**Planning for political risk in Latin America: structuring, risks and possible litigation outcomes**

*María Eugenia Salazar-Furiati(*[1])*

Latin America is attractive to local and foreign investors for being one of the richest regions in the world, due to its natural resources and reserves, as well as, human capital. Yet many corporate entities and private investors remain cautioned when considering investing in Latin America.

In recent years, a number of international companies have been expanding its business into Latin America due to the region's potential as an emerging market. In 2021 six major Latam economies had a 5.9% growth up from 4,9%, which is an important increase considering the 7% decrease due to the pandemic in 2020.[2]

Depending on the country, Latin America offers a vast variety of investment possibilities, that include energy projects, either carbon and also renewable energy, due to a focus on low carbon emission; sustainable agriculture and infrastructural projects for basic sanitation facilities and waste treatment; mining; agroindustry; fishing, automobile; tourism; storage and data processing, and other relevant areas. Regarding human resources, Latin America is able to offer outstanding ranked executives as well as prepared and talented people, with high level skills that perfectly suit in managing or operational positions. Salaries are still affordable, and taxes and utility services costs are lower when comparing it to other regions of the world. In an age of business expansion and globalization, Latin America should be the place to be for ambitious companies.

However, despite the foregoing possibilities and options, there are respectable opinions for whom Latam is a risky region. Among them, the World Economic Forum identifies ten major risks to invest in Latin America and the Caribbean[3]:

1. Failure of national governance
2. Profound social instability
3. Unemployment or underemployment
4. Fiscal crises
5. Failure of critical infrastructure

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[1] **Maria Eugenia Salazar-Furiati**, partner at Baker McKenzie Caracas office. JD 1994 Catholic University Caracas Venezuela; LL.M 2000, McGill University Montreal Canada; 2005 Master in Law Central University Caracas Venezuela. Practice Law areas: Investment Protection, International Investment Arbitration; Energy, Telecommunications; Data Privacy; Contracts. Defendant of claimants against host States before ICSID and UNCITRAL tribunals. mariaeugenia.salazar@bakermckenzie.com

[2] Investing in Latin America: Opportunities and Risks for Asian Multinationals, at http://www.marsh.com/in/services/Investing in Latin America: Opportunities and Risks for Asian Multinationals (marsh.com)

[3] Regional Risks for Doing Business 2019 - Reports - World Economic Forum (weforum.org) at http://www.blogs.imf.org/2022/04/26/

6. State collapse or crisis

7. Illicit trade

8. Energy price shock

9. Data fraud or theft

10. Large-scale involuntary migration

It is notable, that from decades Latin America has chronically suffered from inflation, exchange controls, financial crisis, uncontrolled public spending, wayward monetary policy, and external shocks, most recently from the COVID-19 pandemic. There might be cases however, of certain Latin American countries, where governments have enacted constructive policies, mainly to secure the protection of the environment and human rights. Furthermore, there are cases where the authorities have taken pragmatic decisions on macroeconomic policies, seeking a balance between spending on social welfare programs and fighting inflation.[4]

However, after an in-depth review of pros and cons to invest in Latin America, the question under analysis remains on: whether those identified risks are real barriers to invest, and consequently, no investment should be performed under such conditions? or on the other hand; similar conditions have always exist, and those issues are risks or challenges any investor may find when venturing in a new project in a foreign given jurisdiction ? The answer is not straightforward.

There is not a single region in the world 100% risks-free, and Latin America is not the exception. Natural resources or major projects such as infrastructure, energy, telecoms, health and education, among others are not probably located or demanded in lower risks regions.

Investment protection should be an analysis to be performed when investing in any jurisdiction, even in the most conservative and risk-adverse ones, where foreign investors rights are supposed to be protected and respectfully treated. Expropriations or equivalent effects measures against foreign investments have been enforced in low-risk jurisdictions under the umbrella of the public interest benefit. Hence, what are the main issues to considered when thinking in making an investment in Latin America ?

## Thinking in Investing in Latam, the option of structuring an investment under Bilateral Investment and Double Taxation Treaties

### I. General aspects of treaty planning

Investing in Latam supposes to consider several risks. Certain investors decide to invest taking an insurance risk to protect the investment against: expropriations; currency inconvertibility; non-honoring of sovereign obligations and denial of justice, among other risks. In the alternative, or in addition to the foregoing, is the option of structuring or re-structuring an investment under the protection international

[4] *Latin America's unstable politics dim hopes for economic growth* at: https://www.piie.com/blogs/realtime-economic-issues-watch/latin-americas-unstable-politics-dim-hopes-economic-growth

treaties, that might be Bilateral Investment Treaties (BIT)s, Double Taxation Treaties (DTTs) or multinational investment treaties. This paper analyzes structuring an investment under BITs.

BITs are international agreements, containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories States or contracting parties in each other's territories, against expropriation, nationalization or alike measures performed by the country where the investment is made. The main purposes of a BITs is to seek foreign direct investment to aid countries' economies, while securing the rights of foreign investors. Nowadays, almost every single country in the world has entered into a BIT as a way to attract foreign investments.

Since BITs are negotiated agreements between the contracting states, the terms vary from one BIT to the other. However, BITs mainly include the following rights and protections: i) national treatment/most-favored-nation treatment; fair and equitable treatment; ii) due process and protection iii) performance requirements for investments; iv) full protection and security; v) compensation in the event of expropriation, and vi) access to a neutral and alternate dispute settlement forum, instead of resorting to local courts.

The most common dispute resolution or settlement forum is the International Centre for Settlement of Investment Disputes (ICSID). ICSID provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States under the ICSID Convention[5] and its Regulations and Rules[6]. There are a few cases, such as the cases of Venezuela[7], Bolivia and Ecuador[8] that no longer are members of the ICSID Convention. In the case a State has withdrawn from the ICSID Convention, a careful review should be made on the BITs such State has entered into and has ratified, to determine whether ICSID was chosen as a unique forum, or an alternate forum is also available. Alternate fora might be *ad hoc* tribunals that usually provides for arbitration under the United Nations Commission on International Trade Law (UNCITRAL) rules; or institutional arbitration under the auspices of the Stockholm Chamber of Commerce or the International Chamber of Commerce. ICSID also makes available the option of ICSID Additional Facility, that offers arbitration and conciliation for certain disputes that fall outside the scope of the ICSID Convention. In particular, in cases where one—or neither—of the parties is an ICSID Member State or a national of an ICSID Member State. [9]

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[5] ICSID Convention: The ICSID Convention is a treaty ratified by 157 Contracting States. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States (The "Convention"). https://icsid.worldbank.org/rules-regulations/convention

[6] https://icsid.worldbank.org/rules-regulations/convention

[7] In January 2012, the Bolivarian Republic of Venezuela denounced the ICSID Convention, becoming the third country – after Bolivia and Ecuador – to do so. https://www.iisd.org/itn/en/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/

[8] In 2007, Bolivia became the first country to denounce the ICSID Convention, followed in 2009 by Ecuador. In the case of Ecuador, on May 16, President Correa of Ecuador signed the corresponding decrees to unilaterally terminate 16 Bilateral Investment Treaties (BITs). Treaties were terminated with: China, the Netherlands, Germany, the UK, France, Spain, Italy, Sweden, Switzerland, Canada, the United States, Argentina, Bolivia, Peru, Venezuela, and Chile. https://www.ecuavisa.com/noticias/economia/ejecutivo-da-terminado-tratados-inversion-ecuador-16-paises-FDEC274346

[9] https://icsid.worldbank.org/rules-regulations/additional-facility

As shown in the below chart, countries in Latin America are signatories of a great number of BITs. Latam countries have been also diligent in offering fiscal benefits to foreign investors, in addition to the protection provided in BITs. Usually fiscal benefits are set forth in DTTs. The combination of the provisions prescribed in both type of treaties makes the perfect match when choosing a jurisdiction.

| Central America | | |
|---|---|---|
| Country | Bilateral Investment Treaties | Double Taxation Treaties |
| Belize | 6 | 14 |
| Costa Rica | 14 | 1 |
| El Salvador | 21 | 1 |
| Guatemala | 17 | 0 |
| Honduras | 11 | 0 |
| Nicaragua | 18 | 0 |
| Panama | 22 | 17 |
| Mexico | 36 | 61 |

| South America | | |
|---|---|---|
| Country | Bilateral Investment Treaties | Double Taxation Treaties |
| Argentina | 57 | 20 |
| Bolivia | 20 | 9 |
| Brazil | 13 | 35 |
| Chile | 52 | 32 |
| Colombia | 10 | 15 |
| Ecuador | All Terminated in 2017 | 23 |
| Guyana | 5 | 3 |
| Paraguay | 24 | |
| Peru | 28 | 8 |
| Suriname | 1 | 2 |
| Uruguay | 31 | 25 |
| Venezuela | 25 | 31 |

Choosing a jurisdiction that offers the protection of a BIT, and the tax benefits of a DTT is not an easy task. This is a matter to be carefully reviewed under the forensic eye of an expert. A feasible way to do it might be in light of the BIT's provisions and the standards discussed by investment arbitral tribunals. The following present an analysis of the most relevant issues and requirements identified by arbitral tribunals, mainly ICSID tribunals, when determine if a claimant has a stand under a particular given BIT in a dispute with the State where the investment was made (host State).

Those elements or requirements are:

i) *rationae personae*: who is considered to be a protected investor ?

ii) *rationae materiae*: what is considered to be an investment?;

iii) *rationae voluntatis*: has the host State provided its consent to settle a dispute before an arbitration tribunal;

iv) rationae temporis: Is the BIT enforceable by the time the investor files a claim against the host state?.

## II. *Rationae personae*: Who is considered to be an investor?

### Natural Persons/Dual Nationals:

Under this scenario it is relevant to make a distinction between natural and juridical persons. In the case of natural persons, BITs generally prescribe that an investor is a natural person who bears the nationality of one of the contracting States according to the applicable law of such State. BITs may also require a permanent residency or other legal requirement set forth in the applicable nationality law of the contracting State.

Special mention should be made to *dual nationals*, which is a special category that requires a separate analysis that is not covered in this paper. Relevant to say however, that Article 25 of the ICSID Convention[10] expressly excludes dual nationals from the scope of the convention. Such trend has been followed by certain BITs[11]. The opinion of legal scholars and commentators, as well as the criteria of arbitral tribunals is divided in regard to whether dual nationals should be excluded from the protection of BITs when BITs are silent on the subject or not. For those who follow such criterion, dual nationals must not be benefit from the protection of a BIT, mainly based upon the spirit of the ICSID Convention, that is not meant for disputes between States and their own nationals[12]. On the other hand, for those who challenge such position, arbitral tribunals have no power to imply or add terms and conditions not expressly included by the contracting parties in the applicable BIT. Hence, in this latter case, dual nationals are included where the BIT does not make an express exclusion.

### Juridical Persons

BITs' general requirements to define who is considered an investor mainly are: i) place of incorporation/seat under the law of any of the contracting parties , ii) control: legal persons not constituted under the law of that contracting Party but controlled, directly or indirectly, by natural persons or legal persons as defined as such in the applicable BIT or iii) a real existing business with economic substance: this standard combines place of incorporation/seat with the operation of a business in the place of incorporation.

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[10] Article 25 of the ICSID Convention

[11] The Venezuela and Italy; Venezuela -Iran and the Venezuela and Canada BITs expressly excluded dual nationals from the protection of their clauses. Cases on dual nationals: Victor Pey Casado y Fundación Presidente Allende c. República de Chile (Caso CIADI No. ARB/98/2), Award 8 May 2008 p. 375 https://www.italaw.com/sites/default/files/case-documents/ita0639.pdf ; Serafín García Armas & Karina García Gruber v. Venezuela Caso CPA No. 2013-3 p. 161 https://www.italaw.com/sites/default/files/case-documents/italaw11124.pdf ; Fernando Fraiz Trapote v. República Bolivariana de Venezuela. Caso CPA núm. 2019-11 Final Award, 31 January 2022;
Manuel García Armas v. República Bolivariana de Venezuela Caso CPA No. 2016-08 Award on Jurisdiction 13 December 2019 https://www.italaw.com/sites/default/files/case-documents/italaw11113.pdf

[12] Schreuer, C., and Others, *The ICSID Convention: a Commentary*, 2nd ed., 2009, page 290, paragraph 496.

Out of the three aforementioned requirements, the most common option chosen by investors when structuring an investment is picking a BIT that requires place of incorporation /seat. Under such option, no other requirement is needed (i.e. control or existing business in the territory of the host State). This option is backed by several arbitral tribunals that refuse to imply additional terms and conditions where BITs do not prescribe so.

In *Rompetrol v. Romania*[13], the tribunal considered the definition of "national" of the Netherland-Romania BIT, and found that its application *did not depend on "corporate control, effective seat or origin of capital*". In *Mobil v. Venezuela*[14], ICISD tribunal recognized that the "outer limits" under Article 25 of the ICSID Convention "*… do not impose any particular criteria of nationality (whether place of incorporation, siége social or control). Thus, the parties to the Dutch-Venezuela BIT were free to consider as national the legal persons constituted under the law of one of the Parties* and those constituted under another law, but controlled by such legal persons. The BIT is thus compatible with Article 25 of the ICSID Convetion."(Emphasis ours)

However, the foregoing criteria is no free of challenge. Host States have asked arbitral tribunals to pierce the corporate veil of the entity, on the basis of abuse of right and fraud, or on the widely criticized practices of "treaty or forum shopping". In particular, host States seek to evidence that either natural persons or legal entities incorporated in the host State have the corporate control of the entity, and those persons or entities are not supposed to file a claim against their own State. Host States usually rely on Professor Weil dissenting vote in Tokio Tokéles[15] when raising this argument:

> "Since the object and purpose of this provision [Article 25(2)(b)]- and for that matter, of the whole ICSID Convention and mechanism - is to protect foreign investment, it should not be interpreted so as to allow domestic, national corporations to evade the application of their domestic, national law and the jurisdiction of their domestic national tribunals."

Contrary to Professor Weil dissenting opinion, is the view of the majority of the arbitral tribunal in the Tokio Tokéles, for whom "*…Tribunals should not impose limits on the scope of BITs not found in the text.*"[16] In line with the foregoing, the conclusion of the arbitral tribunal in *Saluka Investment v. the Czech Republic* is quite clear on the subject:

> "The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of 'treaty shopping' which can share many of the disadvantages of the widely criticized practice of 'forum shopping.'

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[13] *The Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/03, Decision on Respondent's Preliminary Objection on Jurisdiction and Admissibility, 18 April 2008 (Rompetrol) paragraph 110.
[14] *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on jurisdiction, 10 June 2010, (Mobil v. Venezuela) paragraph 157.
[15] *Tokio Tokéles v Ukrane*, ICSID Case No. ABR/02/18, Dissenting Opinion on Jurisdiction, April 29, 2004 (Tokio Tokéles) paragraph 23.
[16] Tokio Tokéles, supra note 15, paragraph 56.

> "However that may be, the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimantinvestor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add." (Underline ours)[17]

Although each case requires a proper analysis, and the circumstances may change from case to the other, I am inclined to follow the criteria of the tribunals of Saluka, Rompetrol and the opinion of the majority in Tokio Tokéles. Arbitral tribunal do not have jurisdiction to replace and add terms and conditions not included by the contracting parties in a BIT. If for instance, place of incorporation is the sole requirement, and the investor is an entity dully incorporated under the laws of the contracting party where the investment was made, unless a fraud or abuse is proven to treat the case as *treaty shopping*, no further requirements should be asked.

**III. Rationae materiae: What is considered to be an Investment ?**

The definition of investment may vary from one BIT to the other. In this regard, there are two relevant categories of BITs i) BIT with an open and non- restricted definition of investment, that provide a non-exhaustive list of examples of what an investment might be, and ii) BITs with a restricted wording, that provide for a specific definition of investment, limited within the boundaries of a restrict list of investments types. In order to determine whether an investment fulfills the requirements of a given BIT, it is necessary to review the applicable BIT and distinguish if the investment meet the requirements set forth there in. A BIT with an open or non-limited wording definition of investment provides the investor more room to have a protected investment, and consequently, has a stand under the applicable BIT, in case an eventual dispute arises with the host State.

In addition to the requirements prescribe in a BIT, in case of a dispute before an ICSID arbitral tribunal, the requirements of Article 25 of the ICSID Convention also apply. Article 25 of the Convention however, does not include a definition of investment. ICSID preparatory works indicate that the intention of not including a definition of investment was for the contracting parties to be free when discussing and negotiating the term of a BIT of what an investment might be[18].

Scholars and arbitral tribunals' opinion on the subject are divided. While some of them recognize the freedom of contracting parties to define "investment" in the BITs, others rely on the opposite side. In the latter case, the decision in in CSOB v Slovak Republic[19] is included:

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[17] Saluka Investment v. the Czech Republic, ICSID Case No. 2001-04, Partial Award, March 24, 2006, p. 49.
[18] Schreuer, C.,supra note 12
[19] Ceskoslovenska Obchodni Banka AS v Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24,1999 ('CSOB'), paragraph 68.

> "…A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."

Furthermore, in Malicorp v. Egypt[20]:

> "There must be 'active' economic contributions, as is confirmed by the etymology of the word invest," but such contributions must 'passively' have generated the economic assets the instruments are designed to protect. … … It can be inferred from this that assets cannot be protected unless they result from contributions …"

"Having an investment is not the same as making an investment" (*Standard Charter v. Tanzania*)[21]. "It takes an action to invest, the mere holding of shares or a concession is not enough to speak of investment." (*Quiborax v. Bolivia*)[22].

In line with the foregoing criteria, are who support the application of the so-called Sallini[23]-test in order to define whether the investment meet the requirement of the ICSID Convention. In this regard, an investment should be:

> (i) a substantial contribution of money or in other assets; (ii) for a certain duration; (iii) with an element of risk; (iv) which makes a contribution to the economic development of the host State; and also, that (v) it is in accordance with host state laws; and (vi) it is made in good faith.

The Sallini test has been criticized by some arbitral tribunals[24], while certain requirements set forth there in are no generally accepted, such as that the investment should be made in accordance with the laws of the host state and in good faith.

Those who challenge Salini say that the test do not contain jurisdictional requirements. Furthermore, Sallini cannot impose limits not provided for under ICSID or the BIT. Regarding Sallini, Professor Schereuer states that: "*These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."*[25]

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[20] Malicorp Limited v Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award, February 7, 2011 ('Malicorp'), paragraph 107.
[21] *Standard Charter v. Tanzania,* ICSID Case No. ARB/10/12, Award, November 2, 2012.
[22] *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Award , September 16, 2015.
[23] Salini Costruttori SpA v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001 ('Salini'), paragraph 44.
[24] Malaysian Historical Salvors v Malaysia, ICSID Case No. ARB/05/10, Award, 17 May 2007 and 4 Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, ('Biwater').
[25] Schreuer Commentary, paragraph 153.

One of the most important decision on the applicability of Sallini was issued in the case of Abaclat v. Argentina[26]:

> "If Claimants' contributions were to fail the Salini test, those contributions — according to the followers of this test — would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words — and from the value perspective — there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because — from the perspective of the contribution — the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create. (Underline ours)

A practical suggestion when structuring an investment, is to review whether the investment fulfills the requirement of the applicable BIT and the ICSID Convention. As commented, the ICSID Convention does not include an investment definition, or prescribe specific requirements either. However, the investment should at least meet the following three elements: (i) made a contribution, (ii) assumed risk in connection with the investment and (iii) held the investment for a certain duration. Another practical suggestion, of proving that an investment was made is having enough evidence of paid taxes, mostly in cases where the investment was structured to benefit from a DTT. In addition, if possible, keeping an evidence of the investment registration with the foreign investment agency of the host State, might be good to have. This is not a jurisdictional requirement, but is useful to have it in case of an eventual dispute with the host State arises.

**IV) Rationae Voluntatis & Rationae Temporis**

*Rationae Voluntatis* is the most important jurisdictional requirement in case an investor has to resort to arbitration if an eventual dispute with the host State arises. Any party can be brought to arbitration if its consent has not been granted. Arbitration unlike local courts of tribunals, is a voluntary jurisdiction, parties expressly require to consent to. Therefore, parties' consent cannot be presumed, it should be clear, unequivocal and unambiguous.

States and investors must provide a written consent to arbitrate. States usually grant their consent in international treaties, such as BITs; contracts or domestic legislation. In the case of investors, the consent can be given by a letter (trigger letter) or in the arbitration request. If an offer to arbitrate has not been yet

[26] Abaclat and others v Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 ('Abaclat').

accepted, then the party may withdraw it. Consent becomes irrevocable, once perfected, and cannot be unilaterally withdrawn.

[27]According to the interpretation of arbitral tribunals, the State's consent expressed in treaties and specially in BITs, have been widely accepted as a "standing offer" to arbitrate, that does not require a further confirmation of consent. A different case might be, if the State has just given a "promise" to consent, or the consent is conditioned, so a further evidence of consent is required.

The consent can be limited to certain disputes; persons or type of fora. States are free to leave their consent open, in which case no restrictions are imposed on the type of disputes that might be resolved before an arbitration tribunal (i.e any legal dispute concerning the investment).[28] On the other hand, the State may limit its consent to the type of disputes (i.e. expropriations, exchange control provisions, taxes). Finally, the consent to arbitrate at a different fora might be also limited. The most common forum choice is ICSID. However, States may include other choice of for a, such as *ad hoc* tribunals under the UNCITRAL rules; or institutional arbitration under the auspices of the Stockholm Chamber of Commerce or the International Chamber of Commerce.

**Rationae Temporis:** Jurisdiction *ratione temporis* is related to the effect of time on a tribunal's powers pursuant to a treaty. Usually, BITs do not impose time bars that prevent investors to bring a claim before an international arbitral tribunals, but this is an issue to be studied on a case by case basis.

In investment arbitration, the protection of a BIT is granted to investments and disputes arose after the BIT entry into force, unless an express provision of the applicable BIT prescribes otherwise. The foregoing is apparently fair and is generally accepted. However, it may bring discussion when the investment has made before the BIT entered into forced, but the dispute arose after the BIT was in effect.

It has been generally accepted in the majority of BITs that investments made prior to their entry into force are covered by protection granted under the applicable BIT. The foregoing criterion has been understood even in cases where the BIT is silence on the issue, especially when the investment continue to exist after the date the BIT entered into force. Are there other tribunals, however, that have an opposite criterion and refuse to grant the protection of a BIT to investments made before the BIT's entry into force, so consequently those investments are not considered to be protected.[29]

The aforementioned criteria may vary in case of an investment made before the entry into force of a BIT, is restructured under the protection of such BIT, an a dispute with the host State was foreseeable by the time the corporate restructure was taking place. In the criteria of certain arbitration tribunals, the foreseeability of a dispute does not negatively impacted the tribunal's jurisdiction in the absence of bad faith[30]:

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[27] Natalia Chaeva, "*Consent to Arbitration*" at https://jusmundi.com/en/document/wiki/en-consent-to-arbitration last updated August 19, 2022

[28] Natalia Chaeva, "*Consent to Arbitration*" supra note 26.

[29] Armand Terrier, *Jurisdiction Rationae Temporis*, https://jusmundi.com/en/document/wiki/en-jurisdiction-ratione-temporis last up dated September 9, 2022

[30] See supra note Armand Terrier, *Jurisdiction Rationae Temporis*.

In the *Philip Morris v. Australia*[31], the Tribunal pointed out that "… it would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim."

In addition to determine the time when an investment was made, the *Rationae Temporis* principle is also related to the *momentum* on which the breach of the BIT arises. The breach of the BIT is usually performed by host States against the rights of the investors. BIT' contracting parties are free to explicitly or implicitly exclude from the protection of the BIT disputes that have arisen before the BIT's entry into force. In the absence of an express provision of the applicable BIT, it is widely accepted that a treaty's breach triggers the host's State liability when such breach occurs after the BIT has entered into force. However, the discussion is now centered on whether braches committed before the BIT's enters into force entitle the investor with the right to bring a claim against the host State or not. The criteria of the arbitral tribunals on the subject indicates that if the breach and its effects continue after the date the BITs entries into force, then the arbitral tribunal cannot deny having jurisdiction on the case. However, it is very important that "the acts must continue or must be consummated after the entry into force of the treaty".[32]

*Rationae Temporis* principle is also relevant in cases where host States unilaterally terminate BITs they party of, and cases where the ICSID Convention is being denounced and States are no longer part of it.

In case of unilaterally termination of BITs, investor rights are usually protected for a given term under the so called *umbrella* or *sunset clause*s. While certain States still challenge the purpose and effects of such clauses and deny their application in case of an investment dispute, arbitral tribunals have agreed upon that a claim brought under a sunset clause after the host State has unilaterally terminates a BIT, is protected by the provisions of the applicable BIT, and such circumstance does not challenge or negatively impact the arbitral tribunal jurisdiction over the case.[33]

Another issue related to the *Rationae Temporis* principle is related with the denunciation of the ICSID Convention by member States. Denunciation of the ICSID Convention is regulated under Articles 71 and 72 of such treaty. There are just a few cases where this event has occurred. In the case of Latin American countries, this has been the case of Venezuela, Bolivia and Ecuador previously commented. Although legal commentators, scholars and arbitration tribunals have commented on the subject, the issue is still unclear. However, denunciation of the ICSID Convention is an issue that is also related to the *Rationae Voluntatis* principle, and has most relevancy in cases where the consent to arbitrate has been limited to the ICSID forum and no other alternate fora is offered to protect the investor' rights.

In this respect, when discussing the issue, arbitral tribunals have held "*that they could retain jurisdiction over claims brought after denunciation but before the withdrawal, while others have declined jurisdiction on the basis that consent could not be perfected after a State had notified its withdrawal."*[34]

What it is still unclear and requires further discussion is whether the consent given by a State to ICSID jurisdiction is still valid, after such State withdraws from the ICSID Convention. A possible option to keep

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[31] Philip Morris v. Australia. UNICTRAL PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, p. 176.

[32] See supra note Armand Terrier, *Jurisdiction Rationae Temporis*.

[33] Longreef Investment A.V.Vv. the Republic Bolivarian of Venezuela. ICSID Case No. ARB/11/5 decision on jurisdiction, 12 February 2014.

[34] See supra note Armand Terrier, *Jurisdiction Rationae Temporis*.

the consent given to ICSID Convention "alive" before the withdrawal from the ICSID Conventions takes place, is in case the investor would have accepted the standing offer to arbitrate contained in the applicable BIT, before the denounce and further withdrawal from the ICSID Convention is in effect. This issue still has to be more carefully studied on a case by case basis.

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