

Reports of a “Deferral” Have Been Greatly Garbled

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As someone who straddles the worlds of specialized and mainstream media, I can appreciate how difficult it is to report on international arbitration for different audiences.

It’s much easier writing for readers who are familiar with investment treaties, and the concept of investor-state arbitration – not to mention the alphabet soup of acronyms which abound in this specialized field (ICSID, UNCITRAL, ECT, SCC, ICC, etc.)

Things get dicey, however, when you try to report on complex legal issues and arcane arbitration processes for a lay audience.

Take some of the recent media reports about a hotly-anticipated arbitral clash, the E.T.I. Euro Telecom International v. Bolivia case at ICSID.

Back in mid-December, Reuters reported that the case had been “deferred”.

The next day, Telecom Italia vigorously denied that the case had been suspended.

So, what’s really going on?

Well, first a bit of background. E.T.I., a Dutch subsidiary of Telecom Italia is suing Bolivia for at least \$300 Million (US), alleging an expropriation of their 50% ownership stake in Bolivian telecoms company Entel.

The case is an important one both for the parties and for the International Centre for Settlement of Investment Disputes (ICSID).

After all, Bolivia became the first country to tear up their ICSID membership card, when the Government filed a withdrawal notice in 2007. Bolivian government officials resented the threat of arbitration which loomed over various of its policy initiatives – including schemes to increase the public’s share of hydrocarbons wealth. Bolivia also complained of ICSID’s perceived bias in favour of foreign investors.

So, in May of 2007, the Bolivian Government formally notified ICSID that they would withdraw from the Centre – setting in motion a six month waiting period before the denunciation takes effect.

However, during this six month window, E.T.I. filed a Request for Arbitration with the ICSID, accusing

Bolivia of breaching protections contained in the Netherlands-Bolivia bilateral investment treaty.

Bolivia objected strenuously to this move and urged the ICSID secretariat to refrain from adding the case to the ICSID's docket. According to Bolivia, and some legal observers, the state no longer consented to use the ICSID facility from the moment that it notified ICSID of its denunciation of the ICSID Convention.

However, ICSID ultimately registered the case, while stressing that the threshold for registering arbitrations is a low one. In other words, it falls to an arbitral tribunal – not the secretariat – to decide whether the ICSID has jurisdiction to hear the claim.

For some months after the registration of E.T.I.'s claim, there were doubts as to whether Bolivia would mount a defence. When the Government was slow to nominate an arbitrator to the three-person tribunal, counsel for E.T.I. publicly questioned Bolivia's commitment to the process. However, Bolivia fired back that it had no intention of absenting itself from the ICSID proceedings. Soon, thereafter it nominated its own arbitrator to the tribunal.

In mid-October, the three-member tribunal was constituted, and an organizational meeting between the parties and the tribunal was held in December.

Following that meeting, Reuters reported that the case had been “deferred” or “put on hold”. But mid-way through the Reuters report, a Bolivian official offered a much more nuanced point: the proceeding has been suspended so that Bolivia's jurisdictional objections can be heard.

The next day, Reuters published a follow-up article wherein an E.T.I. official insisted that talk of a suspension was “completely groundless”. The E.T.I. spokesperson added that the case is “proceeding normally”.

The overall picture presented to the public was a rather muddled one.

Indeed, other media sites subsequently reported on the difference of opinion as to whether the case is, in fact, suspended.

But, upon closer scrutiny, what is actually happening in the case may not come as a surprise to arbitration-watchers. The proceedings on the merits were suspended – but this was done so that arbitrators can first hear Bolivia's jurisdictional objections to the claim.

The parties have agreed a procedural timeline which will see an exchange of written briefs over the coming months, culminating in a jurisdictional hearing.

So, stay tuned.

This case has not been deferred or put on hold.

Rather, the merits have been suspended so that arbitrators can come to grips with the issue that everyone is eagerly anticipating: to what extent will Bolivia's withdrawal from ICSID have any bearing on the consent to investor-state arbitration lodged in the Bolivia-Netherlands bilateral investment treaty?