

Decoding Arbitral Disputes: Fiscal Liability Vs. Int'l Investment

By **Josep Galvez** (March 14, 2025)

This article is part of a monthly column that delves into the most critical cross-border investment and commercial European disputes over arbitral award enforcement. In this installment, I analyze the International Centre for Settlement of Investment Disputes award in the case of Amec Foster Wheeler USA Corp. v. Republic of Colombia.



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The International Centre for Settlement of Investment Disputes award in the case of Amec Foster Wheeler USA Corp. v. Republic of Colombia, rendered on Dec. 19, 2024, represents a significant moment in the intersection of fiscal liability proceedings and international investment law.[1]

The dispute arose from Colombia's imposition of fiscal liability on the claimants in connection with the modernization of the Cartagena oil refinery. In this context, it is essential to note that "fiscal liability" refers to financial accountability and misuse of public funds, as they shaped the core of the dispute.

Notably, this case underscores the complex interplay between domestic administrative measures and protections afforded to foreign investors under international treaties, specifically the U.S.-Colombia Trade Promotion Agreement. The tribunal's award delves into jurisdictional challenges, the substantive merits of the claimant's allegations and the intricate legal arguments surrounding the notion of protected investments.

The relevance of this arbitration extends beyond the immediate parties. It serves as a cautionary tale for states employing fiscal liability mechanisms against foreign investors, highlighting the potential for such measures to be scrutinized under investment treaties. The award also offers insight into the standards for jurisdiction under the ICSID Convention and the U.S.-Colombia TPA, particularly regarding the concept of investment and the role of waivers in conferring consent to arbitration.

The procedural history reveals a litany of objections and counterobjections, illustrating the adversarial nature of investment arbitration. The claimants contended that Colombia's fiscal liability proceedings violated their treaty rights, while Colombia maintained that the claimants failed to meet jurisdictional prerequisites. The tribunal's ultimate decision to dismiss the claims for lack of jurisdiction underscores the critical importance of procedural compliance in investment arbitration.

This article analyzes the tribunal's reasoning, exploring the factual background, the legal contentions of both parties and the broader implications of the award. The case exemplifies the growing tension between domestic regulatory measures and international investment protections, offering valuable lessons for practitioners navigating this challenging terrain.

Background to the Dispute

The roots of this arbitration lie in Colombia's ambitious project to expand and modernize the Cartagena oil refinery, managed by Reficar, a wholly owned subsidiary of Ecopetrol. The claimants, through their joint venture FPJVC, were engaged to provide project management

services for this endeavor. The project, intended to enhance Colombia's refining capacity and environmental standards, became embroiled in controversy due to alleged fiscal mismanagement and cost overruns.

The contract, signed in November 2009, established the claimants' role in overseeing the project. However, by 2015, the comptroller general of the republic initiated a special audit, ultimately concluding that the project had failed to adhere to principles of economy, effectiveness and efficiency. This finding led to fiscal liability proceedings under Colombian Law No. 610, targeting the claimants and other parties involved in the project.

The claimants argued that the fiscal liability proceedings were politically motivated and without due process. They asserted that the measures imposed by Colombia constituted a breach of the fair and equitable treatment standard under the U.S.-Colombia TPA. Conversely, Colombia maintained that the proceedings were legitimate exercises of its sovereign regulatory powers, aimed at safeguarding public funds and ensuring accountability in public projects.

The arbitration proceedings commenced on Dec. 6, 2019, with the claimants seeking relief under the ICSID Convention and the U.S.-Colombia TPA. Colombia raised multiple jurisdictional objections, challenging the claimants' standing, the nature of the investment and the validity of the claimants' waiver under the treaty. The procedural journey was marked by extensive submissions, provisional measures and hearings, reflecting the complexity and high stakes involved.

At the heart of the dispute were questions regarding the definition of "investment" under the treaty, the role of waivers in investment arbitration, and the legitimacy of fiscal liability measures as regulatory acts. The tribunal's meticulous examination of these issues culminated in a decision that, while unfavorable to the claimants, provides a comprehensive analysis of key principles in investment arbitration.

Decision of the Court

The tribunal in the Amec Foster Wheeler v. Colombia ICSID case comprised José Emilio Nunes Pinto of Brazil as president, appointed by agreement of both parties; John Beechey of the U.K. as arbitrator, appointed by the claimants; and professor Marcelo Kohen of Argentina as arbitrator, appointed by the respondent.

The tribunal's decision centered on five critical jurisdictional objections raised by Colombia. First, Colombia argued that the claimants failed to meet the requirements of Article 10.16.1 of the U.S.-Colombia TPA, which necessitates the submission of a valid waiver of the right to initiate parallel proceedings. The tribunal concurred, finding that the claimants' waiver was defective and thus invalid, effectively nullifying consent to arbitration.

Second, the tribunal addressed Colombia's contention that the claimants did not possess a protected investment under the treaty. The tribunal, referencing established jurisprudence, held that the claimants' project management services did not constitute an investment within the meaning of the ICSID Convention and the US-Colombia TPA. This determination was pivotal, as it underscored the necessity of meeting specific definitional criteria for investment protections to apply.

The third objection pertained to the claimants' legal standing. In particular, Colombia asserted that FPJVC, as a contractual joint venture, did not qualify as a juridical person under Article 25(2)(b) of the ICSID Convention. Once again, the ICSID tribunal agreed,

further eroding the claimants' jurisdictional foundation to the dispute.

Additionally, the tribunal examined the timing and scope of the claimant's notice of intent, noting that it was submitted solely by FPJVC and not by the other claimants. This procedural misstep contributed to the tribunal's finding of a lack of jurisdiction.

Lastly, the tribunal considered the claimants' prior submission of claims for breach of fair and equitable treatment to Colombian courts. It held that the election to pursue domestic remedies precluded subsequent recourse to international arbitration under the treaty's fork-in-the-road provision. The cumulative effect of these findings led the tribunal to dismiss the claims in their entirety, emphasizing the criticality of procedural and jurisdictional compliance in investment arbitration.

Takeaways

The ICSID tribunal's award offers several salient lessons for investment arbitration practitioners. Foremost, it underscores the importance of adhering to procedural prerequisites under investment treaties. The claimants' failure to submit a valid waiver proved fatal to their case, highlighting the need for meticulous attention to all jurisdictional requirements.

The case also illustrates the stringent standards for establishing a protected investment. The tribunal's narrow interpretation of "investment" reflects a cautious approach that prioritizes textual fidelity over expansive readings, thereby reinforcing the importance of precise contractual and financial arrangements in international investment projects, particularly in Latin America.

Furthermore, the award highlights the significance of legal standing in investment arbitration. The tribunal's refusal to recognize FPJVC as a juridical person underscores the need for clear and distinct legal identities when structuring investment vehicles. Similarly, the tribunal's reliance on the fork-in-the-road provision reminds us of the irrevocability of forum selection in investment disputes. Therefore, investors must carefully strategize their dispute resolution pathways, as initial choices may foreclose future options.

In sum, this case serves as a broader commentary on the balance between state sovereignty and investor protection. While the tribunal upheld Colombia's jurisdictional objections, it also implicitly acknowledged the legitimacy of state measures aimed at financial accountability. This balance is pivotal in maintaining the integrity of both domestic regulatory frameworks and international investment regimes.

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[1] Amec Foster Wheeler USA Corp., Process Consultants Inc., and Joint Venture Foster Wheeler USA Corp. and Process Consultants Inc. v. Republic of Colombia, ICSID Case No. ARB/19/34.