Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID

Kluwer Arbitration Blog
August 12, 2017

José Carlos Bernal Rivera (Guevara & Gutiérrez S.C.) and Mauricio Viscarra Azuga

Please refer to this post as: José Carlos Bernal Rivera and Mauricio Viscarra Azuga, 'Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID', Kluwer Arbitration Blog, August 12 2017, http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/

It has been ten years since Bolivia denounced the International Centre for Settlement of Investment Disputes Convention (**"ICSID Convention"**), becoming the first country to withdraw from the ICSID Convention in history. True, several countries have never even signed the ICSID Convention in the first place (including large economies such as Brazil and India), but until 2007, no countries had denounced the treaty. After Bolivia´s denunciation, Ecuador and Venezuela soon followed.

Several articles have touched upon the apparent crisis of ISDS in Latin American countries as a result of the ICSID withdrawals, and the attempt of UNASUR to establish a new regional investment arbitration center for South America. It would be interesting to analyze the influence of Bolivia´s withdrawal over foreign direct investment in the country, but any such analysis would need to factorize many features of the Bolivian economy and political environment. That task is not, by any means, an easy one.

Instead, we would like to use this brief article to "commemorate" the inauspicious anniversary of the first denunciation of the ICSID Convention, by describing Bolivia´s life after ICSID. In the last ten years, several international arbitration cases have been filed against Bolivia, and there are certain lessons to be learned from them, in connection to the denunciation of the ICSID Convention.

1. **Arbitration claims filed prior to the denunciation**

Although 10 years have passed since Bolivia denounced the ICSID Convention, a still active ICSID case involves the country. In *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), the Chilean company Quiborax sought compensation for the revocation of mining concessions in the department of Potosí by the government. The arbitration claim was filed against Bolivia at ICSID on October 5, 2005, almost two years before Bolivia denounced the ICSID Convention. In September of 2015, the arbitral tribunal issued an award in favor of Quiborax and ordered Bolivia to pay approximately US$ 50 million. Bolivia filed an annulment request, and the case is now pending a decision from the annulment committee.

While there is consensus on the fact that claims filed at ICSID against a particular country, are not affected by the subsequent denunciation of the Convention by that country (pursuant to article 72 of the ICSID Convention), it is still mesmerizing to realize that Bolivia remains subject to the decisions of an ICSID tribunal, even ten years after leaving ICSID. In this case, one of the reasons for the delay was the multiple time extensions requested by the parties in order to reach a settlement agreement, which was ultimately unsuccessful.

2. **Arbitration claims filed during the six month term of Art 71 of the ICSID Convention**

Article 71 of the ICSID Convention establishes that *"[t]he denunciation [of the ICSID Convention] shall take effect six months after receipt of such notice."* Using this article, an investor filed a claim against Bolivia during that six-month gap between the submission of the denunciation and the entry into effect of the denunciation. In *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia* (ICSID Case No. ARB/07/28), the Italian company filed a claim against Bolivia for the nationalization of its investment in the telecommunications company "Entel."

The interesting aspect of this arbitration claim is that it was filed on October 12, 2007, five months and ten days after Bolivia submitted a notice of denunciation of the ICSID Convention, but within the six month waiting period required for the denunciation to take effect. Bolivia objected to the jurisdiction, but the claim was validly registered at ICSID, as it seemed not to be manifestly outside the

jurisdiction of the center.

The claim of the Italian company was later settled with Bolivia for approximately US$ 100 million, so we did not get to see whether Bolivia had compelling arguments to object to the jurisdiction of ICSID under this article. The preliminary registration of the arbitration claim at ICSID, and later cases against Venezuela (see e.g. *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/22), seem to show that the scale would have leaned in favor of the investor on the topic of jurisdiction in this case.

3. **Arbitration claims filed long after the withdrawal of the country**

It seems logical that after the six-month period, the doors to ICSID arbitration would be closed. However, article 72 of the ICSID Convention leaves room for another interpretation.

Article 72 states that *"[n]otice by a Contracting State pursuant to Articles 70 or 71 [i.e. denunciation of the Convention] shall not affect the rights or obligations under this Convention of that State […] arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary"* (emphasis added). The logic of the argument would be that a withdrawing State, such as Bolivia, is still subject to ICSID jurisdiction even after denouncing the ICSID Convention, if it has already given its consent unilaterally, for example, in a BIT, or in a contract (as was the case in *Alcoa Minerals of Jamaica Inc. v. Jamaica*, ICSID Case No. ARB/74/2).

Arbitration clauses in BITs are commonly understood as irrevocable signs of consent granted by states to arbitrate investment disputes with nationals of the other states. Following the exact wording of Article 72, there would be room for interpreting that Bolivia would still be bound to ICSID arbitration by its BITs, where specific consent to ICSID arbitration was granted to certain investors.

It might be a long shot for investors to try to convince an arbitration tribunal that states are permanently subject to ICSID jurisdiction even after denouncing the Convention. There are, now, precedents of more strict interpretations of Article. 71, which could play against any such attempt (e.g. Venoklim v. Venezuela), but these cases did not exist in 2007. The wording of the specific BIT would also be important, as it can condition ICSID arbitration on membership of both states to ICSID (in which case, the article 72 interpretation would not apply).

A relevant case for Bolivia regarding this point was *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8). It was registered at ICSID on April 12, 2010, more than two years after the denunciation of Bolivia became effective, and it would have been the first practical approach to the correct interpretation of article 72 of the Convention under this theory. The case was, however, settled for US$ 357 million, and we did not get to hear the arguments of the parties on this issue.

4. **Bolivia's exposure to investment arbitration in other fora**

It is also important to note that, if the intention of Bolivia by denouncing the ICSID Convention was to completely close investors' access to international arbitration against the state or state-owned entities, the goal was not met. During the ten years after denouncing ICSID, Bolivia was involved in several international arbitration cases arising from expropriations and nationalizations carried out by the government of president Evo Morales. In the absence of ICSID as an alternative, the investors sought other fora for pursuing their claims.

They did so on the base of bilateral investment treaties (**"BITs"**) entered into by Bolivia. Bolivia had 23 BITs in place before denouncing the ICSID Convention. In 2009, after the new Constitution of Bolivia was enacted, the government announced that it would start a process of denunciation and renegotiation of all these bilateral treaties, as they were deemed to be contrary to the new Constitution. It is not completely clear when exactly did Bolivia denounce all its BITs, as no hard data can be found on the status of the BITs, but it is relevant that the BITs had survival clauses which allowed investors to continue to rely on them, at least for some years, for protection of their investments. The BITs also provided for other available dispute settlements forums.

BITs entered into with France, Sweden and the UK had survival clauses of 20 years; those entered into with Argentina, the Netherlands and Peru had survival clauses of 15 years; and so forth. Some BITs also granted investors the possibility of filing ad-hoc arbitration claims using UNCITRAL rules, or the possibility of using the Additional Facility Rules of ICSID, and even ICC arbitration. Among the arbitration claims filed against Bolivia after the denunciation of the ICSID Convention are i) *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17); ii) *South American Silver Limited v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2013-15); and iii) I*berdrola*

S.A. and Iberdrola Energía, S.A.U. v The Plurinational State of Bolivia (UNCITRAL, PCA Case No. 2015-05). As can be seen, arbitration under UNCITRAL rules, and administered by the Permanent Court of Arbitration, are the preferred options for the investors nowadays.

5. **Conclusions**

Even if a state denounces the ICSID Convention, the doors for investment arbitration are not completely closed to foreign investors. Articles 71 and 72 of the ICSID Convention provide for mechanisms that allow investors additional protection periods (for at least six months and questionably for even longer), and survival clauses of BITs also keep states exposed to investment arbitration in other arbitration forums. As Bolivia learned the hard way, denouncing the ICSID Convention is not an immediate escape valve for regretful states.

The views expressed are those of the authors alone, and should not be regarded as representative of or binding upon the authors' law firm.