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# Trends Against BITS and Investor State Dispute Resolution

March 31, 2018

In my first *Expect Focus International* article, I suggested that investors doing business outside the United States should do so in countries that have entered into bilateral investment treaties (BITs) with the United States. That is still good advice. However, there is a trend toward terminating BITs in various parts of the world, particularly in more authoritarian Latin American jurisdictions. Ecuador is the latest to announce its withdrawal from BITs. It has terminated 12 BITs, including those with the United States, Spain, Argentina, Peru, and Bolivia. These terminations come on top of Ecuador's withdrawal from the International Centre for the Settlement of Investment Disputes (ICSID) Convention, which permits arbitration for various investment disputes. Ecuador is not the only Latin American country to take this step. Bolivia and Venezuela have also withdrawn from the ICSID Convention and from various BITs. Likewise, South Africa has terminated BITs, as have Indonesia and India. These actions would have once been considered unusual. But now, the United States appears poised to follow suit. President Trump has withdrawn from the Paris climate accord and announced that he will renegotiate or withdraw from NAFTA. One U.S. criticism of NAFTA is its Chapter 19, which provides a binational dispute settlement process for challenging anti-dumping and countervailing duty measures. The U.S. aim is to completely eliminate Chapter 19. According to the U.S. administration's draft notice to Congressional leaders with respect to renegotiating NAFTA, "[Chapter 19] panels have ignored the appropriate standard of review and applicable law, and … aberrant panel decisions have not been effectively reviewed and corrected." Since NAFTA's implementation, the United States has been the target of 43 of the 71 matters heard by Chapter 19 panels. The position of the United States and the nations that have terminated BITs appears consistent with a broader trend toward questioning investor state dispute resolution (ISDR) mechanisms, through which investors can sue countries for alleged discriminatory practices. In many instances, a country's withdrawal or threat to withdraw from a BIT or a treaty does not indicate a desire to cease participating in the treaty's protections, but rather is an attempt to renegotiate the treaty. This appears to be the case in India, Indonesia, South Africa, and the United States. Ecuador, additionally, has indicated that it intends to renegotiate from a position of equality or strength, which it lacked when the BIT was first negotiated. Others throughout the world oppose ISDR. For instance,

the International Federation for Human Rights opposes it on the grounds that it protects investor rights, not human rights. Others object that ISDR is conducted privately, not openly in the courts of one or the other country. However, without a BIT, an investor would have no legal recourse against the state in a court of law. In fact, one of the objections to ISDR voiced by certain governments is that it provides an additional channel for investors to sue governments, thereby eroding national sovereignty. But is withdrawing from ISDR the wave of the future? In the revised version of the Trans-Pacific Partnership, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Chapter 9 provides an ISDR mechanism. The 11 countries in the CPTPP, a treaty in which the United States. previously chose not to participate, have determined that the ISDR mechanism safeguards the valuable rights given to investors. As I said in my first article, ISDR assures investors that the rule of law will protect their rights. No nation is forced to enter into a BIT. Nations typically welcome foreign investment. This method of dispute resolution facilitates such investment. BITs provide equal protection treatment for foreign investors that may not be honored in local judicial fora. BITs are not an unjust incursion on national sovereignty, but rather an agreed-upon procedure to ensure fair and equitable treatment.

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