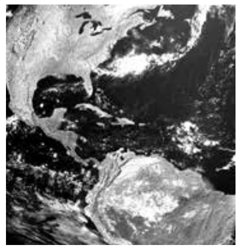
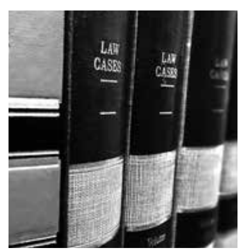
## Summary








# International Development, Investment and Arbitration in Latin America and the Caribbean

**Julissa Reynoso, Marc Suskin and Sofía Klot**

## Introduction

The benefits of attracting Foreign Direct Investment (FDI) to developing countries are well documented. Among other positive spillovers, FDI may allow for the transfer of know-how and technology (including "green" technologies), promote competition and best practices, generate corporate tax revenues and boost domestic employment as well as GDP growth. Domestic employees can receive training in the course of operating the new businesses, while FDI recipients gain access to international marketing networks.[1] FDI is therefore, a key component of economic development.

The last two decades have seen an overall growth of global FDI flows. These peaked at US$1.73 billion in 2015, the highest level recorded since the start of the financial crisis in 2007.[2] Contrary to the global trend, however, FDI in Latin America and the Caribbean decreased by 14 per cent in 2014 and by 9 percent in 2015, as the region grappled with crises and lower commodity prices.[3]

In this context, Latin American and Caribbean countries should strive to create an attractive climate for foreign investment. One of the ways in which countries can develop such an environment is by resorting to international arbitration as an impartial and effective mechanism to resolve disputes with foreign investors.

## I. The Basics of International Arbitration

International arbitration is a widely used alternative dispute resolution method to that allows parties to settle their claims in a binding, legal and impartial manner. It is based on the principle of *party autonomy*: parties must express their written consent to submit their dispute to arbitration, thereby removing it from the sphere of domestic courts. This feature gives parties the freedom to choose *how* a dispute will be resolved and *who* will adjudicate it.

More often than not, foreign investors look at domestic courts in the place of investment with certain misgivings. Whether they are litigating against the State, a State-owned entity or any other domestic party, foreign investors fear that home courts will tend to favor the domestic party. By consenting to international arbitration, foreign investors can bypass the local courts and submit their dispute to a panel of arbitrators appointed either by the parties themselves or by an arbitral institution, a process which *guarantees* the neutrality of the forum.

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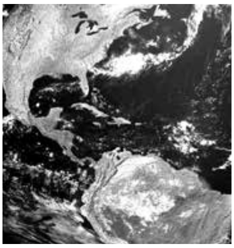
Disputes arising from foreign investments can be particularly complex or highly technical, as is the case of telecommunications or energy disputes. While domestic judiciaries are generally divided along broad lines of specialization, (e.g. criminal, civil, bankruptcy, administrative, etc.) in international arbitration the parties may appoint arbitrators with a *specific* skill set or particular expertise—whether commercial or technical—to adjudicate their disputes. This translates into more efficient proceedings and substantiated decisions.

Another significant advantage of international arbitration—as part of an attractive investment climate—is the absence of appeals and the finality of arbitral awards. Save for awards issued under the auspices of the International Center for the Settlement of Investment Disputes (ICSID),[4] there is a very narrow scope for judicial review of arbitral awards, which is restricted to *setting aside* or *vacating* the award. Under the dominant regime established by the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention), ratified by most Latin American and Caribbean countries,[5] and incorporated into domestic laws, the grounds to annul an international



award are extremely limited.[6] This advantage is further enhanced by the fact that parties also choose the law under which the award will be reviewed (by selecting the "seat" of the arbitration). Finality is particularly relevant in the Latin American and Caribbean context, where appellate review of judicial decisions can stretch over at least two instances and include constitutional challenges, prolonging the proceedings several years. Arbitration thus generally represents a faster, more efficient alternative.

Arbitration also offers investors considerably more *flexibility* to tailor the process to their needs. Contrary to domestic procedure, which is established by law, parties in international arbitration can decide which rules will govern the arbitration. They can either design the procedure themselves (*ad hoc* arbitration) or choose a particular set of pre-existing rules that will apply. They can also submit the dispute to an institution that will administer the proceedings for a fee (institutional arbitration). In all of these settings, the parties can select the place and language of the arbitration, determine the extent of discovery and agree to keep the proceedings *entirely* confidential (as opposed to domestic litigation, where publicity is the norm).

Lastly, arbitral awards are enforceable in *almost* every country in the world—including Latin America and the Caribbean—under the *New York Convention*.[7] Investors can therefore realize the economic gains of an award in any jurisdiction where the losing party (whether a State, State-entity or other) has assets. As with set-aside proceedings, under the *New York Convention* domestic judges can only deny enforcement on the handful of narrow grounds provided therein.[8] ICSID awards, in turn, grant investors an additional layer of protection: they are treated as if they were a final judgment of the courts of a constituent State. They are executed almost automatically, subject only to domestic rules governing the immunity of sovereign property from execution.[9]

International arbitration therefore has the potential of increasing FDI by offering foreign investors a depoliticized, neutral and efficient route to settle their disagreements with States or State-owned entities.

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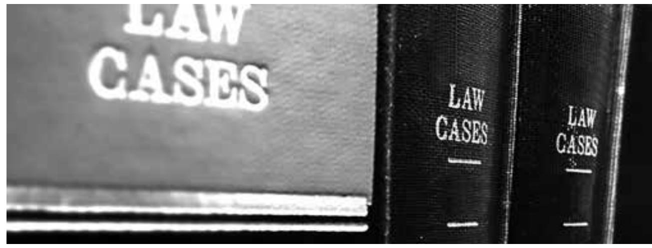
## II. Investment Treaty Arbitration

Countries can agree to submit their disputes with foreign investors to arbitration by contract, or can even offer this possibility in their national investment laws. However, the most common way in which investment disputes can be removed from the jurisdiction of domestic courts is by relying on *investment treaties*. These are international agreements signed by two or more *States* in which they reciprocally grant their respective nationals (individual investors or companies) a number of investment protections. One such protection is, precisely, the investor's right to commence international arbitration directly against the host State (FDI recipient). Generally speaking, these treaties can take the shape of bilateral investment treaties (BITs), multilateral investment treaties (MITs), free trade agreements (FTAs) or preferential trade agreements (PTAs).[10]

The first BITs were drafted following the German model developed in the late 1950s. Starting in 1990, however, the number of investment treaties—particularly BITs—has grown at a dizzying pace. There are now roughly 3,300 investment agreements, including BITs, FTAs, MTAs and PTAs which make up the international investment framework.[11] Despite some initial resistance,[12] most countries in Latin America and the Caribbean have entered into several of these agreements.[13]

Investment agreements feature a series of *core standards* aimed at protecting foreign investment, some of which either build on or embody rules of customary international law.




The main standards of protection are:

1. Prohibition against unlawful expropriation;[14]
2. Fair and equitable treatment (FET);[15]
3. National treatment;[16]
4. Most-favored nation treatment (MFN);[17]
5. Free transfer of investments and returns;[18] and
6. Umbrella Clauses,[19] among others.

Importantly, investment treaties allow investors to initiate an international arbitration against the host State. This particular form of arbitration is referred to as "*investment-treaty arbitration*", precisely because it is provided for in a treaty, as opposed to a contract or a domestic law. It is concerned with *the violation of the treaty's particular standards of treatment*, as opposed to commercial arbitration, which stems from breaches of contract.

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The dispute resolution clauses of investment treaties typically offer the investor an array of options to seek redress from the host State. These invariably comprise one or more forms of arbitration, such as ICSID arbitration, arbitration under the UNCITRAL Rules[20] or any other rules of mutual choice (e.g. International Chamber of Commerce or "ICC" Rules) alongside recourse to domestic courts.[21] By including such clauses in their investment agreements, States already grant their consent to arbitration to any prospective investor. Therefore, should a dispute under the treaty arise, all an investor needs to do is notify the State of the existence of a dispute (*trigger letter*) or submit a request for arbitration to perfect the arbitration agreement.[22]

ICSID arbitration is the most widely used option when it comes to resolving investor-State disputes. An arm of the World Bank, ICSID is the world's leading institution devoted to administering investor-State conciliation and arbitration proceedings. It was created pursuant to the 1966 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*Washington Convention*) with the aim of depoliticizing the resolution investment disputes. While Latin American countries initially opposed the establishment of ICSID, eventually almost all countries in the region joined the *Washington Convention* with certain notable exceptions such as Brazil and Mexico.[23]

Even though there is no doctrine of *stare decisis* in investment arbitration, the decisions of arbitral tribunals carry considerable weight in shaping the understanding of many core standards of protection. Arbitral tribunals dealing with a similar factual scenario even under the same treaty, however, can (and do) resolve the same issue differently, as illustrated by recent awards involving Latin American states.

In *Nova Scotia Power Incorporated v. Venezuela*, for instance, the arbitral tribunal found that a purchase and supply contract for coal did not constitute a protected "*investment*" within the meaning of the Canada-Venezuela BIT.[24] By contrast, in *Gold Reserve Inc. v. Venezuela*, a tribunal applying the *same definition* of investment under the Canada-Venezuela BIT found that indirect title to gold mining rights and concessions in Venezuela (in addition to indirect share ownership of a local subsidiary) *did* in fact constitute an "*investment*" under the treaty, as investment does not require the movement of capital or other values across the host State's border.[25]

Despite these occasional inconsistencies, today foreign investors increasingly resort to investment treaty arbitration as a more neutral forum than domestic courts.[26]

## III. Investment Treaties: Benefits, Costs and the Latin American Response

The main incentive for Latin American states to sign investment treaties is the prospect of capturing a larger share of FDI inflows.[27]

The exact relationship between investment agreements and FDI, however, is still subject to debate. Studies that have looked at this issue have arrived at seemingly contradictory results. One such study, for instance, revealed that PTA membership by any State results in a significant FDI increase of up to 170% over a ten-year period.[28] Focusing only on BITs, that same study concluded that the benefits for developed and developing countries may be fairly different: implementing a BIT between a developing non-OECD state and an OECD member could result in a 130% increase in bilateral FDI for the developing country, while a BIT between two OECD states does not result in a robust FDI effect.[29]

At least two other studies have supported the proposition that there is a positive correlation between FDI and international investment protections,[30] while others have concluded exactly the opposite.[31] In any case, it is clear that investment agreements do play a critical role in increasing FDI to countries with unstable political climates, particularly in highly regulated sectors and sensitive industries such as natural resource extraction.[32] On that basis alone, Latin American and Caribbean countries have a powerful incentive to continue entering into investment agreements to mitigate the potentially deterring effects of their changing political climates.

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That said, investment treaties can also impose potentially damaging restrictions on governments that must be carefully evaluated and negotiated. These agreements have been criticized for encroaching on a State's regulatory space and for exposing them to frivolous claims targeting environmental, labor and public health policies, among others. Scholars point out that standards of protection are often worded vaguely, causing arbitrators to grant investors too far-reaching protections.[33]

Furthermore, there is a growing unease about the balance between States and investors' rights and obligations that have caused countries like Bolivia, for instance, to terminate most of its BITs.[34] To address this legitimate concern, new generation BITs and FTAs describe the standards of protection

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in greater detail, are considerably more restrictive in their scope and contain numerous carve-outs, thus aiming to strike a fair balance between the protection of foreign investment and states' right to regulate in the public interest.

The legitimacy of investor-state arbitration and ICSID arbitration particularly, has also come into question. In the last decade, some OAS Member States have been inundated with investment claims resulting in billions of US dollars in damages. Such is the case of Argentina, Venezuela and Ecuador, which top the chart of the most frequent respondents in ICSID arbitration. Following this wave of claims, Bolivia (2007), Ecuador (2009) and Venezuela (2012) withdrew from the Washington Convention and exited the ICSID system.

While pending cases are not affected by the denunciation of the *ICSID Convention*, the question that remains is whether investors may still bring claims before ICSID against these States. There are two schools of thought. One position maintains that, as long as the BIT containing the relevant ICSID arbitration clause is in force, an investor may still bring an ICSID claim. The rationale of this position is that the BIT constitutes an independent, unilateral standing offer of consent that can *only* be revoked by terminating said treaty and is not affected by the denunciation of the *Washington Convention*.[35]

By contrast, proponents of the opposite view maintain that an investor must have accepted a host State's standing offer to go to ICSID arbitration *before* the denunciation of the Washington Convention took effect. In other words, once a host State has already exited the ICSID system, it can no longer be compelled to go to ICSID arbitration *even if the underlying investment treaty is still in force*.[36] If the relevant investment treaty allows for UNCITRAL or other type of arbitration, investors may still bring these claims.

Latin American and Caribbean states should become increasingly familiar with the standards of protection contained in investment agreements as interpreted by arbitral tribunals before making such commitments. To the extent that new generation agreements become the norm, States should be able to negotiate more nuanced investment treaties that preserve their regulatory space and provide adequate safeguards for sectors of strategic importance.

## IV. The OAS and International Arbitration

International arbitration is not unknown to the OAS. Its involvement with the field goes back to the Panama and Montevideo Conventions.

The 1975 *Inter-American Convention on International Commercial Arbitration* (*Panama Convention*), signed and ratified by 19 OAS Member States, embodies an institutional effort to have international awards executed "*in the same manner as […] decisions handed down by national or foreign ordinary courts*".[37] In turn, the 1979 *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (*Montevideo Convention*), ratified by ten OAS Member States, gave foreign judgments, awards and decisions extraterritorial validity in all of the State parties.[38] Through these instruments, the OAS has promoted the legitimacy of international commercial arbitration as a mechanism for resolving international disputes, granting awards real "teeth" in OAS jurisdictions. In addition, in 2012 the OAS launched a project on international commercial arbitration as a way to build capacity amongst judges and public officials.[39]

> "In a nutshell, by focusing on the practice of international commercial arbitration and its legal framework, the OAS is encouraging regional economic integration and growth."

The OAS—through its Department of International Law (DIL)—is currently engaged in efforts to further understand the practice of international commercial arbitration, the decisions resulting from it and their validity in domestic by domestic courts. As described by the DIL, "*international commercial arbitration is highly relevant to business and trade, because investors* *prefer to put capital into countries with high political stability, legal certainty, and strong markets*".[40]

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## V. Conclusion: the way forward

As the OAS' DIL has pointed out, the ability to enforce an arbitral award through an expeditious process is a key aspect of an investor's risk assessment when deciding where to invest.[41] For the system to catalyze foreign investment, domestic courts must strive to correctly apply and interpret the legal principles that govern the enforcement of international arbitration awards.[42]

In this regard, Latin American and Caribbean countries need to continue updating their arbitration statutes by relying on the UNCITRAL Model Law. Importantly, they should uphold the New York and Washington Conventions to favor the depoliticized resolution of investment disputes and effective enforcement of international arbitral awards. At the same time, states should negotiate investment agreements that do not exclusively target the attraction of FDI, but that also protect the right to regulate in the public interest.

To the extent that this careful balance is achieved, and that Latin American and Caribbean States follow through with their commitments, they may diminish the risk of facing treaty claims, while still reaping the benefits of increased FDI.

[1] P. Mallampally, K. Sauvant, *Foreign Direct Investment in Developing Countries, Finance & Development*, Volume 36, Number 1 (March 1999), available at: http://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm; OECD, *FDI in Figures* (April 2016), http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2016.pdf.

[2] OECD, *FDI in Figures* (April 2016), http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2016.pdf; United Nations ECLAC, *Foreign Direct Investment in Latin America and the Caribbean 2016*, Briefing Paper (June 2016), pp. 9, 17, available at: http://repositorio.cepal.org/bitstream/handle/11362/40214/4/S1600414_en.pdf.

[3] UNCTAD, World Investment Report 2015, Reforming International Investment Governance (2015), p. 60; United Nations ECLAC, *Foreign Direct Investment in Latin America and the Caribbean 2016*, Briefing Paper (June 2016), pp. 9, 20-21, available at: http://repositorio.cepal.org/bitstream/handle/11362/40214/4/S1600414_en.pdf.

[4] ICSID awards are not subject to judicial review and can only be annulled on extremely limited grounds by an ICSID-appointed panel, through a self-contained mechanism.

[5] Out of the 35 member states of the Organization of American States, only three of them—Grenada, St. Lucia, and St. Vincent & the Grenadines—are not part of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

[6] Although the New York Convention governs only the recognition and enforcement of arbitral awards, not their annulment, the principles set forth in Article V of the New York Convention that allow domestic judges to refuse such recognition or enforcement are also widely accepted as grounds for annulling arbitral awards.

[7] To date, 156 countries are parties to the Convention. For the full list of Contracting States, *see* http://www.newyorkconvention.org/countries.

[8] These grounds include the violation of public policy, gross procedural mistakes either in the composition of the tribunal or the conduct of the proceedings and invalidity of the arbitral agreement due to illegality or the incapacity of one or more parties, among others. *See* New York Convention, Article V, available at http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[9] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention), Articles 53-55, available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[10] A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2007), p. 7.

[11] Of the roughly 3,300 treaties concluded, about 2,600 are currently in force. *See* UNCTAD, Investment Policy Hub, International Investment Agreements Navigator at: http://investmentpolicyhub.unctad.org/IIA.

[12] L. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy. The Politics of Investment Treaties in Developing Countries*, Cambridge University Press (2015), p. 31.

[13] There are close to 500 investment agreements currently in force with at least one Latin American party. *See* UNCTAD, Investment Policy Hub, International Investment Agreements Navigator at: http://investmentpolicyhub.unctad.org/IIA.

[14] Expropriation clauses in investment treaties allow host States to expropriate an investment, whether directly, or through measures which have the equivalent effect, only if: (i) the

expropriation is for a public purpose; (ii) it is conducted in a non-discriminatory manner; (iii) pursuant to due process and (iv) is accompanied by "prompt, adequate and effective" compensation. If the State fails to satisfy one or more of these conditions, the expropriation is deemed "unlawful".

[15] FET is the most frequently invoked standard of protection in investment disputes. The FET clause was conceived as a "gap filling" provision, to address arbitrary, discriminatory or otherwise unfair treatment not captured by the other standards. It is a flexible concept which covers the host State's violation of the investor's legitimate expectations (i.e. breach of promises made by the host State which induced the investment) as well as arbitrary, discriminatory or non-transparent measures targeting foreign investments, among others. FET is sometimes linked to the "Minimum Standard" of treatment of aliens under customary international law. Some investment agreements treat these two standards as one and the same, while others conceive FET as providing an added layer of protection.

[16] In their traditional formulation, national treatment clauses require a host States to accord foreign investors treatment "no less favorable" than that which it accords to its own investors. Their purpose is to eliminate negative discrimination between foreign and domestic investors.

[17] The goal of MFN clauses is to ensure that foreign investors and their investments receive treatment no less favorable than that given to investors of other third countries. The MFN clause widens the protection of a particular treaty to include additional protections that the host State may have granted to investors of other States through other BITs, FTAs or MTAs.

[18] The repatriation or transfer of funds clause protects the free flow of capital into and from the host State. Investment treaty practice shows that practically no treaty grants an absolute right to make transfers, as these are usually subject to the laws of the host State.

[19] Umbrella Clauses guarantee that a host State will observe any specific commitments or obligations it may have entered into with a foreign investor with respect to their investment, typically contracts between an investor and the State or a State-owned entity. In this way, the contract is placed under the treaty's protective "umbrella" and the investor can initiate arbitration under the treaty for simple breaches of contract.

[20] UNCITRAL is the United Nations Commission on International Trade Law. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings. These are used both in *ad hoc* and administered arbitrations.

[21] *See*, *for example*, the US-Argentina 1991 BIT, Article VII; the Dominican Republic-Central America FTA (CAFTA-DR), Article 10.6 and the Ecuador-Sweden 2001 BIT, Article 8. Some treaties prescribe a particular order for the different types of arbitration, with ICSID as the default option, and ICSID Additional Facility or UNCITRAL as backup alternatives if ICSID arbitration is not available (such as when one or more of the Contracting States is not a party to the ICSID Convention). *See*, *for example*, the Spain-Venezuela 1995 BIT, Article XI. All treaties are available at: http://investmentpolicyhub.unctad.org.

[22] Some treaties require that the investor negotiate an amicable settlement of the dispute with the host State for a period of time (usually six months) before being able to submit a dispute to arbitration.

[23] Venezuela, Ecuador and Bolivia were parties to the Washington Convention but denounced it more recently. The list of Contracting States to the Washington Convention as of April 2016 can be accessed at ICSID's website: https://icsid.worldbank.org.
[24] *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1), Award, 30 April 2014. The tribunal was of the opinion that the contract did not entail a contribution or assumption of risk that would enable it to qualify as an investment: "A commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment […] [the tribunal] has not found that the risks alleged are of the sort that is inherent in the notion of investment."
[25] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014.
[26] While not all claims are public, by 2015 there were 600 cases registered against nearly 100 states. *See* L. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy. The Politics of Investment Treaties in Developing Countries*, Cambridge University Press (2015), p. 1.
[27] In addition to boosting incoming FDI, with the rise of the "multilatinas" (Latin American multinational corporations), states are also increasingly concerned with ensuring an adequate level of protection for their own investors venturing into regional or international markets.
[28] M. Buge, *Do preferential trade agreements increase their members' foreign direct investment*, German Development Institute, Discussion Paper 37 (2014); *see also* T. Buthe, H. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements*, American Journal of Political Science, Vol. 52, Issue 4 (October 2008).
[29] M. Buge, *op cit.*
[30] E. Neumayer, L. Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, World Development Vol. 33, No. 10, pp. 1567–1585 (2005) (concluding that bilateral FDI and BIT-partnership are highly correlated); Y. Haftel, *The Effect of U.S. BITs on FDI Inflows to Developing Countries: Signaling or Credible Commitment*, paper prepared for the workshop on Globalization, Institutions and Economic Security (GIES), Ohio State University, November 30, 2007.
[31] C. Peinhardt, T. Allee, *The Costs of Treaty Participation and Their Effects on U.S. Foreign Direct Investment*, paper presented at American Society for International Law's International Economic Law Interest Group Meeting, Washington, DC, USA, November 2008; A. Bergera, M. Busseb, P. Nunnenkampc and M. Royd, *More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!*, World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2010-10, May 2010 (concluding that investor-state dispute resolutions in BITs do not necessarily increase FDI).
[32] For a compilation of studies that discuss this issue, *see generally*, K. Sauvant, L. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, Oxford University Press (2009).
[33] In 2003, for instance, one UNCITRAL award led to more than US$350 million in damages against the Czech Republic, an amount higher than its entire health budget and double the public sector deficit for that year. L. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy. The Politics of Investment Treaties in Developing Countries*, Cambridge University Press

(2015), pp. 2-3. In 2012, a split ICSID tribunal awarded an American plaintiff US$2.37 billion in compensation from Ecuador, including interests, despite acknowledging that the investor had broken Ecuador's laws, as well as its contract with the Ecuadorian government. The award amounted to almost 7% of the Ecuadorian government's total budget. *See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012. This award was partially annulled by an ICSID Annulment Committee in November of 2015.

34 A list of Bolivia's BITs and their status is available at http://investmentpolicyhub.unctad.org.

35 In this theory, even if the BIT is eventually terminated, the unilateral offer of consent to ICSID arbitration can still survive for many years by operation of the so-called survival or "sunset" clause. These clauses typically provide that the protections of the BIT (including the right to resort to arbitration) will remain in force for a number of years (usually 10 and up to 20) following the termination of the treaty. During the "sunset" period, the investor could still "accept" the standing offer to go to ICSID arbitration and bring an ICSID claim.

36 For a general discussion of these two positions *see* UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA Issues Note No. 2 (December 2010), available at http://unctad.org/en/docs/webdiaeia20106_en.pdf.

37 Inter-American Convention on International Commercial Arbitration, Article 4: "An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties." Available at http://www.oas.org/juridico/english/treaties/b-35.html.

38 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Article 2, available at http://www.oas.org/juridico/english/treaties/b-41.html.

39 The Project includes the instauration of a training program particularly tailored to each country's needs, the creation of a participatory process that allows member States to contribute to the Program, the hosting of sub-regional workshops that promote Inter-American and international law on commercial arbitration, and the creation of networks and databases that facilitates the exchange of information. *See* Organization of American States, Secretariat for Legal Affairs, Department of International Law, The Project. *International Commercial Arbitration* (2012), available at: http://www.oas.org/en/sla/dil/docs/international_commercial_arbitration_brochure_en.pdf.

40 Organization of American States, Secretariat for Legal Affairs, Department of International Law, The Project. *International Commercial Arbitration* (2012), available at : http://www.oas.org/en/sla/dil/docs/international_commercial_arbitration_brochure_en.pdf.

41 *Id.*

42 Practitioners in the field have defined the interplay of powers between arbitrator and judge as the "Achilles' heel of truly effective arbitration. *See* B. Cremades, *The Impact of International Arbitration on the Development of Business Law*, The American Journal of Comparative Law, Vol. 31, No. 3 (1983).

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