



Pey Casado dies at 103 but claim lives on

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Victor Pey Casado Wikimedia Commons

Victor Pey Casado, the claimant in ICSID's longest running case, has died aged 103, but the claim he started against Chile 21 years ago, which has been through various iterations and is now being heard at the Permanent Court of Arbitration in The Hague, continues in the name of his daughter and a foundation he established.

The former publisher, engineer and businessman, who was a native of Spain, died in Santiago on 5 October. His counsel tells GAR that his attempts to gain compensation from Chile for the seizure of his newspaper, *El Clarin*,

during the 1973 coup that brought Augusto Pinochet to power will continue in the name of his daughter and co-claimant, Coral Pey Grebe, to whom he transferred all shares in the newspaper's holding company when he was 96.

The claim also continues in the name of another co-claimant, the President Allende Foundation, named after Pey's friend, Salvador Allende, who was president of Chile from 1970 to 1973 and who was killed in the coup.

In its latest iteration, the claim is being heard at the PCA by an UNCITRAL tribunal presided over by **Bernard Hanotiau** of Belgium and including **Hélène Ruiz Fabri** of France and **Stephen Drymer** of Canada as co-arbitrators, appointed by the claimants and Chile respectively. The tribunal issued a decision upholding Chile's request for bifurcation of the case in late June.

Born in Madrid in 1915, Pey fought in the Spanish Civil War in the late 1930s on the side of the left-leaning Republicans, who supported the established government of Spain against the far-right nationalists led by General Franco.

He later worked with his brother in an armament factory near the Republicans' capital, Barcelona, and was an adviser to the Spanish government in exile there.

After the fall of Barcelona during the Catalonia offensive of 1939, he and his brother Raul crossed the Pyrenees into France where they were arrested and taken to a prison camp.

They escaped to Paris and later headed to exile in Chile on board a ship named the *Winnipeg*, among some 2,000 Spanish refugees whose passages were arranged by the Chilean poet-diplomat Pablo Nureda, a later winner of the Nobel Prize for literature.

On arrival in Chile in September 1939, Pey settled in Santiago and got a job as a surveyor on an aqueduct construction project, later forming a company with his brother that was responsible for building commercial ports and other infrastructure. He also wrote a column for the *La Hora* newspaper.

After meeting the future President Allende at a *La Hora* party in the 1940s, he became one of his advisers and closest associates along with the likes of Nureda.

In the 1970s, Pey took over as publisher of *El Clarin* newspaper, which is claimed to have been the most widely read newspaper in Chile at the time, using it to promote support for President Allende and his socialist policies. In the wake of the coup, that newspaper was seized by Pinochet's government and its assets transferred to the state by a 1975 decree.

For the second time in his life, Pey was forced into exile. He lived in Venezuela, then Spain and did not return to Chile until after the fall of the military regime in the 1990s, when the state adopted measures to make reparations for crimes and illegal acts committed during Pinochet's dictatorship including politically motivated seizure of property.

However, the former publisher was not successful in obtaining restitution of his property or compensation through judicial proceedings, with money instead awarded by Chile to four other individuals whose names appeared in *El Clarin*'s sharehold registry.

Aged 100, Pey was made honorary rector of the University of Chile. He was never to have the satisfaction of seeing his losses compensated.

Commenting on his death, which came on the 30th anniversary of the 1998 plebiscite in which the Chileans said "no" to Pinochet remaining in power, the university said that a "defender of human rights and freedom of expression" had passed.

Pey's dispute with Chile, 1997 - 2017

In 1997, Pey and the foundation started arbitration against Chile at ICSID under the Spain-Chile bilateral investment treaty. Nearly a decade later, in 2008, a first tribunal issued its award, ruling that it lacked jurisdiction over the bulk of the claims as the expropriation of the claimants' property had occurred in 1975 before the entry into force of the BIT.

The first tribunal - composed (after numerous arbitrator changes) of **Pierre Lalive** of Switzerland, **Emmanuel Gaillard** of France and **Mohammed Chemloul** of Algeria - upheld one claim for the breach of the fair and equitable treatment standard of the BIT, finding that Chile had committed a denial of justice as a result of delay in issuing a judgment on the merits of Pey's claim for compensation.

However, it said the claimants had put forward no evidence for damages relating to this breach and said it would evaluate it based on objective criteria. In the end it awarded only some US\$10,000 damages, equivalent to the amount Chile had awarded the other claimed El Clarin shareholders.

Pey and the foundation failed to get that first award revised on the basis of alleged new evidence that supported their claim for US\$800 million in damages and later both they and Chile applied to annul the award. In 2012, an ICSID ad hoc annulment committee composed of **Yves Fortier QC** of Canada, **Piero Bernardini** of Italy and **Ahmed El Koshi** of Egypt agreed to annul the section on damages, finding that Chile had been denied the right to be heard and the first tribunal had given contradictory reasons for its damages findings.

Chile subsequently sought and obtained a supplementary decision from the tribunal identifying interest due to it on costs incurred by Pey and the foundation.

Shortly after, a resubmitted ICSID arbitration was underway, in which Pey, the foundation and (this time) Coral Grebe sought compensation for a denial of justice by the Chilean courts. That claim was heard by **Franklin Berman** of the US, **VV Veeder QC** of the UK and **Alexis Mourre** of France (with Veeder replacing **Philippe Sands**, who resigned after a challenge).

The tribunal found that the only issue properly before it was the nature of the compensation due for breaches established by the first award and that allegations relating to Chilean court judgments were outside its jurisdiction. It confirmed that the first tribunal's ruling that it lacked jurisdiction over the claimants' expropriation claim for temporal reasons had res judicata effect and that the request for damages resulting from the original expropriation should be rejected on that basis.

Since the claimants had only put forward evidence as to damages owed for the expropriation, not the breach of fair and equitable treatment, the tribunal said they should get nothing.

It also said Grebe could not be considered an independent claimant because she had not been a claimant in the first arbitration.

Following this second award in 2016, Pey, the foundation and Grebe challenged the independence and impartiality of Berman and Veeder, noting that barristers in the same chambers as them in London had worked on other matters involving Chile. Their request for disqualification of the two arbitrators was rejected by the chairman of the ICSID Administrative Council, who said that the information that formed the basis of the challenges had been publicly available in the media since 2012 without concerns being raised.

Further challenges against each arbitrator were treated by ICSID as a proposal to disqualify the majority of the tribunal and referred again to the chairman of the Administrative Council, who issued a second decision rejecting them in 2017. The tribunal went on to issue a decision on a request for rectification of the second award that the claimants had filed the year before, correcting clerical errors only.

The PCA case

Last April, the claimants began the new arbitration at the PCA before the Hantiaou-led tribunal, which is running concurrently with an ICSID proceeding in which they seek the annulment of the second award (being

heard by **Rolf Knieper** of Germany, **Yuejiao Zhang** of China and **Nicolas Angelet** of Belgium).

In the new case, they argue that Chile breached the Spain-Chile BIT by failing to comply with its obligations under the first award and failing to put an end to the treaty violations it established, including denial of justice.

They also argue that Chile breached the BIT by refusing to disclose “close and secretive financial connections” between the state and several members of Berman and Veeder’s chambers, Essex Court Chambers in a further denial of justice in the resubmitted arbitration.

They say the PCA case is “conceptually distinct” from the earlier proceedings and are seeking restitution, damages and moral damages as well as reimbursement of their costs for the first arbitration, the revision proceeding, the first annulment proceeding, the supplementation proceeding and an enforcement proceeding in Spain relating to the first award.

Chile, for its part, seeks the dismissal of the claims on jurisdictional grounds, arguing among other things that the first award conclusively determined the expropriation of *El Clarin* in the 1970s was outside the temporal scope of the treaty and that *res judicata* principles prevent the claimants from challenging this by asserting it was a “continuous act” or seeking moral damages in respect of it.

The state also argues that the exclusivity rule that attaches to ICSID proceedings prevents them from now arguing before an UNCITRAL tribunal that the state failed to comply with the final ICSID award; and that the costs orders of the respective ICSID tribunals have been paid and may not be revisited.

It says that the BIT does not apply to any of the claims asserted in the new arbitration and that the tribunal lacks jurisdiction to entertain claims for the alleged non-performance of the first award or “related to the Essex Court Chambers issue”.

In the latest decision on bifurcation in June, which has not been reported by GAR to date, the tribunal considered the above objections and said they should be considered as preliminary questions – holding they are “prima facie serious and substantial” and go to “the very basis of the tribunal’s power to award the relief sought by [the] claimants.”

If admitted, the objections will either dispose of the case all together or decrease the number of claims, it noted – making it efficient to hear them first.

The tribunal said just one jurisdictional objection raised by Chile should be heard in the merits phase, concerning a particular Santiago civil court judgment from 2008 that was favourable to the claimants but the benefits of which they say they have not been able to reap.

Answering this objection will involve assessing whether the denial of justice identified in the first award “encompasses ... the lesser offences of unfair and inequitable treatment and discrimination,” the tribunal said – an inquiry that “goes to the heart of the substance of the claimants’ treaty claims”.

Victor Pey Casado (1915-2018) is buried in Santiago, at the former home of his friend Nureda, who died during the 1973 coup, and his second wife, the Argentine artist Delia del Carril, which is now a museum.

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