

BOLIVIA EXPOSES 'CRITICAL DATE' AMBIGUITY

The ICSID Convention is ambiguous on when obligations survive exit from the treaty. Alejandro Escobar, senior associate at Latham & Watkins, explains three plausible scenarios

The Republic of Bolivia has become the first state to denounce the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID convention). The convention has a mechanism by which certain rights and obligations survive after a state's withdrawal. The text, though, is unclear on whether there is a critical date when determining which obligations survive, and in particular whether investors can file claims against Bolivia in the six months before its membership formally ceases. Three different scenarios are plausible under the text.

Bolivia announced this decision in a summit held among like-minded governments (which included Venezuela, Nicaragua and Cuba), which wanted to signal a break from what they perceived as Washington-dominated institutions such as the World Bank, the International Monetary Fund and ICSID. Bolivia has so far been the only one of these countries to implement this policy decision.

Bolivia's notice of denunciation of the convention was executed on 1 May 2007 and addressed to the president of the World Bank. According to an ICSID news release (dated 16 May 2007), the World Bank received Bolivia's written notice of denunciation on 2 May 2007. Under the terms of the convention, Bolivia's denunciation will take effect six months after the receipt of the notice, that is, on 3 November 2007.

Bolivia had signed the ICSID convention on 3 May 1991. After depositing its instrument of ratification with the World Bank, it became an ICSID contracting state on 23 July 1995. Over the past 12 years, Bolivia has been a party to one concluded ICSID arbitration proceeding (*Aguas del Tunari v Republic of Bolivia* (ICSID case No. ARB/02/03)) and to a further proceeding which is still pending (*Química e Industrial del Borax Ltda. v Republic of Bolivia* (ICSID case No. ARB/06/3)).

The operative provisions

Article 71 of the ICSID convention provides:

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

The depositary of the ICSID convention is of course the International Bank for Reconstruction and Development, also known as the World Bank.

Article 72 of the convention provides:
Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent sub-divisions or agencies or of any national 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.

The above provisions have specific consequences for Bolivia's denunciation of the convention. Parsing the language of article 72, Bolivia's denunciation (i) shall not affect its rights or obligations (ii) under the ICSID convention (iii) arising out of consent to the jurisdiction of the ICSID centre given by it and (iv) before its notice of denunciation was received by the World Bank on 2 May 2007.

'Rights and obligations arising ...'

As a first approach to the scope of article 72, it may be useful to consider which rights and obligations are capable of arising under the convention from Bolivia's consent to the jurisdiction of the ICSID centre. The following is a possible catalogue of those rights and obligations.

Article 25(1) of the convention provides:
When the parties have given their consent, no party may withdraw its consent unilaterally.

Article 26 of the convention provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed to consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27(1) of the convention provides:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

Under article 36 of the convention, the consent of the parties to the jurisdiction of the ICSID centre entitles either of them to initiate proceedings by submitting a request to the ICSID secretary general.

Article 44 of the convention provides in the relevant part:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration.

Articles 50 to 52 of the convention govern the post-award remedies available to a party in an ICSID proceeding. Notably, those remedies include annulment proceedings, which, if successful, will allow the resubmission of the dispute to a new ICSID tribunal.

Articles 53 to 55 of the convention govern the effect and enforceability of ICSID arbitration awards and are a direct corollary of consent to jurisdiction of the ICSID centre.

Article 64 of the convention provides:
Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such disputes, unless the States concerned agree to another method of settlement.

Under article 66(2) of the convention, the date of consent to ICSID jurisdiction shall preserve the rights and obligations arising out of that consent before any amendment to the ICSID convention.

Under articles 21 and 22 of the convention, consent to the jurisdiction of the ICSID centre would carry with it the obligation to observe certain privileges and immunities in regard to arbitral proceedings conducted in accordance with the convention.

There are two further points to be made in connection with the rights and obligations preserved by article 72. First, the provision refers to consent given by Bolivia as opposed to consent given by any third party. This sets article 72 of the convention apart from article 66(2), which deals with rights and obligations preserved in the light of an amendment to the convention and which does not contain that phrase. In

accordance with article 72, Bolivia therefore has no continuing obligation to recognise or enforce ICSID arbitration awards which derive from the consent of third parties. Bolivia likewise has no continuing obligation to observe the privileges and immunities in connection with ICSID proceedings among third parties.

Second, the rights and obligations in question are only those arising out of Bolivia's consent to the jurisdiction of the ICSID centre. Bolivia will retain no continuing rights or obligations of ICSID membership. For example, it will no longer have the right to make appointments to the ICSID Panel of Arbitrators or Conciliators. Importantly, Bolivia will have no continuing representation on the ICSID Administrative Council. This means that after 3 November 2007, Bolivia will no longer have a say in the election of the ICSID secretary general, in the adoption of ICSID rules and regulations, in the approval of ICSID's arrangements with the World Bank and in the approval of ICSID's budget and annual report.

When does consent need to be perfected?

The critical question is whether there is a certain date by which rights and obligations must have arisen – from Bolivia's consent to the jurisdiction of the ICSID centre – for those rights and obligations to be preserved through the operation of article 72. In particular, does the consent that Bolivia has given to the jurisdiction of the ICSID centre need to have been accepted by a national of another ICSID contracting state before 2 May 2007 for the packet of rights and obligations “arising” out of that consent “under the Convention” to be preserved beyond the date on which denunciation takes effect?

Three scenarios have been outlined as possible solutions to the above questions. Each of these scenarios may be plausible on the basis of the text of article 72 and other provisions of the convention.

Scenario one: Consent must be perfected before the notice of denunciation is received by the depositary

One interpretation of article 72 would require consent to be perfected (ie, for Bolivia's consent to have been accepted by an investor) before 2 May 2007 in order for any rights and obligations under the convention to survive Bolivia's denunciation. This view is adopted, for example, by Professor Christoph Schreuer in his 2001 Commentary.

The *advantages* of this view would include:

- that it is consistent with what may reasonably be understood as the “consent of the parties” referred to in other provisions of the convention, such as article 25; and
- that it provides certainty and control to the denouncing state regarding exposure to the centre's jurisdiction.

The *disadvantages* of this view would include:

- that it provides uncertainty for investors who may have invested significant sums in reliance on Bolivia's ICSID membership and references to ICSID convention arbitration in Bolivia's treaty commitments;
- that it would leave certain of Bolivia's investment treaties with no investor-state dispute settlement procedures (and possibly expose Bolivia to an allegation that it has breached those or other treaties); and
- that it would mean, somewhat oddly, that Bolivia's consent to convention arbitration in the six-month period after denunciation, while it is still a contracting state, would have no legal effect (suggesting a situation of ‘diminished’ membership).

The text of the ICSID convention could support a variety of possible solutions to the question of determining the “critical date”

Scenario two: Consent must be perfected before the notice of denunciation takes effect

A second interpretation of article 72 would require consent to be perfected at any time while Bolivia remains an ICSID contracting state, ie, until 3 November 2007. This view is shared, for example, by Professor Sebastian Mancieux of Université de Bourgogne.

The *advantages* of this view would include:

- that it is consistent with the possibility that parties may have given their consent at different times; and
- that it is consistent with a contracting state's exercise of its rights up until the time that its denunciation takes effect.

The *disadvantages* of this view would include:

- that there may be some uncertainty as to the effect of consent if by 3 November 2007 no dispute has arisen between the parties (thus not satisfying the terms of article 25(1) to the letter); and
- that there may be some uncertainty as to the effect of any consent given by a denouncing state after (as opposed to before) receipt of its notice of denunciation by the depositary.

Scenario three: Consent may be perfected as long as the consent ‘given by’ Bolivia remains in place

A third interpretation of article 72 would allow consent to be perfected as long as the consent “given by” Bolivia has not been withdrawn.

The *advantages* of this view would include:

- that it would avoid any exposure to an allegation that Bolivia is acting in violation of its investment treaty commitments; and
- that it would preserve the expectations of investors on the basis of which they may have invested in Bolivia.

The *disadvantages* of this view would include:

- that it would tie in the effect of the ICSID convention, as regards the consent to the jurisdiction of the ICSID centre, for many years beyond the date of denunciation (and Bolivia's consent would be available even to investors who invested after that date); and
- that it would create some uncertainty if Bolivia were to declare its various treaty consents to be withdrawn despite the continuing force of the relevant treaties.

The text of the ICSID convention could support a variety of possible solutions to the question of determining the “critical date” (to use the expression from the seminal *Holiday Inns* case) at which certain rights and obligations must arise from Bolivia's consent given by it before 2 May 2007.

In the absence of a consensus emerging among ICSID users having to deal with a number of emerging or actual investment disputes between Bolivia and foreign investors, or as among various ICSID arbitration tribunals that might be called upon to settle those disputes, the meaning of article 72 may need to be settled, definitively, between any interested ICSID contracting states and Bolivia.

The matter will ultimately require, of course, a full analysis under the public international law rules on treaty interpretation in which examination of the text and context of the convention will play a part.

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