An Overview of Investment Disputes Involving the Colombian State: lessons learned

Julio González
Dispute Resolution

Santiago Cruz
Dispute Resolution

Felipe González
Dispute Resolution

This year marks the 25th anniversary of the entry into force in Colombia[1] of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. For 19 of these past 25 years, Colombia was not involved in any investor-State disputes. In 2016, however, the first request for investment arbitration against Colombia that ended in an arbitration was filed[2] with the International Centre for Settlement of Investment Disputes ('ICSID'). From that point onwards, there has been an upward trend in the number of investment cases brought against the country. Moreover, certain sectors face a climate of deep economic and legal uncertainty, particularly with the recent change of President.[3]

This could make Colombia a breeding ground for new investment disputes. Currently there are investment protection treaties in force between Colombia, on the one hand, and each of the following countries: Canada, Chile, China, Costa Rica, El Salvador, France, Guatemala, Honduras, India, Israel, Japan, Mexico, Peru, South Korea, Spain, Switzerland, the United Kingdom, and the United States of America. Colombia has also signed investment protection treaties that are yet to come into force with Panama, Singapore, Spain, Turkey and the United Arab Emirates.

1 Approved by Law 267 of 1996, and Decision C-442/96 of the Colombian Constitutional Court.
2 The first case registered by ICSID that resulted in an award was filed by Glencore International A.G and C.I. Prodeco S.A. on 16 March 2016 (ICSID Case No. ARB/16/1). Prior to that, Tobie Mining and Energy, Inc. filed a notice of intent to arbitrate under UNCITRAL Rules on 5 August 2015. However, this claim was discontinued after Colombia's brief of 19 March 2016 in response to the request for arbitration. See *Cosigo Resources, Ltd, Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc v Republic of Colombia*: <https://www.italaw.com/cases/3961> accessed 2 November 2022.
3 Gustavo Petro Urrego was inaugurated on 7 August 2022.

Any analysis of a potential investment claim should take into consideration the outcomes of already concluded cases and the nature of claims brought against Colombia. Additionally, an assessment of ongoing cases can give a sense of the circumstances that are likely to trigger an investment claim. These issues are addressed below.

Pending cases

According to the Colombian National Agency for the Legal Defence of the State ('ANDJE'[4]), by 30 June 2022 Colombia was party to 19 ongoing international investment disputes (seven at the pre-arbitration stage and 12 in arbitration).[5] This information matches ICSID's Case Database.[6]

Claims in these arbitration proceedings total USD 2.3 billion and correspond to requests that invoke Colombia's bilateral instruments with Canada (4), the United States (3), the United Kingdom (2), Switzerland (2) and Spain (1). It is noteworthy that 66.6% of the disputes are in the oil, gas and mining sector. The remainder are divided between the telecommunications (16.6%), transportation (8.3%) and construction (8.3%) sectors.

The arbitrators sitting in these international arbitral tribunals are renowned experts from various jurisdictions, including Argentina, Canada, Costa Rica, Spain, Sweden, Switzerland and the United Kingdom.

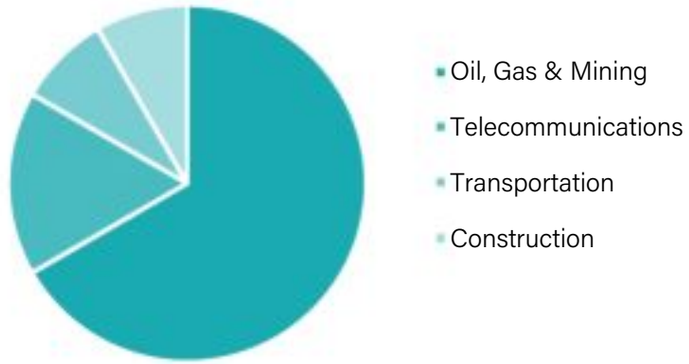
There are a number of cases pending before ICSID that are expected to become milestones in investment arbitration against Colombia. For instance, cases number ARB/19/34 (*Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc.*) and ARB/22/11 (*CB&I UK Limited*) stand out due to the amounts being claimed, the media coverage that they have received and the impact they may have, among other matters, on the jurisdiction and scope of powers of Colombia's General Comptroller Office.

Concluded cases

Thus far, the balance is in favour of Colombia in the six investment cases that have already concluded. Colombia has won two cases on the merits and has obtained three favourable decisions on jurisdictional issues (jurisdiction, statute of limitations and discontinuance). The remaining case is Case number ARB/16/6 (*Glencore International A.G. and C.I. Prodeco S.A*), in which the claimant sought over USD 350 million from Colombia and was awarded USD 19.1 million plus interest.

Here is a summary of the most important concluded cases:

Cases pending before ICSID



1. AFC Investment Solutions S.L. v Republic of Colombia (Case No ARB/20/16)[7]

Treaty: Agreement between the Kingdom of Spain and the Republic of Colombia for the Promotion and Reciprocal Protection of Investments.

Date of the award: 24 February 2022.

Summary: Claimant challenged the Colombian Financial Superintendent's decision to take possession of its assets for a forced liquidation.

Decision: The Tribunal dismissed all AFC's claims. The Tribunal held that the opportunity to file the claim had expired. Under Article 10(5) of the Spain-Colombia bilateral investment treaty, claimant had a three-year term to file the claim from the time it knew or should have known of the facts that violated its rights.

Remarks: This is the most recent investment arbitration award concerning Colombia. It is also the first case in which Colombia's legal defence was handled exclusively by an internal ANDJE team. Prior to this case, Colombia engaged outside counsel for its defence in investment arbitrations. It is yet to be seen if Colombia will continue with this new approach.

2. América Móvil S.A.B. de C.V. v Republic of Colombia (Case No ARB(AF)/16/5)[8]

Treaty: Free Trade Agreement between the United Mexican States and the Republic of Colombia

4 ANDJE stands for *Agencia Nacional de Defensa Jurídica del Estado*.
5 Agencia Nacional de Defensa Jurídica del Estado, 'Informe de Litigiosidad a junio 30 de 2022' (26 July 2022).
6 <https://icsid.worldbank.org/cases/case-database> accessed 2 November 2022.
7 *AFC Investment Solutions S.L v República de Colombia*, ICSID Case No ARB/20/16, Award (24 February 2022).
8 *América Móvil S.A.B de C.V v República de Colombia*, ICSID Case No ARB(AF)/16/5, Award on Preliminary Objection (7 May 2021).

Date of the award: 7 May 2021.

Summary: Claimant sought damages after the concession contracts it had entered into with the Colombian State to provide mobile telecommunications services were terminated in breach of an alleged right to non-reversion.

Decision: The Tribunal held that each state's laws determine whether there is a right to non-reversion in its own territory and that, unless those laws are clearly contrary to international law, no tribunal or judge can rule against them.

In support of this position, the Tribunal cited *Helnan*: '[A]n international tribunal must accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs.'[9]

Therefore, the Tribunal held that it was not contrary to international law for concession contracts entered into by the Colombian State to not provide a right of non-reversion. Thus, the absence of the alleged right that supported the expropriation claims resulted, by definition, in the claims being rejected.

Remarks: This case provides an example of how investors could mitigate potential risks from the start of a given project by carefully negotiating the contracts they enter into with the Colombian State.

3. Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia (Case No ARB/16/6)[10]

Treaty: Agreement between the Swiss Confederation and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments

Date of the award: 27 August 2019.

Summary: In 1989 the parties entered into a contract to explore, construct and exploit a coal mining project in Cesar Department. During the project, the General Comptroller's Office investigated allegedly corrupt practices within the mining authority. Ultimately, the General Comptroller's Office held the investors liable for around USD 25 million. The investors claimed this decision was arbitrary and unreasonable.

Decision: The Tribunal held that the General Comptroller's Office wrongly and unreasonably calculated the damages owed to the Colombian State. Colombia was ordered to pay the investors USD 19.1 million plus interest. The Tribunal dismissed the investors' other claims on the grounds that there were proceedings ongoing before local courts in which they were seeking relief for measures taken by the Colombian State.

Colombia filed an application to annul the award, which was ultimately rejected.

Remarks: The Colombian State viewed the decision as a victory, even after its unsuccessful application to annul the award. As mentioned, this is the only time that the Colombian State has been ordered to pay damages. Glencore has brought two additional unrelated investment arbitrations against Colombia which are pending before ICSID.

4. Eco Oro Minerals Corp. v Republic of Colombia (Case No ARB/16/41)[11]

Treaty: Free Trade Agreement between Canada and the Republic of Colombia.

Date of the award: 9 September 2021 (not including damages).

Summary: The investor claimed unlawful and indirect expropriation of its investment under a concession contract to exploit various types of minerals, as a consequence of

9 *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Award (3 July 2008).

10 *Glencore International A.G and C. I. Prodeco S.A. v Republic of Colombia*, ICSID Case No ARB/16/6, Award (27 August 2019).

11 *Eco Oro Minerals Corpo v the Republic of Colombia*, ICSID Case No ARB/16/41, Decision on jurisdiction, liability and directions on quantum (9 September 2021).

the Colombian State's measures to prohibit mining activities in its tropical moorlands, affecting Eco Oro's project in Santurbán moorland.

Decision: The Tribunal held that Colombia had breached the standard of protection under the applicable investment treaty because it was not diligent in delimiting the Santurbán moorland in a timely manner. It also held that Colombia caused damage by breaching the treaty. Two of the arbitrators submitted a Partial Dissenting Opinion.

The Tribunal's decision on damages is pending.

Remarks: This case exemplifies the long-standing tension between the Colombian State's sovereignty over its natural resources and investors' rights acquired prior to the Colombian State introducing measures to protect those natural resources. The circumstances of this case are common to several other industries and economic sectors. Nevertheless, the feasibility of an investment claim should be analysed on a case-by-case basis. This case also exemplifies a widely used technique to bifurcate decisions on the merits and decisions on damages. For the investor, proving damages is a demanding task that takes time, resources and requires experts as well as legal counsel.

For the moment, it is not evident that these decisions have triggered any general policy modifications within the Colombian State. This means that it is likely that the legal and factual grounds that have so far given rise to disputes before ICSID will continue to impact foreign investors.

Agenda for the incoming Administration

At the time of submitting this article, Colombia is in the early days of a new Administration. It has an ambitious political agenda on matters such as human rights, environmental protection, public health, social security and taxation. It is still too early to assess whether these new policies, if enacted, will have an impact on the number of investment cases brought against the Colombian State.

The Colombian Administration's legal strategy for the next four years regarding investment arbitration will to some extent shape the path to be taken by both future claimants (foreign investors) and defendants (Colombia). The new Administration should continue efforts carried out by the ANDJE on (i) achieving efficient working methods and communication among State entities; (ii) promoting awareness of Colombia's international obligations; and (iii) training civil and public servants on the implications of their decisions.

To sum up, the Colombian State has a brief but already significant history in the international investor-State dispute settlement system. The outcomes obtained by Colombia prove that it has managed to swiftly put in place sophisticated and successful legal defences. However, at a domestic level, the factual background of some of these cases shows that there is much room for the Colombian State to improve on how it coordinates the various public entities that international investors must interact with when doing business in Colombia. The brief overview in this article shows that most investment cases against Colombia have been brought as a result of an alleged lack of coordination between state agencies.