An Argentine Court Orders a Corporation Not to Initiate Arbitration Before ICSID: Should Investors be Worried?

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In April 2019, an Argentinean court ordered a company not to initiate an investment arbitration before ICSID based on the bilateral investment treaty between the Argentine Republic and the Republic of Chile ("BIT"). The Federal Court in Civil and Commercial Matters No. 5 (the "Court") ordered the interim measure in a case between the Argentinean State's Assets Administration Agency ("Agencia de Administración de Bienes del Estado", in the following "AABE") and Cencosud S.A. ("Cencosud")[fn]It is also the author's understanding that Cencosud S.A. is the Argentinean subsidiary of the Chilean group Cencosud.[/fn] relating to AABE's claim for asset reversion. AABE's claim is based on Cencosud's alleged failure to comply with certain contractual obligations relating to sanitation and urbanization investments.

1. **The Court's decision**

In the reply to AABE's claim for asset reversion, Cencosud – *inter alia* – alleged that any arbitrary violation of its rights could trigger a claim of its shareholders before ICSID, since they were protected under the BIT. Based on this allegation, AABE requested the Court to issue a provisional measure requesting ICSID to not register any claims relating to the subject matter in dispute filed by either Cencosud or any of its shareholders.

In a 5-page decision, the Court granted an interim measure to block the commencement of an arbitration proceeding before ICISD. In the decision, the Court found that it had exclusive jurisdiction to entertain the dispute based on the following grounds:

First, the Court stated that Cencosud accepted the jurisdiction of that tribunal by not challenging the jurisdiction of that Court in the answer to AABE's claim under the applicable law of the Argentine Republic.

Second, the Court also found that the BIT was applicable since the dispute related to the sanitation and urbanization investments which were allegedly not made by Cencosud. In connection with the application of the BIT, the Court concluded that both AABE and Cencosud chose to submit the dispute before the Argentine Republic's courts. Thus, the parties in the Court proceedings had made a definitive choice in favor of the jurisdiction of the domestic Court and thereby triggered the fork in the

road provision contained in Article 10(2) of the BIT.

Third, the Court also mentioned that the dispute resolution clause incorporated in the public bid referred the disputes before the federal courts of the City of Buenos Aires.

In connection with the scope of the interim measure, the Court appeared to have limited its scope. Instead of ordering that ICSID not register any claim filed by Cencosud or its shareholders as it was requested by the applicant, the Court only ordered that Cencosud refrains from filing an arbitration before ICSID.

2. **The manner the Court interpreted and applied the BIT**

The decision of the Court is short, but it raises several questions relating to the conclusions regarding a) the triggering of the fork in the road provision contained in Article 10(2) of the BIT, and b) the impact of forum selection clauses on the jurisdiction of an ICSID tribunal to hear a dispute. The conclusions reached by the Court create inherent doubts about the correctness of the decision.

The conclusion that AABE's claim and Cencosud's failure to contest the jurisdiction of the Court triggered the fork in the road provision in the BIT is, in the author's view, incorrect. Pursuant to the last paragraph of Article 10(2) of the BIT, "[o]*nce a national or corporation submitted the dispute to the jurisdictions of the Contracting Party or to international arbitration, the choice of one or the other proceeding will be definitive*".[fn]Article 10 (2) of the BIT, "*Una vez que un nacional o sociedad haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva*."[/fn] Thus, irrespective of whether Cencosud is a protected investor under the BIT, the choice between local courts and arbitration is to be made by a national or company of one of the contracting Parties, and not by the State. Moreover, the appearance before a court in a local proceeding does not automatically mean a choice in favor of a local court in every case.[fn]Schreuer, Christoph and Dolzer, Rudolf, "*Principles of International Investment Law*", Second Edition (2012), Oxford University Press, p. 267.[/fn] Furthermore, in the case pending before the Court, the dispute arises out of the alleged failure to fulfill contractual obligations, and not the BIT.[fn]*Id*.[/fn] Thus, the subject matter of the dispute before the Court does not seem to be covered by the BIT.

In this respect, it is also to be noted that, under the terms of the BIT, Cencosud is not a company falling under the scope *ratione personae* of the BIT. The BIT does not contain an express definition of the term "*investor*" in Article 1 and only refers to investors and companies that are located in the other Contracting Party as the protected persons in the BIT. There is no provision extending the scope *ratione personae* of the BIT to locally incorporated companies owned or controlled by a national of one of the contracting parties in the country of the other Contracting Party.

As regards the reference to the forum selection clause in the bidding conditions, the Court's finding goes against established case law in investment arbitration. Arbitral tribunals have consistently found that forum selection clauses do not preclude the jurisdiction of an ICSID tribunal over treaty claims.[fn]*AES Corporation v. the Argentine Republic*, Decision on Jurisdiction (26 April 2005), ICSID Case No. ARB/02/17, paras. 90-99; *CMS Gas Transmission Company v. the Argentine Republic*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), ICSID Case No. ARB/01/08, paras. 70-76; *Compañía de Aguas del Aconquija et al. v. the Argentine Republic*, Award (21 November 2000), ICSID Case No. Arb/97/03, para. 53.[/fn].

3. **The effects of the Court's measure**

With the change of the government at the end of 2015, the Argentine Republic has taken measures to position itself as an important, relevant and predictable hub for Latin American arbitrations. The new Argentine international commercial arbitration law – based on the UNCITRAL Model Law and its 2006 amendments – coupled with the issuance of several arbitration-friendly decisions by the Courts have cleared up the doubts generated by the regulation of arbitration in the new National Civil and Commercial Code in 2015. In this context, the question is whether this recent decision can be interpreted as a drawback to these efforts.

It is the author's opinion that the decision should not have an impact on the perception of Argentina as an arbitration-friendly jurisdiction. Besides the fact that the decision could be reviewed by the appeal court (there is no publicly available information as to whether Cencosud filed an appeal against this decision although the time period for filing an appeal has elapsed), the scope of the decision also appears to have left the request by AABE without any material effect towards Cencosud's shareholders. Because the interim measure is case specific and only directed to Cencosud, its shareholders – which are protected investors under the BIT – are not prevented from resorting to arbitration before ICSID. Furthermore, the author does not see a procedural avenue by which the interim measure directed to Cenconsud could be enforced against its shareholders, which are the protected investors under the BIT.

All in all, while the decision and rationale of the Court is unfortunate, it appears that there is no harm in sight to the efforts of the Argentine Republic to position itself as an arbitration-friendly jurisdiction.