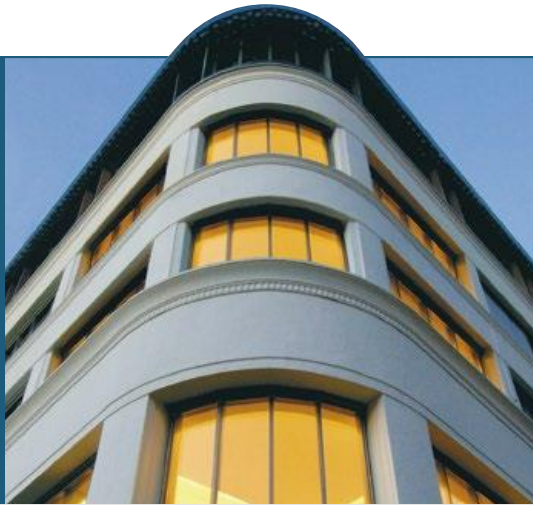


LALIVE



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

Domitille Baizeau, LALIVE

# 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
    - 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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