Transational Dispute Management

www.transnational-dispute-management.com

ISSN : 1875-4120
Issue : (Provisional)
Published : June 2014

This article will be published in a future issue of TDM (2014). Check website for final publication date for correct reference.

This article may not be the final version and should be considered as a draft article.

Opting Out of ICSID and BITs: Legal and Economic Effects
by L. Burger and J. Nicholson

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2014
TDM Cover v1.8

Opting out of ICSID and BITs: legal and economic effects

Laurence Burger and James Nicholson[1]

I. Introduction

In the last decade, the International Center for Settlement of Investment Disputes ("ICSID") has become much more visible due to it administering a rising number of arbitrations. Whereas there were only a handful of investor-state arbitration cases in the 1980s and early 1990s, by 2012 the cumulative figure had risen to 419. Over 77% of these cases were initiated from 2002 onwards.

Yet, several countries have recently decided to denounce the ICSID Convention and terminate Bilateral Investment Treaties ("BITs"). The purpose of this article was initially to review the countries that had left ICSID, terminated BITs, or refused to enter into ICSID or to conclude BITs, to determine the reasons and mechanisms behind their decisions, and finally to ascertain whether these decisions made sense from an economic point of view. The focus was in particular on the South American countries and Australia.

The result is, at best, ambiguous on many levels. Economic research has not yielded a consensus on the relationship between BIT participation, whether or not accompanied by access to ICSID arbitration, and Foreign Direct Investments ("FDI") flows. The countries that recently withdrew from ICSID have seen no clear effects on their FDI stocks as a result of their announcements to do so.

Moreover, as the authors were finalising this article, two significant events occurred that supported investor-state dispute settlement ("ISDS"). First, Argentina, which had refused to pay many awards that had been rendered against it, agreed to pay USD 500 million to resolve these disputes.[1] Second, Australia accepted to include investor-state dispute resolution mechanisms in its recently-concluded free trade agreement with Korea. Australia had previously become the poster-child of the anti-ISDS movement, being the only G8 country to have chosen this path. The reasons for this change seem to be mostly political, as described below.

Other recent events, however, indicate a negative perception of the BIT system. In March 2014 Indonesia cancelled its BIT with the Netherlands. Moreover, the inclusion of ISDS mechanisms in the US-EU Transatlantic Trade and Investment Partnership has met increasing opposition from public interest groups. Recently even Germany, which reportedly initially supported the inclusion of ISDS mechanisms in the treaty, has declared itself against such mechanisms for this treaty.[2]

In summary, decisions over signing BITs and adopting the ICSID mechanism appear, for countries that have not accepted these mechanisms, to be driven by political considerations, many of which are wider than any debate over BITs and ICSID themselves. The act of rejecting BITs and/ or ICSID has not been shown to lead to short-term economic consequences. However, it seems reasonable to suppose that the wider political context in which such acts typically take place, which is often explicitly hostile to at least certain kinds of FDI, will indeed deter FDI with the consequent longer-term economic effects.

This article reviews certain of the countries that are in some way against ISDS (II), the legal mechanisms of opting out of ISDS and particularly the ICSID system (III), the economic effect of opting out of ICSID (IV), possible future developments (V), and alternative mechanisms within the existing system (VI).

---

[1] Laurence Burger is a Partner with Perréard de Boccard in Geneva; James Nicholson is a Senior Managing Director with FTI Consulting in Paris. James Nicholson gratefully acknowledges the assistance of Maroje Culinovic in relation to the economic parts of this article.

II. Countries which are not part of the investor-state dispute resolution system

The reasons for countries not entering the investor-state dispute resolution system, or opting out of it, are fairly similar: mistrust in the system, seeing it as tilted in favor of investors, or seeing no benefits to these countries anything.

A. Brazil, Mexico, India and South Africa

Brazil, Mexico, India and South Africa are all countries that have not joined ICSID. They have been picked here as examples as they are fairly representative of the countries that refuse to follow this route. All of them have economies that, if not expanding, are at least stable, with FDI playing an important role. Yet, the reasons for these countries not to join ICSID vary.

Brazil is consistently the largest FDI recipient in Latin America, with new foreign investment reaching approximately USD 65 billion in 2012, and typically receives close to half of all South America's incoming FDI.[3]

Despite the importance of foreign investment to its economy, Brazil is not a party to any BIT. In the 1990s, Brazil signed BITs with Belgium and Luxembourg, Chile, Cuba, Denmark, Finland, France, Germany, Italy, the Republic of Korea, the Netherlands, Portugal, Switzerland, the United Kingdom and Venezuela, but none of these has been approved by the Brazilian Congress.[4] Brazil has not ratified the ICSID Convention either.

One of the reasons given for this is legal uncertainty. There is controversy in particular as to whether ratification of BITs or the ICSID Convention is prohibited under Brazilian law on grounds that it impedes the sovereign right of the state.

Mexico is part of the North American Free Trade Association ("NAFTA") and, as a result, regularly part of ICSID proceedings thanks to Article 1120 NAFTA which provides that disputes under NAFTA can be submitted to arbitration under the ICSID Convention. Mexico has consistently been one of the largest recipients of FDI among emerging markets. While it is not a party to the ICSID Convention, it is a member of NAFTA and has signed 27 BITs. Since 1999, it has been a respondent in 14 cases using the ICSID Additional Facilities Rules, which apply when neither the host state nor the foreign investor's state is party to the ICSID Convention, and the UNCITRAL rules. Mexico won in half of the cases. Mexico's reasons for not joining ICSID are unclear. According to one author, there is no public policy that justifies this omission, which is rather a product of neglect.[5]

India and South Africa are not parties to the ICSID Convention. India announced in April 2012 that it was planning to move away from the investor-state dispute system and renegotiate Free Trade Areas ("FTAs") with South Korea, Singapore and other countries to ensure that any lawsuits filed against it by foreign companies could only be heard by Indian courts.[6] It is unclear whether this position will hold against South Korea's favoring of investor-state dispute resolution mechanisms. The resolution of this issue will probably show the respective bargaining strength of both countries.

The South African government is reexamining the investor-state dispute settlement system after a policy of affirmative action, aiming at reducing economic disparities between white and black South Africans, was targeted in 2007 by a multinational corporation.[7]

B. Bolivia, Ecuador and Venezuela

Bolivia, Ecuador and Venezuela have all denounced the ICSID Convention.

Bolivia had, in 2012, a GDP of USD 55 billion.[8] Since 2006, it started nationalizing the hydrocarbons industry. As a gesture of protest against the numerous arbitrations initiated by investors, it denounced the ICSID Convention in 2007, based on a perceived bias in favor of corporations, the lack of transparency in ICSID proceedings, the lack of an appeal mechanism, and other reasons, some ideological. [9]

Ecuador had, in 2012, a GDP of USD 150 billion.[10] As of 2009, Ecuador was facing USD 12 billion worth of arbitration complaints arising out of disputes with foreign investors, in particular due to a new hydrocarbons law, that unilaterally modified the terms of oil production sharing contracts and increased the government's share of revenues.[11] In response to the numerous investor claims, Ecuador gave notification of its denunciation of ICSID in 2009, effective in 2010.[12]

Venezuela gave notification that it withdrew from ICSID in 2012, after its nationalization of the Cerro Negro oil project and firms in several other industries, among which telecommunication, mining and hydrocarbons. Late President Hugo Chavez gave rise to multiple actions against it.

The rejection of ICSID by Bolivia, Ecuador and Venezuela is as much politically motivated as economically. Latin America has been historically the geographic area most frequently sued in international investment disputes, and these countries' denunciation has been seen as a protest against this trend. In particular, Bolivia's and Ecuador's declarations and actions against ICSID and BITs are driven by an ideology that foreign investment is wrong, promotes imperialism, and does not deserve protection.[13]

C. Argentina, Australia

Argentina and Australia are also considering whether to withdraw from ICSID. Argentina currently faces 43 cases at ICSID with an overall value of USD 65 billion. Moreover, it has already been condemned in 15 cases arising out of the financial crisis that hit the country in the decade after the year 2000. Up until recently, most of these awards have not been executed, being embroiled in post-award execution and confirmation battles.[14] However, on 18 October 2013, Argentina announced that it was willing to pay about USD 500 million to several European and US corporations in an effort to rebuild foreign investor confidence.[15] The payment reflects a 25% discount on a total USD 677 million in claims. It takes part amidst Argentina's attempt to unlock additional credit lines from the World Bank, the IMF and the People's Bank of China in order to support its dwindling foreign currency reserves.

Although a member of ICSID, Australia has announced in 2011 that it would reject investor-state arbitration in all trade agreements. Australia has famously refused to include such method of dispute resolution in the Trans-Pacific Partnership.

While in line with the actions of some Latin American countries, Australia's stance is, in contrast to that of these countries, not explicable simply by reference to individual state experience as respondent to investment state arbitration. Until the recent claim by Philip Morris International arising out of Australia's plain packaging legislation, Australia had never been a respondent to investor-state arbitration.

It has been argued that Australia's position emanated from a lack of trust of investor-state dispute settlement as a mechanism to achieve meaningful trade liberalization and from a shift back to the principled commitment to multilateralism and away from bilateral and regional FTAs.[16] In that sense, it was a more significant, and in some ways more worrisome, development. Indeed, the government's position had been criticized by prominent Australian business executives as a threat to Australian companies dealing internationally.[17]

However, in the negotiations of the free trade agreement between Australia and Korea, Korea requested the inclusion of an arbitration mechanism as a non-negotiable requirement, and Australia accepted this requirement. It was reported in this respect that the new government in Australia has changed its stance towards investor-state dispute resolution, seeing it as a trading-chip rather than a deal-breaker. It is, however, too soon to know whether the Australian government has totally abandoned its negative position towards investment arbitration.[18]

III. The legal mechanisms of opting out

It is a fundamental legal principle that no state can, without consent, be compelled to submit disputes to arbitration or any other kind of pacific settlement.[19] Consent is a corollary of the principles of sovereignty and equality of the State, which in turn constitute the basic constitutional doctrine of the law of nations governing a community consisting primarily of States having uniform legal personality.[20]

Consent is usually expressed in the form of a treaty containing dispute resolution clauses providing for arbitration. Treaties are subject to the principle *pacta sunt servanda*, an internationally acknowledged principle sanctioned, in the context of public international law, at Article 26 of the Vienna Convention on the Law of Treaties ("VCLT"). This Article provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

It follows from these principles that a treaty can only be terminated in specific circumstances or according to specific procedures laid out in the provisions of the treaty, or by consent of all the parties to the treaty (Articles 54(a) and 56(1) VCLT).

A. Termination of ICSID

1. Denunciation of the ICSID Convention pursuant to its Articles 71 & 72

Articles 71 and 72 of the ICSID Convention provide for the denunciation of the ICSID Convention and its effects.

Article 71 provides as follows:

> "*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.*"

Article 72 provides as follows:

> "*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.*"

2. Issues with the definition of consent

The wording of Article 72 gives rise to a controversy arising out of the term "consent". Consent is, as explained above, a pre-condition to any arbitration under the ICSID Convention and as a result the term "consent" is present throughout the Convention. For example, Article 25(1) makes consent an indispensable jurisdictional requirement that cannot be withdrawn unilaterally, and the presence of the nationality requirement under Article 25(2)(a) and (b) depends upon the date at which the parties consented.

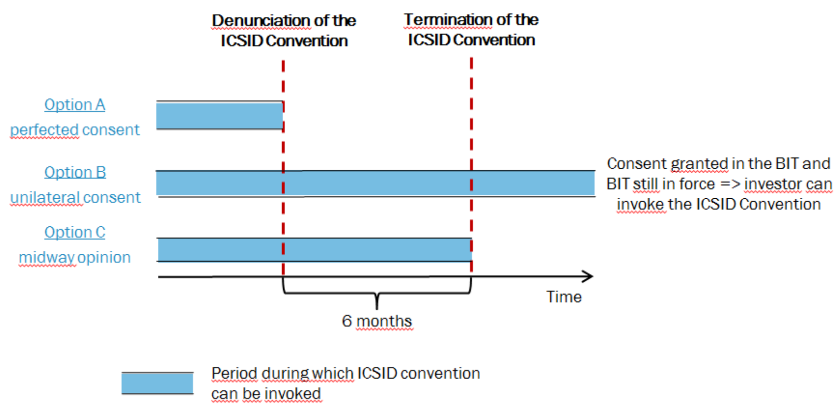
The Convention grants the parties a large measure of freedom in expressing their consent. Consent can take the form of a compromissory clause in the investment agreement between the investor and the Host State, a unilateral instrument (notice letter to the ICSID Secretariat), a piece of legislation, or finally a treaty (whether bilateral or multilateral, for example NAFTA).[21]

Consent in the context of the denunciation of the ICSID Convention is however sometimes interpreted restrictively, this term meaning in this case only *perfected consent* (a.), which is achieved once the investor has sent a notice letter to the ICSID Secretariat. This in turn leads to the conclusion that investors who have not expressed their consent to jurisdiction by way of notice letter prior to the denunciation cannot initiate arbitration once the notice of denunciation has been received by the World Bank. In other words, on this view investors cannot initiate arbitration during the 6 months between the time when the notice of denunciation is filed and the Convention terminates.

The opposing view is that consent in Article 72 means *unilateral consent* (b.). According to this view, if granted in a BIT, consent will allow investors to invoke the ICSID Convention even after the denunciation of this Convention by the Host State has taken effect, as long as the BIT continues to be in force.[2]

A midway opinion (c.) provides that consent given in a BIT is valid prior to the notice of denunciation and during the 6-months denunciation period, but has no effect if given after denunciation takes effect.

The chart below illustrates these three opinions:



B. BITs

According to the VCLT, the termination of a treaty has to be made in conformity with the provisions on withdrawal in that treaty. Most BITs contain such specific provision.[3]

BITs are typically effective for a specific period of time with an automatic renewal after this period expires, unless the BIT is terminated by written notice. For example, Article 12 of the Swiss Turkey-BIT provides as follows:

> *"This Agreement will come into force 30 days after the date on which the two governments notified each other that the constitutional requirements for the conclusion and enactment of international treaties have been fulfilled; it will remain valid for a period of 10 years. If it is not denounced in writing 6 months before the expiration of this period, it will be*

[2] The question arises what would happen were the consent to arbitration under the ICSID Convention to be found in a domestic statute (typically an investment statute)? In the opinion of the authors, the solution would not necessarily be the same. The reason for this is that a domestic statute is unilaterally enacted by the State which denunciated the ICSID Convention. Consequently, this denunciation must also apply to any domestic statutes that refer to ICSID.

[3] Even if it is not the case, Article 56 VCLT provides that a State may withdraw from a BIT if (a) it is established that the parties have intended to admit the possibility of denunciation or withdrawal or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

considered renewed at the same conditions every two years, until it is terminated.

In case of denunciation, the provisions of Article 1 to 11 of this Agreement will apply for a period of 10 years to investments made before the denunciation."

The second paragraph above constitutes a so-called "survival clause", according to which the State is still bound by the BIT in respect of an investment made prior to the termination of the treaty. In most cases, the survival clause applies to the entirety of the agreement, as this is the case for the Swiss-Turkey BIT.

C. Freedom is not immediate

Freedom from ICSID or BITs is never immediate and can, in some cases, only be achieved after a long period of time. Yet this is particularly the case for Venezuela and Ecuador, which as explained above have withdrawn from the ICSID Convention, but which remain bound by BITs.

Among Ecuador's BITs, only treaties with Chile and France provide ICSID arbitration as the sole recourse. The rest of its BITs provide various options for investors including, in addition to ICSID, the Additional Facility Rules, UNCITRAL, ad-hoc arbitration and domestic courts.

Of the 26 BITs in force in Venezuela, only two, those with Chile and Germany, name ICSID as the sole arbitral venue available to investors. All other BITs concluded by Venezuela provide, in addition to the opportunity to arbitrate under ICSID, opportunities for investors to arbitrate under the ICSID Additional Facility Rules or UNCITRAL.

In 2008, Venezuela gave notice of termination of its BIT with the Netherlands. But freedom will not be immediate since the "sunset period" will end in 2023 only. The Netherlands-Venezuela BIT has served as a basis for at least ten ICSID cases against Venezuela, as the Netherlands is often used by firms from other countries to incorporate holding companies and structure investments.[22]

IV. Does opting out of ICSID and BITs have an economic effect?

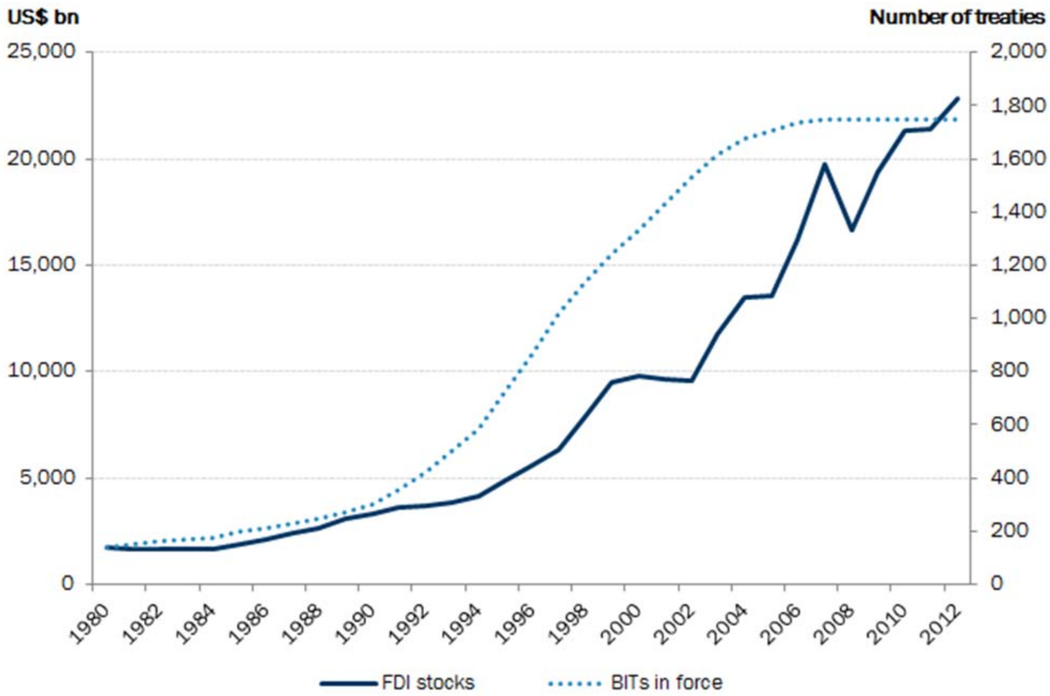
While the theoretical appeal of BITs as an inter-governmental mechanism providing enforceable protection to investors seems to make a strong case for joining ICSID and enacting BITs, to date, economic research yields no consensus on the financial impacts of these measures. Countries in Central and Eastern Europe appear to have particularly benefitted from the BITs they have signed, while the effects are harder to discern in other regions, including Latin America. One partial explanation may be that while BIT protection may benefit countries that are already perceived as offering semi-stable investment environments, these same benefits are not felt by more stable countries, or, for different reasons, more unstable countries.

In this context, the recent withdrawal from ICSID of certain Latin American countries poses crucial questions on the economic implications of ICSID membership. The limited available data suggests that opting out of ICSID had not had a great impact on the FDI into each country, perhaps partly because each of these countries has denounced ICSID but not investment treaty arbitration before other forums.

A. The rise of BITs and FDI

By 2012, over 2,500 BITs had been signed and over 1,700 ratified, most of which came into force after 1990. In fact, from 1959 to 1989, only 269 BITs had been ratified, while in the 16 years up to 2007, almost 1,500 new BITs came into force.[23] Simultaneously, FDI stocks have exploded, from approximately $1.7 trillion in 1980 to just under $23 trillion in 2012 (in 2012 prices).[24]

Figure 1: World BITs and FDI stocks between 1980 and 2012



Source: All data on FDI in this and following graphs come from UNCTAD data series "Inward and outward foreign direct investment stock, annual, 1980-2012", available under http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx. All dollar values in this and following graphs are expressed in 2012 US dollars.

Figure 1 above illustrates just how closely the number of BITs and the amount of global FDI have moved together over the last 30 years. While there is consensus that host-country market size, trade orientation and stability remain dominant factors for attracting FDI, assessing the size of the impact of the conclusion of BITs on inward FDI flows has been a crucial policy question, not just for developing countries.[25]

B. The economics of BITs

The most economically efficient outcome in international investment is achieved if investment takes place where it will earn the greatest return. Absent transaction costs, this outcome is achieved when the parties are able to contract with each other and when a breach of contract is accompanied by damages equal to the lost profits of the party suffering the breach ("expectation damages"). When BITs came into existence, the intention was that they would solve a central problem that was preventing the efficient allocation of capital from capital-exporting countries, the so-called dynamic inconsistency problem.[26] At the heart of this problem is the fact that, even though it may be beneficial for a sovereign state to offer a foreign investor various appropriate protections in advance of an FDI being made, once the investment is made, the host country government may see benefit in failing to honor such commitments. This leads either to changes in the law or to interference in host state legal processes in violation of the host state's prior assertions and to the detriment of the investor. By committing the host state to penalties if it acts in such a way after an investment has been made, the existence of a BIT, in theory, allows a sovereign state to make a credible commitment to treat certain investors according to certain standards. In so doing, it decreases the risk for potential investors, and consequently, in theory, increases the flow of FDI to that country.

Countries where these risks are the greatest are typically countries that do not have a track record of treating foreign investors equitably, either because they have had limited foreign investment in the past, or because they have treated foreign investors inequitably. Such countries are often economically less developed. Therefore, in theory, the signing of investment treaties should unlock high-return investment opportunities and thereby increase the flows of FDIs to the least economically developed countries. If such projects are managed appropriately, this can be to the benefit both of the investors into and of the populations in the host state.

The above argument is simplistic in that it focuses on a single investment decision. In reality, countries may want to maximize their economic positions over multiple investment decisions over a period of time. Thus, even absent BITs, they may resist the temptation to seize assets today to create or maintain a reputation that will ensure the continued attraction of future investments. These long-term reputational effects, however, do not completely remove the dynamic inconsistency problem described above. In particular, although such reputational effects may deter outright expropriation, they offer weaker protection in relation to indirect or "creeping" expropriation, or to infringements of the "fair and equitable treatment" standard.[27] This has been a concern particularly in developing countries where political and legal structures are less stable and traditional forms of institutional protection not enough of a guarantee for foreign investors. In this light, BITs and the ICSID mechanism, at least in theory, are tools for those developing countries to bind themselves credibly to the standards of the international trade system, but also to send a signal to outside investors about the attractiveness of the policy environment.[28]

We would therefore expect to see a positive effect on FDI inflows from the conclusion of BITs, especially in developing countries.

Another element to consider in this respect is the relationship between BITs and political risk insurance. As the mitigation of the risk of investing abroad is a key objective behind the enactment of BITs, it has often been argued that the existence of such treaties is a precondition for political risk insurance.[29] In reality however, only the public investment guarantee programs sponsored by the German and French governments make their guarantees contingent on being covered by BITs, in exception to most other public political risk insurance schemes.[30] For the World Bank's Multilateral Investment Guarantee Agency ("MIGA"), BIT cover of an investment indicates the existence of sufficient legal protection and indeed facilitates the underwriting process, but is not a necessary condition for coverage. Similarly, when premium rates are determined, the existence of a BIT is only one of 57 rating factors. These facts suggest that, for countries which credibly demonstrate a commitment to the rule of law, access to political risk insurance and the pricing of coverage may not be affected significantly by the lack of BITs in the majority of cases. However, the denunciation of investor-state dispute settlement mechanisms, or the failure to honor rights stipulated in already-existing BITs, may still be seen as a negative signal of an increase in risk and hence be factored into the underwriting decisions of insurers.[31]

C. Search for empirical evidence

Six studies published between 2004 and 2009 showed a positive and significant effect of BITs on FDI flows.[32] These studies concluded that the more BITs a country signed, the more incoming and outgoing FDI it experienced – both due to increased capital flows between the signatory countries and an overall increase in inward investment flows from non-signatory countries spurred by the signing of BITs.[33] This last point would confirm the theory that entering BITs signals an attractive policy environment to all foreign investors.

At a regional level, the transitional economies of Central and Eastern Europe appear to have benefitted crucially from the role of BITs in the region's institution-building and in the lowering of the costs for investors.[34] However, the picture for Latin America is mixed. While the total number of BITs a country has signed does seem to have a positive effect on FDI flows, signing BITs with the US specifically was not found to stimulate FDI for countries in Latin America.[35]

More recent studies, however, raise questions about these results.[36] Factors confounding the analysis include that (a) a surge in capital inflows in one year may incentivize a government to commit to signing more BITs in the following year, hence making BITs an effect rather than a cause of FDI, and (b) an improvement in the investment climate of the host country may cause a simultaneous increase both in FDI inflows and in BIT ratifications, thereby making the domestic policy environment the key factor concerning FDI decisions.[37] Moreover, it appears that the *least risky* of the developing countries – that is those countries that had reasonably strong domestic institutions and already received considerable stocks of FDI – were the most likely to gain from additional BITs.[38] These factors further suggest that the effect of BITs on FDI will be hard to determine amongst these other positive developments.

Moreover, the effects of BITs may be confined to certain sectors[39] - the costs and risks associated with expropriation tend to be the highest in the infrastructure and natural resources industries.[40] Studies focusing on aggregate data are less likely to capture an isolated positive relationship that may exist for a specific country or industry.[41]

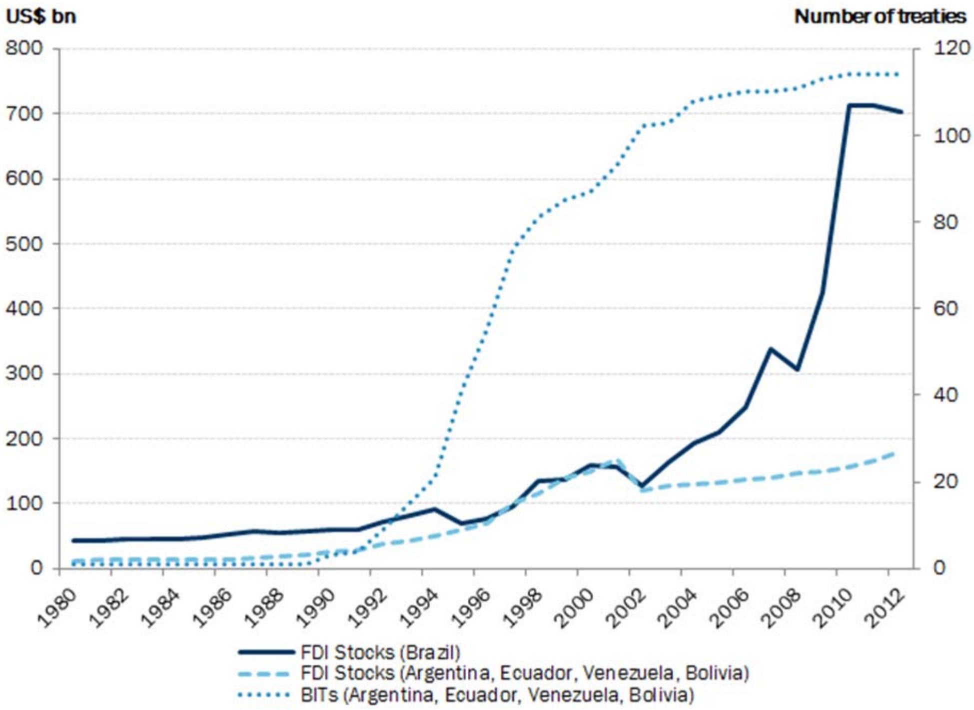
An alternative perspective on the role of BITs has been sought by surveying the business executives involved in making FDI decisions.[42] However, these studies are just as ambiguous. Some investors seem to regard BITs as a crucial means of enhancing the predictability of an investment,[43] but other surveys suggest that BITs only become a subject of interest once a dispute has arisen.[44] At the OECD-hosted "Freedom of Investment" Roundtable in 2011, participants were asked in a questionnaire whether BITs help countries attract additional foreign investment. Of the 21 government representatives who responded, three agreed with the proposition that investment treaties help countries attract additional foreign investment, two disagreed, and 16 stated that they were neutral or did not know.[45] Our anecdotally-gathered experience is that, while BITs may be an important factor when companies consider *how* to structure an investment, they are typically at most a secondary consideration in companies determining *whether* to go ahead with an investment.

D. A closer look at country data

Brazil has no BIT in force, and yet the country has gained a rising share of the stock of global cross-border investment in the last decade (up from 1.3% in 2002 to more than 3% in 2012).[46] However, these figures should not simply be treated as evidence that an emerging country does not need to enter into BITs and offer investor-state arbitration mechanisms to attract substantial amounts of FDI. Brazil is Latin America's biggest economy, and therefore may simply be more attractive to investors than its neighbors (who mostly chose to enter into BITs[4]) due to the business opportunities arising from its wealth and market size.[47] In this case, the rate of return on investments may be judged sufficiently high that offering no investor-state dispute settlement mechanisms via BITs, and the potential negative signal that comes with it,[48] do not deter investors. Another possible explanation is that Brazil routinely enters into direct investment contracts with its investors; these contracts offer binding agreements to protect the interests of investors and often allow for access to international arbitration as dispute resolution mechanism. While Brazil remains competitive in the attraction of inward capital flows, the more complex question (which we do not examine here) may be how far the lack of BITs could affect the ability of Brazilian multinationals to maintain global competitiveness in the absence of BIT protection of their outbound FDI.[49]

[4] Apart from Brazil, all Latin American countries have signed and ratified several BITs since 1990. For a list of BITs, see endnote 24.

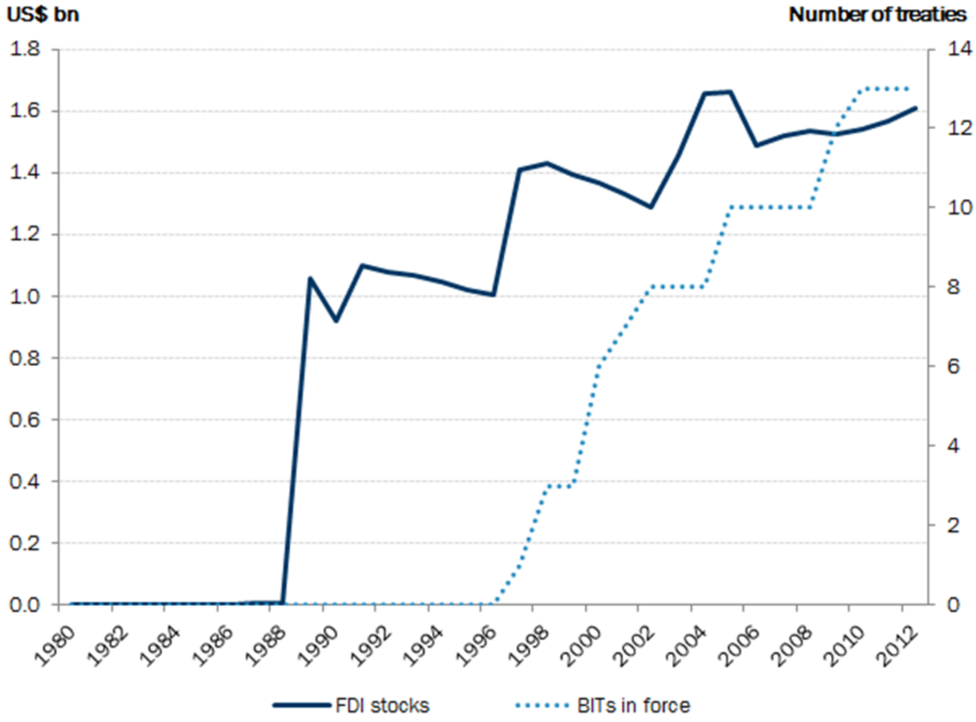
Figure 2: Growth of Brazil's FDI stocks between 1980 and 2012



Source: UNCTAD data.

The experience of Brazil shows that the lack of BITs does not necessarily imply a lack of attractiveness of a country to foreign investors; by contrast, North Korea shows that the ratification of BITs is far from being sufficient to spur impressive amounts of inward FDI. Despite having ratified 13 BITs between 1997 and 2010, FDI inflows have been small and unstable in the years after 1997 just as they were before, as shown in the chart below. North Korea had at end-2012 a stock of FDI of $1.6 billion, only slightly more than Belize despite having an economy that is more than nine times larger.

Figure 3: Growth of North Korea's BITs and FDI stocks between 1980 and 2012



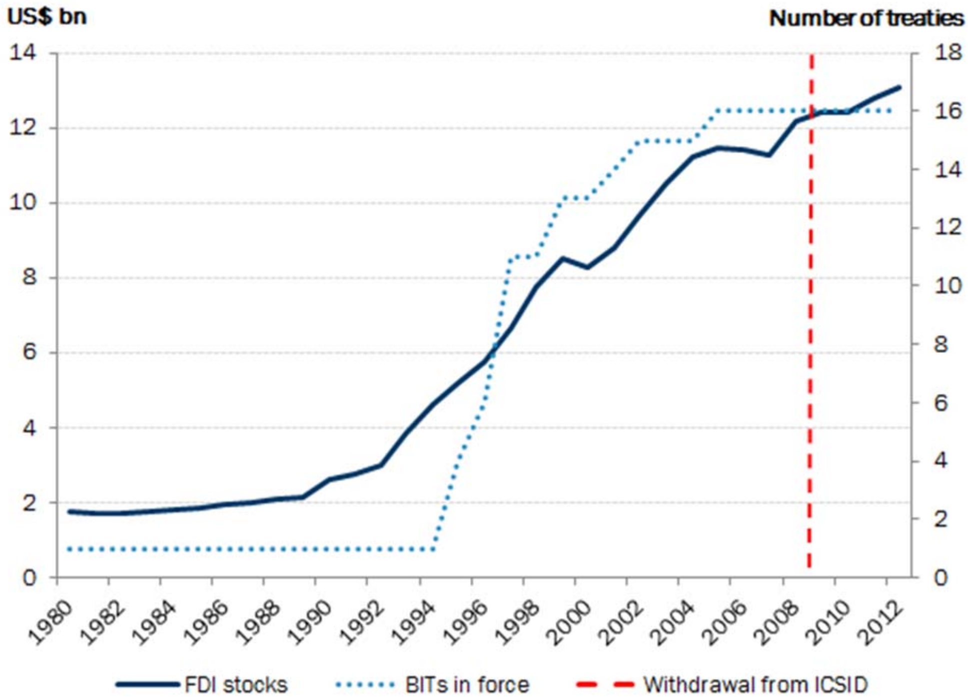
Source: UNCTAD data.

Several countries have officially denounced ICSID dispute resolution, including Bolivia (in 2007), Ecuador (in 2009) and Venezuela (in 2012) – after having signed and ratified 18, 23 and 27 BITs respectively since the early 1990s.[50] Ecuador in 2008 annulled nine of its BITs[5] – the same year that Venezuela terminated its BIT with the Netherlands. Bolivia followed by revoking its BIT with the United States in 2012. How did their BIT participation affect their respective inward FDI in the last two decades? What consequences did their announcing their departure from ICSID have in terms of their FDI positions?

Ecuador entered the 1990s with a modest FDI stock of under $3 billion; by the time it withdrew from ICSID it was boasting a stock of over $12 billion. This rapid increase was matched by a slightly lagged but even steeper rise in BIT participation. Until 1995, Ecuador had ratified two BITs; only eleven years later, that number had increased to 25. While the figure below suggests a notable correlation between BITs and FDI until the late 2000s, leaving ICSID and terminating nine BITs did not bring a halt to the expansion of its stock in foreign investment, as far as this is observable in the three years since withdrawal.

[5] Those with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay.

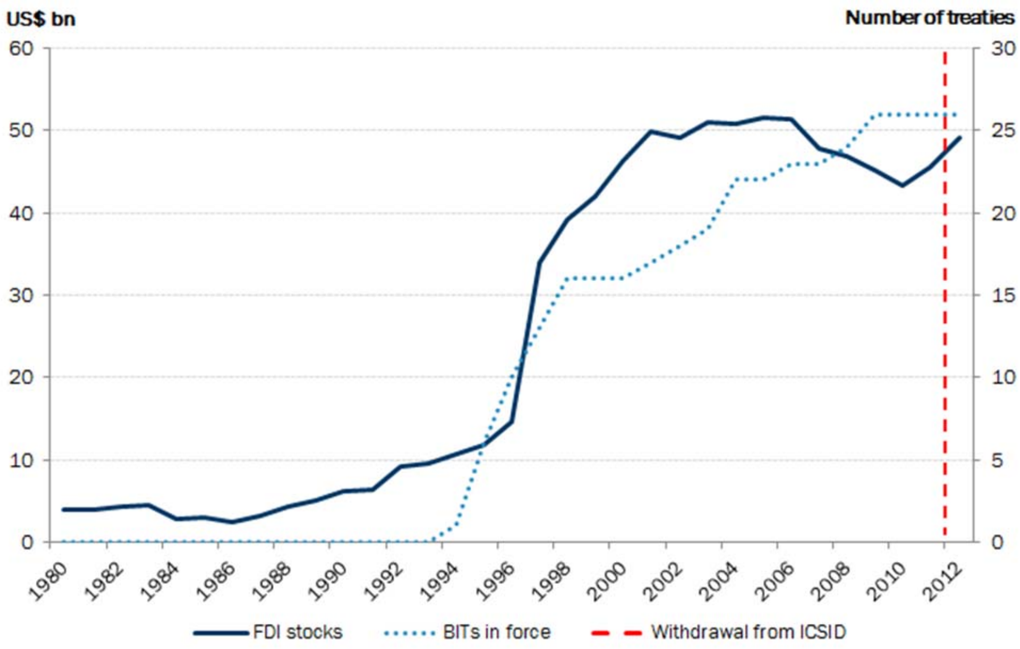
Figure 4: Growth of Ecuador's BITs and FDI stocks between 1980 and 2012



Source: UNCTAD data.

Venezuela initially shows a similar pattern as Ecuador. An up-tick in inward FDI starting in the late 1980s developed into exponential growth in the following ten years, and was closely tracked by the enactment of numerous BITs throughout the 1990s and early 2000s. Contrary to Ecuador, the country experienced a strong and prolonged dip in FDI stocks in the five years after 2005. This, however, was followed by a reversal in trend that emerged only two years after the termination of its BIT with the Netherlands, and that seemed to remain unaffected by the country's long-discussed exit from ICSID in 2012 (as far as can be seen in the available data).

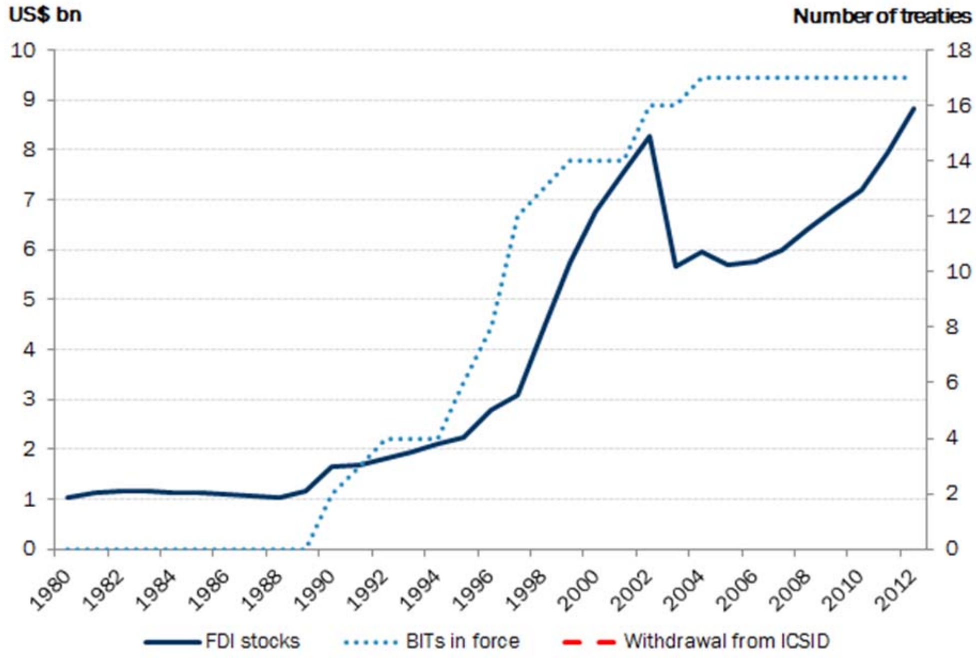
Figure 5: Growth of Venezuela's BITs and FDI stocks between 1980 and 2012



Source: UNCTAD data.

Bolivia has had a similar experience as Venezuela, with explosive growth in FDI stocks throughout the late 1990s and enactment of 18 BITs in only 14 years being followed by a sharp dip after 2002. In only one year, the country's stock of foreign investment fell by more than 30 per cent to just under \$5.7 billion. However, from 2005 onwards, Bolivia has been boasting a fast, continuous and substantial rise in FDI inflows and finally in 2012 surpassed the level of FDI stock of nine years earlier. These developments are particularly striking when seen against the backdrop of the country's denunciation of ICSID in 2007, which appears to have had no negative effect on FDI flows and stocks. It remains to be seen what impact Bolivia's recent annulment of its BIT with the United States, a major trading partner, may have on FDI flows in the long-run. The "sunset period" on this BIT will continue to apply to investments existing at the time of termination for another ten years.

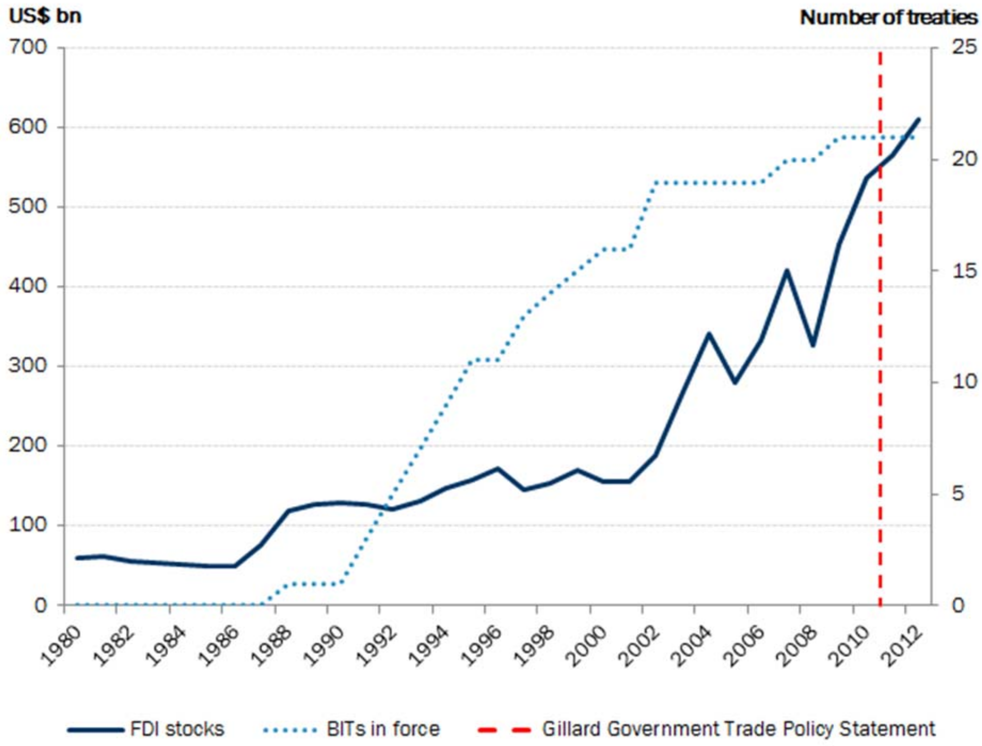
Figure 6: Growth of Bolivia's BITs and FDI stocks between 1980 and 2012



Source: UNCTAD data.

In contrast to the last three countries, Australia is a developed country with a strong economy and a widely recognized stable and independent judicial system – these factors may offer an explanation why the Gillard Government's Trade Policy Statement of 2011, which asserted that investor-state arbitration was not an efficient or necessary protection mechanism for investors, seems to have had no immediate impact on capital flows into Australia, as the chart below suggests. However, like their Brazilian counterparts and unlike foreign investors into Australia, Australian companies investing in considerably more risky markets than their home market may face less developed local judiciary systems in the respective host countries and, hence, may indeed benefit from the protection mechanism investor-state arbitration to mitigate risks and operate competitively.

Figure 7: Growth of Australia's BITs and FDI stocks between 1980 and 2012



Source: UNCTAD data.

E. What does this mean for potential exits?

The impact on a country of withdrawing from ICSID may turn out to be moderate:

- as discussed above, evidence suggests that BITs, although beneficial to investors, are not the sole determinants, and sometimes only weak determinants, for FDI inflows. While the Latin American experience shows a correlation between BIT participation and FDI inflows, post-withdrawal movements in FDI leave doubts about the causal nature of this relationship;
- as the BITs of withdrawing countries generally contain provisions for several investor-state dispute settlement mechanisms, the biggest impact of withdrawals from ICSID (rather than from all forms of BIT dispute resolution mechanism) may be a change in dispute resolution forum used;[51] and
- Australia was the first developed country to announce it would no longer include investor-state dispute settlement provisions in trade agreements and investment treaties. Apart from the already-mentioned recent developments suggesting a softening of this position, the country's stable economic and institutional environment is likely to continue to attract FDI inflows.

Just as the impact of entering into BITs remains ambiguous at best, it is not straightforward to determine the potential effects of an exit from ICSID on a country's FDI inflows. With the Australian and South American countries' announcements still very recent, there is only limited relevant data. The example of Bolivia illustrates how complex the determinants of the flow of FDI are – the causes of the spike in FDI after its moves away from investor-state dispute settlement mechanisms presumably lie in the decisions made around a small number of large projects that were not adversely affected by this development.

Looking forward in the light of recent withdrawals, can we expect more disputes being settled in front of ICSID's Additional Facility or UNCITRAL? If the denouncement of ICSID simply leads to a switch in forum, then we should possibly not expect substantial direct effects on FDI flows. Precisely because of the existence of these alternative mechanisms, the effect of a widespread denunciation of BITs - a step that even the countries withdrawing from ICSID have so far mostly refrained from taking – could be expected to be more dramatic.

However, if the effect of states signing BITs is partly to signal the state of their investment environments, so far the withdrawing states either:

- may through political rhetoric or other actions have signalled the true nature of their political environment to potential investors before withdrawing from ICSID – and, given the limited practical impact of withdrawal from ICSID per se, governments may in any case be more concerned with domestic politics than FDI flows; or
- are already sufficiently stable, with a fair and efficient legal system, such that inbound investors have limited need for additional protection (as seems to be the case in Australia or Brazil).

V. What does the future hold?

Since denunciations have focused on ICSID specifically rather than BITs in general, and withdrawing from BITs is a lengthy process, the opting out of ICSID and BITs may be driven by politics rather than economics. This increases the difficulty in predicting what the future holds.

Recent events point towards some renewed willingness of certain states to give a chance to investor-state dispute resolution. This willingness might be the product of opportunistic behavior by certain governments willing to use it as a negotiating chip.

VI. Could an alternative be found within investment arbitration?

One of the causes for the current backlash against investment arbitration might reside in the difficulty in drafting treaties which will fairly describe the contractual outcome for all possible situations in the future. Indeed, treaty drafting often takes place against a background of information asymmetries between the teams acting for each state, and unanticipated contingencies affecting the negotiations.

A solution to deal with these issues is smart flexibility clauses. These clauses take into account unforeseen contingencies in order to distinguish between host state measures that are in the public interest, for which compensation is not required, and opportunistic measures for which compensation is necessary. They also include guidance to the tribunal concerning the allowed scope of review.[52]

For example, a measure taken in good faith should be more readily accepted by tribunals (as long as compensation is paid) because a good faith measure arises more often out of evolving circumstances that warrant for the taking of such measure, rather than opportunistic behavior by the government. This type of measure is provided for in the US and Canadian Model BITs.[53] They not only describe permissible measures, while also permitting measures that would otherwise be considered discriminatory if the intent behind the discriminatory measure is benevolent as warranted by special circumstances, such as a financial crisis, and the measure applies both to nationals and non-nationals.

However, such clauses are not the perfect solution since the scope of review of smart flexibility clauses to be afforded to tribunals is difficult to tackle. On the one hand, full review seems inadequate given that in some circumstances a margin of appreciation should be provided to the government. Control limited to good faith only seems to be, however, a very broad limitation on a tribunal's discretionary power, rendering its scope of review akin to that of an administrative court. A solution might be to delegate questions that require specific knowledge to expert bodies, as Article 20(3) of the US Model BIT does. The latter provides for consultation by competent financial authorities of both parties when faced with measures relating to financial services for prudential reasons.

---

[1] "Argentina to pay USD 500 million to resolve disputes with foreign firms", W. Bianchi, A. Levine and R. Chang, *Reuters*, 19 October 2013.
[2] "Transatlantic trade talks hit German snag", Shawn Donnan and Stefan Wagstyl, *Financial Times* 14 March 2014.
[3] 2013 Investment Climate Statement, US Department of State, available at http://www.state.gov/e/eb/rls/othr/ics/2013/204608.htm.
[4] 2013 Investment Climate Statement, US Department of State, available at http://www.state.gov/e/eb/rls/othr/ics/2013/204608.htm.
[5] "Mexico before ICSID: rebel without a cause"?, F. Gonzàlez de Cossío, available at http://www.gdca.com.mx/PDF/arbitraje/Mexico%20and%20ICSID%20Rebel%20Without%20a%20Cause.pdf.
[6] "India plans to abolish clause in FTAs", J. Eun-joo, (2012), available at http://www.bilaterals.org/spip.php?article21295&lang=en.
[7] "India plans to abolish clause in FTAs", J. Eun-joo, (2012), available at http://www.bilaterals.org/spip.php?article21295&lang=en.
[8] The World Factbook: Bolivia, available at https://www.cia.gov/library/publications/the-world-factbook/geos/bl.html.
[9] "The Counter-Productivity of ICSID Denunciation and Proposals for Change", D. M. Wick (2012), *The Journal of International Business & Law* 11.
[10] The World Factbook: Ecuador, available at https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html.
[11] "Impact of Ecuador ICSID Exit", *Latin Business Chronicle*, 30 June 2009, available at http://latinbusinesschronicle.com/app/article.aspx?id=3502.
[12] "The Counter-Productivity of ICSID Denunciation and Proposals for Change", D. M. Wick (2012), *The Journal of International Business & Law* 11.
[13] "The Uncertain Future of ICSID in Latin America", I. Vincentelli (2010), *Law & Business Review of the Americas* 16.
[14] "Argentina by the numbers: where the things stand with investment treaty claims arising out of the Argentine financial crisis", L. E. Peterson (2011), *Investment Arbitration Reporter*, available at http://www.iareporter.com/articles/20110201_9.
[15] "Argentina to pay USD 500 million to resolve disputes with foreign firms", *Reuters*, 19 October 2013.
[16] "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication", J. Kurtz (2012), *ICSID Review* 27 (1).
[17] See Letter to Prime Minister Julia Gillard from Australian Chamber of Commerce and Industry, dated 13 July 2012, available at http://acci.asn.au/getattachment/3061e3f7-017c-49e4-8f67-53353e02e48f/ISDS-Letter-to-PM_COMPLETE_16072012.aspx.
[18] "Australia agrees to investor-state provisions in Korea", D. Thomson (2013), *Global Arbitration Review*.
[19] Permanent Court of International Justice (PCIJ), *Status of Eastern Carelia*, Advisory Opinion, Ser. B, No. 5 (1923), 19.
[20] "Principles of Public International Law", I. Brownlie (2012), *Oxford: Oxford University Press*.
[21] "The Backlash against Investment Arbitration: Perceptions and Reality", M. Waibel, A. Kaushal, K.H. L. Chung, and C. Balchin (2010), *Kluwer Law International*: "Denunciation of the ICSID Convention and Consent to Arbitration", C. Schreuer (2010).
[22] "Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve", S. Ripinsky (2012), *International Institute for Sustainable Development: Investment Treaty News*, available at http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/.
[23] Data on BITs available on the ICSID website at https://icsid.worldbank.org/ICSID/.
[24] Data on FDI available from the UNCTAD website at http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx?sCS_referer=&sCS_ChosenLang=fr.

[25] E.g., "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries", UNCTAD (2009), *New York and Geneva: United Nations*, Section I and page 38.

[26] For a detailed analysis of the problem, see "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", A. T. Guzman (1998), *Virginia Journal of International Law* 38, pages 21–29.

[27] "Investor State Arbitration or Local Courts: Will Australia Set a New Trend?", L. E. Trakman (2012), *Journal of World Trade* 46 (1), page 12.

[28] "The BIT Generation's emergence as a collective action problem: prisoner's dilemma or network effects?", S. Montt (2007), *The Latin American and Caribbean Journal of Legal Studies* 2 (1), Section 2.

[29] For several references, see "Political risk insurance and bilateral investment treaties: a view from below", L. S. Poulsen (2010), *Columnia FDI Perspectives* No. 27.

[30] "Political risk insurance and bilateral investment treaties: a view from below", L. S. Poulsen (2010), *Columbia FDI Perspectives* No. 27.

[31] "Political risk insurance and bilateral investment treaties: a view from below", L. S. Poulsen (2010), *Columbia FDI Perspectives* No. 27.

[32] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis", T. Büthe and H. V. Milner (2009), Section B paragraph 4 and Section C; "The Impact of Bilateral Investment Treaties on Foreign Direct Investment", P. Egger Peter and M. Pfaffermayr (2004), Section B; "Do Investment Agreements Attract Investment? Evidence from Latin America", K. P. Gallagher and M. B.L. Birch (2006), Section C; "New Institutional Economics and FDI Location in Central and Eastern Europe", R. Grosse and L. J. Trevino (2005), Section C; "Do bilateral investment treaties increase foreign direct investment to developing countries?", E. Neumayer and L. Spess (2005), Section D; "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", J.W. Salacuse and N.P. Sullivan (2005), Section E.

[33] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis", T. Büthe and H. V. Milner (2009), Section E; "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", J.W. Salacuse and N.P. Sullivan (2005), Section E.

[34] ""The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "New Institutional Economics and FDI Location in Central and Eastern Europe", R. Grosse and L. J. Trevino (2005), Section D. "More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!", A. Berger, M. Busse, P. Nunnenkamp and M. Roy (2010), *Kiel Working Paper* No. 1621, page 6.

[35] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Do Investment Agreements Attract Investment? Evidence from Latin America", K. P. Gallagher and M. B.L. Birch (2006), Section C.

[36] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation", E. Aisbett (2007), Section D; "The Global BITs Regime and the Domestic Environment for Investment", S. Rose-Ackerman (2008), Section B; "Do BITs really work? Revisiting the Empirical Between Investment Treaties and Foreign Direct Investment", J. Yackee (2007), Sections A and B. "More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!" *Kiel Working Paper* No. 1621, A. Berger, M. Busse, P. Nunnenkamp and M. Roy (2010), page 5.

[37] E.g., "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation", E. Aisbett (2007), Section C.

[38] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite", M. Hallward-Driemeier (2003), Section G; "The Global BITs Regime and the Domestic Environment for Investment", S. Rose-Ackerman (2008), Section B; "Do BITs really work? Revisiting the Empirical Between Investment Treaties and Foreign Direct Investment", J. Yackee (2007), Section B.

[39] "Granting and Renegotiating Infrastructure Concessions: Doing It Right", J. L. Guasch (2004), *World Bank Institute Development Studies* 28816, page 92.

[40] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*",* K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Do BITs really work? Revisiting the Empirical Between Investment Treaties and Foreign Direct Investment", J. Yackee (2007), Section A.

[41] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*",* K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation", E. Aisbett (2007), Section D.

[42] E.g., "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*",* K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis", T. Büthe and H. V. Milner (2009), Section D. "Political risk insurance and bilateral investment treaties: a view from below", L. S. Poulsen (2010), *Columbia FDI Perspectives* No. 27. "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence", J. Yackee (2010), *Virginia Journal of International Law* 51 (2), pages 400, 423 and 426.

[43] "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*",* K. P. Sauvant and L. E. Sachs (2009), *New York: Oxford University Press*: "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis", T. Büthe and H. V. Milner (2009), Section D.

[44] "Political risk insurance and bilateral investment treaties: a view from below", L. S. Poulsen (2010), *Columbia FDI Perspectives* No. 27; "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence", J. Yackee (2010), *Virginia Journal of International Law* 51 (2), page 404.

[45] "Government perspectives on investor-state dispute settlement: a progress report", OECD (2012), Freedom of Investment Roundtable 14 December 2012, available at http://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf.

[46] UNCTAD data (see reference under Figure 1).

[47] "The Counter-Productivity of ICSID Denunciation and Proposals for Change", D. M. Wick (2012), *The Journal of International Business & Law* 11, pages 288-289.

[48] "The BIT Generation's emergence as a collective action problem: prisoner's dilemma or network effects?", S. Montt (2007), *The Latin American and Caribbean Journal of Legal Studies* 2 (1), pages 45-46.

[49] "Investment Arbitration in Brazil: Yes or No?", E. Whitsitt and D. Vis-Dunbar (2008), *International Institute for Sustainable Development: Investment Treaty News,* available at http://www.iisd.org/itn/2008/11/30/investment-arbitration-in-brazil-yes-or-no/.

[50] "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration", S. K. Fiezzoni (2011), *Beijing Law Review* 2; "Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve", S. Ripinsky (2012) *International Institute for Sustainable Development: Investment Treaty News*, available at http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/; "Ecuador Denounces ICSID: Much Ado About Nothing?", T. Yalkin (2009), available at http://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/. Note that Ecuador's BITs with Switzerland (1969) and Uruguay (1985) are the only BITs involving one of these three countries ratified before 1990.

[51] "The Counter-Productivity of ICSID Denunciation and Proposals for Change", D. M. Wick (2012), *The Journal of International Business & Law* 11, page 1; "Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve", S. Ripinsky (2012), *International Institute for Sustainable Development: Investment Treaty News*, available at http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/; "Ecuador Denounces ICSID: Much Ado About Nothing?", T. Yalkin (2009), available at http://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/.

[52] "Smart Flexibility Clauses in International Investment Agreements", A. Van Aaken (2013), *International Institute for Sustainable Development: Investment Treaty News*, available at http://www.iisd.org/itn/2013/06/26/smart-flexibility-clauses-in-international-investment-agreements/.

[53] See Article 20 of the US Model BIT, available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.