

Rules of the Road for Going International

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Rule Number 1-Where to Do Business

Opportunity may knock on your door as a company that wishes to engage in cross border trade or to invest in or establish a business outside of the United States. Where should you go to do this? If you are presented an opportunity in a country, should you take it? What protections will you want to put in place? Rule number 1 speaks to the fundamental decision of whether the country in which you want to invest provides certain important safeguards for your investment. Choice of country is important: Whenever possible, choose projects in a country that has a bilateral investment treaty (a "BIT") with the United States. BITs protect you from discrimination and uneven treatment. What is a BIT? A BIT is an agreement between two nations that protects, to a recognized extent, the investment of the nationals of one country from unfair treatment by the other country. BITs also provide certain assurances to the investors. BITS apply to direct investment in the host country. What are the major protections? BITS typically provide investors assurances of fair and equitable treatment as well as protection from (or compensation for) expropriation. Many BITS require the host country to treat the investor as favorably as it treats nationals of its country. BITS also provide for free transferability of invested funds in and out of the host country. What remedies does an investor have if the BIT is violated? The major protection of an investor is that it has access to an arbitration method for resolving disputes with the host country. In the absence of a BIT, a country cannot be sued or brought to an arbitration. Via a BIT, the host country has already agreed to allow itself to be pursued in an arbitral proceeding brought before the International Center for the Settlement of Investment Disputes ("ICSID") or another arbitral body. ICSID is a construct of the World Bank and the decisions of ICSID arbitration panels are published, thereby giving guidance to investors and their counsel in connection with issues that may arise in the course of investments. BIT arbitration also has the benefit of allowing the investor to avoid having to pursue remedies in the host country's courts. What does this mean to me if I am investing in Latin America or the Caribbean? The U.S. currently has signed and ratified 41 BITS. Of these, nine are in effect in Latin America. These are: Argentina, Bolivia, Ecuador, Grenada, Jamaica, Panama, Trinidad & Tobago, and Uruguay. In addition, almost every member of the United Nations has signed the ICSID Convention.

That convention, however, requires the permission of the applicable parties to mediation or arbitration of investment disputes. Accordingly, unlike a BIT in which arbitration is mandatory, without a BIT arbitration is permissive. Note that Bolivia, Ecuador, Venezuela and potentially Nicaragua have decided that they will no longer be subject to ICSID jurisdiction, thereby making investment into those countries more uncertain. Finally, please note that there have been many arbitrations against Argentina recently in which after an award was granted against Argentina, Argentina refused to recognize the award. Reportedly, the U.S. government has just suspended duty free treatment for some Argentine goods until it pays several awards entered against it in ICSID proceedings. What about the other important countries in Latin America? The Free Trade Agreements ("FTAs") entered into by the United States contain the same types of protections including similar dispute resolution provisions. So Canada, Mexico, Panama, Colombia, the Dominican Republic, Costa Rica, Chile and Peru all have dispute resolution provisions. Many of these contain a choice of forum provision and often there are pre-selected panels of arbitrators available to resolve disputes under the rules established by each FTA. While this short note has focused on Latin America and the Caribbean and then only on signed, ratified agreements, these types of protections are available in many other countries. To find out more about these protections, please feel free to contact us.

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