



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date:

Victor Pey Casado and Foundation “Presidente Allende” v. The Republic of Chile (ICSID Case No. ARB/98/2) – Award, Resubmission proceedings 13 September 2016

Case Report by:

Diana Moise,** Victoria Ritah Nalule***,

Summary:

In the Award rendered on 13 September 2016 in the resubmission proceedings, the Tribunal dismissed the Claimants’ request for compensation. The First Tribunal’s decision established a breach of the fair and equitable treatment obligation under the 1994 Spain-Chile Bilateral Investment Treaty. Following the decision of the *ad hoc* annulment Committee, the Tribunal in the case at hand was confined to rule on the nature and quantum of compensation. Since the Claimant did not meet the burden of proof of damage or injury, the Tribunal rejected its claims to compensation. The subsidiary argument relying on unjust enrichment following the dispossession of the property was also rejected for falling outside the scope of the present proceedings. Furthermore, the moral damage claim was found groundless due to the failure to prove material damage.

Main issues: Award – resubmission proceedings; Burden of proof; *Ratione temporis, res judicata*; Unjust enrichment, Moral damage.

Tribunal: Sir Frank Berman KCMG QC (President), Mr. V. V. Veeder QC (Arbitrator), Mr. Alexis Mourre (Arbitrator)

Claimants’ Counsel: Graces y Prada, Madrid, Spain; Gide Loyrette Nouel, Paris, France; Buckley Sandler LLP, Washington D.C., U.S.A.

Respondent’s Counsel: Investment Promotion Agency - InvestChile, Santiago de Chile, Chile; Arnold & Porter LLP, Washington D.C., U.S.A., Carey & Cia, Las Condes, Santiago, Chile.

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Digest:

1. Relevant Facts and Procedural Dates

Mr. Victor Pey Casado is a Spanish national who has acquired Chilean nationality by naturalization in 1958 (¶2). On 2 October 1972, Mr. Pey Casado acquired interest in the Chilean left-wing newspaper *El Clarin* that was supporting the then President Allende, a friend of Mr. Pey Cassado. The newspaper was under the control of *Consorcio Periodistico y Publicitario* (“CPP”) through its wholly-owned subsidiary *Empresa Periodistica Clarin* (“EPC”).

On 11 September 1973, President Allende was overthrown in a coup d’état led by General Pinochet, and military troops occupied the premises of the newspaper. Later that year, Decree-Law No. 77 was passed following which *El Clarin* remained under complete control by the military and was subsequently confiscated. Decree No. 165, issued in 1975, formally confiscated the property. (¶¶3-7)

Mr. Pey Casado left Chile until his return in 1989, when the democratic Government was reinstated in Chile. (¶8)

On 16 January 1990, the Foundation “Presidente Allende” was established under Spanish law, to which Mr Pey Casado donated 90% of stock holdings in the companies owning the newspaper. On 6 September 1995 and subsequently on 10 January 1996, Mr. Pey Casado wrote to the President of Chile asking for restitution of *El Clarin* assets. In October 1995, Mr. Pey Casado filed a request with the First Civil Court in Santiago (“the Goss press case”). (¶¶10-11)

In November 1997, Mr Pey Casado and the Foundation (“Claimants”) filed a Request for Arbitration at ICSID against the Republic of Chile (“Respondent”), under the Spain-Chile BIT signed in 1994. (¶15)

On 23 July 1998, Chile initiated a reparations programme under Law No. 19.568 to which Mr. Pey Cassado was invited to participate. However, he notified the Government that he waived the right to seek compensation under the programme. On 28 April 2000, through the ministry Decision no. 43, compensation following the confiscation of *El Clarin* was granted to four individuals, not including Mr. Pey Casado. (¶¶12-14)

Subsequently, Chile rejected Mr. Pey Casado's request to suspend the application of the Decision No. 43. Also, the court dealing with the Goss press case refused to stay proceedings pending a decision to transfer the claim to ICSID. (¶¶17-19)

On 8 May 2008, the First Tribunal issued its Award ("the First Award") finding that the expropriation of the newspaper was not covered *ratione temporis* by the BIT, but that the Goss press case proceedings pending for 7 years without a decision constitute denial of justice, and the award for compensation to other individuals constituted discrimination, thus breaching the fair and equitable treatment obligation under the BIT. (¶21)

On 2 June 2008, Claimant submitted a request for revision under Article 51 of the ICSID Convention following the emergence of new facts and requested provisional suspension of the execution of the First Award. (¶22) On 24 July 2008, the court decision in relation to the Goss press case was issued, finding that Mr Pey Casado did not have standing and that his claim is time barred. On 16 June 2009, an *ex parte* motion was filed by the Council for Defence of the State for the abandonment of the case, which upon appeal, have been abandoned. (¶23)

On 5 September 2008, the Respondent filed a request for annulment of the First Award. On 15 October 2010, the Claimant put forward a request for partial annulment. On 18 December 2012, the *ad hoc* Committee decided to annul the part of the Award relating to damages, rejecting all the other requests. (¶¶24-27)

On 18 June 2013, Claimant lodged a new Request for Arbitration under Article 52(6) of the ICSID Convention.

2. Analysis by the Tribunal

The Tribunal began the analysis by acknowledging its role in resubmission proceedings, emphasizing its awareness of the long duration of the overall arbitral proceedings. Following partial annulment, in accordance with Article 52(6) of the ICSID Convention and Rule 55(3) of the ICSID Arbitration Rules, the Tribunal shall refrain from considering the portions of the previous Award that have become *res judicata*. (¶¶171, 173)

Consequently, the Tribunal defines the dispute as referring to the nature of the compensation and, if monetary, the due date for payment. Hence, the Tribunal shall refrain from any assessment on the existence of a breach, type of breach or whether the breach gives right to compensation. (¶¶177-178)

Before proceeding to the merits, the Tribunal established the Parties before it. After the completion of the annulment proceedings, there have been changes with regard to the initial Claimant. Ms. Pey Grebe is the beneficiary of a cession of the Mr. Victor Pey Casado and the Foundation "Presidente Allende" claim due to Mr. Pey Casado's old age. The Tribunal interprets the cession as legal representation and proceeds to retain the same composition of the Claimant as in the previous proceedings, seeing the present ones as a continuation. (¶¶180-188).

Admissibility

Following this clarification, the Tribunal proceeds to analyze the admissibility of claims. The claims put forward are in most part claims for damages and subsidiarily for unjust enrichment, in relation to breaches of Article 4 of the BIT regarding fair and equitable treatment. The claim includes lost profits and moral damages. (¶¶189-190)

Claimant's contention revolves around the method of valuation. It argues that Respondent's breach of the obligation to accord fair and equitable treatment and to refrain from discrimination, including a denial of justice, leads to compensation assessed at the fair market value at the time of their seizure, uprated to the current values. The unjust enrichment claims in relation to the Goss press, in Claimant's contention, should be valued by cumulating the capital value of the property with the rental income. (¶191)

Respondent rejects the proposed methods, arguing that fair market value is common for expropriation claims that have been rejected by the First Tribunal. Further, it argues that the unjust enrichment claims are also stemming from the expropriation contentions, while moral damages fall altogether outside the scope of compensation. (¶193)

The Tribunal clarifies that the dispossessions that have taken place between 1973 and 1975 fall outside of the scope of the BIT, as found by the First Tribunal and thus being *res judicata*. However, the Claimant argues that the denial of justice due to the delayed decision of the Santiago Court prevented them from arguing that Decree No. 165 was null *ex tunc* and the expropriation only took place much later, fact that brings the claim under the Tribunal's jurisdiction. Consequently, Claimant's loss of the right to compensation in the initial arbitration can now be claimed in the current proceedings. (¶¶195-196) The Tribunal proceeds to analyse the allegations systematically.

(a) Decree No. 165

The parties disagree on the nullity of Decree No. 165. Respondent submits that such a nullity requires a judicial pronouncement, and no such declaration of nullity can be inferred from the Santiago court's judgment. The Tribunal considered that the status of the Decree is irrelevant for the purpose of the present proceedings. The conclusions of such argument could only be that either the First Tribunal erred in finding that expropriation was excluded *ratione temporis*, or that expropriation effectively took place with Decree No. 43 – both excluded from the scope of the proceedings. (¶¶197-198)

(b) Compensation under the First Award and International Law

Following the meaning and effect of the First Award, the present Tribunal considered that it is also its duty to establish whether Claimant has a right to monetary compensation or to other forms of reparation as well. As the term "compensation" has not been explicitly interpreted in the First Award and the BIT does not provide guidance in this sense, the Tribunal relies on applicable rules of general international law. Both parties refer to the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts and on the Permanent Court of International Justice *Factory at Chorzow* case. The Tribunal notes that the case at hand differs from the stated sources due to the fact that, it is confronted with a course of conduct and not with a mere act. It follows that the Tribunal needs to establish what conduct constitutes the wrongful act that caused the injury. (¶¶199-204)

(c) The Burden of Proving Damage

The Tribunal considers axiomatic that Claimant has the burden to show that compensation follows from an assessment of the damage they suffered as a consequence of Respondent's breach of its international obligations under the BIT. (¶206)

(d) The Interpretation of the First Award

The Tribunal's duty to refrain from reconsidering parts of the First Award does not prevent it from interpreting the relevant portions of the previous Award in order to carry out its own mandate. However, the process is not uncontroversial. (¶¶207-208)

The entire conduct leading to a breach of the fair and equitable treatment obligation, which includes denial of justice, gives rise to a right to compensation. In relation to this, the *ad hoc* Committee only annulled the method by which the First Tribunal arrived at the respective compensation. This Tribunal is asked to determine the injury caused by the breach and the appropriate reparation. (¶¶209-211)

The breach has been established by the First Tribunal as following from Respondent's failure to accord fair and equitable treatment, while expropriation of the investment is outside the scope of the BIT. (¶217) The allegation that the Respondent's actions gave rise to a new denial of justice falls outside the scope of the present proceedings, as the present Tribunal is confined to interpreting the part of the dispute remaining after the annulment. (¶216)

The Claimant submits that the excessive delay in the Goss press proceedings prevented them from demonstrating to the First Tribunal that expropriation was a continuing act, extending beyond the entry into force of the BIT. Furthermore, due to the Respondent's application of Decision No. 43, the Claimant suffered from discrimination, losing the right to recover the compensation for expropriation. (¶¶219-220)

Respondent mainly submits that all of Claimant's arguments are in fact referring to the injury caused by the expropriation itself, which falls outside the temporal scope of the BIT. In addition, it argues that Decision No. 43 did not cause any injury, and any disadvantage of the Claimant is attributable to their own conduct. (¶222)

The First Tribunal, in the un-annulled portion of the Award, considers that the expropriation of *El Clarin* under Decree No. 165 was not a continuing breach and was thus outside the BIT's protection, by contrast with Decision No. 43 and the denial of justice claim. Decision No. 43 is to be considered a discriminatory application of a law, together with the denial of justice, falling under the temporal scope of the BIT and constituting a breach of the fair and equitable treatment obligation. (¶¶224-228) The *ad hoc* Committee considered that the arguments relating to damages were limited to the expropriation claims and irrelevant for the other claims. (¶229) Thus, the First Tribunal made no findings regarding the injuries stemming from the breaches referred to in the case at hand, which leads to a burden on the Claimant to prove this injury before the present Tribunal. (¶230)

(e) Have the Claimant met the Burden of Proving Injury?

The Tribunal considers that since Claimant focused on evaluation of damage, it did not meet the burden of proof for injury. Next, the Tribunal informally agrees with Respondent's argument that Claimant suffered no material damage following the breach established by the First Tribunal. Conversely, if it has suffered any damage, this is only attributable to its own actions. (¶232)

Finally, the Tribunal concludes that the Claimant has not established a *prima facie* case for a material injury caused by the breach. (¶233)

(f) Have the Claimant met the Burden of Proving Quantifiable Loss?

Following the previous finding that there is insufficient proof of injury or damage, the Tribunal concludes that the question of quantification of damages does not arise. (¶235)

(g) The Unjust Enrichment Claim

The Tribunal finds two possible ways of looking at the unjust enrichment claim: by considering it a freestanding claim or by seeing it as a mere method of quantification of a right to compensation established by other means. In the first instance, such a claim would fall outside the scope of the proceedings as the Tribunal is confined to rule on the compensation for the injury identified in the First Award. In the second instance, the method of quantification would correspond to the value of the expropriated assets. However, a claim for expropriation is excluded. (¶¶237-240)

(h) The Moral Damage Claim

The Tribunal states that there has been no specific claim that moral damages had been suffered by the Foundation. Regarding the claim for the moral damage suffered by Mr Pey Casado at the time of the *coup d'état* and during the subsequent denigration campaign, the Tribunal reiterates its previous reasoning that the Claimant is under a burden to prove the damage caused. If material damage would have been established, the Tribunal would have considered the moral damage claim. (¶¶242-243)

(i) The Options Open to the Tribunal

The Tribunal notes the Claimant's failure to specify the type of injury and damage that could have been caused by the breach of the fair and equitable treatment obligation. This failure leads to the decision of dismissing the monetary claims entirely. At the same time, the Tribunal emphasises that this conclusion is without prejudice to the breach found by the First Tribunal, which creates a subsisting obligation for the Respondent to redress the injustice internally. (¶244)

3. The Tribunal's Decision

Costs

The principle followed by the Tribunal with regard to costs is that the successful litigant should be protected against the litigation expenses. (¶249) However, the resubmission

proceedings are out of the ordinary. Due to the complex nature of the case and the findings of the two Tribunals, the present Tribunal decides to mirror the decision in the First Award, but this time in the favour of the Respondent. Consequently, making use of its discretion under Article 61(2) of the ICSID Convention, the Tribunal decides that three quarters of the total amount to be borne by the Claimants and the remaining quarter by the Respondent. (¶¶249-251)

Decision

The Tribunal concludes that Ms. Pey Grebe is not a Claimant in her own right. Further, the Tribunal upholds the previous findings that recognition of the denial of justice is a form of satisfaction for the breaches found under the BIT. Having established that the Claimant did not meet the burden of proof with regard to a quantifiable injury following from the breach, the Tribunal does not award any monetary compensation. The unjust enrichment and the moral damage claims are found to be groundless. (¶ 256)