



Peruvian State's Strategy for Addressing Investor State Disputes

By Magrit F. Cordero Hajar *

Legal Advisor in the Special Commission that represents the State
in international investment disputes, Peru

I. Introduction

Foreign direct investment (FDI) could play an important role in the economic growth and development of a country. Many countries in the world continue to enter into International Investment Agreements (hereinafter, IIAs) with the objective of encouraging higher investment flows into their economies.

Peru is not alien to this international juncture. Peru not only has thirty-eight IIAs in force, but it is additionally negotiating commercial agreements with such countries as India and Turkey. It has also recently signed the Trans-Pacific Partnership (TPP) Agreement, a multilateral commercial agreement among twelve economies which are members of the Asia-Pacific Economic Cooperation (APEC) forum, located in the Americas, Asia and Oceania.

These IIAs set forth standards to be applied by those States that are parties to these IIAs for the protection of foreign investments as well as mechanisms for the resolution of disputes through investor-state arbitration, which is also contemplated under investment contracts signed by Peruvian public entities with investors.

To date, Peru has faced a total of sixteen international investment claims, of which eleven were brought under an IIA, four under an investment contract and one under the two instruments. The rising number of international claims against the State of Peru motivated the establishment of a national institutional framework designed for preventing and facing the investment disputes.

This brief explains the approach adopted by Peru to establishment of the "System for the Coordination and Response of the State in International Investment Disputes" (hereinafter, SICRECI) and the role it played in responding to investor-state dispute settlement (ISDS) faced by Peru.

II. A system for preventing and dealing with international investment disputes

Ever since the 1990s, Peru has had a stable legal framework for the promotion and protection of investment, complemented by a policy focused on attracting investment. Through Law No 28933 dated December 14, 2006, SICRECI was established in order to optimize coordination between entities of the Peruvian public sector against possible international claims¹ arising from IIAs and investment contracts².

Initially, the Ministry of Foreign Affairs coordinated the handling of arbitral demands by facilitating the recruitment of international lawyers through the Embassy of Peru in the United States of America. Subsequently, multi-sectoral commissions were established specifically for each case. These commissions, while having the same composition of members that the current Commission has, were of a more limited scope in terms of the mechanisms and procurement rules of the State's defense. The commissions also lacked a warning system to the emergence of disputes, and faced administrative obstacles to the timely financing of funds needed to cover expenses, lacked delineation of the responsibilities of the entities involved and coordination in

This brief is part of the South Centre's policy brief series focusing on international investment agreements and experiences of developing countries.

While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.

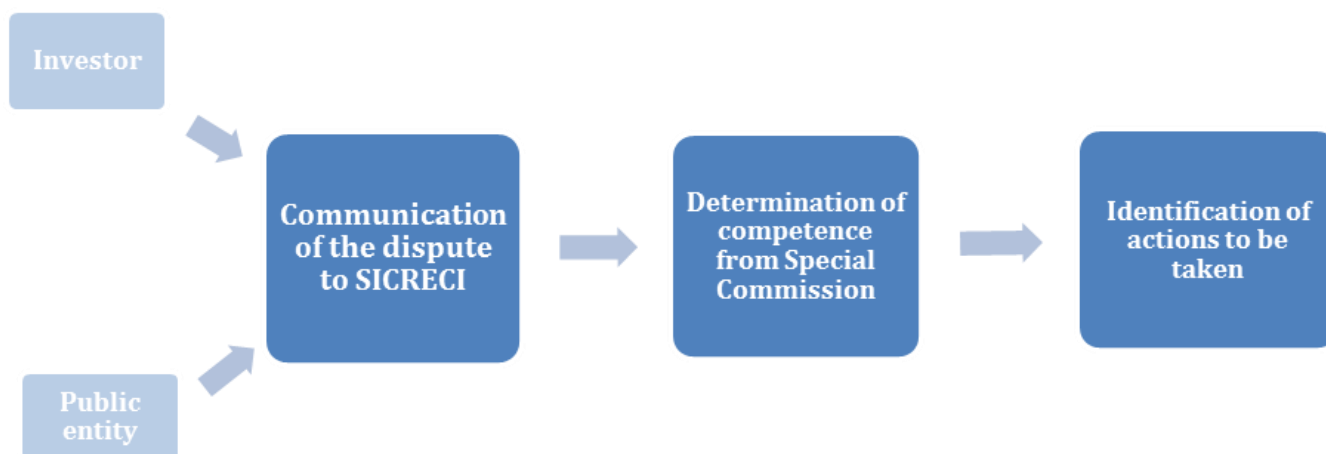
Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.

The policy brief series is intended as a tool to assist in further dialogue on needed reforms.

**** The views contained in the policy brief are personal to the author and do not represent the institutional views of the South Centre or its Member States.**

* The opinions expressed in this document are those of the author and do not necessarily reflect the views of the Special Commission or the Peruvian Government.

Early Alert System



allocation of costs, as well as experienced delays in obtaining relevant information. The design of the SICRECI managed to overcome these weaknesses.

The SICRECI has the following main elements: i) centralization of coordination within the state, ii) rapid and effective procedure for hiring lawyers and experts needed for defense, iii) adequate and timely financing, iv) clear delineation of responsibilities and allocation of expenses, v) system of early warning of disputes, vi) database of IIAs and investment contracts signed and vii) mandatory criteria for drafting dispute resolution clauses.

This system is composed of the Ministry of Economy and Finance (which plays the role of coordinator), a Special Commission, and all public entities of any level of government (national, regional and local) that have signed investment contracts or represent the State in signing treaties containing provisions on investment³.

The Special Commission is a multi-sectoral body involving representatives of the Ministry of Economy and Finance, which chairs the Commission, the Ministry of Foreign Affairs, the Ministry of Justice and Human Rights, and the Agency for the Promotion of Private Investment. Furthermore, in accordance with the type of the dispute, representatives of the Ministry of Foreign Trade and Tourism and of the public entity involved in the dispute may also take part in the Commission⁴. The objective of this Commission is to represent the State in international investment disputes, both at the stage of direct negotiations and in the arbitration or conciliation stages⁵.

There are two main fields of action in this system: the prevention of international investment disputes and the defense of such disputes if they arise. With respect to the first area, Peru has developed two projects focused on the strengthening of the SICRECI. The first project was aimed at the development of an electronic platform for facilitating guidance as to the functioning of the SICRECI, offering a database for all IIAs and investment contracts containing a clause for international investor-state dispute settlement. The platform also

includes an early alert system that allows the investor and the public entities to address the potential rise of a dispute⁶.

The second project focused on the design of a capacity building program aimed at training public officials, at all levels of government, on issues related to the prevention of international investment disputes. The program also includes guidance on international commitments in regard to investment and a prevention manual for such type of disputes including overview of the obligations assumed by the State under the IIAs, the operation of SICRECI and international investment arbitration, among other elements.

Regarding the defense of such disputes whenever they arise, Peru tackles these international investment disputes in a centralized manner, resulting in an efficient and organized management of the dispute, both internally and externally. At the internal level, the Special Commission adopts the strategy to be followed in each case, proposes the hiring of lawyers needed for the legal defense of the State, approves the provision of financial resources, and facilitates, channels and coordinates the exchange of relevant information between public entities⁷. Externally, the Special Commission establishes a single channel of dialogue with the State, since the Commission represents the State in international investment disputes. In accordance with the report prepared by United Nations Conference on Trade and Development (hereinafter, UNCTAD) in 2011, the SICRECI is a good example for preventing possible disputes and facing those which effectively arise; it is a real advantage having one single institution (in this case, the Ministry of Economy and Finance) dealing with the disputes as this creates predictability and certainty for investment⁸.

III. International claims regarding investments

As noted in the introduction, to date, Peru has faced a total of sixteen international investment claims, of which eleven were brought under an IIA, four under an investment contract and one under the two instruments. All claims were brought before the International Centre for

Settlement of Investment Disputes (ICSID), except three arbitrations under the rules of the United Nations Commission on International Trade Law (UNCITRAL). (See Box (1).)

The following provides a brief overview of eleven concluded cases.

1. The *Compagnie Minière Internationale Or SA* case (ICSID Case No. ARB/98/6) was the oldest investment arbitration process against Peru. It started on October 28, 1998 under the bilateral investment treaty (BIT) between Peru and France. This case ended on February 23, 2001 as a result of an agreement outside the arbitration⁹.

2. The *Industria Nacional de Alimentos SA and Indalsa Perú SA* case (ICSID Case No. ARB/03/4) started on March 26, 2003 under the BIT between Peru and Chile. It ended on February 7, 2005 with an award, whereby the Tribunal declared itself incompetent to deal with the gist of the dispute, given it arose before the treaty entered into force¹⁰. Later, on 1st of July 2005, the claimant requested the annulment of the award. The ICSID ad hoc committee addressing annulment issued its Decision on September 5, 2007, whereby it rejected the annulment petition, given it did not find any reasons to generate doubts as to the decision of the Tribunal¹¹.

3. The *Duke Energy International Peru Investments No1 Ltd* case (ICSID Case No. ARB/03/28) started on October 24, 2003 under a Juridical Stability Agreement¹² signed in 2001, which referred to ICSID as the forum for the resolution of disputes between the parties. This case ended on August 28, 2008 with the issuance of an Award whereby the Tribunal concluded that the stability guarantee had been infringed and ordered the payment of a redress in favor of the claimant¹³. Later, on March 4, 2009 Peru requested the annulment of the Award. An Ad Hoc Committee issued its decision on annulment on March 1, 2011 whereby it dismissed the request, ordered Peru to assume the costs of the ICSID tribunal and finished the suspension in the execution of the Award¹⁴.

4. The *Aguaytia Energy LLC* case (ICSID Case No. ARB/06/13) started on July 17, 2006 under a Juridical Stability Agreement signed in 1996 that referred to ICSID as the forum for resolution of disputes between the parties. This case ended on December 11, 2008 with an Award whereby the Tribunal declared that Peru did not fail to implement the non-discrimination guarantee of the Juridical Stability Agreement¹⁵.

5. The *Tza Yap Shum* case (ICSID Case No. ARB/07/6) started in February 12, 2007 under the BIT signed between Peru and China. It resulted in an Award on July 7, 2011 whereby the Tribunal ordered Peru to pay compensation to claimant. The tribunal found that Peru failed to implement the guarantee against expropriation set forth in the treaty¹⁶. On November 9, 2011, Peru requested the annulment of the

Award. The Ad Hoc Committee issued its decision on February 12, 2015 turning down the petition for annulment and ended the suspension of the execution of the Award¹⁷.

6. The *Convial Callao SA and Compañía de Concesiones de Infraestructura SA* case (ICSID Case No. ARB/10/2) started on February 2, 2010 under the BIT between Peru and Argentina. On May 21, 2013, an award was issued in which the tribunal dismissed the alleged infringements to the Treaty and ordered the claimants to pay the costs incurred in the arbitration¹⁸.

7. The *René Rose Levy de Levi* case (ICSID Case No. ARB/10/17) started on July 20, 2010 under the BIT between Peru and France. The tribunal issued an award on February 26, 2014 in which it declared the arguments of the claimant groundless and ordered it to assume the fees and expenses incurred in the arbitration as well as the costs of ICSID and the fees and expenses of the arbitrators¹⁹. Later, on August 15, 2014, the claimant requested the annulment of the Award. However, some months later it filed a request of termination of the process.

8. The *Caravelí Cotaruse Transmisora de Energía SAC* case (ICSID Case No. ARB/11/9) started on April 15, 2011 under the Concession Contracts of the Machu Picchu-Cotaruse Line and the Mantaro-Caravelí-Montalvo Line signed in 2008, which contemplated ICSID as the forum for the settlement of disputes between the parties. The award in this case was issued on April 15, 2013, whereby the tribunal rejected all pretensions and condemned the claimant to payment of costs and expenses incurred by Peru as it declared that the obligations of the claimant did not become excessively burdensome²⁰.

9. The *Renée Rose Levy and Grencitel SA* case (ICSID Case No. ARB/11/17) started on June 24, 2011 under the BIT between Peru and France. It concluded on January 9, 2015 with an award ordering the claimants to reimburse Peru the amounts deposited in ICSID and to pay the fees and expenses incurred by Peru during the arbitration. The tribunal found that there had been abuse of process on the part of claimants²¹.

10. The *Isolux Corsán Concesiones SA* case (ICSID Case No. ARB/12/5) started on February 15, 2012 under the BIT between Peru and Spain. In the award issued on March 25, 2014, the Tribunal included the Integral Agreement signed on December 19, 2013²². It should be noted that the claim was filed by Elecnor SA jointly with Isolux Corsán Concesiones SA, however, after the procedural hearing in early 2013, Elecnor SA filed a request to finish the procedure.

11. *Pluspetrol Peru Corporation and others* case (ICSID Case No. ARB/12/28) started on September 11, 2012 under the License Contract for the Exploitation of Hydrocarbons from Block 56 signed in 2004, which contemplated ICSID as the forum for resolution of disputes between the parties. The claim was filed against Perupetro S.A., a Peruvian state-owned company accredited before ICSID. This case concluded on May 21, 2015 with an

Box (1): ISDS cases faced by Peru				
YEAR THE CLAIM WAS FILED	CLAIMANT(S)	RESPONDENT(S)	LEGAL BASIS	YEAR THE CASE WAS CONCLUDED
1998	Compagnie Minière Int Or	República del Perú	IIA	2001
2003	Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.	República del Perú	IIA	2007
2003	Duke Energy International Peru Investments No. 1 Ltd.	República del Perú	Contract	2011
2006	Aguaytia Energy, LLC	República del Perú	Contract	2008
2007	Tza Yap Shum	República del Perú	IIA	2015
2010	Compañía de Concesiones de Infraestructura S.A and Convia Callao S.A.	República del Perú	IIA	2013
2010	Renée Rose Levy de Levi	República del Perú	IIA	2014
2011	Caravelí Cotaruse Transmisora de Energía S.A.C.	República del Perú	Contract	2013
2011	Renée Rose Levy de Levi and Gremcitel S.A	República del Perú	IIA	2015
2011	The Renco Group, Inc	República del Perú	IIA	Pending
2011	DP World Callao S.R.L and others	República del Perú	IIA/Contract	Pending
2012	Isolux Corsán Concesiones S.A	República del Perú	IIA	2013
2012	Pluspetrol Perú Corporation and others	Perupetro S.A	Contract	2015
2013	República del Perú	Caravelí Cotaruse Transmisora de Energía S.A.C.	Contract	2013
2013	Exeteco International Company S.L	República del Perú	IIA	Pending
2014	Bear Creek Mining Corporation	República del Perú	IIA	Pending
2016	Gramercy Funds Management LLC and others	República del Perú	IIA	Pending

Award whereby the Tribunal ordered the claimants to pay royalty adjustments in respect of damages and their interests, as well as the costs and fees incurred by Peru in the arbitration process, as it was found that the claimants failed the duty to correctly calculate the royalty paid according to the contract²³.

Consequently, Peru's experience in the twelve international investment arbitrations concluded and administered before ICSID has had a positive balance; rulings favorable to the State were obtained in ten of the twelve arbitration claims. The *Convial Callao SA* and *Compañía de Concesiones de Infraestructura SA*, *René Rose Levy de Levi*, *Caraveli Cotaruse Transmisora de Energía SAC*, *Pluspetrol Peru Corporation* and others, and *Renée Rose Levy* and *Gremcitel SA* cases represented a success for Peru as the Arbitration Tribunal not only supported the Peruvian position but also ordered the claimants to pay costs and expenses in favor of Peru.

A Comprehensive Agreement dated December 19, 2013 was signed between Peru and the business group consisting of: *Elecnor SA*, *Isolux Corsán Concesiones SA*, and *Caravelí Cotaruse Transmisora de Energía SAC*. It is considered the most important agreement of friendly settlement ever signed by Peru as it allowed for a series of favorable economic benefits for the State²⁴. The Peruvian State received payment of the amount provided in the Award dated April 15, 2013 and an additional amount for the costs associated with the cases.

Finally, it should be noted that Peru was the first country in Latin America to file an international investment arbitration claim against a company. The *Republic of Peru vs. Caravelí Cotaruse Transmisora de Energía SAC* case (ICSID Case No. ARB/13/24) commenced on September 19, 2013 before ICSID, under the Concession Contracts of the Machu Picchu-Cotaruse Line and the Mantaro-Caravelí-Montalvo Line signed in 2008. The claim was filed by Peru due to non-payment of penalties charged to that company for delay in the start date of commercial operation of the power transmission lines. That case ended on December 26, 2013 when the parties signed a Comprehensive Agreement described in the preceding paragraph.

IV. Conclusion

The creation of SICRECI represented a major institutional change in approaching international claims related to investments filed against Peru. The establishment of this system has allowed the State to be prepared to prevent and manage its defense in the event that it faced a case before an international forum. Furthermore, it has shown that centralizing the handling and management of arbitrations, coupled with a good coordination within the public sector, can make the difference in having an effective defense of the interests of the State.

Since the creation of SICRECI, it has treated a total of

seventeen cases, two of them already in an advanced stage of the arbitration process. This system allowed the State to offer a coordinated, orderly and timely response to an arbitration claim, as the Regulation of Law No. 28933²⁵ allowed to establish an internal mechanism of attention to the disputes and the Supreme Decree No. 002-2009-EF²⁶ facilitated administrative procedures for hiring the lawyers needed for defense.

While this institutional development adds value in terms of managing cases as they arise, this system faces major hurdles due to multiple challenges arising from ISDS. Indeed, after the establishment of SICRECI, Peru continued to face a rising number of ISDS cases (see Box (1): ISDS cases faced by Peru).

The discussion on reforming ISDS continues at the international level. According to UNCTAD the ISDS regime faces problems such as deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; among others²⁷. Against this, the institution proposes to discuss about alternative dispute resolution mechanisms other than arbitration, the introduction of an appellate body and the creation of a permanent court of investment arbitration²⁸.

End notes:

¹ Republic of Peru, Law N°28933 "Law establishing the System for the Coordination and Response of the State in International Investment Disputes", Article 2 (2006).

² Ibid. Article 3 (2006).

³ Ibid. Article 4 (2006).

⁴ Ibid. Article 7.3 (2006).

⁵ Ibid. Article 7.1 (2006).

⁶ MEF. SICRECI's web. Available at: <https://apps4.mineco.gob.pe/sicreciweb/>.

⁷ Law N°28933, op. cit. Article 8 (2006).

⁸ United Nations Conference on Trade and Development. Best practices in investment for development. Case Studies in FDI. How to Prevent and Manage Investor-State Disputes. Lessons from Peru. Investment Advisory Series, Series B, number 10. New York: UNCTAD, 2011, p. 57-58. Available at: http://unctad.org/en/Docs/webdiaepcb2011d9_en.pdf.

⁹ For more information, see PBS Front Line World. Available at: <http://www.pbs.org/frontlineworld/stories/peru404/timeline.html>.

¹⁰ Final Award, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), p. 421. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Luchetti.pdf.

¹¹ Decision on Annulment, *Industria Nacional de Alimentos, SA and Indalsa Perú, SA (formerly Empresas Lucchetti, SA and Lucchetti Perú, SA) v. Republic of Peru* (ICSID Case No.

ARB/03/4), p. 33. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0278.pdf>.

¹² Juridical Stability Agreements are instruments aiming at promoting investment, which materialize through signing of contracts with the Peruvian government, through which stabilization guarantees are offered to investors or companies, as appropriate, for the period the Agreements are in effect. Such agreements can only be amended with the consent of both parties. PROINVERSION's web. Available at: <http://www.investinperu.pe/modulos/JER/PlantillaStandard.aspx?are=0&prf=0&jer=5844&sec=1>.

¹³ Final Award, Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru (ICSID Case No. ARB/03/28), p.39. Available at: <http://tax-arbitration.com/Duke%20v.%20Peru%20SPANISH.pdf>.

¹⁴ Decision on Annulment, Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru (ICSID Case No. ARB/03/28), p.94. Available at: http://www.italaw.com/documents/DukevPeruFinal_1_Mar2011_Sp.pdf.

¹⁵ Final Award, Aguaytia Energy, LLC v. Republic of Peru (ICSID Case No. ARB/06/13), p. 53-54. Available at : https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Aguaytia.pdf.

¹⁶ Final Award, Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6), p. 120. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_TzaYapShum.pdf.

¹⁷ Decision on Annulment, Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6), p. 120. Available from. p. 92. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Anulacion_Laudo_Tza_Yap_Shum.pdf.

¹⁸ Final Award, Convia Callao SA and CCI - Compañía de Concesiones de Infraestructura SA v. Republic of Peru (ICSID Case No. ARB/10/2), p.194. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Convial.pdf.

¹⁹ Final Award, Renée Rose Levy de Levi v. Republic of Peru (ICSID Case No. ARB/10/17), p. 193. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_BNM.pdf.

²⁰ Final Award, Caravelí Cotaruse Transmisora de Energía SAC v. Republic of Peru (ICSID Case No. ARB/11/9). p. 46. Available at:

https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Caraveli.pdf.

²¹ Final Award, Renée Rose Levy and Gremcitel SA v. Republic of Peru (ICSID Case No. ARB/11/17), p. 66. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Gremcitel.pdf.

²² Final Award, Isolux Corsán Concesiones SA v. Republic of Peru (ICSID Case No. ARB/12/5), p. 3. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Isolux.pdf.

²³ Final Award, Pluspetrol Perú Corporation and others v. Perupetro SA (ICSID Case No. ARB/12/28), p. 73-74. Available at: https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Pluspetrol.pdf.

²⁴ Lex Arbitri's web. Available at: <http://lexarbitri.pe/wp-content/uploads/2014/03/Transacci%C3%B3n-entre-Partes.pdf>.

²⁵ MEF's web. Available at: https://www.mef.gob.pe/contenidos/inv_privada/normas/sicreci/DS_125_2008_EF.pdf.

²⁶ MEF's web. Available at: https://www.mef.gob.pe/contenidos/inv_privada/normas/sicreci/DS_002_2009_EF.pdf.

²⁷ UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", IIA Issue note (June 2013). Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

²⁸ Ibid.



**SOUTH
CENTRE**

Chemin du Champ-d'Anier 17
PO Box 228, 1211 Geneva 19

Telephone: (4122) 791 8050
Fax: (4122) 798 8531
E-mail: south@southcentre.int
<http://www.southcentre.int>

Previous South Centre Investment Policy Briefs

No. 1, July 2015 – Indonesia's Perspective on Review of International Investment Agreements

No. 2, July 2015 – Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina

No. 3, July 2015 – India's Experience with BITs: Highlights from Recent ISDS Cases

No. 4, August 2015 – International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa

No. 5, August 2015 – Ecuador's Experience with International Investment Arbitration