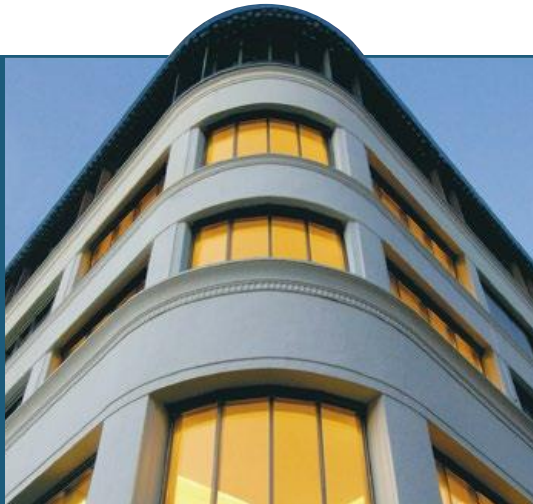


LALIVE



*Opciones ante las denuncias de los
TBI / Options available upon the
termination of BITs*

Domitille Baizeau, LALIVE

Seminario de Derecho Público y Derecho Internacional, Quito, 5 October
2017

1. Foreign investment protection under BITs and ICSID

1.1 BITS

- Substantive protection
 - I. Fair and equitable treatment (FET)
 - II. Protection from expropriation
 - V. Most-favoured-nation treatment (MFN)
 - VI. Full protection and security (FPS)
 - VII. Prohibition of discriminatory & arbitrary measures
 - VIII. Freedom to transfer funds
- Direct investor-State dispute settlement (ISDS):
Arbitration

1. Foreign investment protection under BITs and ICSID

1.2 ICSID Convention

- Procedural protection: self-contained ISDS
- Among key features
 - I. No State immunity from jurisdiction
 - II. Application of international law
 - IV. Exclusion of intervention by local courts
 - V. Award directly enforceable

1. Foreign investment protection under BITs and ICSID

1.3 Relationship between BITs and ICSID

- Two requirements for ICSID arbitration
 - I. Parties to ICSID Convention
 - II. Parties' consent
- ICSID Convention membership is not State's consent
- State's consent to arbitrate to be granted by another instrument
 - Investment contract
 - Investment law
 - BITs

2. A recent move away from foreign investment protection?

- Increasing number of claims by foreign investors
- Increasing knowledge
- Increasing criticism at
 - I. Protection standards
 - II. ISDS
- Two approaches
 - Renegotiation and replacement of BITs
 - Unilateral terminations/withdrawals

2. A recent move away from foreign investment protection?

- Denunciation of multilateral investment treaties
 - ICSID Convention: Bolivia (2007) Ecuador (2010) Venezuela (2012)
 - Energy Charter Treaty: Russia (2009) and Italy (2015)
- Unilateral termination of BITs
 - India (15), Indonesia (20)
 - South Africa (9)
 - Columbia (4), Bolivia (11), Venezuela (1), Ecuador (26)

3. Issues arising out of BIT termination

3.1 States' right to terminate BITs

- Parties may terminate a treaty
 - I. In accordance with the provisions of the treaty; and
 - II. By mutual consent (Art. 54 VCLT)
- Termination provisions in BITs
 - Initial term during which neither party may terminate (5 to 20 years)
 - Six-month or 12-month notice requirement
- Termination under international law (Art. 61/62 VCLT)

3. Issues arising out of BIT termination

3.2 Effect of BIT termination: survival/sunset clauses

- Vary greatly
 - in length (5 to 20 years)
 - in scope (all or some investments)
- Reflect general international law principle (Art. 70(1) VCLT)
- Termination under international law
- Termination by mutual consent?

4. Issues arising out of withdrawals from ICSID

- Three countries so far: Bolivia, Ecuador, Venezuela
- Former parties to
 - The ICSID Convention
 - BITs providing for ICSID arbitration
- Issues, arising under:
 - The termination of the ICSID Convention
 - The obligations under the BITs

4. Issues arising out of withdrawals from ICSID

4.1 Effect of ICSID withdrawals **under the ICSID Convention**

- Termination right in the Convention
 - Any State any time
 - Six-month notice (Article 71)
- Preservation of rights and obligations (Article 72; Art. 70 VCLT)

4. Issues arising out of withdrawals from ICSID

4.1 Effect of ICSID withdrawals **under the ICSID Convention**

Article 72: “*Notice by a Contracting State pursuant to Article 70 or 71 shall not affect the rights or obligations under this Convention 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 depository.*”

- Parties’ perfected consent or State’s unilateral consent?
- Much (academic) debate but no final decision

4. Issues arising out of withdrawals from ICSID

4.2 Effect of ICSID withdrawals **under the BITs**

- Depends on terms and conditions of the BIT:
 - “*Party*” to the ICSID Convention
 - e.g. Ecuador-US BIT
 - “*shall have become party*” to the ICSID Convention
 - e.g. Ecuador-Spain BIT; Bolivia France BIT
 - State “*may agree to*” ICSID arbitration
 - e.g. Bolivia-UK BIT
 - Disputes “*shall be submitted to ICSID arbitration*”, with no pre-conditions

Conclusion

- About 10% of BITs terminated as at March 2017
- But relative impact and uncertainty remains
- 2/3 of BITs terminated replaced by a new treaty: a better option?
- The option of joint interpretative notes

Thank you
dbaizeau@lalive.ch