

Chile Round-Up: Developments in the Pey Casado saga, new under-the-radar arbitrations and domestic proceedings involving foreign investors, and updates on pending ICSID proceedings

Published: Oct 31, 2024 | By:

Below, we provide updates on arbitration-related developments involving Chile, including:

- A ruling by the Supreme Court of Chile that declared that the 1975 expropriation of the El Clarín newspaper, at the centre of the [Victor Pey Casado and President Allende Foundation v. Chile](#) arbitrations, null and void.
- A dispute between the Chinese lithium company Tianqi and the Chilean market authority in relation to a lithium project in the Atacama Desert.
- An under-the-radar ICC arbitration pitting the Chilean National Petroleum Company against a Spanish constructor.
- Investigations regarding a potential conflict of interests situation that may have influenced a decision of the Supreme Court of Chile in relation to a mining project dispute, currently pending before an arbitral tribunal.
- An overview of the status of ICSID and non-ICSID proceedings involving Chile and its state-owned companies.

Chilean Supreme Court declares invalidity of dissolution of newspaper El Clarín that led to ICSID arbitration; enforcement proceedings continue before Spanish courts

In an August 16, 2024 judgment [[click to download](#)], the Supreme Court of Chile declared that Pinochet's governmental decree no. 165 of 1975 (Decree no. 165), which had ordered the dissolution of the companies linked to the Chilean newspaper El Clarín and the expropriation of their assets, was null and void.

As readers may recall, the dispute formed the object of three arbitrations initiated against Chile by members of the Pey Casado family (previous owners of the newspaper) and the Spanish President Allende Foundation, which currently owns 90% of the shares of the companies affected by Decree no. 165:

- The first arbitration, launched in 1998, led to a [2008 award](#), which ordered Chile to pay approximately 10 million USD in damages, plus interest and costs, on account of breaches of the Chile-Spain bilateral investment treaty ("BIT"). The damages portion of this first award was [annulled in 2012](#) by an ICSID *ad hoc* committee.
- The partial annulment led to resubmission proceedings, which culminated in a [2016 award](#). In that award, the tribunal found that the claimants' case for damages flowing from the BIT breach had not been made out, but it reminded Chile of its BIT breach and corollary duty to pay compensation for damages that could be proved under international law. This 2016 award was upheld in a [2020 annulment decision](#), which emphasized the *res judicata* effect of the 2008 award.
- A third arbitration, [Victor Pey Casado & President Allende Foundation v. Chile \(3\)](#), proceeded under the UNCITRAL Rule of Arbitration, resulting in an [award](#) that rejected the claimants' case on jurisdictional grounds.

During the proceedings before the Chilean Supreme Court, the parties debated the potential *res judicata* effect of the 2008 ICSID award in relation to the ownership of the companies' shares, and its potential impact on the assessment of the claimants' standing to bring the domestic claims. The Supreme Court, however, did not address the merits of the issue, rejecting the claimants' appeal on the point on procedural grounds.

The court, however, considered that it could rule on the validity of Decree no. 165. On this point, the judges ruled that since the legislation upon which the decree was grounded was unconstitutional, the decree was equally null and void.

Meantime, we have confirmed that the President Allende Foundation and Chile remain involved in enforcement proceedings before Spanish courts. Readers may recall that the Madrid civil court found that the claimants were entitled to recover [over 550 million USD](#) in damages. The Spanish Ministry of Foreign Affairs, however, submitted [two opinions](#) to the court, in which it ultimately considered that Chile was entitled to rely on its sovereign immunity from enforcement (which the state had invoked in July 2022).

We will continue to monitor the dispute.

Chinese investor sues Chilean market authority over lithium deal

TLC Inversiones, the local subsidiary of Chinese lithium giant Tianqi, has initiated domestic court proceedings against the Chilean market authority (Comisión para el Mercado Financiero – “CMF”) in relation to a lithium project.

The dispute stems from a disagreement between the shareholders of Sociedad Química y Minera de Chile (“SQM”), a private company active in the production of lithium, and in which Tianqi holds a minority stake. In December 2023, SQM [announced](#) that it had concluded an MoU with the state-owned company Codelco for the establishment of a new public-private venture for the exploitation of lithium in the Atacama region, set to start in 2025.

(The MoU appears to fall within a [broader government initiative](#) to regain control over the state’s lithium resources.)

According to Tianqi, the MoU was approved by the shareholders’ meeting, but this position was seemingly rejected by the company’s board of directors. The latter’s decision was then confirmed by the CMF.

In July 2024, TLC Inversiones resorted to the Court of Appeal of Santiago to challenge the decision of the CMF, which it considers arbitrary and in breach of due process. While the proceedings remain pending, the Chilean courts have so far rejected the claimant’s requests to suspend the application of the decision – and hence of the MoU – on an interim basis. SQM intervened in the proceedings, supporting the position of the public authority.

Although the dispute remains domestic, some media outlets (e.g. [here](#)) indicate that the company may resort to international arbitration to further defend its alleged rights.

Chilean National Petroleum Company is involved in ICC arbitration over power plant project

The Chilean National Petroleum Company (Empresa Nacional del Petróleo de Chile – “ENAP”) has been involved in a contract-based ICC arbitration with the Spanish construction company Duro Felguera and its local subsidiary.

According to the companies’ financial statements (available [here](#) and [here](#)), the underlying dispute stems from a contract for the construction of a power plant serving the Aconcagua refinery, located in the Valparaíso region.

Duro Felguera resorted to arbitration in May 2020, seeking around 30 million USD on account of ENAP’s alleged failure to pay certain bonuses for the production of energy. ENAP replied by filing a 137 million USD counterclaim against the contractor for alleged contractual breaches.

As of June 2024, the dispute was reportedly still pending, and an award was expected on August 30, 2024. It remains unclear if the award was issued on that date.

We are seeking to learn more.

Supreme Court judge under scrutiny for potential failure to disclose conflict of interests in case related to pending arbitration

[As we reported](#), in March 2024, the state-owned company Codelco initiated a new case before the Centre of Arbitration and Mediation of the Chamber of Commerce of Santiago (“CAM”) against a consortium that includes the Belarusian state-owned company BelAZ. In these proceedings, Codelco is seeking over 73 million USD in damages in relation to a copper mine project.

The arbitration had initially run in parallel to domestic proceedings stemming from the same project, initiated by the consortium against Codelco in relation to different claims. These proceedings concluded on July 4, 2024, with a judgment of the Supreme Court in favour of the consortium.

The local press, however, is now reporting that the Supreme Court’s presiding judge in that case had failed to disclose her close friendship with one of the lawyers representing the consortium in the domestic proceedings (see, e.g., [here](#) and [here](#)), reportedly prompting the initiation of investigations by Chilean authorities.

It is unclear if these reported investigations had had any effect on the parties’ positions in the arbitration.

Chile remains involved in several investment arbitration proceedings, but two cases concluded in 2024; previous arbitration threats did not bear fruit

Chile remains involved in three ICSID arbitration proceedings, which all saw recent developments during the summer:

- A hearing on jurisdiction and the merits was held in June 2024 in the [ADP International and Vinci Airports v. Chile](#) arbitration, and the parties filed their respective post-hearing briefs at the end of September 2024. In these ICSID proceedings, the claimant is [reportedly](#) seeking over 400 million USD in compensation for the government refusal to extend an airport concession agreement despite the allegedly disastrous impact of the Covid-19 pandemic on the revenues of the concessionaire.
- The [Interconexión Eléctrica v. Chile](#) ICSID arbitration may be coming to an end, as the parties filed their respective submissions on costs at the end of the summer.
- In the recently registered [NC Telecom & WOM v. Chile](#) ICSID arbitration, concerning a 5G project, the parties are currently exchanging briefs concerning the claimants’ request for provisional measures.

Two contract-based cases, on the other hand, concluded in the first half of 2024:

- The [Nuevo Pudahuel v. Chile Ministry of Public Works \(MOP\)](#) contract-based arbitration, stemming from the same facts that gave rise to the [ADP International and Vinci Airports v. Chile](#) ICSID arbitration, [concluded with an award](#) in May 2024. In the award, the tribunal ruled that the COVID-19 pandemic amounted to an unforeseen event that had generated a contractual imbalance against the airport concessionaire. As a consequence, the arbitrators ordered MOP to reestablish the contractual equilibrium through good faith negotiations within 6 months of the award, but they refused to award any damages.
- An ICC arbitration between the Chilean state agency CORFO and the US-based lithium miner Albermarle was [settled](#) in April 2024.

We have further confirmed that previous arbitration threats made between 2020 and 2021 by foreign companies in relation to the state’s regulatory action in the gambling ([here](#)) and pension ([here](#), [here](#), and [here](#)) sectors did not lead to any arbitrations against the state.