Bolivia’s Step Back in State Arbitration

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José Carlos Bernal Rivera (Guevara & Gutiérrez S.C.)

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As reported in the excellent piece by Alejandro López Ortiz and Gustavo Fernandes in “A Year of Legal Developments for International Arbitration in Latin America”, Bolivia may have taken a step back in State arbitration with the passing of its new act on arbitration in 2015. The article remarks the limitations to arbitrability introduced by the new act, and the investment arbitration chapter of the act, which intends to provide a domestic arbitration framework for both national and foreign investors in Bolivia. The goals of these and other provisions of the new act are to keep arbitration proceedings (even investment arbitrations involving foreign investors) inside the country and subject to Bolivian law and its authorities.

So, how far does the new Bolivian arbitration act go in its intent to keep State arbitration inside the country? Aside from whether this mechanism will attract foreign investments, it is interesting to analyze the Bolivian proposal. Why is the government so disenchanted with international arbitration? How is the act’s investment arbitration chapter supposed to work? Are these limits to international arbitration a brand new feature of this act, or just a reflex of the policies implemented by the government since 2006? This brief article will try to dig deeper in the current situation of Bolivia, and the great lengths it is willing to go in order to avoid any more international arbitration cases involving the State or State entities in the future.

International arbitration boom in the last decade in Bolivia

In the last decade, a large amount of arbitration claims were filed against Bolivia as a result of investment disputes between foreign nationals and the State. The nationalizations carried out by the government of Mr. Evo Morales since he was elected to the Bolivian presidency in 2006, have, predictably, brought a large array of foreign investors to the negotiation table for reaching settlements with the government, and in several cases to arbitration instances. Bolivia promptly proceeded to withdraw from ICSID in 2007, becoming the first country in history to take this step.

Euro Telecom International reached a settlement agreement with Bolivia for approximately US$ 100 million for the nationalization of the telecom company ENTEL. Ashmore Energy International and Shell reached another settlement agreement with Bolivia in 2009 for US$ 241 million for the nationalization of pipeline infrastructure, and Pan American Energy settled with Bolivia for US$ 498 million in 2014 for the nationalization of the oil company "Chaco."

Other companies were not able to reach settlements and opted for arbitration. Chilean company Quiborax was awarded US$ 48.6 million by an ICSID tribunal. Red Eléctrica of Spain was awarded US$ 65 million for the nationalization of its shares in the Bolivian company "TDE". The Canadian company South American Silver is seeking US$ 385 million for the nationalization of the "Mallku Khota" mine in Bolivia, and Glencore has recently filed, in August 2016, a new arbitration claim against Bolivia for the nationalization of "Vinto" and "Colquiri" mines, for which the parties were initially negotiating a settlement agreement, which was unsuccessful. There are several other cases, but these are enough to illustrate the point.

It is not possible to say that Bolivia´s disenchantment with investment arbitration in international fora is based solely on the results of these cases. Bolivia's policy rather fits well with the general discourse of the government regarding the recovery of natural resources from transnational companies. In 2009, the Bolivian Constitution was completely modified in order to implement the new policies of the government. One of the most remarkable changes was that of article 366, which states that all foreign companies operating within the oil and gas industry in Bolivia are bound to Bolivian sovereignty and authorities, and that *"[n]o foreign jurisdiction or international arbitration will be accepted in any case […]."* This is the first and only mention of the word "arbitration" in the Bolivian Constitution.

Against this background, the policies of the 2015 arbitration act are definitely not new. The ICSID withdrawal, the 2009 Constitution and, the repeal of key pieces of legislation (such as the repeal of the investment law which was in place since the nineties) were revealing factors regarding the shift in the investment policies of the government, and they all took place several years before the enactment of the new arbitration law of 2015. It is likely that the high amounts paid by the Bolivian government for the nationalizations were a contributing factor for the step back of Bolivia in State arbitration, although some people claim that the amounts paid actually reflect good results, if they compare to the amounts sought by the investors in the first place.

The "investment arbitration" chapter of the Bolivian act

This second part of the article analyzes the content of the new act in regards to investment arbitration in Bolivia and subject to Bolivian law. How would an investment arbitration case involving a foreign company be conducted in Bolivia?

One of the most important realizations about this chapter of the Bolivian act is that it might not be applicable to many of the foreign companies doing business in the country. Here is why. There are several restrictions to the participation of foreigners in some industries of the Bolivian economy (all in accordance to the general discourse of the current government, as explained in the first part of this article). The "strategic" sectors of the economy, which include some of the largest industries in Bolivia, such as oil, gas, mining and electricity, are reserved only for State-owned entities. Any participation of foreign companies in these industries can only be made in close connection with State-owned companies. This means that State-owned companies would either need to hire foreign companies to provide services (in which case the foreign companies would probably not be doing investments *per se*), or they would need to associate with the foreign companies in a sort of joint venture enterprise or "PPP." The second scenario is less common in practice than the first.

It seems like the investment chapter of the Bolivian law has in mind the rather uncommon scenario of mixed enterprises in which both State and the foreign company associate. This chapter of the law envisages two scenarios: one dedicated to Bolivian investment and, one dedicated to mixed investment and

foreign investment. The terms “Bolivian investment”, “mixed investment” and “foreign investment” are not defined in the arbitration act, but their exact definition can be gathered from the Investment Promotion Act of April, 2014.

If a foreign company and a Bolivian State-owned company associate to work in a strategic sector of the Bolivian economy, this would probably be considered a mixed investment (it cannot be a “foreign investment”, because of the restrictions applicable to strategic sectors of the economy). In such a case, internal disputes between the two partners might be considered investment disputes, which the parties could potentially submit to the investment arbitration procedure established under the new act. What would such an investment arbitration case look like?

The investment arbitration chapter of the new Bolivian act establishes several mandatory provisions that will be applied to investment cases, thus limiting the right of the parties to freely determine the characteristics of the procedure in their arbitration agreement. The law mandates that, before submitting to arbitration, the parties must first engage into a conciliation process. The *lex arbitri* will be Bolivia’s, and the arbitration would be deemed local, not international (though the audiences can take place abroad). The arbitral tribunal must necessarily be composed of three arbitrators, and the arbitration cannot be *ex aequo et bono*, it must be decided under Bolivian law.

By far, the most relevant restriction in the investment arbitration chapter is that of the *lex arbitri*. The act mandates that the procedural laws applicable to investment arbitration cases be Bolivian law, which means that any annulment claim sought against an arbitral award issued in an investment case against Bolivia, would be reviewed by Bolivian courts. This is, as you can imagine, far from ideal for a foreign company. If the seat of the arbitration is that of the country against which the company has filed the claim, then many of the most attractive features of the institution of arbitration as an ADR mechanism are diminished.

Conclusion

There seems to be several reasons that have pushed Bolivia to withdraw from ICSID and try to establish a local alternative structure for investment arbitration cases. It is also clear, however, that the “local option” in the new arbitration law

does not really offer a completely neutral forum for investors, and this might be a potent deterrent for investment. Bolivia must consider the possibility that, by trying to keep investment arbitration cases inside the country, it might be keeping foreign investment outside of it altogether.