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INTERNATIONAL ARBITRATION LAW

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Anti-Arbitration Trends in Latin America

While certain Latin American countries are adopting instruments which contemplate international arbitration as a means of resolving investor-state disputes (see, e.g., the Free-Trade Agreement between the United States and Peru, which was approved on June 28, 2006 by the Peruvian Congress), others have engaged in the reverse trend of terminating or narrowing the scope of existing commitments to arbitrate. All members of the Alternativa Bolivariana para Las Américas y El Caribe (ALBA)—namely Nicaragua, Cuba, Bolivia and Venezuela—as well as Ecuador have, over the last year, announced measures or taken active steps to curtail investors' recourse to international arbitration.

These countries are evaluating or implementing a spectrum of options in this respect, ranging from constitutional reforms or amendments of legislative provisions to the denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention, International Centre for Settlement of International Disputes.") Not all of these measures are, however, likely to achieve the contemplated goal.

Constitutional Reforms

A first type of measure is to impose constitutional restrictions on international arbitration. Both Ecuador and Bolivia are in the process of reforming their constitutions to that effect.

In Ecuador, the Commission on Sovereignty, International Relations and Integration of the Constituent Assembly

suggested to the Plenary of the Constituent Assembly the adoption of a number of constitutional amendments. The provisions adopted by the plenary include the following article: "No treaty or convention may be entered into pursuant to which the State must relinquish jurisdiction in favor of arbitral tribunals in disputes regarding commercial or contractual matters between the State and individuals or corporations" (Article 7 of the draft as approved by the Constituent Assembly). An exception was included in respect of treaties entered into among Latin American states for the resolution of disputes between their nationals and another of those states before regional arbitral institutions. In addition, the Constituent Assembly is considering a proposal to eliminate the last phrase of Article 14 of the constitution, which provides: "Contracts entered into by State entities and foreign nationals or corporations shall entail the renunciation of diplomatic protection. If said contracts are entered into on Ecuadorian territory, recourse to a foreign jurisdiction may not be agreed upon, unless provided otherwise in international conventions."

In a similar vein, on Dec. 9, 2007, the Bolivian Constituent Assembly approved new constitutional language aimed at restricting foreign investors' recourse to arbitration. The approved text of the new constitution, which remains to be submitted to referendum, provides in particular that:

> Foreign investment will be subject to Bolivian jurisdiction, law and authorities, and no person may object to such jurisdiction nor appeal to diplomatic protection in order to obtain a more favorable treatment. (Proposed Article 320 (II)).
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> All foreign companies performing activities in the hydrocarbon production chain on behalf of the State are subject to the State's sovereignty,
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> laws and authorities. Under no circumstances recourse to foreign tribunals or jurisdictions will be recognized, and no one may invoke the existence of an arbitration agreement or have recourse to diplomatic protection. (Proposed Article 366).

It is extremely doubtful that arbitral tribunals sitting in a neutral venue will give effect to such restrictions when confronted to an existing arbitration agreement freely entered into, be it by commercial entities, state-owned entities or the states themselves (on the relevant case law, see, e.g., Fouchard, Gaillard, Goldman on "International Arbitration," Kluwer, 1999, paragraphs 547 et seq.).

Denunciation of the Convention

Although all members of Alternativa Bolivariana para Las Américas y El Caribe, or ALBA, expressed their intention to denounce the ICSID Convention at the ALBA Fifth Summit in April 2007, Bolivia is, to date, the only country that has in fact taken such a step. In February 2008, the Venezuelan National Assembly urged the president to withdraw from the ICSID Convention, and in April 2008 the Procurador de la República of Nicaragua indicated that Nicaragua was also considering this step. Yet, to date,

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ICSID (or, the Centre) has received no communication in this respect other than the Bolivian denunciation, which became effective on Nov. 3, 2007.

A state that has denounced the convention ceases to be a Contracting Party to the Convention. Denunciation does not, however, affect that state's rights and obligations created while the convention was in force. Indeed, Article 72 of the convention, in line with the customary rules of international law as codified in Article 70(1) of the Vienna Convention, provides that:

> 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 subdivisions 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.

Consent to ICSID jurisdiction does not result from a state's status as Contracting Party to the Convention but, in accordance to Article 25(1), requires both parties' written consent to the Centre's jurisdiction. Parties may consent to the Centre's jurisdiction simultaneously in a contract or other document. Their mutual consent may also result from the investor's subsequent acceptance of a state's prior consent given in a law or treaty providing for the protection of investments.

In cases where the investor has accepted the state's prior consent before the receipt of the notice of denunciation by the Centre or within six months from its receipt—when the denunciation becomes effective—the state is still a party to the convention and thus the effectiveness of its obligations presumably raises little difficulty. It is in the other cases where the investor accepts the state's consent after the denunciation has become effective that Article 72 becomes relevant. Under this provision, a state is bound by the obligations arising out of its consent to the jurisdiction of the Centre given before the notice of denunciation was received by the Convention's depositary.

Because it specifically refers to "consent" by the state, as opposed to consent given by both parties to the arbitration, a state's expression of consent to the Centre's jurisdiction in an instrument such as a BIT should suffice for the purposes of Article 72 and that state's obligation to arbitrate its dispute before ICSID (E. Gaillard, "The Denunciation of the ICSID Convention," NYLJ, June 26, 2007).

Limitations

Another type of measure aimed at restricting the Centre's jurisdiction is the one adopted by Ecuador last year. On Dec. 4, 2007, Ecuador notified to the Centre the types of disputes that it would not accept to be submitted to ICSID jurisdiction:

> The Republic of Ecuador will not consent to submit to the jurisdiction of the International Centre for Settlement of International Disputes (ICSID) the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, mineral or others. Any instrument containing the Republic of Ecuador's previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date.

The possibility to carve out exceptions in order to limit the types of disputes that may be submitted to the Centre is expressly provided for in article 25(4) of the Convention:

> Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

While Article 72 of the convention sets forth the effect of a state's denunciation in relation to its rights and obligations under the convention, there is no comparable provision addressing the effect of a notification pursuant to Article 25(4). An investor's position is therefore more uncertain, even where the investment was made prior to the state's notification under Article 25(4).

In order to assess the effect of notifications with respect of investments made both prior and after the notification, it is necessary to understand the nature of such notification. The genesis of Article 25(4) is telling in this respect. Inclusion of the provision was suggested by Aron Broches, the World Bank's general counsel and principal architect of the Convention, after various States voiced concerns that their participation in the convention would create expectations of widespread consent to submit any dispute to the Centre's jurisdiction. Mr. Broches then proposed that states may announce the type of disputes they may not consider apt to submit to Centre ("History of the ICSID Convention," vol. II-1, p. 54 and pp. 566-567; vol. II-2, p. 957).

The Report of the Executive Committee also indicates that notifications under Article 25(4) are not to be considered as reservations, but rather as a means of information about the type of disputes that a state might not consider apt to be submitted to the Centre (see Report of the Executive Directors Committee, para. 31, available on the ICSID Web site).

Nor is an Article 25(4) notification an expression of consent—or lack thereof. Consistent with the mechanism of the convention according to which a state's status as a contracting party does not constitute consent to the Centre's jurisdiction, and as confirmed in the last sentence of Article 25(4), such a notification does not constitute consent under Article 25(1).

Only a few cases have considered the effect of a notification under Article 25(4). In *Alcoa Minerals Jamaica v. Jamaica*, the tribunal found that notifications under 25(4) are not retroactive and do not constitute a means to withdraw consent to jurisdiction:

> In the present case the written consent [is] contained in the arbitration clause between the Government and Alcoa […]. This consent having been given could not be withdrawn. The notification under Article 25 only operates for the future by the way of information to the Centre and potential future investors in undertakings concerning minerals and other natural resources. (Decision on Jurisdiction and Competence, July 6, 1975, Y.B. COMM. ARB., Vol. IV, 1979, p. 208).

The effects of notification were also explored by the Tribunal in *PSEG Global Inc. v. the Republic of Turkey*. In that case, Turkey objected to the tribunal's jurisdiction on the basis of its notification under Article 25(4), arguing that, pursuant to its notification made in 1989 which provided that "only the disputes arising directly out of an investment which has obtained necessary permission, in conformity with the relevant legislation of the

Republic of Turkey on foreign capital, and that effectively started shall be subject to the jurisdiction of the Centre," the dispute concerned a project that had not "effectively started" and was therefore excluded from ICSID jurisdiction.

Turkey claimed that its consent to ICSID jurisdiction, as contained in the U.S.-Turkey BIT signed in 1985 and entered into force in 1990, was qualified by the 1989 notification. It further argued that notifications under Article 25(4) must serve some purpose as otherwise they will be meaningless. It relied, in this respect, on the tribunal's decision in *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic* which provided that: "It is worth noting, […] that a Contracting State that wishes to limit the scope of the Centre's jurisdiction can do so by making a declaration provided for in Article 25(4)" (Award on Jurisdiction, May 24, 1999, para. 65, available on the ICSID Web site).

The claimant, on the other hand, argued that the purpose of an Article 25(4) notification is only to inform potential investors that the state may rely on the notification when it gives its consent and that, to the extent that the convention does not deal with consent, it cannot deal with the qualification of consent or introduce conditions to consent.

The tribunal in *PSEG* rejected the respondent's interpretation regarding the effect of the notification and found:

> It has become increasingly common for treaties to exclude reservations and allow for declarations instead. These declarations do not alter the legal rights and obligations under the treaty nor do they amend any of its provisions. They are simply an instrument that allows states to express questions of policy to which they are not bound and that do not create rights for the other parties. It is a matter of information, normally resorted to for domestic needs. This is also the legal nature of the declarations made by the state in the form of notifications under Article 25(4) […]. It follows that to be effective the contents of the notifications will always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. (Decision on Jurisdiction, June 4, 2004, paras. 144-145, available on the Investment Treaty Arbitration Web site).

Admittedly, in the *PSEG* case, Turkey was seeking to subsequently qualify the consent given in general terms in the applicable BIT. The question whether, under the same reasoning, a state's exclusion of an entire class of disputes in accordance with Article 25(4) would have no effect remains untested, although the *PSEG* reasoning seems sufficiently broad to encompass such a situation.

Specific BITs

The consent to arbitrate being found in the relevant bilateral or multilateral investment protection treaty, only the denunciation or renegotiation of such instruments are likely to produce the desired effect of limiting or excluding altogether investors' recourse to international arbitration, subject only to the survival provisions of the relevant treaty.

For example, on April 30, 2008, in the aftermath of the actions taken by Exxon Mobile in connection to its investment in the Orinoco Belt and Cemex's announcement that it will pursue arbitration under the Venezuela-Netherlands BIT, Venezuela denounced that treaty.

Although the Venezuelan government indicated that it intends to renegotiate the terms of the treaty rather than to terminate it, it gave notice of its intention to denounce it in order to avoid the treaty's automatic renewal for a further period of 10 years.

Should renegotiations to amend the treaty fail, the termination will take effect on Nov. 1, 2008. However, while termination will ensure that consent in respect of ICSID arbitration for investments under the BIT is withdrawn, not all obligations under the treaty will cease as it contains a survival clause for a period of 15 years with respect to investments made while the treaty was in force.