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

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1. Foreign investment protection under BITs and ICSID

1.1 BITS

- Substantive protection
  1. Fair and equitable treatment (FET)
  2. Protection from expropriation
  3. Most-favoured-nation treatment (MFN)
  4. Full protection and security (FPS)
  5. Prohibition of discriminatory & arbitrary measures
  6. 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
  1. No State immunity from jurisdiction
  2. Application of international law
  4. Exclusion of intervention by local courts
  5. 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
  1. Protection standards
  2. 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

- 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
    e.g. Ecuador-Peru BIT
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

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