Post-award Bargaining Power of States: Examples from Bolivia

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

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One of the main objectives of investment arbitration, as a feature of international investment law, is to provide a neutral forum for the parties in dispute. Neutrality is necessary because the parties are fundamentally different: while the investor is a private entity, the state is a sovereign entity with sovereign immunity. However, the scenario of neutrality that is created by the arbitral procedure ends with the issuing of an arbitral award. The situation of imbalance between the state and the investor, which was present before the start of the arbitral procedure, resurfaces once the jurisdiction of the arbitral tribunal has ceased, and the parties sit again at the negotiation table.

The reason for this imbalance is that enforcement of an award against a state cannot be sought before a neutral arbitral tribunal, but must be sought before local courts, those of the very own losing state, or those in other countries where assets of the losing state can be located. The task of enforcing arbitral awards against states is complex, to say the least, and both parties are aware of this. The situation creates considerable leverage for states, which can be used to negotiate significant discounts on the amounts awarded by the arbitral tribunal, in exchange for prompt payment. This article examines briefly the sources of this leverage, and describes examples from Bolivia, to try to grasp the magnitude of this post-award bargaining power of states.

Sovereign immunity as the main leverage factor

Leaving aside all factors related to recognition of the arbitral award, the investor must also take into consideration the problems related to sovereign immunity. As entities subject to international law, states have sovereign immunity rights, from both jurisdiction and enforcement. Immunity from jurisdiction is deemed to be waived through the state´s consent to arbitration. However, immunity from enforcement is not, as it is the investor's task to enforce the award against assets not covered by this immunity.

Specific immunity provisions are regulated by the internal laws of each state. For instance, in the US, the applicable law is the US Foreign Sovereign Immunities Act of 1976. Therefore, investors are subject to the specific laws of each country where enforcement of the award is sought, and such laws vary. A common criteria for determining whether specific assets can be seized (under the prevailing doctrine of restrictive immunity), is based on the "commercial" use of such assets. Embassies, for example, cannot be seized, as they are not commercial in nature.

The task of trying to defeat the sovereign immunity of a state is considerably burdensome. Argentina, for example, successfully avoided compliance of investment arbitration awards for years, creating doubts on the entire international system of investor-state dispute resolution [fn] *See* Lin, Tsai-yu, Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement? (May 31, 2012). Contemporary Asia Arbitration Journal, Vol. 5, No. 1, pp 1-22, May 2012. Available at SSRN: https://ssrn.com/abstract=2115553 [/fn]. There are no broadly used mechanisms to avoid this problem. States and investors could explicitly provide for a waiver of the state's immunity from enforcement, included in their specific investment contracts, or in the relevant investment treaty. However, states are understandably reluctant to waive their immunity from enforcement.

Lack of well-organized information on post-award settlement agreements

The conventional wisdom is that most states voluntarily comply with arbitral awards, which is true, but misses the point of this analysis. It is unclear how post-award actions of states should be analyzed and recorded, but they are certainly not receiving the attention that they deserve.

Take as an example the several investment arbitration awards settled by Argentina in late 2013[fn] These cases are: *CMS Gas Transmission Company v the Argentine Republic* (ICSID Case No. ARB/01/8)*, Azurix Corp v the Argentine Republic* (ICSID Case No. ARB/01/12)*, Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v the Argentine Republic* (ICSID Case No. ARB/97/3)*, Continental Casualty Company v the Argentine Republic* (ICSID Case No. ARB/03/9)*,* and *National Grid plc v. the Argentine Republic* (case under UNCITRAL rules)[/fn]. The arbitral awards in these cases had established various compensation amounts in favor of the investors, but following the negotiations between the Argentinian government and the investors, the terms of the compensation had varied considerably. Yet, the outcomes of these post-award negotiations are not shown in the web database of ICSID, or in other popular sources of information such as UNCTAD's "Investment Policy Hub".

It is understandable that arbitration records do not to pay particular attention to whether the award was paid in full, or whether the state had successfully negotiated a discount. However, the lack of well-organized information regarding the aftermath of arbitral awards, could be deceiving the arbitration practitioner's perception of the value of an arbitral award in the real world. It seems like a country which has bargained the amount of the arbitral award, would still be considered by academics and practitioners, for all general purposes, as having complied voluntarily with the award. So, the conventional wisdom declaring that almost all states voluntarily comply with investment arbitration awards, is not particularly useful to assess the bargaining power of states.

Examples from Bolivia

Bolivia has taken part of investment arbitration cases, as respondent state, in at least 8 opportunities; however, most of the commenced arbitration cases – and other potential cases arising from nationalizations – were settled by the Bolivian government before an arbitral award was rendered. Only two investment arbitration cases brought against Bolivia have reached an award.

In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), the arbitral tribunal awarded US$ 48,619,578 to the investors, plus interests on 16 September 2015. Bolivia requested the annulment of the award, but the application for annulment was dismissed by the *ad hoc* committee.

The interest of this award was established at 1-year LIBOR + 2%, compounded annually, calculated from 1 July 2013 until payment in full. The date of the settlement agreement was 7 June 2018. At that point in time, the total amount of the award – with interest – would have been of approximately US$ 57,1 million. However, after the negotiations between the parties, they agreed to a settlement of US$ 42,6 million. In this case, the bargaining power of the state represented a reduction of 26,4% of the amount of the award.

In *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (PCA Case No. 2011-17) the arbitral tribunal awarded US$ 28,927,582 to the investor plus interest, on 31 January 2014. The award established annually compounded interest at a rate of 5.633331% starting on 1 May 2010.

A settlement agreement was reached by the parties on 29 May 2014, for US$ 31,5 million. However, applying the interest provided for in the award, the compensation would have been approximately of US$ 36,18 million. In this case, the bargaining power of the state represented a reduction of 12,93% of the amount of the award.

These limited examples, are only intended to show that states do, in fact, have a bargaining power, and that in certain situations, this leverage can be as powerful as to allow the discount of even a quarter of the total amount awarded by the arbitral tribunal to the investor.

Bargaining power as market valuation of the arbitral award

The market is the best judge of the true value of most things, including the real value of investment treaty arbitration awards. An analysis of the bargaining power of states is, in essence, an analysis of the true value of the arbitral awards, as determined by the players in the market.

Of course, every arbitral award can be valued differently. The specific characteristics of the case, and of the respondent state, could play an important role in the valuation of every specific award. For example, in the case of Argentina, political pressure of the US and other countries pushed Argentina to settle and pay some of its pending arbitration cases, but it is unlikely that this would happen in all scenarios of recalcitrant states. In addition, the investors could “sell” their rights under the award to firms specialized in performing complex multinational enforcement proceedings, widening the pool of market participants. All these factors will, in ultimate instance, affect the value of the arbitral award, and the willingness of the parties (investor and state) to settle the award at a discount. Whatever the circumstances are, it is predictable that the parties will end up sitting again at the negotiations table, after the award is issued, and that the state will intrinsically have a leverage to negotiate more favorable terms.

Conclusions

It is only logical that the complexities of enforcing arbitral awards against states would considerably diminish the true value of arbitral awards, augmenting the bargaining power of states. A more thorough analysis of the spread between awards (as provided by the arbitral tribunal) and settled amounts, could offer arbitration practitioners a better understanding of the entire value of investment arbitration claims. Understating the importance of this bargaining power of states would only alienate the entire investment arbitration system from its true value in the real world.

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