samuel Buffone** in Washington, DC

Counsel to Chile

- Arnold & Porter

Partners **Paolo Di Rosa** and **Gaela Gehring Flores** and associate **Mallory Silberman** in Washington, DC

- Carey & Cia

Partners **Jorge Carey** and **Gonzalo Fernández** and associate **Juan Carlos Riesco** in Santiago de Chile

In the annulment proceeding

Ad hoc annulment committee

- **Yves Fortier QC** (Canada)
- **Piero Bernardini** (Italy)
- **Ahmed El Kosheri** (Egypt)

Counsel to Victor Pey Casado and Foundation Presidente Allende

- Garcés y Prada Abogados in Madrid

Partner **Juan Garcés** in Madrid

- Gide Loyrette Nouel

Partner **Carole Malinvaud** and associate **Alexandra Muñoz** in Paris

- Buckley Sander

Partner **Samuel Buffone** in Washington, DC

Counsel to Chile

- Foreign Investments Committee

Matías Mori Arellano and **Carlos Dettleff** in Santiago

- Arnold & Porter

Partners **Paolo Di Rosa**, **Jean Kalicki*** and associates **Samuel Witten** and **Mallory Silberman** in Washington, DC

*no longer with the firm

- Carey & Cia

Partners **Jorge Carey** and **Gonzalo Fernández Ruiz** in Santiago

In the original arbitration

Arbitral tribunal

- **Pierre Lalive** (President) (Switzerland) - appointed following the resignation of **Francisco Rezek** (Brazil)
- **Mohammed Chemloul** (Algeria) - appointed following the disqualification of **Mohammed Bedjaoui** (Algeria)
- **Emmanuel Gaillard** (France) - appointed by ICSID following the resignation of **Jorge Witker** (Mexico) and **Galo Leoro Franco** (Ecuador)

Counsel to Victor Pey Casado and Allende Foundation

- Cabinet Garcés y Prada Abogados

Partner **Juan Garcés** in Madrid

- Gide Loyrette Nouel

Partner **Carole Malinvaud** and associate **Alexandra Muñoz** in Paris

- Ropes & Gray

Partner **Samuel Buffone** in Washington, DC

- Boston University School of Law

William W Park

Counsel to Chile

- Chief of justice, ministry of the economy, development and reconstruction, **Eduardo Escalona Vázquez**
- Department for defence of arbitrations relating to foreign investments, Ministry of Economy, Development and Reconstruction **Eduardo Bobadilla Brinkmann, Nicolás Muñoz Montes** and **Diego Rioseco Antezana**
- Carey & Cía

Partners **Jorge Carey** and **Gonzalo Fernández Ruiz** in Santiago

- Arnold & Porter (from 2007)

Partner **Paolo Di Rosa** in Washington, DC

- Winston & Strawn (from 2004 to 2007)

Partner **Paolo Di Rosa** in Washington, DC

- White & Case (from 1997 to 2004)

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