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What if Peru (or Another Country) Leaves the ICSID Convention? Possible Recourses for Investors Facing a Potential Change in the Game

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Before winning Peru's presidential race in June 2021, Peruvian President Pedro Castillo vowed to withdraw Peru from the ICSID Convention and to renegotiate several of the country's Bilateral Investment Treaties ("BIT's"). According to the then-presidential candidate's government plan (chapter XXI), ICSID tribunals are biased and "*at the service of the multinational companies*" in prejudice of the State's interests, and thus Peru should reconsider its situation.

Peru signed the ICSID Convention in September 1991 and ratified it in August 1993. Since then, Peru has been a key player in international investment disputes, showing a solid track-record with a favorable outcome in 15 out of 18 ICSID disputes as of March 2021. It is estimated that Peru has been compelled to pay only 0.086% of the total claims presented by investors before ICSID. In fact, Peru has recovered more than double the amount the country has had to pay in indemnities.

Despite the country's outstanding statistics, Peru has recently been inundated with claims, having been sued in 15 new ICSID cases since 2020. As these proceedings are still ongoing, it is impossible to gauge Peru's performance. However, last August, Peru enjoyed a new victory in the ICSID case *Hydrika v. Peru* over jurisdictional grounds, maintaining the country's legacy of favorable arbitral awards.

Nevertheless, Peru's tumultuous political situation creates unpredictability as to whether the current President will ultimately withdraw from ICSID. If so, Peru would follow the path of other South American countries such as Bolivia, Ecuador (recently rejoined), and Venezuela.

Under these circumstances, foreign investors might wonder what implications an ICSID withdrawal, or the potential termination and renegotiation of BIT's, could have on the international protection of their investments. This article explores some available recourses for investors who foresee its host state might change the rules of the game.

It must be noted that the following sections aim to merely describe both sides of the debate. This post does not advance, nor does it intend to advance any position of the authors nor their respective law firms or clients on these topics.

Are ICSID contract-based disputes safe?

Peru is one of the few countries that has signed state contracts which contain an arbitration clause that provides for ICSID as the forum for contractual disputes. These contracts are the preeminent framework for concessions to build, operate and maintain public infrastructure through large-scale investment projects. All in all, one third of Peru's ICSID arbitration proceedings have or are being arbitrated based on an ICSID contractual arbitration clause rather than on the legal framework established in a BIT.

This legal practice raises the question: would a state contract providing for ICSID as the dispute resolution forum survive ICSID's jurisdiction under Article 25, despite denunciation by one of the Contracting Parties? The History of the ICSID Convention may already give us a hint.

When asked about the effects of denunciation of the Convention, Mr. Aron Broches, the main drafter of the ICSID Convention and founding Secretary-General of ICISD, explained that under current Article 72 of the Convention (equivalent to Article 73 during the Convention's original discussion)

> *"If a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to arbitration if a dispute arose"* (p. 1009), adding that *"if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre"* (p. 1010).

The reasoning behind would be that in such cases the consent of both parties, the State and the investor, has been perfected already since the signing of the agreement, unlike Treaty arbitration clauses that need the future consent's perfection from the investor. In theory, this would apply to any state contract that contains an ICSID arbitration clause, including investment agreements.

The applicability of this reasoning to contractual ICSID disputes has not been tested yet, to the authors knowledge. However, it's likely that States would challenge such an argument since Article 25 of the ICSID Convention requires that a dispute arise between an investor and *"a Contracting State."* As the *National Gas v. Egypt* tribunal stated, Article 25 requirements set *"an objective Convention limit beyond which ICSID jurisdiction cannot exist"* (¶ 133). Given the amount of state contracts including an ICSID arbitration agreement, if Peru denounces the Convention, we will see a very interesting battle on this topic.

The sun may not yet have set for some treaty-based disputes

An investor must also consider that, even if the host state withdraws from the ICSID Convention, the effects of the termination are not immediate. Article 71 of the Convention indicates that *"[t]he denunciation [of the ICSID Convention] shall take effect six months after receipt of such notice."* This is the so-called *"sunset clause"* period. In principle, during the six months immediately after the withdrawal, the rights and obligations arising from the Convention continue to apply to the denouncing state. However, there is a debate as to whether the six-month period exclusively covers

disputes initiated before the host state denounced ICSID or whether they are also applicable to disputes which initiate within the six-month period.

The issue was explored in *Blue Bank v. Venezuela* where claimant perfected its consent to arbitration on June 25, 2012, five months after Venezuela's denunciation to the ICSID Convention in January 24, 2012, *i.e.* within Article 71's sunset clause period. Venezuela challenged the tribunal's jurisdiction arguing, among others, that *"once a notice of denunciation is given under Article 71, consent can no longer be perfected"* (¶ 79). Ultimately, the majority of the tribunal rejected such objection, highlighting the *effet utile of* the sunset clause contained in Article 71 (¶ 119) and concluding that given that the investor perfected its consent within such sunset clause period *"then the agreement to arbitrate was formed before the expiry of the six-month period during which Venezuela, despite its denunciation, was still party to the ICSID Convention"* (¶ 120). In other words, for the *Blue Bank* tribunal's majority, investors have standing to perfect consent even after the denunciation within the sunset clause period.

However, a different approach is found in *Favianca v. Venezuela* where claimant perfected its consent on July 20, 2012, *i.e.* before the expiration of the six month period after Venezuela's denunciation. As discussed in a previous post, after analyzing Articles 71 and 72 of the ICSID Convention, the *Favianca* tribunal declined jurisdiction holding that "*only where consent to arbitration to the jurisdiction of the Centre is perfected, such that it generates rights and obligations under the ICSID Convention, that those rights and obligations persist following the receipt of a notice of denunciation by a Contracting State pursuant to Article 71*" (¶ 282). In other words, the *Favianca* tribunal required that consent be perfected before the denunciation of the ICSID Convention, contrary to the majority in *Blue Bank*.

Given the lack of consensus, investors should also review the applicable BIT's, as most of them provide for longer sunset clauses and alternative dispute resolution forums such as UNCITRAL and ICSID Additional Facility. For instance, most BIT's subscribed by Peru in the 90s, including the BIT's with France, Germany and Spain, provide both for 15-year sunset clauses and for UNCITRAL as an alternative forum. If the BIT provides for other forums, the investor may be able to initiate arbitration proceedings for the stipulated duration of sunset clauses before those other forums, regardless of whether access to ICSID is available.

The widely debated procedural application of the MFN Clause

Even if the BIT resorts exclusively to ICSID, there may be other alternatives for investors. One notable example is the Most Favored Nation Treatment clause (MFN), whose applicability to import a dispute resolution forum from one Treaty to another is still widely debated.

A landmark case is *Venezuela US, S.R.L. v. Venezuela*, a dispute under the Barbados-Venezuela BIT. Article 8 of this BIT provided for UNCITRAL as a forum only as long as Venezuela was not a Member to the ICSID Convention and ICSID Additional Facility was unavailable. Given that when claimant filed its claim before UNCITRAL Venezuela had already become a member of the ICSID Convention and subsequently withdrawn from it, Venezuela objected to jurisdiction claiming that UNCITRAL had only been available in the pre-ICSID period (¶ 81).

However, since article 3(3) of the Barbados-Venezuela BIT stated that the BIT MFN provision specifically applied to the dispute resolution clause, the majority of the tribunal decided to extend

the MFN to arbitration matters. Since Venezuela is a contracting party to several BITs which provide for UNCITRAL as the main or default means of arbitration, the tribunal held that Barbados investors were entitled to the same "treatment" as other investors in terms of access to the same dispute resolution forums (¶¶ 129-130).

In contrast, in *Wintershall v. Argentina*, claimant invoked the MFN clause contained in Article 3 of the Argentina-Germany BIT to demand access to a more favorable dispute settlement procedure provided in other BIT's. However, in this case the MFN clause was not specific about its application to the dispute resolution clause. As such, the tribunal concluded that the investor could not use the MFN clause to avoid complying with the procedure and dispute resolution forum stipulated in the relevant BIT (¶ 156). Most recently, the *Kimberly-Clark v. Venezuela* tribunal also declined jurisdiction, ruling, among others, that the MFN provision could not be imported to procedural matters (¶ 235).

Corporate Restructuring may also be an option

Finally, investors may have the option of restructuring their investment to secure greater guarantees.

In this regard, some arbitral tribunals have held that corporate restructuring with the sole purpose of gaining international protection is not *per se* forbidden. For example, the *Gremcitel v. Peru* tribunal stated that "*it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate per se, including where this is done with a view to shielding the investment from possible future disputes with the host state*" (¶ 184). However, investors must avoid restructuring when the dispute has already arisen or when the dispute is foreseeable. What qualifies or not as "foreseeable" depends on the specific circumstances.

Conclusion

In sum, Peru's uncertain future in the arbitral landscape should not be interpreted as an unavoidable risk for investors. Recent arbitral rulings demonstrate that diverse mechanisms exist to protect investors from a potential change in policy. However, the sooner the investor prepares for a change in circumstances, the better. It is up to investors to assess their relevant risk and define which avenue suits them and when to activate it.

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