PUBLIC SERVICES IN THE CROSSHAIRS

The impacts of investment protection regimes on the public services sector in Latin America and the Caribbean

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1. Introduction

During the 1990s, the countries of Latin America and the Caribbean (LAC) signed hundreds of international treaties safeguarding foreign investment and granting foreign investors unprecedented rights. These include the right of investors to sue states in international courts when investors consider their profits to have been affected in some way by government actions. LAC countries expected that, by signing these investment protection agreements (known as Bilateral Investment Treaties, or BITs), they would boost foreign direct investment. Yet 30 years later, **evidence shows that BITs have been anything but an instrument that contributes to attracting investment, much less of promoting development;** on the contrary, these treaties have had harmful effects on the countries in the region.

At present, LAC is the world's second region in terms of the number of claims brought against various countries before arbitral tribunals on the basis of BITs. These claims, however, are not adjudicated in national judicial systems, because BITs grant investors the power to bring claims before international tribunals through Investor-State Dispute Settlement (ISDS) mechanisms. This has produced a *parallel justice* system,[1] whereby investors circumvent national courts and go directly to private tribunals that often favour claimants over the states being sued.

The Investor-State Dispute Settlement mechanism, known as ISDS, allows foreign investors, mostly large transnational corporations (TNCs) and investment funds, to bring claims against states before international arbitral tribunals when they find that laws, regulations, court rulings, and other measures taken by a given state violate the safeguards they have under a treaty. There is no obligation to exhaust national legal remedies.

ISDS is a one-way mechanism, as only investors are allowed to file a case with an international arbitral court, not the states. This is so because these claims are based on clauses established in BITs, investment protection treaties centred on the investor's legal rights, rather than on human, labour, or environmental rights.

Cases brought before arbitral tribunals are usually decided by three arbitrators, often lawyers working for the private sector and heavily biased in favour of investors. ISDS has been subject to widespread criticism from scholars, professionals, and civil society for, among other reasons:

- Lack of transparency in arbitral procedures.
- Absence of impartiality and independence by arbitrators.
- Higher cost of investment–state arbitration costs over rulings by national courts.
- Victims of abuses by TNCs have no similar mechanism to bring their claims before justice.

By the end of 2001, 327 ISDS claims were known to have been made against countries in the LAC region. Nearly two thirds of the 206 claims resolved favoured investors, either awarded by an arbitral tribunal or by agreement between the parties. The states were ordered to disburse USD 33.638 billion.[2] It was estimated by the United Nations that just a third of that amount (USD 10.667 billion) would be enough to overcome the extreme poverty of 16 Latin

American countries.[3] Dozens of these ISDS claims against LAC countries are in connection with the public services sector: water and electricity supply, waste management, pensions, and health care. These claims prevent the provision of better services, rendering public services more expensive and any change in service management more difficult, since this could trigger multimillion-dollar claims.

It is important to bear in mind that in the international arbitral system states always lose, since these claims cost them millions of dollars in legal fees and procedural expenses. Moreover, in those cases in which the arbitral tribunals decide in favour of the state, it is not uncommon for the state to pay millions of dollars to hire law firms that can charge up to USD 1,000 an hour for their advisory services. For example, by 2013 Ecuador had spent USD 155 million on legal services and arbitration fees.[4] Peru forecasts that its legal defence in a claim brought against the country by the Latam Hydro LLC-CH Mamacocha S.R.L. corporation will have cost some USD 6 million by 2023.[5] On top of that, when an investor wins the case, usually the tribunal orders the state to pay the investor's arbitration costs. In a claim brought by Perenco against Ecuador, for instance, the government had to pay out USD 23 million to settle the investor's expenses.[6]

Countries such as Bolivia and Ecuador, and to a lesser degree Venezuela, reacted to this constant threat by terminating their BITs. Moreover, these countries left the World Bank International Centre for Settlement of Investment Disputes (ICSID) and have reviewed their investment protection policies, adopting sweeping and concrete changes – including in their constitutions – to prevent the country from being sued in foreign arbitral tribunals. By doing so, they took a step towards retaining some room for manoeuvre in favour of the common good. Outside Latin America and the Caribbean, India, Indonesia and South Africa have taken similar steps.

Among the reasons for reviewing and terminating their BITs, governments claim that, despite the promises, there is no clear relation between an increase in BITs and a resulting increase in foreign direct investment (FDI),[7] while there is a clear danger to state sovereignty if governments act in favour of the common good.

This report shows how BITs endanger public services in LAC by mapping sector-related claims brought by foreign investors. It is intended to foster debate on how to break free from the investment protection system by presenting examples of countries in LAC and beyond have reviewed their BITs.

This report is part of a series of joint publications by the Transnational Institute (TNI) and Public Services International (PSI-Inter Americas) focusing on investment protection regimes and their consequences at the regional level. Other reports in this series are:

Justicia Paralela [1]
[Parallel Justice]
How the investment protection systema jeopardises the independence of Latin America´s judiciary branch.

Impactos del sistema de protección de inversiones y arbitraje en CHILE [2]
[Impacts of the investment protection and arbitration system in Chile] - Contributions to the constitutional process.

ISDS in Nigeria [3]
Investment Regime Reforms and the threat of joining the ECT

1 • https://www.tni.org/es/justicia-paralela
2 • https://isds-americalatina.org/perfiles-de-paises/chile/
3 • https://publicservices.international/resources/publications/isds-in-nigeria?id=12167&lang=en

2. Public services in the cross hairs of foreign investors

The world's most important economic sector is the booming services sector. According to the Organisation for Economic Co-operation for Development (OECD), services account for more than two thirds of global GDP.[8] Public services are a fundamental part of this economic sector. It comes as no surprise, therefore, that 102 of the 327 known claims against LAC countries as at 31 December 2021 were related to public services.

What are public services?

Public services can be understood as the set of basic goods and activities provided directly or indirectly by state or private entities and designed to ensure better living standards to all and to promote equal opportunity and citizen rights. These services can be subdivided into three groups: emergency services, state administration, and essential services.

2.1 In numbers: ISDS claims in the public services sector [9]

About a third of all claims brought against countries in LAC are related to the public services sector,[10] more precisely 102 claims of a total of 327 claims brought against countries in the region.

COUNTRIES AFFECTED BY CLAIMS IN PUBLIC SERVICES SECTOR
Source: Prepared by the authors, based on UNCTAD´s Investment Policy Hub.

The countries most affected by public services-related claims are **Argentina (38), and Bolivia and Mexico (12 each)**. In the Bolivian and Argentinian cases, more than 60% of their ISDS claims are related to the public services sector. Almost all of the Argentinian public services claims arose from the 2001 crisis and the measures taken by the government in 2002 to mitigate the economic and social consequences of that crisis.

The **most affected public service** is **energy supply**, followed by telecommunications.

Source: Prepared by the authors; based on UNCTAD's Investment Policy Hub

Of the claims already resolved in these cases **72% ended with decisions that favoured the investors** either by tribunal ruling or by agreement between the parties. Only about 25% of these claims were decided in favour of the state (although, as stated above, states never actually win arbitration cases, since they have to pay millions of dollars in arbitration costs and legal fees); 17 claims related to the public services sector are still pending.

FIGURE 1 · STATE OF SETTLED CLAIMS

Source: Prepared by the authors; based on UNCTAD's Investment Policy Hub, arbitration reviews, and arbitration centres.

With regard to the **57 claims won by investors, the states were ordered to pay more than USD 3.901 billion** in damages,[11] or enough to pay more than 234,000 nursing personnel in Argentina for more than a year and to employ another 117,000 staff nurses.[12]

Only in **seven of the 17 claims pending** do we know the damages claimed by the investors, which amount to **USD 2.897 billion**, or more than 152 million doses of Pfizer's COVID-19 vaccines sold to Brazil.[13]

Investors filing claims in the services sector are mainly from the United States (30 claims) and European countries, mostly from Spain (24), France (12), and the Netherlands and the United Kingdom (8 each). Indeed, **86% of all investors who filed public services-related claims come from the United States or Europe.**

FIGURE 2 · ORIGIN OF INVESTOR CLAIMANTS

Source: Prepared by the authors; based on UNCTAD's Investment Policy Hub, arbitration reviews, and arbitration centres

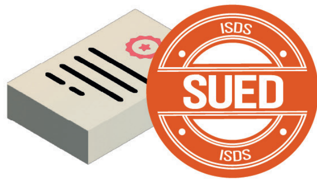
2.2 Milestone ISDS cases in the public services sector

ADP International S.A. and Vinci Airports S.A.S. against Chile [14]

The first-ever pandemic-related ISDS claim was against Chile and in the public services sector.

In January 2021, the main stakeholders of Nuevo Pudahuel, the consortium operating Santiago's main airport, announced their intention, under the BIT between Chile and France, to sue the Chilean state over air-traffic restrictions adopted in the context of the COVID-19 pandemic.[15]

Nuevo Pudahuel demanded an extension of its contract to mitigate the financial effects caused by a decline in air traffic due to the pandemic.[16] Chile's Ministry of Public Works refused to extend the contract, arguing that the terms of the original contract should be respected.[17] Yet, for the French partners, the government's refusal to negotiate an extension of the concession contract and resolve the financial losses brought about by the pandemic did not adequately protect their investments. In response, the Chilean senator Carmen Gloria Aravena said that, 'The threat of claims renews the need to include recognition of unanticipated events in civil contracts (...) because special situations require special measures'.[18]



for ensuring **decent retirement** for the working people

Banco Bilbao Vizcaya Argentaria S.A. against Bolivia

Several Latin American countries privatised their pension systems in the 1990s as part of the neoliberal adjustment and restructuring process promoted by the World Bank and the International Monetary Fund (IMF). Bolivia was no exception and privatised its pension system in 1996. In 2010, the Evo Morales administration renationalised the pension system, a decision that resulted in arbitration claims. The most recent one, in 2020, was filed by the Swiss Zurich Insurance Company and Zurich South America Invest. The other claim, filed by Banco Bilbao Vizcaya Argentaria (BBVA) in 2018, under the BIT signed between Spain and Bolivia, was decided in favour of the investor in July 2022. The ICSID tribunal decided to award the bank the full USD 118.5 million it demanded. It also ordered Bolivia to pay USD 105 million on the grounds that the renationalisation process had been 'chaotic and prolonged' and that the investor had been 'basically a hostage in the country'.[19]

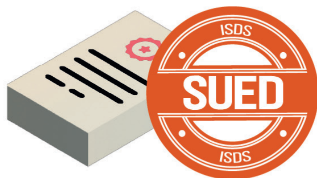
The case is interesting because ...

... it only exists because of a zombie clause. In 2009, Bolivia voted for the Political Constitution of the State, which prohibits the country from settling disputes with foreign investors in international tribunals in investment-related matters.[20] In other words, that any disputes that arise between a private investor and the state have to be settled in national courts, which 'entails explicitly renouncing any other international forum in which disputes may be settled'.[21] Hence Bolivia decided to revoke all of its BITs, including the one with Spain. Yet it was precisely that BIT that BBVA invoked six years later, a procedure made possible by a ten-year survival clause. Moreover, although Bolivia had also left the ICSID in 2007, the BIT establishes in such cases that the investor may request that the rules established by the ICSID Additional Facility Mechanism be used.

Therefore, not only did the survival clause allow claims to continue to be made against Bolivia regardless of having terminated its BITs, but also allowed these claims to be brought before an arbitration tribunal that Bolivia had already left. This is how investment protection treaties undermine the will of the people and national laws, delaying structural changes to serve the common good.

... it shows the pro-investor bias of tribunals. While managing pensions, BBVA had not adequately demanded that employers paid their employees' contributions. As acknowledged by BBVA itself, the debt amounted to USD 45 million in 2012.[22] Even though BBVA, as pension fund administrators (PFAs), had failed to make sufficient efforts to recover the funds in arrears during the length of its administration, as required by the Nationalisation Law in its Articles 188 and 298,[23] the arbitral tribunal argued in its decision that demanding that the company compensate the amounts not collected constituted a violation of the BIT and 'a measure [...] founded on whim rather than legal rules'.[24] And that 'the requirement established in Article 188 [...] holding PFAs accountable for Executive Processes until their termination is in itself disproportionate and irrational'.[25] So, rather than BBVA being charged for its negligence, the tribunal ruled that the Bolivian government had to pay more than USD 100 million to the company for 'taking arbitrary measures that hindered the disposition of the investment'.[26] Not only that, but also throughout the process that transferred the pension fund administration to the hands of the state, BBVA continued to receive millions in dividends.

Also worthy of note is the fact that, in 2021, in an open letter, the Nobel laureate in Economic Sciences and formerly Chief Economist of the World Bank, Joseph Stiglitz, and more than 100 economists and development/ social security experts, condemned the fact that insurance companies had sued Argentina and Bolivia for their decisions to renationalise the pension system, saying that 'Pension systems exist to provide income security in old age – to ensure that older persons retire with adequate pensions. It is the duty of the governments of Argentina and Bolivia to best ensure the welfare of their citizens'.[27]



for protecting health and the environment

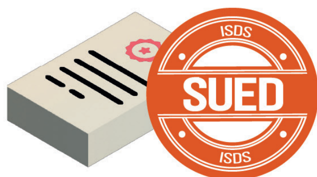
Abengoa against Mexico

The Mexican government and the Spanish multinational Abengoa signed a contract in 1996 whereby the company would handle 4,000 tons a day of hazardous waste over a 30-year period. Zimapán was selected for this purpose, a strategic area in the State of Hidalgo, close to Mexico City and served by direct roads to the US border, and to the Gulf of Mexico, because most of the waste came from abroad. The company started operating with a federal permit in 2004, failing however to obtain a city permit.

The hazardous-waste landfill was set up just 2 km away from a natural reserve and less than 500 metres from the Hñañu Indigenous community, endangering their fragile ecosystem, including by spilling arsenic into the water table, which studies claim directly affected 14 water sources in the area.

In 2009, under the BIT, Abengoa sued Mexico for halting the hazardous waste-dumping operations.[28] The company argued that citizens' protests had obstructed their work, which ultimately led to the revocation of the city operation permit. The company also alleged that public funds had been used to obstruct the operation. Yet Abengoa omitted to refer to the irregular conditions surrounding the approval of public permits,[29] since the application for the city permit was four years later than mandated by the Law of General Ecological Balance and Protection of the Environment.

The case arbitrators decided that the Mexican government had to pay Abengoa USD 45 million in compensation for losses and USD 1.7 million for legal advice and arbitral proceeding fees.[30] Mexico ultimately agreed to pay USD 41.5 billion to the company.[31]



for ensuring
the right to **drinking water**

Suez against Argentina

At the end of 2001, Argentina plunged into a serious economic, political, and social crisis that forced the interim government in January 2002 to take several emergency measures: to devalue the peso and to freeze rates for public services such as water supply, cooking gas, and electricity in order to mitigate popular unrest. In 2003, faced with the government's refusal to raise water rates, the French companies Suez and Vivendi and Spain's Aguas de Barcelona filed three lawsuits with ICSID demanding in excess of USD 1.2 billion.

All three awards benefited the investors and Argentina was ordered to pay more than USD 609 million in damages to the companies. The amount agreed upon or paid for some of the claims is not known, since these were not disclosed. For example, it remains unclear whether the Argentinian government disbursed the amount it was ordered to pay in relation to the water system concession in Córdoba.[32]

Argentina was sued nine times in cases arising from sanitation and water supply in relation to the 2001 crisis. Most of these claims were decided in favour of the investor and the Argentinian government was ordered to pay USD 850 million to companies that took advantage of the country's crisis to get rich.[33]

In detail: The Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A claim against Argentina

In 1993 Suez and Aguas de Barcelona were awarded water-system concessions in the Greater Buenos Aires area by purchasing stocks in the company Aguas Argentinas SA. At the time of the award, it was the world's largest concession, serving a population of 7 million, which by 2006 had risen to 12 million.[34]

The case is interesting because...

... it shows the arbitrators' conflict of interest.

The Swiss judge Gabrielle Kaufmann-Kohler, appointed by the companies and one of the most constant arbitrators in claims brought against states in Latin America and the Caribbean, was appointed in April 2006 as a board member of UBS (formerly Union Bank of Switzerland), which had a stake in Vivendi and Suez. Consequently, Kaufmann-Kohler would benefit indirectly from a favourable award, in this case as the board member of a shareholder in the claimant companies.[35] In this respect, it is worth reading the argument based on which the tribunal rejected Kaufmann-Kohler's recusal in May 2008, stating that the relation between the arbitrator and the claimants was not sufficiently direct to place the arbitrator's independence in doubt.[36] In the decision to disqualify Kaufmann-Kohler as a member of the tribunal it is argued that arbitrators 'are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions'.[37]

... misapplication of fair and equitable treatment.

In its decision on liability, the tribunal ruled that Argentina had effectively violated fair and equitable treatment by not allowing the companies to raise rates, ultimately frustrating investors' expectations.[38] According to the lawyer and International Law specialist Javier Echaide, 'This interpretation is biased in favor of investment as regards any general economic measure that may affect it. As a result, the State, in order to implement public policies, should previously safeguard foreign investment from being harmed by a policy being taken. Yet that would favor the [foreign] investor over national investors, rendering fair and equitable treatment a mechanism for the enjoyment of the foreign investor rather than for balanced foreign-local investment'.[39]

... is a good example of how arbitral courts ignore international law to protect investors.

Both Article 5(3) of the Argentina–France BIT and international law exempt countries during periods of emergency from fulfilling obligations imposed by BITs.[40] Nonetheless, the tribunal considered the Argentinian social and economic crisis not to be sufficiently serious and ruled that it was more important to protect the investor to the detriment of the population's well-being.

... shows that arbitral courts favour investment protection over human rights.

In 2006, Argentina cancelled the concession contract with the companies and nationalised Aguas Argentinas S.A., because Suez, Vivendi, and Aguas de Barcelona had violated the human right of access to water, 'prioritizing their economic interest and providing services in the more profitable areas of the concession, while leaving the humbler sectors of society without water'.[41] Moreover, as per the termination executive order, given poor maintenance and lack of investments, the concessionaires had deliberately distributed water from a well contaminated with nitrates, jeopardising the population's health. Despite the gravity of the charges, the arbitral tribunal rejected the government's concerns and ruled that Argentina had to respect its international obligations whether imposed by investment treaties or human rights. According to the tribunal, both issues are 'neither mutually incongruent, nor contradictory, nor exclusive'.[42]

3. Is there a way out of the foreign investment protection system and international arbitration?

The answer is: Yes! Bilateral Investment Treaties contain specific clauses that outline the procedure for treaty termination – unilaterally or by mutual agreement between the parties. In the event of agreement, a treaty can be terminated at any time during the initial validity period.[43] Otherwise, should a party decide to breach a BIT unilaterally, it must comply with the treaty's termination clause. Generally, there are three types of termination clause:

A • A treaty might be terminated at any time after entry into force.
B • The treaty has an initial validity period (in general ten years) after which it can be terminated at any time. This is the most frequently used legal procedure.
C • The treaty generally has a ten-year validity period and if no prior notice of termination is issued (either one year or six months before expiry), it is automatically renewed for another ten years (though the number of years can vary).

At any rate, almost all BITs include a 'survival clause' that extends the life of a treaty upon its termination.

The zombie clause

The survival clause – also called the zombie clause – is an integral part of almost every BIT, often worded in quite simple terms. The Chile–Spain BIT, for example, states that,

'With respect to investments made prior to the expiration date of this Agreement, the provisions of the Agreement shall thereafter remain in effect for twenty years from such expiration date'.[44]

Upon termination of a BIT, the survival clause is invoked for extended protection of foreign investors on each contracting party for a period that might extend from five to 20 years. Survival clauses may be applicable to investments made prior to the termination of a given BIT or even to investments made during the survival clause extended period. There is no general rule, as clauses vary across BITs. Should a treaty be terminated by consent, the parties may decide to neutralise the survival clause, which entails clarifying that, upon termination of treaty by mutual consent, the zombie clause expires.[45]

Currently, all the countries in the region could choose to terminate most of their BITs, should they wish to do so. Let us look at three cases.

Argentina is the country with the largest number of BITs in effect and the most sued before international arbitral tribunals worldwide. Almost all of Argentina's BITs were signed in the 1990s. Of its 48 BITs in effect, 41 (85.4%) have already outlived their initial validity terms, and so could be terminated should the government wish to do so. However, the present Argentinian government has shown no sign of considering such option. On the contrary, after a 15-year impasse with respect to BIT negotiations,[46] since 2016 Argentina has negotiated and signed three new BITs – with Qatar (2016),[47] with the United Arab Emirates (2018),[48] and with Japan (2018). To date (December 2022), none of these BITs has been ratified. Seven BITs signed by Argentina were terminated between 2014 and 2021: four of which were terminated by the other party – Bolivia, Ecuador, South Africa, and India. A fifth, with Indonesia, was terminated by mutual consent at Indonesia's request. The BIT with Nicaragua was terminated, according to UNCTAD, while the BIT with Chile was replaced by an FTA.[49]

Chile is the country with the third largest number of BITs in effect –34[50]– most of which were signed in the 1990s, as was the case for most of the region's countries. Most of these BITs are valid for a ten-year term, after which period they are either automatically renewed or terminated if this is what the country's executive and legislative branches decide. In the case of Chile, 90% of its BITs could have been terminated. In fact, several Chilean BITs were terminated either unilaterall – as in the cases of the BITs with Bolivia and Ecuador, whose survival clauses are still in effect – or by consent, replaced with investment protection provisions within a free trade agreement (FTA). It is worth mentioning that replacing a BIT with an FTA containing an investment protection clause makes it even harder to leave the investors' protection system, since an FTA covers a wide number of trade-related issues, affecting both countries, and cannot be terminated easily.

Colombia has eight BITs in effect, five of which could be terminated now should the government decide to do so. By 2025, seven of the eight BITs will have outlived their terms and allow termination. Ten BITs have also been signed but are not in force.[51] One of the most recent BIT, signed in 2021 with Spain,[52] is a 'modernisation' of the BIT in force, including for instance the replacement of the traditional ISDS system with the European Union's proposed mechanism: the Multilateral Investment Court. This court has not yet been established, as it is being considered in negotiations to reform the ISDS system by the United Nations Commission on International Trade Law (UNCITRAL). It is also worth underlining that the proposed court does not address the arbitration system's overall bias, but merely regulates some of its most unfair aspects. Though able to terminate most of their BITs and thus exit the investment protection system, none of the governments of these three countries has made any progress in this regard, even though there are many examples worldwide of reviews of and exits from the system.

3.1 How to exit the investment protection system – examples for envisaging a future without ISDS

There are several strategies that governments may follow to exit investment protection treaties and the ISDS mechanism; and many countries have already been taking this path.

As we have seen, the investment protection system restricts the governments' regulatory capacity and leads to multi-million dollar compensation to investors, paid with public money. This has prompted numerous criticisms from different quarters. A number of institutions, scholars, lawyers, and civil society organisations (CSOs) have been highly critical of the effects of BITs and ISDS claims. For instance, during a wave of protests against the Transatlantic Trade and Investment Partnership (TTIP) in Europe, Germany's largest magistrates' association (with a membership of 15,000) called on the government 'to significantly curb recourse to arbitration within the framework of the protection of international investors.[53]

Building on this critical position, many countries have decided to terminate BITs and leave the ICSID, have proposed new model investment treaties, or even prohibited recourse to international arbitration within a country's jurisdiction. The aim of this paradigm shift is to regain control of the country's sovereignty and jurisdiction to regulate foreign investment. In this group are Bolivia, Ecuador and Venezuela in the Americas, as well as India, Indonesia, Poland, South Africa and Tanzania. Brazil and Indonesia, for example, have even developed alternative BIT models. India is also negotiating a new treaty model, though still allowing ISDS. Moreover, El Salvador, in a bid to prevent ICSID-related suits, reformed its national investment framework after being sued by Pacific Rim Mining.[54]

ECUADOR
locking investment protection out of the National Constitution

Ecuador included Article 422 in its 2008 Constitution establishing that, 'It shall not be possible to enter into international treaties or instruments in which the Ecuadorian State waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the State and private individuals or corporations'. This article has stirred much discussion with respect to its interpretation, especially in clarifying such definitions as 'sovereign jurisdiction'.

The drafting of Article 422 enabled Ecuador to revoke its BITs. In 2009 the government revoked the ICSID Convention, and in 2010 started terminating its investment treaties with Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

In 2013 the Rafael Correa administration proposed the creation of the Ecuadorian Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System, or CAITISA, in the Spanish acronym.[55] The CAITISA commission was comprised of civil society experts, government officials representing the Ecuadorian State, scholars, and legal experts. CAITISA's final report was released in May 2017, with the Ecuadorian government accepting all of its recommendations, including the termination of the 16 BITs then in effect.
CAITISA's main goal was to make sure that Ecuador's foreign investment-related obligations met the country's development goals, as set out in the Constitution and in the Buen Vivir [freely, Good Living] Plan. CAITISA, the world's only experience of a comprehensive and citizen audit of BITs, thoroughly reviewed the uses and effects of foreign investment in Ecuador as well as all investors' claims previously filed.

The audit report found that BITs in Ecuador had failed to attract the promised FDI to the country. In addition, the report concludes that only 23% of Ecuador's FDI came from countries with which it had struck BITs, while the country's main investment came from Brazil, Mexico, and Panama, with which Ecuador had not signed any BIT. While investment and development failed to materialise, public expenditure was extraordinary, as investors were hugely favoured in cases brought against the Ecuadorian state. In 2014, Ecuador was the world's fifth most sued country, with claims worth USD 21.2 billion for allegedly having violated foreign investment protection treaties.[56] Moreover, the audit showed that the BITs signed by Ecuador contradict and undermine the development goals set out in the Constitution and the *Buen Vivir* Plan.[57]

Ecuador's example shows how important it is that countries audit all of their BITs in force as well as all foreign investor claims brought against them. By means of datasets and studies, CAITISA clarified the imbalances in treaties in effect and proposed other ways of attracting foreign investment without having their hands and feet tied by investors.

> *'Public policies must guide foreign investment processes and provide for general requirement criteria.'*
> Ecuadorian Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System (CAITISA), Ecuador.

Later on, the Lenín Moreno and Guillermo Lasso administrations pushed for an international agenda advocating that Ecuador should resume signing BITs based on a 'reinterpretation' of Article 422. A number of politicians and scholars publicly expressed their opposition to that move and urged the Constitutional Court of Ecuador to rule that such a decision should be approved by the National Assembly. The *amicus curiae* (friend of the Court) letter submitted by human rights advocates,

including Nobel Peace Prize laureate Adolfo Pérez Esquivel, argues that, 'Ruling that signing the ICSID Convention "does not compromise [Ecuador] at all" is denying – or at least ignoring – how international arbitration in investment matters works'. Nevertheless, in June 2021 the Constitutional Court, in a clearly political gesture, dismissed the appeals and endorsed Ecuador's return to the ICSID.

BRAZIL and INDIA

new investment protection agreement models

Some of the countries that revoked their BITs decided at the same time to develop new BIT models. Two such countries are Brazil and India. In 2015 India started reviewing its model BIT, and Brazil signed its first Cooperation and Facilitation Investment Agreements (CFIAs) with Latin American (Mexico, Chile, Colombia) and African (Mozambique, Angola) countries.

In January 2020, Brazil and India signed a mutual CFIA, bringing together two of the most innovative treaties developed in recent years.[58] It is important to underscore that, notwithstanding the model's novel features, CFIA has maintained, albeit less comprehensive, clauses similar to those of the BITs such as National Treatment and Most-Favoured-Nation Treatment; yet the CFIA does not establish any binding obligations (performance requirements) on investors.[59] This model does not establish an ISDS mechanism, which is replaced with a specific State-State Dispute Settlement (SSDS) mechanism with a number of steps to reconcile disagreements between parties before they sue. For that purpose, it establishes national focus points and an ombudsman. Nonetheless, it is still unclear how this dispute-settlement mechanism will work in practice.

It is worth clarifying that Brazil has no BITs in effect, since the 14 that were signed in the early 1990s were not ratified. Even so, that has not kept Brazil from becoming the world's eleventh largest FDI recipient in 2022, and the largest in Latin America and the Caribbean. The countries that most invest in Brazil are the Bahamas, Germany, Luxembourg, the Netherlands, Spain and the United States.[60]

India began signing BITs in the 1990s, having signed more than 80 treaties. Yet India's romance with BITs ended in 2011, when an international tribunal ordered the country to pay USD 4.1 billion (plus interest and legal costs) to Australian mining company White Industries. As a result, in 2015 India announced a new BIT model, and in 2017 terminated treaties with 58 countries.

India's new BIT model has been heavily criticised for its inconsistencies,[61] especially because it features somewhat contradictory goals: protecting foreign investment while also reaffirming sovereignty. The Indian model adopts the ISDS mechanism, but requires investors to seek remedy in the national justice system before filing a claim against the state with an international arbitral tribunal. The new BIT also changes in the treatment assigned to investors, since it does not refer to 'fair and equitable treatment', excludes the most-favoured-nation clause, and establishes certain obligations for the investor.

In 2016, the then European Commissioner for Trade, Cecilia Malmström, sent a letter to India's ministers of trade and finance warning them that the BIT notices of termination sent to 'a significant number' of EU Member States could 'have serious consequences'.[62] According to the letter, this could 'create a gap in investment protection and consequently discourage EU enterprises from further investing in India', as investors 'may perceive the investment climate as deteriorating'.

Indeed, India is the world's fifth largest recipient of FDI, which has risen steadily since the country announced its new model BIT, or rather since it left its treaties in 2017. FDI grew by 65% from 2007–2014 to 2014–2021, from USD 266 billion to USD

440 billion.[63] Even against the backdrop of the pandemic, from April to September 2020 India managed to attract an additional 15% in FDI compared with the same period in 2019, with a total equity in excess of USD 500 billion.[64] Ten per cent of India's FDI comes from European countries: the Netherlands (8%), Germany and France (1% each).[65]

SOUTH AFRICA

new investment framework to guarantee the right to regulate

As many other countries did, South Africa signed a large number of BITs in the 1990s. However, the milestone case brought against South Africa by Piero Foresti laid bare how these treaties can collide with a country's human rights and reparations policies. In 2007, a group of Italian investors in the mining sector contested the Mineral and Petroleum Resources Development Act, which provides for economic empowerment of the black majority population, with the aim of redressing some of the injustices of the apartheid regime. The act established that mining companies should transfer a part of their shares to black investors, among other things. The dispute (which arose from the BITs signed by South Africa with Italy and Luxembourg) was settled in 2010, after the foreign investors received new permits requiring a much smaller transfer of shares.[66]

In 2009, South Africa released an assessment report on its investment policy, recommending a balance between investors' rights and regulatory space. As a result, in 2015 the country passed the Protection of Investment Act, which considered the treatment the country afforded to foreign investors and established the government's intention of not renewing its BITs and of entering into BITs only for compelling economic reasons and policies.[67] The Act comprised substantive changes such as limiting the definition of investment and investor, excluding fair and equitable treatment, limiting full protection and security, and replacing ISDS arbitration with State-State arbitration after exhausting all local remedies. The new legal framework was opposed by the Democratic Alliance party, which argued it would scare off foreign investors.[68]

During the debates held between 2012 and 2014, the South African government decided to unilaterally terminate its BITs with nine EU countries, including those with Belgium-Luxembourg, Germany, Italy and Spain. South Africa terminated 10 BITs, while still having 11 in effect.[69]

Again, the government's decision did not affect inward investment as opponents of the process had predicted. South Africa does not depend on treaties to receive FDI: it is well positioned in southern Africa, with little competition with other countries in the region since most of the FDI is channelled to the exploitation of natural resources.[70] Moreover, given the size of the country's economy and its global connectivity, investors can maximise their returns by investing in South Africa's manufacturing industry.

An example of European FDI that has not left South Africa is Germany's Volkswagen. After the passage of the Protection of Investment Act and the termination of the South Africa–Germany BIT, VW announced investments worth USD 340 million in a plant located in the city of Uitenhage, where Polo models are manufactured for the domestic market and for export.[71] On these investments, Thomas Schäfer, Managing Director of Volkswagen Group South Africa (VWSA), said that, 'South Africa is not a logical production location for the motor industry as only 0.6% of the world's vehicle production is situated here. However due to the strategic location and the potential of Africa as a future market for exports, as well as the security that the APDP [Automotive Production and Development Program] provides for investors, on-going investments in our vehicle manufacturing base makes sense. Hence the decision by our parent company to allow us to embark on such a major new investment. Exports will again play a key role in our strategy going forward'.[72]

More recently, in August 2022, VW once again announced investments in its South African plant, this time worth USD 13 million. 'This investment from the Volkswagen Group is a massive vote of confidence in VWSA as a production plant', said Ulrich Schwabe, production director at VWSA. [73]

What the VW case shows is that foreign investment does not necessarily leave when a given government reviews its investment protection framework to afford more space for public policy making. Germany's VW continues to invest in South Africa even though:

1. There no longer is an investment protection treaty in effect between the country where a company is headquartered (Germany) and the country hosting the investment (South Africa).

2. The country is entering into new BITs under a new model that cuts investors' rights and restricts their access to an ISDS mechanism.

These examples show that there is no causal link between the existence of a BIT and FDI inflows, because investors assess other variables in reaching decisions.

4. Conclusions and lessons for a future without ISDS in Latin America and the Caribbean

The investment protection treaties signed by the countries of Latin America and the Caribbean have proved to undermine a government's capacity to act for the common good. ISDS claims affect numerous sectors, but most importantly the public services sector. Improving the living conditions of those who most depend on good public services – workers, women, the elderly, and children – requires strong political will, so it is imperative that governments across LAC take measures to exit the investment protection system.

As we have seen, there are many options to pursue to that end, among which some highlights are:

Not signing new treaties containing investment protection provisions

First, the governments should not sign any new ISDS treaties. Several experiences around the world (Brazil, India, South Africa) show countries continuing to receive foreign investment without having signed an investment protection treaty or even after having terminated one.

Governments continue to negotiate treaties with no evidence to show that BITs drive FDI growth. On the contrary, there is plenty of data attesting to the damaging effects of the investment protection system.

Conducting a comprehensive audit of all investment protection treaties and of their economic and social impacts.

It is essential that the region's governments and citizens can obtain full information on all the effects of these treaties and of the ISDS system. To achieve this, Governments are therefore urged to conduct comprehensive, independent, citizen, and binding audits that will systematically study the effects of BITs and the arbitration system. Ecuador's example in this regard could be emulated by other countries in the region.

Suspending investors' recourse to ISDS for the duration of the audit and taking the measures recommended once it is completed.

The audit's findings should be binding on all executive offices. They cannot merely be indicative, since the audit's conclusions are based on demonstrable data and in-depth investigation into the effects and impacts of the investment protection system in the country. While audits are being conducted, ISDS mechanisms should be suspended.

Terminating BITs with ISDS provisions

Terminating these treaties is not only possible, but is also essential if a government seeks to adopt development plans that are respectful of the environment and of human and labour rights.

Exiting ICSID and promoting the use of the national justice system for settling disputes opposing investors and states.

Endnotes

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2 • Transnational Institute (2022) 'ISDS en América Latina y el Caribe'. Amsterdam: Transnational Institute. **https://isds-americalatina.org/en-numeros/**

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Public utilities (essential services)

- Energy supply (distribution, power infraestructure only)
- Gas supply (does not include gas pipeline construction)
- Water supply
- Waste management

National administration (state administration)

- road administration (especially vehicle inspection as part of road safety)
- pension system

Others

- national transport system (including air transport and vehicles for public transport system, but not building transport infraestructure such as highways; no highways concessions)
- Telecommunications (internet services, telephony, etc.)

Excluding construction of infrastructure for the provision of public services, e.g. hospitals, schools, penitentiaries.

11 • This amount is even larger, since there are 11 claims whose awards to investors have not been disclosed.

12 • According to a study by Argentina's Federal Observatory of Human Resources in Health published in August 2020, there were 234,527 nursing staff. **https://www.argentina.gob.ar/sites/default/files/informe_fdt_datos2019_vf-1.pdf**

The monthly salary of a senior nurse in Argentina as at 1 August 2022 was 121,537 Argentinian pesos, or USD 925. Collective bargaining agreement nr 122/75. 4 May 2022. **https://www.sanidad.org.ar/ContentManager/Files/ContentFileManager/acciongremial/cct_pdfs/c122/cct122_acuerdo_2022.pdf**

So, the USD 3.901 billion could have paid the salaries of more than 351,000 nurses over a year.

13 • Pfizer vaccine prices vary across countries. It is USD 19 in the case of Brazil, as shown in this comparative study: Taborda, A., Murillo, D.A., Moreno, C., Taborda, P.A., Fuquen, M., Díaz, P.A. et al. (2022) 'Análisis de impacto presupuestal de la vacunación contra COVID-19 en América Latina', *Revista Panamericana de Salud Publica*. 46 e. 5. **https://doi.org/10.26633/RPSP.2022.5**

14 • For a detailed account of this claim see: **https://isds-americalatina.org/perfiles-de-paises/chile/**

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Annexes

Argentina´s BITs

BIT with	Date on entry into force	Year treaty may be terminated unilaterally	Treaty termination type	Duration of survival clause period
OUTLIVED INITIAL PERIOD OF VALIDITY				
Argelia	28/01/2002	2012	B	10 years
Armenia	20/12/1994	2004	B	10 years
Australia	11/01/1997	2007	B	15 years
Austria	01/01/1995	2005	B	10 years
Bulgaria	11/03/1997	2007	B	10 years
Canada	29/04/1993	1993	A	15 years
China	01/08/1994	2004	B	10 years
Costa Rica	01/05/2001	2011	B	10 years
Croatia	01/06/1996	2006	B	10 years
Cuba	01/06/1997	2007	B	10 years
Czech Republic	23/07/1998	2008	B	10 years
Denmark	02/02/1995	2005	B	10 years
El Salvador	08/01/1999	2009	B	10 years
Finland	03/05/1996	2006	B	15 years
France	03/03/1993	2003	B	15 years
Germany	08/11/1993	2003	B	15 years
Guatemala	07/12/2002	2012	B	10 years
Hungary	01/10/1997	2007	B	15 years
Israel	10/04/1997	2007	B	10 years
Jamaica	01/12/1995	2005	B	15 years
South Korea	24/09/1996	2006	B	10 years
Lithuania	01/09/1998	2008	B	10 years
Malaysia	20/03/1996	2006	B	10 years
Mexico	22/06/1998	2008	B	10 years
Morrocco	19/02/2000	2010	B	10 years
Panama	22/06/1998	2008	B	10 years
Peru	24/10/1996	2006	B	15 years
Philippines	01/01/2002	2012	B	10 years
Poland	01/09/1992	2002	B	10 years
Romania	01/05/1995	2005	B	10 years
Russia	20/11/2000	2010	B	10 years
Sweden	28/09/1992	2002	B	15 years
Senegal	01/02/2010	2020	B	10 years
Thailand	07/03/2002	2012	B	10 years
Tunisia	23/01/1995	2005	B	15 years
Turkey	01/05/1995	2005	B	10 years
Ukraine	06/05/1997	2007	B	10 years
Great Britain	19/02/1993	2003	B	15 years
United States	20/10/1994	2004	B	10 years
Venezuela	01/07/1995	2005	B	10 years
Vietnam	01/06/1997	2007	B	10 years

OUTLIVED INITIAL PERIOD OF VALIDITY, RENEWED, NEW VALIDITY TERM				
BLEU (Belgium-Luxembourg Economic Union)	20/05/1994	2024 (6-month notice)	C	10 years
Egypt	03/12/1993	2023 (6-month notice)	C	10 years
Italy	14/10/1993	2027 (1-year notice)	C	5 years
Netherlands	01/10/1994	2024 (6-month notice)	C	15 years
Portugal	03/05/1996	2026 (1-year notice)	C	15 years
Spain	28/09/1992	2024 (6-month notice)	C	10 years
Switzerland	06/11/1992	2024 (6-month notice)	C	10 years

Source: Prepared by the authors; based on UNCTAD´s Investment Policy Hub.

Argentina´s terminated BITs

BIT with	Date on entry into force	Terminated on	Reason	Duration of survival clause period
Bolivia	01/05/1995	13/05/2014	Unilateral termination by Bolivia	15 years
Ecuador	01/12/1995	18/05/2018	Unilateral termination by Ecuador	15 years
India	12/08/2002	30/08/2013	Unilateral termination by India	10 years
Indonesia	01/03/2001	19/10/2016	Terminated by consent	10 years
South Africa	01/01/2001	31/03/2017 (terminated by South Africa)	Unilateral termination by South Africa	15 years
Chile	01/01/1995	01/05/2019	Replaced with an FTA	15 years
Nicaragua	01/02/2001	01/02/2021	Expired	15 years

Source: Prepared by the authors; based on UNCTAD´s Investment Policy Hub.

Chile´s BITs in effect

BIT with	Date of entry into force	Year treaty may be terminated unilaterally	Treaty termination type	Duration of survival clause period
OUTLIVED INITIAL PERIOD OF VALIDITY				
Hong Kong	14/07/2019	2020	A	10 years
Austria	22/10/2000	2010	B	10 years
Costa Rica	23/06/2000	2010	B	10 years
Croatia	15/06/1996	2011	B	15 years
Cuba	30/09/2000	2015	B	15 years
Czech Republic	05/10/1996	2011	B	15 years
Denmark	03/11/1995	2010	B	15 years
El Salvador	18/11/1999	2014	B	15 years
Finland	01/05/1996	2011	B	15 years
France	24/07/1994	2004	B	20 years
Germany	08/05/1999	2009	B	20 years

BIT with	Date of entry into force	Year treaty may be terminated unilaterally	Treaty termination type	Duration of survival clause period
Greece	27/10/2002	2017	B	15 years
Guatemala	10/12/2001	2011	B	10 years
Honduras	10/01/2002	2017	B	15 years
Iceland	12/08/2006	2016	B	10 years
Malaysia	04/08/1995	2005	B	10 years
Nicaragua	24/11/2001	2016	B	15 years
Norway	07/09/1994	2009	B	15 years
Panama	21/12/1999	2014	B	15 years
Paraguay	17/12/1997	2012	B	15 years
Philippines	06/08/1997	2012	B	15 years
Poland	17/01/2000	2015	B	15 years
Portugal	24/02/1998	2008	B	10 years
Romania	27/07/1997	2012	B	15 years
Spain	28/03/1994	2004	B	20 years
Switzerland	02/05/2002	2022	B	20 years
Sweden	30/12/1995	2015	B	20 years
Ukraine	29/08/1997	2012	B	15 years
Great Britain	21/04/1997	2007	B	20 years
Uruguay	18/03/2012	2012	A	10 years
Venezuela	25/05/1995	2005	B	15 years
OUTLIVED INITIAL 10-YEAR PERIOD, RENEWED, NEW VALIDITY TERM				
BLEU (Belgium-Luxembourg Economic Union)	05/08/1999	2029	C	10 years
Dominican Republic	08/05/2002	2032	C	10 years
Italy	08/02/1995	2025	C	5 years

Source: Prepared by the authors; based on UNCTAD´s Investment Policy Hub.

Chile´s terminated BITs

BIT with	Date on entry into force	Terminated on	Reason	Duration of survival clause period
Bolivia	21/07/1999	11/04/2020	Unilateral termination by Bolivia	15 years
Ecuador	21/02/1996	19/05/2018	Unilateral termination by Ecuador	10 years
Argentina	01/01/1995	01/05/2019	Replaced with FTA	15 years
China	01/08/1995	02/04/2014	Replaced with FTA	10 years
Australia	18/11/1999	06/03/2009	Replaced with FTA	15 years
Peru	03/08/2001	01/03/2009	Replaced with FTA	15 years
South Korea	16/09/1999	01/04/2004	Replaced with FTA	15 years

Source: Prepared by the authors; based on UNCTAD´s Investment Policy Hub.

Colombia´s BITs in effect

BIT with	Date of entry into force	Year treaty may be terminated unilaterally	Treaty termination type	Duration of survival clause period
OUTLIVED INITIAL TERMINATION PERIOD				
Peru	30/12/2010	2010	A	15 years
Spain	22/09/2007	2017	B	10 years
Switzerland	06/10/2009	2019	B	10 years
India	02/07/2012	2022	B	10 years
China	02/07/2013	2023	B	10 years
INITIAL 10-YEAR PERIOD STILL RUNNING; ONCE PERIOD IS OUTLIVED, BIT CAN BE TERMINATED AT ANY TIME				
France	14/10/2020	2030	B	15 years
Japan	11/09/2015	2025	B	10 years
Great Britain	10/10/2014	2024	B	15 years

Source: Prepared by the authors; based on UNCTAD´s Investment Policy Hub.

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