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Will Ecuador's denunciation of ICSID drive that country's arbitrations further underground?

Luke Eric Peterson (Investment Arbitration Reporter) · Sunday, July 12th, 2009

After several months of increasingly angry political rhetoric, and a formal green-light from the country's Legislature, Ecuadorian President Rafael Correa has made his country the second state to denounce the ICSID Convention in recent years.

It's no secret that ICSID has been singled out for particular opprobrium from some governments in Latin America, and it remains to be seen what knock-on effects the denunciation will have.

However, one unusual effect of *Bolivia's* earlier departure from ICSID in 2007 was that high-stakes arbitrations over nationalizations sometimes ended up being brought to venues which lag the much-maligned ICSID in terms of their transparency and in the degree to which they cater to sovereign governments.

Indeed, when Bolivia left ICSID, and Luxembourg-based Ashmore Energy International objected to the nationalization of a pipeline company in that country, AEI simply opted to bring an arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce.

In line with the SCC's handling of numerous private commercial disputes, the facility does not formally disclose cases on its docket and leaves it to the discretion of the parties to reveal information about such disputes.

In basic governance terms, an argument might be made that Bolivia may have been better off staying in ICSID, where the country had never lost an arbitration, and where many arbitration lawyers would privately say that governments tend to get ample due process from a Centre which is ultimately controlled by its various member-governments.

But now that Ecuador has followed Bolivia to the exits, it bears remembering that both countries have consented to arbitration in a multitude of bilateral investment treaties, and one can probably expect disputes to be brought to UNCITRAL tribunals or other commercial arbitration venues like the SCC (where provided in those treaties).

Of course, if withdrawing from ICSID is merely Step One in a larger disengagement strategy – as seems to be the case – then the prospect of investor-state arbitrations being shunted off to private commercial venues is only a temporary detour.

However, given that many of the aforementioned treaties may run for some years before becoming

eligible for termination, foreign investment disputes with Bolivia or Ecuador could be run increasingly under the radar for a number of years– unless both governments (or all claimants) pledge to disclose such cases to the extent permitted under these other arbitral rules.

Mind you, given the degree of anger directed at the highly visible ICSID system, it remains to be seen whether part of the animus directed at the centre has been motivated by an annoyance at the countries' dirty laundry being aired in a semi-public context. In other words, will the powers-that-be in Bolivia and Ecuador actually prefer to have foreign investment disputes play out in less visible fora?

Even if they do, interest in investor-state arbitration – from lawyers, academics, concerned citizens, and, yes, train-spotting arbitration reporters – will likely make it politically challenging to permit such claims to play out under cover.

However, as the ICSID option recedes into the rear-view mirror, it remains to be seen whether Bolivia and Ecuador intend to turn on the headlights for the next phase of their respective journeys.
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