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AFC v. Colombia: Developing the Scope of Objections under ICSID Rule 41(5) Regarding the Expiration of Time Limits for Commencing an Arbitration

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The recent Award in *AFC v. Colombia* dated 24 February 2022 provides new developments on the scope of Rule 41(5) of the Arbitration Rules of the International Centre for the Settlement of Investment Disputes (the "ICSID Rules"). The Tribunal dismissed the claims of AFC Investment Solutions S.L. (the "Claimant") after accepting a defense raised by Colombia (the "Respondent") under Rule 41(5) of the ICSID Rules. Respondent had argued that the claims had a "manifest lack of legal merit" as the time limits for commencing an arbitration had already expired.

The Tribunal was constituted under the ICSID Convention and its Arbitration Rules, and the dispute was brought under the Spain-Colombia BIT (2006) (the "BIT"). Among the multiple legal issues raised by the parties, including the doctrine of estoppel, this article focuses on the Tribunal's review of the arguments regarding the applicability of Rule 41(5), which was invoked by Respondent and gives parties the right to present a preliminary objection for the dismissal of a claim when the claim was submitted with a manifest lack of legal merit.

Relevant Background

AFC's investment pertained 80% of the shares of the Colombian company Internacional Compañía de Financiamiento S.A. ("ICF"), a financial entity incorporated on 27 April 1978. On 15 November 2015, the Superintendency of Finance ("SFC"), through Resolution 1585 (the "Resolution"), ordered the forceful taking of IFC, including all of its assets, due to a mandatory liquidation proceeding triggered after the SFC found a series of irregular practices carried out by IFC. Following SFC's actions, on 2 December 2015, Claimant filed an administrative appeal before the SFC, which was rejected on 29 January 2016.

On 16 November 2018, Claimant submitted to the Colombian Embassy in Madrid a notice of the existence of a dispute under Article 10(2) of the BIT. On 30 November 2018, Colombia's Direction of Foreign Investment (the "DIES") replied that, under Article 10(5) of the BIT, Claimant could not bring such claims as more than three years had lapsed since the appeal was decided by the SFC. Indeed, Article 10(5) of the BIT provides that "*an investor may not submit a claim to arbitration if more than three years have elapsed from the date on which it had knowledge*

or should have had knowledge of the alleged breach of this Agreement and the loss or damage".

On 12 January 2019, Claimant replied contending that the *dies a quo* should be counted since 29 January 2016, when the SFC rejected its appeal, and the *dies ad quem* thus finalized on 29 January 2019. Accordingly, AFC considered that it had the right to bring the claims to arbitration since it had submitted its notice of dispute to the Colombian Embassy in Madrid on 16 November 2018, months before the expiration of the statute of limitations. On 18 January 2019, the DIES received Claimant's communication and reserved its rights on the determination of whether AFC's notice of dispute was timely submitted.

On 24 July 2019, Claimant informed Colombia of its intention to submit the dispute to an ICSID arbitration. The DIES proposed holding consultations, but these stalled as of 12 September 2019. On 21 April 2020, Claimant sent a formal request for arbitration before ICSID. On 21 April 2021, Respondent filed a preliminary objection under Rule 41(5) of the ICSID Arbitration Rules arguing that the claim was manifestly without legal merit because it was filed after the expiration of the time limit to submit its claim.

Objections Grounded on Time Limits for Commencing an Arbitration are Covered by Rule 41(5) of the ICSID Rules

In its submissions, Colombia mainly relied on *Ansung v. China* to argue that preliminary objections grounded on the expiration of time limits for commencing an arbitration are covered by Rule 41(5) of the ICSID Rules. Respondent recalled that, in *Ansung*, the tribunal dismissed claimant's claims because they were presented after the statute of limitations period set forth in the applicable investment agreement had lapsed.

In turn, Claimant argued that Colombia's objection should be dismissed as the alleged lack of merit of its claim was not "manifest". According to AFC, following *Brandes v. Venezuela*, the purpose of Rule 41(5) is to prevent abusive claims, meaning that the alleged defect of the claim must be "*clear, obvious or flagrant*". Additionally, Claimant asserted that Colombia's submission entailed questions of certain complexity that could not be resolved without difficulty, thus falling outside the scope of Rule 41(5).

In its Award, the Tribunal referred to *Trans-Global v. Jordania* to interpret the standard of Rule 41(5). *First*, the Tribunal concluded that the determination of an objection under Rule 41(5) "*may be complicated but should not be difficult*". *Second*, the Tribunal stressed that, even though previous tribunals considered that Rule 41(5) requires refraining from any determination on the facts of the case, taking into account some facts may be relevant when they can produce consequences on jurisdictional matters.

Interestingly, the Tribunal concluded that the resolution of the difference between the parties was easy given that there was no dispute on the facts of the case and its task was limited to interpreting the terms of the BIT. Hence, the Tribunal determined that Colombia's objection fell within the scope of Rule 41(5). This decision should be welcomed as forcing the parties to submit pleadings and evidence on the merits of the dispute would be an unreasonable burden when the dispute can be easily disposed early and on an expedite basis.

Submission of a Notice on the Existence of a Dispute or an Intention to Submit a Dispute to Arbitration Cannot Be Equated to the Commencement of an Arbitration

For the Tribunal, the main issue of the case was determining whether, when Claimant notified Colombia of the existence of a dispute pursuant to Article 10(2) of the BIT, Claimant was also abiding by the time-limits provided for in Article 10(5) of the BIT. To this end, the parties discussed whether the terms "dispute" and "claim" in the BIT were interchangeable as to consider that, by sending a notice of dispute on 16 November 2018, AFC had also submitted its claim to arbitration within the statute of limitations.

According to AFC, Articles 10(1) to 10(5) of the BIT used the terms "controversy" and "claim" interchangeably and referred to any conflict related to an investment between a foreign investor and any of the BIT's signatories. Further, Claimant considered that the time-limit for commencing an arbitration could be interrupted through the submission of the notice of dispute as established in Article 10(2) of the BIT, as this notice could be equated to the "*presentation of a claim*" under Article 10(5) of the BIT.

Respondent referred to the case of *Mavrommatis* decided by the Permanent Court of International Justice (the "PCIJ") to assert that, while "controversy" has a broad meaning that refers to any disagreement on a matter of fact or law, a "claim", in the context of the BIT, means the vehicle through which procedures before domestic or international forums are effectively triggered. Additionally, Colombia argued that the only event capable of interrupting the time limit for commencing an arbitration was the submission of a request for arbitration, excluding notices of dispute.

To resolve this issue, the Tribunal relied on Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT") to interpret Article 10 of the BIT. *First,* the Tribunal found that, according to the context of this provision, "controversy" and "claim" are not interchangeable since, as clarified by the tribunal in *Feldman v. Mexico*, the meaning of "controversy" is a difference of opinions between the parties, while the term "claim" should be equated to a "lawsuit". In other words, the Tribunal considered that a "claim" did not arise from the submission of a notice of a dispute, but only from the formal initiation of arbitral proceedings before the competent tribunal to declare a violation of the BIT and offer redress to the damaged party.

Second, the Tribunal decided that the time-limit for commencing an arbitration under the BIT could not be interrupted by a notice of a dispute because the practical effect of such an interpretation would leave signatories exposed to the claim of foreign investors forever. Besides, the Tribunal clarified that a different interpretation would also leave Article 10(5) of the BIT without effect because, as Article 10 was a multi-tiered arbitration provision that referred to notices of dispute and claims in separate provisions, it made a clear distinction between notifying a "dispute" and submitting a "claim".

The Tribunal's reasoning on this distinction is also a remarkable aspect of the decision. When States condition an offer to arbitrate to a submission of a formal claim within certain time-period, they do so to avoid protracted litigation and unnecessary delays. Additionally, as the State's consent to submit a claim to dispute resolution is the cornerstone of arbitration, it should not be implied, meaning that interpretations relating to this matter should be carried out with a significant degree of care and deference for the terms and nuances of the relevant investment agreement.

Conclusion

The AFC Award took a correct approach on the scope of a preliminary objection based on Article 41(5) of the ICSID Rules. With this decision, the Tribunal swiftly resolved a dispute without forcing the Parties to submit a full case on the merits of the case.

Lastly, it is worthwhile noting that the AFC arbitration was the first international arbitration fully handled by Colombia's State Agency in charge of its Legal Defense (the "ANDJE") without resorting to external counsel. This Award is also another chapter of Colombia's successive and impressive series of victories in its investment arbitrations. In fact, the State has won four consecutive cases and achieved the dismissal of 99.7% of the damages claimed in the fifth case. The AFC Award not only confirms that Colombia respects its international obligations under BITs but also shows that Colombia's ANDJE has reached a high level of sophistication that allows it to personally assume the State's legal defense.

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