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David A. Gantz, *University of Arizona, Rogers College of Law*

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Resolution of Investor-State Controversies in Developing Countries

David A. Gantz

Abstract

The large volume of literature and commentary on resolution of investor-state disputes tends to focus primarily on the rights of the foreign investor and the process through which the investor may protect her interest through investor-state arbitration, either at the World Bank's ICSID or in some other forum. Where issues relating to governments-as-respondents have been addressed, the emphasis has often been on nations such as the three NAFTA Parties and other relatively large and affluent nations such as Argentina. Until relatively recently, much less attention has been paid to challenges facing small developing respondents, such as the member nations of CAFTA-DR, Chile, Colombia or Ecuador. How, for example, should such governments respond to and manage claims, some of which in magnitude may represent a significant portion of the annual budget of the respondent government, when there is relatively limited in-house legal expertise and experience in such dispute resolution? Fortunately, UNCTAD and others have begun to take such challenges into account and to provide training for respondent government officials. Still, further actions are needed, including educating policy makers and the public as to the risks that arise in the investor-state dispute context and how best to address them. Changes in BITs and FTA investment provisions are also warranted. This article identifies the nature of the challenges presented to such governments and suggests practical means of dealing with them more effectively. It addresses, inter alia, coordination issues for the national administering authority; means of identifying and resolving such disputes before they reach the arbitration stage; effective use of outside legal advisers at various stages of the process; factors relating to the selection of arbitrators; administration of the arbitral process; and making current and future bilateral investment treaties more responsive to the procedural needs of respondent government. The article also draws on the history of a number of nations with experience in responding to and/or litigating investor state disputes.

KEYWORDS: investor-state disputes; investment; law and development

Author Notes: The impetus for this article was a project for USAID and Chemonics International, a consulting group with extensive experience in Latin America in the Dominican Republic, in 2010. It produced a study entitled, "Resolution of Investor-State Controversies in the Dominican Republic: Conclusions and Recommendations." The purpose of the study, which involved extensive discussions with Dominican Republic officials and a number of lawyers and other experts in the private sector and with international organizations, was to analyze current procedures and determine whether more effective ones could reduce the number of conflicts ultimately submitted to arbitration.

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I. INTRODUCTION

The actual and potential costs of investor-state dispute settlement for small developing nations [1] such as Chile, Colombia, the Dominican Republic and Ecuador, are enormous in terms of personnel, litigation costs, costs to pay or resolve conflicts and the potential negative impact on the investment climate. Consequently, efforts to improve the capabilities of such governments to meet the challenges of investor-state from the outset, recognition of a "problem" before it becomes a "conflict" and then in a formal "dispute" are well worth the effort. Moreover, it is obvious that the difficulties identified with such nations as the Dominican Republic and Ecuador are far from unique, and apply much more generally to developing country responses to investor-state disputes. The challenges are particularly formidable for those governments that do not maintain extensive in-house expertise in investor-state dispute resolution, and may not have organized their internal procedures so as to assure that the responsible agency is aware of the existence of potential disputes early on and has the necessary authority to manage all stages of the process.

Whether the investor-state arbitration problem is more serious for developing countries than for other nations is a matter of some controversy among government officials, the private sector, civil society and academia. There is considerable disagreement

[R]egarding the extent to which bilateral investment treaties (BITS) and free trade agreements (FTAs) with BIT-like investment chapters unfairly subject developing countries to investment arbitration. A key argument is that these treaties elevate the rights of foreign firms over host governments, and allow those firms to directly file claims against those governments . . . Moreover, the costs of awards that need to be paid to claimants and the cost to carry out a case are seen as enormous by developing country standards.[2]

One scholar, Professor Susan Franck, has determined on the basis of empirical analysis that most investment disputes (around 90%) arise in developed countries and 70% of investor-state arbitrations are brought against developing countries, many of those (45%) against upper middle income countries. Professor

[1] The impetus for this article was a project that produced a study entitled, "Resolution of Investor-State Controversies in the Dominican Republic: Conclusions and Recommendations." The objective was to analyze current procedures and determine whether more effective ones could reduce the number of conflicts ultimately submitted to arbitration. The study was the sole responsibility of the author and does not necessarily reflect the views of its sponsors, Chemonics Int'l and USAID.

[2] Kevin P. Gallagher & Ellen Shrestha, *Investment Arbitration and Developing Countries: A Reappraisal,* Global Development and Environmental Institute Working Paper no. 11-01, May 2011, p. 2, available at <http://www.ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitration Reappraisal.pdf>, accessed 9 June 2011.

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Franck also concluded that investors won only about one half of the cases submitted to arbitration, and that in most instances the amounts of the awards were considerably less than the amounts originally sought.[3] For Franck, this meant that despite the need for some improvements investment arbitration generally took place in an unbiased manner.[4]

Others, such as Kevin Gallagher and Ellen Shrestha have criticized Franck's results, arguing *inter alia* that developing countries are subject to a "disproportionate number of claims" and that considering the magnitude of government budgets and per capita incomes "developing countries pay significant more in damages than developed nations do."[5] They point out that upper middle income and lower middle income developing countries in the aggregate receive only 19% of aggregate foreign investment flows but are subject to 75% of all claims.[6] The authors also suggest that, for example, the average amount claimed by U.S. investors against high income countries is about $150 million, while for developing countries the average amount is $450 million.[7] It is also notable that the total claims amounts paid under NAFTA's Chapter 11 are zero for the United States, about $140 million for Canada and around $200 million for Mexico).[8] Interestingly, initial claims, based on notices of intent to seek arbitration, are similar in number, ranging from 15 (Mexico) to 19 (United States) to 26 (Canada).[9]

Still others have suggested that the extent of the problem relating to investor-state disputes has been exaggerated. For example, Professor Michael Riesman has estimated the number of multinationals and their subsidiaries around the world are more than 180,000. Because of this large number of investments, the potential for claims represented by this group is enormous, and it is perhaps

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[3] Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C.L. Rev. 1, (2007) , 32 [Hereinafter "Franck I"]; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration,* 50 Harv. Int'l L.J. (2009), 435-489 [hereinafter "Franck II"].

[4] Franck II, *supra* note 3.

[5] Gallagher & Sherstha, *supra* note 2, at 3.

[6] *Ibid.*

[7] *Ibid.*

[8] Canada agreed to pay awards or negotiated settlements in *Ethyl, Pope & Talbot, S.D. Myers, and AbitibiBowater Inc*., with the latter accounting for about $140 of total payouts. As discussed more fully in Part III(E), Mexico paid compensation in *Metalclad, Feldman, ADM, Corn Products and Cargill*, with all but about $20 million attributable to the cases brought by the three agribusiness giants arising out of Mexico's taxation of high fructose corn syrup. The total for Mexico excludes Tecmed, an award paid under the Spain-Mexico BIT. Oxford University Press, *Investment Claims by Host State*, available at <http://www.investmentclaims.com.ezproxy.law.arizona.edu/subscriber_awards_by_hoststate1?letter=C>, accessed 3 October 2011) [hereinafter "OUP Investment Claims"]

[9] According to one source, NAFTA Claims, by Pleadings and Award, <www.naftaclaims.com>, accessed 3 October 2011.

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surprising that there have been fewer than 350 ICSID arbitrations since 1965. Even if many additional investor-state disputes have been resolved by negotiation, the total number of conflicts is a "tiny fraction of the universe of foreign direct investment."[10] Still, the aggregate statistics are largely irrelevant should even a handful of potentially expensive disputes be lodged against a small developing country, such as the Dominican Republic, Chile or Ecuador, among others.[11] Even if the number is mercifully small for an individual host government, one or two claims is one or two too many, particularly if the claim constitutes a substantial amount of annual government revenue.[12] Consequently, changes that can improve the avoidance and management of such disputes by the respondent government are likely to be well-worth the efforts required.

There are a host of reasons which logically suggest that more investment disputes would be submitted to arbitration by foreign investors in developing countries than in developed countries. Among those are generally better observance of the rule of law in developed countries, including independent and competent courts; the existence of more consistent administrative and agency procedures in developed countries; generally greater political stability; and at least in some instances there is a perception that prevailing in an arbitral proceeding is more likely against a developing country whose government lacks expertise in defending such actions. Realistically, it is easier for developing country governments to deal with some of these deficiencies than others. In this article I have focused on improving administrative procedures and expertise, most of which could in fact be accomplished in the short term at relatively low cost if the host governments have the political will and can obtain the necessary expertise to consider and implement changes.

The overall challenges are nevertheless long term. According to 2009 UNCTAD data, more than 2760 bilateral investment treaties (BITs) and 250 free trade agreements (FTAs) with investment chapters had been concluded, and the

[10] W. Michael Riesman, "International Investment Arbitration and ADR: Married but Living Apart", in *Prevention and Alternatives to Arbitration II* (2010), pp. 22-23i, available at <http://www.unctad.org/en/docs/webdiaeia20108_en.pdf>, accessed 6 October 2010 [hereinafter "UNCTAD—Prevention and Alternatives II].

[11] Arbitral awards against Chile, the Dominican Republic, Ecuador and Colombia are approximately 3, 2, 15 and zero, respectively. (Most such claims involve multiple awards, e.g., on jurisdiction and interim measures, as well as a final award on the merits.) Settlements relating to OPIC insurance claims based on political violence coverage arising out of investments in Colombia are excluded. Mexico has been involved in 12 proceedings that resulted in one or more arbitral opinions, Canada, 8 and the United States, 9. OUP Investment Claims, *supra* note 8.

[12] *See* Jarrod Hepburn, "Togo Fails to Overturn ICSID Arbitral Award; Damages Owed to French Electricity Investors Amount to 12% of State Revenue", Investment Arbitration Reporter, 7 September 2011, available at <http://www.iareporter.com.ezproxy.law.arizona.edu/articles/20110915>, accessed 17 October 2011 (indicating that the $80 million award constitutes about 12% of annual public sector revenues).

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number actually in force undoubtedly exceeds 2000.[13] The vast majority have been negotiated by capital exporting countries with developing countries seeking foreign investment. Developing countries typically conclude such agreements for several reasons: BITs are thought to attract investment into the countries, protect existing investments, and less obviously, push the host governments into establishing systems with greater transparency that follow best practices[14] and, presumably, increase compliance with the rule of law. Much of the aggregate foreign investment in developing nations enters "sensitive" sectors, such as public utilities, mining and petroleum, which may be more prone to disagreements between the investor and the host state.[15]

BITs, along with the ICSID Convention as noted earlier arose in the 1960s out of a decade of discussions in the United Nations over the relationships between foreign investors and host countries, and the controversial requirement that expropriation or nationalization was subject to minimum requirements of international law rather than just the national law of the host country. [16] BITs commonly provide an extensive list of protections for foreign investors, including national treatment; most favored nation treatment; fair and equitable treatment; restrictions on performance requirements; the right to appoint management of any nationality and to repatriate profits and capital; and protection against direct expropriation, among others. Most modern BITs also provide a process for mandatory resolution of disputes through third-party international arbitration; the effective management of such processes is the principal focus of this paper.[17] As of the end of 2008, at least 317 known investor-state arbitration cases had been lodged.[18]

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[13] UNCTAD—Prevention and Alternatives to Arbitration II, *supra* note 10, p. xvii; *see also* Americo Beviglia & Pierre Sauve, "International Investment", in Andrew T. Guzman & Alan O. Sykes, eds., *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007), p. 215 (citing 2005 data).

[14] Dominican Republic, Dispute Prevention Policies—Lessons Learned from the Dominican Republic, APEC Workshop on Dispute Prevention and Preparedness, 27 July 2010, available at <http://aimp.apec.org/Documents/2010/IEG/WKSP1/10_ieg_wksp1_008.pdf>, accessed 6 October 2010 [hereinafter "Dominican Republic—Dispute Prevention Policies"].

[15] UNCTAD, *Investor State Disputes: Prevention and Alternatives to Arbitration* (2010), p. 74, available at <http://www.unctad.org/en/docs/diaeia200911_en.pdf>, accessed 6 October 2011 [hereinafter "UNCTAD—Prevention and Alternatives"].

[16] *See* Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation,* 38 Georgia J. Int'l & Comp. Law (2009), 48 (relating the debate that had taken place in the General Assembly regarding the inclusion of the reference to international law).

[17] See, e.g., NAFTA, Ch. 11, arts. 1102, 1103, 1105, 1106, 1108, 1109, 1110.

[18] UNCTAD—Prevention and Alternatives, *supra* note 15, p. 96. There are undoubtedly a few cases submitted to arbitration under UNCTAD Rules or other *ad hoc* methods that have been kept secret by agreement between the investor and the host state.

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For most nations there are few viable alternatives to operating under BITs and FTA investment chapters, and to resort to provisions of the ICSID Convention or the ICSID Additional Facility Rules.[19] Of the seven nations discussed herein, four— Canada, the Dominican Republic, Ecuador and Mexico—are not currently parties to the ICSID Convention.[20] In rare occurrences countries such as Bolivia in 2007[21] and Ecuador in 2010[22] have chosen to withdraw from the Convention. However, such withdrawal does not obviate the need for improved procedures to deal with investment disputes. First, denunciation of the Convention takes effect only six months after the instrument of denunciation is delivered to ICSID.[23] Second, the denunciation may not affect existing investments under the provisions of relevant BITs. Finally, in most BITs arbitration under ICSID is only one of several alternative fora; in many instances the investor may seek arbitration under the ICSID Additional Facility (if the investor's home country is a party to ICSID, or in most instances under the UNCITRAL Arbitration Rules.[24] Better options exist, including avoiding signing new BITs simply because it seems like a good idea at time, to cap a high level meeting of ministers of foreign relations or heads of governments, without fully analyzing the actual and potential trade between the two countries and the acceptability of the provisions of the proposed treaty. Where possible, it makes

[19] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, U.N.T.S. 159. As of May 2011, 157 states had signed the Convention and 147 had ratified it. ICSID, List of Contracting States and Other Signatories of the Convention, 5 May 2011, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>, accessed 30 September 2011; ICSID Additional Facility Rules, pp. 13, 21, available at <http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf>, accessed 3 October 2011 [hereinafter "ICSID Convention"].

[20] ICSID, *List of Contracting States and Other Signatories of the Convention*, 5 May 2011, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>, accessed 10 October 2011. Canada and the Dominican Republic signed the Convention in 2006 and 2000, respectively but have not completed the ratification process. Ecuador withdrew in 2010. Mexico has never signed the Convention.

[21] Effective 3 November 2007, six months after notification. Article 71 of the Washington Convention establishes that every contracting state has the right to denounce the Convention through a written notification directed to the depositary thereof, with the denunciation being effective six months after the notification.

[22] Effective 7 January 2010.

[23] ICSID Convention, *supra* note 19, art. 71.

[24] For example, when Bolivia withdrew from ICSID, it agreed to refer a pending dispute to arbitration under UNCITRAL. See "Has Bolivia's Ironclad Defence Faded in ICSID Investment Arbitration", *Arbitration Review of the Americas 2011*, available at <http://www.emba.com.bo/index.php?option=com_content&view=article&id=141%3Ahas-bolivias-ironclad-defence-faded-in-icsid-investment-arbitrations&Itemid=114&lang=en>, accessed 30 September 2011 (discussing the arbitration between Entel SA and the Government of Bolivia resulting from Entel's expropriation).

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sense for a government to conduct a comprehensive review of the BITs in force, and either seek revision of those with unduly onerous provisions or denounce those which do not satisfy the host country's current needs (as Ecuador has done).[25]

For the United States, the level of protection provided to U.S. foreign investors in Bush era BITs and FTAs has decreased modestly since NAFTA, in part because under NAFTA the United States for the first time was a respondent in actions brought by Canadian investors in the United States,[26] and in part because of civil society complaints about the unbalanced nature of the agreements (which incorporate few or no protections for the host governments). Subsequent FTA investment chapters, including those in the FTAs with Chile, the Central American nations and the Dominican Republic, Peru, Colombia, Panama and South Korea,[27] as well as BITs with Uruguay and Rwanda,[28] provide host

[25] Dominican Republic—Dispute Prevention Policies, *supra* note 14.

[26] While the United States has more than 40 BITs in force and a dozen FTAs with investment provisions no litigation has resulted to date except under NAFTA; with respect to the nine actions that resulted in decisions or awards, all were lodged by Canadian interests. *See* OUP Investment Claims, *supra* note 8.

[27] United States-Singapore Free Trade Agreement, U.S-Sing., 6 May 2003, 42 I.L.M. 1026 (2003) [hereinafter Singapore FTA], available at, <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf>; U.S.-Chile (2003), United States-Chile Free Trade Agreement, U.S.-Chile, 6 June 2003, 42 I.L.M. 1026 (2003) [hereinafter Chile FTA], available at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf>; The United States-Central America-Dominican Republic Free Trade Agreement, U.S.-CAFTA-DR, 5 August 2004, <http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html> [hereinafter CAFTA-DR]; United States-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248 (2004) [hereinafter AFTA], available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html> [the only one without mandatory third party dispute settlement provisions]; United States-Morocco Free Trade Agreement, U.S.-Morocco 15 June 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.-Morocco FTA], available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text-Section_Index.html>; United States-Oman Free Trade Agreement, U.S.-Oman, 19 January 2006, available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html>; United States-Peru Trade Promotion Agreement, U.S.-Peru, 12 April 2006, available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html> [hereinafter Peru TPA or PTPA]; United States-Colombia Trade Promotion Agreement, U.S.-Colom., 22 November 2006, available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html> [hereinafter Colombia FTA]; United States-Panama Trade Promotion Agreement, U.S.-Pan., 28 June 2007, available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html> [hereinafter Panama TPA]; Free Trade Agreement between the United States and the Republic of Korea, U.S.-S. Korea, 30 June 30 2007, available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html> [hereinafter KORUS], all accessed 30 September 2011.

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governments with greater flexibility in taking non-discriminatory actions to protect the environment and public health and otherwise limit investors' ability to prevail on "fair and equitable treatment" and indirect expropriation claims.[29] These changes are discussed in greater detail in Part III(A) with regard to CAFTA-DR's investment provisions, which are virtually identical to those in the investment chapters of the U.S. FTAs with Chile and Colombia.[30]

It is unclear whether investor protections will be further modified in the investment provisions of the Trans-Pacific Partnership (TPP), since the negotiations on coverage of investment have not been concluded, but it can reasonably be assumed that at least most of the language quoted above has been included in U.S. proposals.[31] None of these changes is generally favored by foreign investors, and they have been criticized by some observers as weakening, somewhat or seriously, the protection for investors under the agreements in which they are found.[32] However, from the host state point of view they are likely to be considered improvements.

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[28] Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, 19 February 2008, available at <http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf>, accessed 30 September 2011.

[29] See David A. Gantz, *Settlement of Disputes under the Central American – Dominican Republic – United States Free Trade Agreement,* 30 B.C. Int'l & Comp. L. Rev. (2007), 331 (discussing the departures from NAFTA in CAFTA-DR and other newer U.S. FTAs).

[30] The FTAs with Colombia, Panama and South Korea, like the one with Peru, contain additional language in the Preamble stating that the parties agree "that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement . . . ."

[31] *See* Michael Bologna, *TPP Negotiators See Progress on Legal Texts; Groups Push Positions During Chicago Round,* 28 Int'l Trade Rep. (BNA) (Sep. 15, 2011), 1496 (indicating that investment was among the issues still being discussed in the TPP negotiations).

[32] *See* Statement of Judge Stephen M. Schwebel, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B, 30 September 2009, available at <http://www.state.gov/e/eeb/rls/othr/2009/131118.htm>, accessed 28 June 2011: "For more than 150 years, the United States strongly espoused the protection of foreign investment. That position was constructively developed by the terms of the 1994 U.S. Model BIT. However the United States sharply modified its traditional position with the advent of NAFTA, not by the terms of that Treaty but by interpretation of it and by the positions it took in cases brought by Canadian investors against the U.S. Government. The United States made the remarkable discovery that treaty obligations run in more than one direction; foreign investors could take advantage of U.S. obligations just as U.S. investors could invoke the BIT obligations of other States. That led the United States to shift to a 'defensive posture' emphasizing restrictions upon the viability of foreign investment rather than its protection, both by the terms of the 2004 Model BIT and in the litigious positions its took in NAFTA cases (such as *Glamis Gold)* In my view, this shift was, and remains, ill advised. "The standards for the protection of foreign investment found in the 1994 U.S. Model BIT are

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These more state-friendly provisions in U.S. BITS suggest that many of the issues concerning host governments under investment protection agreements are similar, including the reluctance of governments to be sued and opposition of politicians and civil societies to afford foreign investors what appear to be rights greater than those possessed by local citizens, whether the host governments are small developing nations (e.g., Colombia, the Dominican Republic) or highly developed nations (e.g., the United States or Canada).

The focus herein is on procedures; substantive issues arising under various international treaties and customary international law are not discussed in extensive detail, although key aspects of certain BITs and FTA investment chapters are discussed briefly in Part III. Much of the discussion relates to what Ugo Draetta calls the "soft law" of arbitration, including standards of conduct, guidelines, recommendations and non-binding norms and practices that exist alongside treaty law and international arbitration rules.[33] The emphasis is on developing more effective means of dealing with disputes between investors and states at all steps of the process. These range from preliminary design (identification and recommendation of desirable provisions of the applicable bilateral investment treaties or free trade agreements); identification of potential problems between investors and the government before they ripened into formal disputes; preliminary assessment of the validity of the claim and its immediate resolution wherever possible: effective use of the notice of intent to arbitrate or notice of arbitration within the national government; management of the formal dispute (arbitration); selection of arbitrators; and to the post-award process, if any.[34]

While the challenges discussed are those of particular importance for small developing country governments, the experience of at least one large developing country government (Mexico): and two developed country governments (the United States and Canada) under NAFTA are relevant as well. While information on other host governments is available through UNCTAD and other studies,[35] these seven nations discussed herein provide a variety of parallel and contrasting approaches that are likely instructive to any agency seeking to

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substantially those found in the some 2800 BITs concluded the world over. The salient – and profoundly misguided – change in those standards embodied in the 2004 BIT [virtually identical to those in CAFTA-DR and subsequent U.S. FTAs] is its substitution of customary international law for those standards."

[33] Ugo Draetta, *Behind the Scenes in International Arbitration* (New York: Jurisnet LLC, 2011), p. 4 [hereinafter "Draetta"]. While Draetta discusses international commercial arbitration, his insights into parties, counsel, arbitrator and the responsibilities of each apply as well to many aspects of investor-state arbitration.

[34] UNCTAD—Prevention and Alternatives II, *supra* note 10, p. xvii.

[35] UNCTAD—Prevention and Alternatives, *supra* note 15, pp. 69-70 (discussing the system in place in Peru).

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improve the efficiencies of its own mechanisms. More common considerations exist even between such disparate nations as the Dominican Republic and the United States. For example, both nations have large, diverse bureaucracies and sub-federal units (although the Dominican Republic's is not a federal system). Thus, there are instances in both countries where what I term the "national coordinating authority" (NCA) is unaware of pending investment disputes until a notice of arbitration, or notice of intent to submit a case to arbitration under agreements which provide for such advance notice, is submitted by the foreign investor.

The balance of the article is organized as follows: Part II focuses on the key administrative aspects of defending investor-state disputes, including the creation and empowerment of an NCA with responsibility within the host government for management of all investor-state disputes; policies and practices for avoiding disputes or resolving them short of a full arbitration; the use (and misuse) of outside legal or other advisors at various stages of the proceedings; issues relating to the wise choice of the state-party appointed arbitrator; and the NCA's functions in managing arbitrations. Part III discusses relevant administrative experiences in seven countries, Dominican Republic, Ecuador, Chile, Colombia, Mexico, Canada and the United States. Part IV—the Conclusion— addresses a series of specific considerations relating to BITs and investment provisions of FTAs and general considerations relating to improving the functioning of NCAs. With minor exceptions the scope and analysis is limited to these nations of the Western Hemisphere, although it is reasonable to assume that most of the issues discussed apply more generally.

II. ESSENTIAL ADMINISTRATIVE CONSIDERATIONS

This section briefly reviews the key administrative aspects of responding to investor claims. Much of this may seem self-evident but in the author's experience many of these organizational considerations are often overlooked.

A. Functions and Responsibilities of a National Coordinating Authority

Where governments create mechanisms to respond to the challenges of disputes between investors and states (including those in developed countries such as the United States and Canada), effective responses are often complicated by the fact that an interagency process is almost always involved. For this reason, many governments have chosen to designate a single entity that is primarily responsible for the defense, referred to in this essay as the "national coordinating authority"

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(NCA). For example, in the Dominican Republic under Decree 610-07 the Directorate of Foreign Commerce (DICOEX)[36] is designated as the NCA. In the Dominican Republic, the NCA functions as a unit of the Secretary of State for Industry and Commerce, but it may be located in justice, foreign relations, trade or other ministries. Often the section is headed by a deputy minister, but the director general of the unit is usually the key official, as in the Dominican Republic. [37] However, investor-state disputes in any host country can be effectively addressed only with the cooperation of other stakeholders, typically including, but not always limited to, the Ministry of Finance (which ultimately would pay any award), the Office of the Attorney General (responsible for national legal issues), the Office of the President (which will necessarily absorb much of the political fallout from settling a case or losing an arbitration and ultimately approve major decisions), and the agency initially responsible for the relationship between the government and the investor. It is thus crucial that the coordinating and other roles of the NCA be effectively established through legislation and communicated to other affected agencies of the government.[38]

In particular, it is typically *not* the NCA, but the agency directly responsible that almost always is in possession of the facts, documents and officials with personal knowledge of the dispute. Moreover, that agency often must be convinced to spend huge amounts of time and money to ensure appropriate responses to requests for document production and to allow its officials to testify at the arbitral hearing or hearings.

In such circumstances, clear lines of authority and consultation procedures between institutions must exist if the NCA is to be capable of managing and controlling all aspects of the conflict, because a system based on consensus will inevitably lead to delays, conflicts and sometimes paralysis since under the typical arbitration agreement the proceeding will move forward regardless of the lack of interagency consensus, or even paralysis. At the same time, the NCA must cooperate with other agencies and vice versa, since reaching a negotiated agreement or reconciliation is probably impossible in most instances without the full cooperation of the responsible agency.

This high level of cooperation is extremely important for an "early warning" system to notify potential conflicts to the NCA. Under many BITs the NCA will not even be aware of the dispute until it receives, as the responsible

[36] La Dirección de Comercio Exterior.

[37] Telephone interview with a Washington, D.C. attorney with experience in representing host states, 7 September 2010 (copy on file with author) [hereinafter "Washington attorney"].

[38] See, e.g., Arnold & Porter, Communicating and Implementing IIA [International Investment Agreement] Obligations, APEC Workshop on Dispute Prevention, 27 July 2010 (not available on line) (suggesting model language for establishing the NCA).

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entity under the BIT, the notice of arbitration, which starts the clock running.[39] Other than those negotiated by the United States and Canada, most BITs do not have a requirement of a "notice of intent to file a notice of arbitration" with the NCA, typically at least 90 days before the actual notice of arbitration is presented.[40] Without this formal early warning, a high level of cooperation is extremely important within the government so that the NCA is immediately notified of potential conflicts, at the first sign of problems. As discussed below, the lack of early notice may curtail or effectively prevent both effective informal discussions with the investor and objective analysis of the bona fides of the claim, both of which are essential to resolving the conflict without resort to and the risks of arbitration, thus compromising essential state interests and increasing the probability that the respondent government will ultimately be forced to pay claims of investors.

A significant aspect of the NCA responsibility in most nations is an educational function for the various stakeholders (national government officials and those of local governments, the domestic private sector, etc.) as well as officials of the agency itself. This typically occurs on an ongoing basis through educational seminars and where practical, inviting experts to visit and present seminars on such topics as the responsibilities of agencies under the relevant FTAs and BITs, the use of ADR and effective means of managing an arbitration. The objective is to make every agency that might be subject to a foreign investor's claim, or threat thereof, aware of the internal procedures that are to be followed should there be such an occurrence.[41]

For most NCAs, it is essential that the agency implement methods of hiring, training and retention of lawyers and other officers, preferably lawyers that are not only intelligent and enthusiastic but bring with them expertise. This is necessarily a continuing process because if the NCA recruits high quality officials some will be wooed away by law firms and other organizations. Typically, NCAs have functions other than managing investor state disputes, such as negotiating investment agreements and in some instances representing the government in international trade matters. Thus, particularly in smaller nations, the agency may have insufficient staffing to respond effectively to new disputes between investors and states, in particular if several disputes are pending simultaneously, and if the number of annual investor-state disputes is small in number. Moreover, since one of the higher costs of arbitration, as in a U.S. federal court proceeding under the Federal Rules of Civil Procedure, [42] is the review of documents and the obtaining

[39] For example, none of the other approximately 15 BITs concluded by the DR contain the early warning provisions found in the U.S. and Canadian agreements.
[40] CAFTA-DR, art. 10.16. 2; *see* NAFTA, art. 1119.
[41] *See* discussion of Colombia, Part III(A) , *infra.*
[42] *See* Fed. R. Civ. P., Part V (2010) (Depositions and Discovery).

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of witness statement, to the extent that these functions can be performed in house rather than by retained counsel (or at least jointly), the costs of arbitration for the respondent state may be reduced accordingly.

While there is a strong argument for affording the NCA responsibility both for managing investor-state disputes and sole or shared responsibility for negotiating new BITs or FTA investment provisions, this does not always occur. For example, as in the Dominican Republic, the NCA may be located in the Ministry of Commerce while principal responsibility for negotiating BITs and other international agreements is within the foreign ministry, possibly with the support of the office of the attorney general.[43]

Regardless of the particular internal structure, the NCA requires the cooperation of other agencies to develop best practices for implementing the budget for administrative costs, dispute resolution and guidelines for the payment of those costs by the responsible agency. NCA legal authority to negotiate and settle (or recommend the settlement of) disputes by the government is required if the NCA is to exercise a lead role in resolving disputes by means other than arbitration, or to assume primary responsibility for management of the arbitration, including the costs of arbitration. These costs will likely include outside counsel costs for any negotiations and arbitration, the actual administrative costs of arbitration, plus the costs of travel by officials, lawyers and witnesses, document production and transmission and the like. If there is an independent outside assessment of the merits of a new claim, and or ADR, those costs would be incurred as well, although successful settlement negotiations or ADR would obviate the need for expending funds on arbitration. Any amounts paid to the foreign investor, either through a negotiated settlement or after an award, would be additional.

B. NCA Policies for Avoiding Investor-State Disputes

As indicated in the introduction, a typical investor-state dispute can be viewed in several stages, with arbitration being only one of them. Complete data do not exist but UNCTAD estimates that the vast majority of disputes between investors and the state have been resolved without arbitration, probably many more than the 317 arbitrations (1964—2008). For example, although estimates vary, some 40% are resolved before a formal arbitration request, and another 33% after arbitration has begun but before an award is issued.[44] This process may include, *inter alia*,

[43] See Part III.

[44] *See* Mark A. Clodfelter, *Why Aren't More Investor-State Treaty Disputes Settled Amicably*, in UNCTAD—Prevention and Alternatives II, *supra* note 10, p. 39 (quoting a study by Professor Jack Coe reporting that 55 of 357 ICSID cases were settled) [hereinafter "Clodfelter"].

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diplomatic negotiations between States; indirect or direct negotiations between investors and the state; the use of the NCA to manage and resolve conflicts; different types of mediation or formal conciliation; early stage neutral evaluation (ENE) (either through retained advisers as discussed below or otherwise) and formal fact-finding through ICSID or otherwise.[45] One can only estimate the substantial savings likely to be realized through resolution of the dispute by negotiation or ADR; the government can avoid the costs of arbitration ($ 3-5 million or more) and perhaps much of the cost of unfavorable arbitration award. It makes sense for all parties involved in the dispute to continuously be aware of opportunities before and during arbitration, and to consider settlement discussions whenever an opportunity arises.[46]

As one attorney has observed, no one wins in investor-state arbitration, even if the host state ultimately prevails. The process is expensive, unpredictable and provides unfavorable world-wide exposure; bias may be exhibited toward the developing host country, divisions may be created within the host country government, and the officials responsible for the defense will probably not be considered by the public to be sufficiently skilled to defend the nation (regardless of their actual capabilities).[47] Thus, developing "the courage not to arbitrate" on the part of the government is well worth the effort, even if it means in some instances being willing to make the first move. [48]

Historically, when cases are resolved before or during the arbitration, the majority of such cases are settled through direct negotiation, with only six formal ICSID conciliation proceedings having been initiated in 40 years, out of 280 cases registered with ICSID.[49] This suggests that the acquisition of excellent negotiating skills is a priority for any NCA, whether those possessing the skills are employees or retained outside advisers, or both. Some experts, like Mark Clodfelter, formerly a lawyer with the United States Department of State, believe that the current emphasis on formal ADR is misplaced, citing the relatively few cases before the ICSID conciliation mechanism and the absence of any case of "fact-finding" before the ICSID Additional Facility.[50] Most likely, the most practical approach is

[45] UNCTAD—Prevention and Alternatives, *supra* note 15, at xxii-xxviii.
[46] *See* Draetta, supra note 38, pp. 15-18 (advocating being on the lookout for settlement opportunities).
[47] Lex Counsel, Tips to Preventing Damaging Arbitration, 27 July 2010, APEC Workshop on Dispute Prevention and Preparedness, Washington, D.C. (no longer available on line; copy on file with author).
[48] Draetta, *supra* note 38, pp. 9-13, 16.
[49] UNCTAD—Prevention and Alternatives, *supra* note 15, p. 61.
[50] Clodfelter, *supra* note 49, p 39.

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not mandatory ADR but "an open door to mediation and other forms of ADR and conflict management in investor-State disputes."[51]

Furthermore, it appears that of the more than 2700 BITs in force or awaiting ratification, many do not incorporate ADR mechanisms, giving primacy to negotiation and consultation between the investor and the host state. For example, CAFTA-DR provides only that "In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation." [52] No further discussion of ADR is included in the chapter. At the same time, many BITs do set aside a period for consultation and negotiation prior to the initiation of arbitration, which in the opinion of some experts is not always utilized as effectively as it might be.[53]

The availability of compulsory investor-state arbitration in BITs, as well as the availability of effective judicial system to resolve domestic disputes, are each an important incentive to the settlement of disputes short of arbitration. Resolution of such disputes through negotiation, even with resort to third-party mediation or conciliation, in most cases is likely more cost-effective than arbitration. The financial and political costs of a negotiated or mediated settlement may be manageable for the host country, assuming that the NCA has obtained and has confidence in the report of an independent, objective and neutral evaluation before serious settlement negotiations are undertaken. In most instances settlement is attractive to the investor in terms of obtaining payment sooner rather than much later (and without the costs of enforcement) and maintaining the possibility of an ongoing business relationship with the host government.

Effective prevention of investor-state dispute begins long before any specific problem arises. The importance of the monitoring function regarding barriers against foreign investment in the nation, maintaining transparency and consistency in agency actions and providing information to investors and all other stakeholders, as well as the design and implementation of mechanisms to identify problems before they occur, cannot be overemphasized. The best way to resolve conflict is to take all reasonable steps to ensure that it does not develop in the first instance. A continuous and regular practice by the NCA to explain to government officials the likely consequences of their actions can also be an important tool to avoid unnecessary conflicts. This prevention depends in part, as noted earlier, on the implementation of methods for coordinating communications between

[51] Lucy Reed, *Synopsis of Closing Remarks*, in UNCTAD—Prevention and Alternatives II, *supra* note 10, p. 30.
[52] CAFTA-DR, art. 10.16.
[53] Discussion with an ICSID attorney, 14 October 2010 (notes on file with author).

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government agencies and as necessary with the investor, at least from the stage at which the NCA is aware of a potentially serious problem.

Once a potential conflict has been identified, usually through informal complaints lodged with the responsible agency by the foreign investor, there is a need for prompt review of the merits of the dispute by an independent consultant, an "early neutral evaluation" to confirm or deny the accuracy (or lack thereof) of the claims, and to suggest possible solutions, without the possible lack of objectivity of the officials of the government agency involved in the dispute, who may have developed animosity toward the foreign investor or see arbitration as a means of covering up their own bureaucratic errors or misdeeds.[54] This independent advisor is best chosen from experienced investment counsel. Depending on the nature of the investment and the claim, it may be desirable that the consultant possess specific expertise in the sector in which the investment was made, for example, electric power or gold mining. That expert's responsibility is to provide an initial determination of whether a claim is well-founded, without merit or as is sometimes the case, uncertain. It is thus as important to maintain lists of experienced evaluators, mediators or neutral third parties as it is to have a strong list of outside counsel or potential arbitrators.[55]

There are so many variations of the ADR that is impractical to discuss most of them here.[56] The methodologies include, *inter alia*, resort to existing treaty provisions on consultation and negotiation;[57] use of mediation and conciliation whether *ad hoc* or based on the Model Law of International Commercial Conciliation; resort to similar provisions of the ICSID[58] or the ICSID Additional Facility "Fact-Finding" Rules[59] (the latter of which has never been used); or the retention of a single independent fact-finder. Since by definition ADR is voluntary (unlike arbitration, which is mandatory under most BITs), the investor and the government may use any ADR mechanism on which both are able to agree. For example, under ICSID and the Additional Facility Conciliation Rules the parties may agree on the use of a sole conciliator rather than a panel of three, which would likely result in significant cost and time savings.[60] Because the results are not binding on the parties risks of a sole conciliator are lower than in

[54] The same may occur as well with officials of the investor firm seeking arbitration.
[55] Lucy Reed, *Synopsis of Closing Remarks, in* UNCTAD—Prevention of Alternatives II, p. 31.
[56] See, e.g., UNCTAD—Prevention and Alternatives II, *supra* note 10, pp. 33-108.
[57] For example, Article 10.15 of CAFTA-DR.
[58] Rules of Procedure for Conciliation Proceedings (Conciliation Rules), in ICSID Convention, Regulations and Rules, p. 81, available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>, accessed 4 January 2012.
[59] Fact-Finding (Additional Facility) Rules, Conciliation (Additional Facility) Rules, ICSID Additional Facility Rules, pp. 13, 21, *supra* note 19.
[60] ICSID (Art. 29 (2) (a); Additional Facility Conciliation Rules (Art. 6 (3).

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binding arbitration, but the choice of sole conciliator will nevertheless likely determine the success or failure of the effort.

In recent years, UNCTAD and organizations have greatly increased awareness among host governments of the availability of ADR methods to resolve investor-state disputes. One can be hopeful that there will eventually be available new mechanisms, such as a simplified and less expensive version of the reconciliation rules (with emphasis on a single arbitrator) to replace previous versions of ICSID Additional Facility Rules. It can also be hoped that the various NCAs will participate actively in these discussions at UNCTAD and thus influence the development of new mechanisms appropriate to the needs of small developing countries.

It may also be possible at some future time to consider mediation through the World Bank's MIGA,[61] the U.S. agency OPIC[62] or similar agencies that guarantee investments against political risk insurance. In particular, since OPIC recovers most of the monies paid to investors through negotiations with host governments under government to government bilateral agreements,[63] OPIC could be in a position to serve as a vehicle for direct negotiations such both OPIC and the host government agree.

Because some methods of participation by the investor's home government in the early stages of the dispute may produce positive results, it may be worth investigating in specific cases the opportunities and risks of a solution through negotiations between the affected states. This may be feasible either through traditional diplomatic channels or where free trade agreements provide broad authority for consultation to address disputes that "might affect the operation of this Agreement" through the Free Trade Commission or similar mechanism created under such agreements.[64] On the positive side, resort to an existing mechanism (although not often used for investment related purposes) is possible because the Commission typically has broad authority to address issues relating to the application and interpretation of the agreement. For example, the

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[61] See Multilateral Investment Guaranty Agency, World Bank Group, available at <http://www.miga.org/>, accessed 3 October 2011.

[62] See OPIC (Overseas Private Investment Corporation), available at http://www.opic.gov/ (last visited Oct. 3, 2011). OPIC currently provides investment insurance in most Latin American countries (except Cuba), including the Dominican Republic (and other Latin CAFTA-DR nations), Chile and Ecuador. OPIC, Latin American and the Caribbean, *ibid.*

[63] From 1971 through September 2009, OPIC made insurance claim settlements totaling $969.8 million. During the same period OPIC's recoveries (cash, receivables and guarantees) from host government amounted to $892.1 million, or 92 percent. OPIC, Insurance Claims to Date; OPIC and its Predecessor Agency, 30 September 2009, available at <http://www.opic.gov/sites/default/files/docs/2009_claims_history_report.PDF>, accessed 3 October 2011.

[64] See, e.g., CAFTA-DR; art. 19.1, 20.2; Peru—United States Trade Promotion Agreement, arts. 20.1-20.3.

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Commission created by CAFTA-DR and by similar provisions in other U.S. FTAs has the authority to issue binding interpretations of the investment provisions of the agreement, including the provisions of the articles and annexes of the investment provisions,[65] which interpretations are binding on an arbitral tribunal convened under CAFTA-DR. Therefore, there is a good legal case for the Commission to play a more important role in investment disputes, if the Parties so agree.

Still, one must also take into account Article 27 of the ICSID Convention and other restrictions against the use of diplomatic protection as a substitute for the mechanisms provided under ICSID and individual BITs. There is a fine line between "informal" discussions regarding a particular investor-state dispute and "formal" diplomatic protection, which may ultimately resemble an exercise of the international law doctrine of espousal based on the classical theory that an individual to a national is an injury to the state,[66] a practice that one or both affected states are likely to want to avoid in the modern world. As between the investor's state and the host government the (developing country) host government will likely be the weaker party both economically and politically, an imbalance that could affect the outcome. Further, in the majority of investor-state disputes, it is unlikely that a diplomatic representative of the investor's state will possess the capability to complete a detailed, objective analysis of the facts and the law concerning the dispute,[67] and in any event there is a risk of political pressure from members of the congress or parliament for whom the investor is a constituent.

Challenges to the suitability of ADR include financial costs (which can be important when a formal conciliation process is used) and significant delays in the resolution of the dispute if the ADR mechanism does not resolve the dispute and arbitration ensues. Under such circumstances, the costs of arbitration will also have to be borne as well. Inevitably, the host government will be subject to criticism by the local media and opposition parties if a negotiated settlement is reached; questions may arise under local law regarding the legal authority of the NCA to negotiate and pay settlement without being ordered to do so by an arbitral tribunal. In addition, allegations of corruption or incompetence may be levied against the government negotiators, particularly after a change of government. The relationship between the investor and the state may be severely strained or

[65] Peru—U.S. TPA, art. 20.1.3(c).

[66] *See* Ian Brownlee, *Principles of Public International Law* (6th ed., Oxford: Oxford Univ. Press, 2003), pp. 497-98.

[67] This assertion is based in significant part on the author's personal experience at the Department of State (1970-77), participating in those pre-BIT days in a variety of investor-state claims settlement negotiations conducted by the Department of State regarding actions by the governments of Peru, Ecuador, Venezuela and others.

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destroyed by the controversy.[68] Not only the money but "saving face" may be important both to the investor and to the host government; the simple lack of familiarity with the various available procedures may also be a factor in the disuse of ADR.

Finally, the availability of cost-effective ADR mechanisms is particularly important for small investors who could not reasonably pay the costs of ICSID or UNCITRAL arbitration, estimated at least $1.5-$2 million for the claimant,[69] with the savings accruing to the host state as well. When the value of the claims under dispute are below the $ 8-10 million range there is likely a greater chance that the investor and NCA can negotiate a settlement, especially if the NCA and other responsible parties in government have sufficient credibility that the investor believes they will consider the complaint fairly and objectively. While the United States no longer incorporates the Hickenlooper Amendment[70] into national legislation threatening to suspend foreign aid in the event of unresolved expropriations, similar provisions exist in unilateral programs such as the Generalized System of Preferences (GSP).[71] These statutes permit the U.S. government to suspend "beneficiary developing country" status or not to afford benefits under such circumstances, even though the authority has seldom been utilized in recent decades.

C. Effective Use of Legal Advisers

The choice of outside counsel for an individual arbitration, or on a longer-term basis, is one of the vital decisions made by the NCA in consultation with other government agencies. Counsel will likely be needed for the independent assessment that is part of the early warning system; for any efforts at informal negotiation, mediation and conciliation; and for the arbitration process itself. The choice may well determine the outcome of the arbitration and will undoubtedly result in substantial costs for legal fees and expenses. Moreover, in many nations

[68] These considerations are based on the author's conversations with a Washington lawyer who has represented several Latin American governments in investor-state disputes, August 2010. Notes are on file with the author.

[69] In one NAFTA case, the award was slightly in excess of $2 million, while the claimant's legal fees were reportedly in excess of $1 million. (Author's conversation with one of the Claimant's counsel, post-arbitration, 2005.) *Feldman Karpa v. Mexico*, Award and Separate Opinion, ICSID Case No. ARB(AF)99/1; IIC 157 (2002); (2003); 2 ILM 625, 16 December 2002.

[70] Incorporated at the behest of Sen. Burke Hickenlooper (R-IA) in the Foreign Assistance Act of 1962, 19 U.S.C. § 2370(e) (Supp. IV, 1962).

[71] 19 U.S.C. §§ 2462(b)(2)(D) (2011); see also the Andean Trade Preference and Drug Eradication Act ("ATPDEA"), 19 U.S.C. §§ 3201 et seq. and the Caribbean Basin Initiative ("CBI"), 19 U.S.C. §§ 2701-2707.

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the selection of legal counsel falls within laws requiring a competitive bidding process.[72] Typically, the NCA sends requests for proposals to five or more law firms with experience in representing governments in investor-state arbitrations, primarily located in Washington, D.C. or Paris but occasionally in Canada or elsewhere.[73] The logic of this competitive bidding process is inescapable as long as it does not preclude the NCA from responding to notices of arbitration or of intent to submit a claim to arbitration in a timely manner,[74] one of the key risks with the traditional *ad hoc* approach to retaining counsel.[75]

Typically, the NCA will not have full control over choice of counsel. Even if the NCA has the necessary formal legal and administrative responsibility within the government for the management of outside counsel, the NCA will not have the same personal knowledge of the facts of the dispute or the official documents as officials in the agency with which the dispute has arisen. Under such circumstances that agency, along with the office of the attorney general, may as a practical matter have some role in the selection of counsel, and it may be politically expedient for the NCA to share the responsibilities of counsel choice with the other interested agencies. Beyond experience of outside counsel and the costs of their retention are more subjective factors such as interpersonal skills and the ability of the outside lawyers to collaborate effectively with the government legal team, in the prevailing language of the host country.[76]

Because of the potential conflict between competitive bidding requirements and the need for promptly analyzing the validity of claims and organizing to defend them, there is considerable merit in considering multi-year legal contracts (with competitive bidding) as has been the practice in Mexico (see Part III(E), *infra.)*. There are advantages of annual or multi-year contracts compared to the *ad hoc* approach. Even if the host state experiences no more than a few cases a year, a continuing legal relationship may be worth considering, in part because lawyers selected will learn to understand the administrative system used in the particular host country and the procedures required (and to be avoided) in dealing with the various agencies involved. It is also likely that the

[72] Discussions with DICOEX officials in the Dominican Republic, September 2011. (Notes on file with author.)
[73] Conversations with a Washington, D.C. attorney who has represented several governments in investor-state arbitrations, *supra* note 42.
[74] At least one law firm has declined to represent a host government when the government sought to hire the firm only six weeks before the respondent's brief was due. Washington lawyer, *supra* note 42.
[75] *See* J. Cameron Mowatt , *Un nuevo modelo de defensa para los países en vías de desarrollo contra las reclamaciones originadas en tratados de inversion*, Revista Internacional de Arbitraje, Bogota, Columbia, ISSN 1974-4252; Enero - Junio 2010 (12), p. 43 (discussing the *ad hoc* model) [hereinafter "Mowatt"].
[76] *Ibid.*

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host government would be able negotiate rates more effectively if the law firm knows that it will be working on a number of cases over an extended period of time.[77] Even if a flat fee contract is impractical, an agreement consisting of a base fee plus negotiated increments for actual cases are likely to be relatively cost effective. Discharging counsel if the NCA determines that the firm is not performing as anticipated, based on objective criteria in the contract, is manageable if the retainer agreement provides for termination upon a reasonable notice period. The disadvantages include the possible desirability of seeking counsel with expertise in a particular sector, such as mining and petroleum production, one that because of professional or political connections may have a better chance of negotiating a settlement in a particular matter prior to arbitration or conflicts of interest within the retained firm.

A question similar to the choice of an arbitration lawyer arises when considering the feasibility of using legal advisers or other experts for the independent assessment function (often consultants other than legal counsel for litigation). In any case, the importance of attorneys who have prior experience in representing both governments and other investors is self-evident. A firm that has represented host governments with a relatively small in-house legal staff is more likely to be able to provide precise estimates of the legal costs of arbitration than one without such experience. Of course, the NCAs can also improve with experience their own expertise in estimating the costs of lawyers and other professionals. Similarly, the achievement of a logical division of labor among lawyers within and outside the NCA, in areas such as the appointment of arbitrators, creation of an appropriate defense strategy, drafting of pleadings, development, production and analysis of documents, obtaining statements, conducting the hearings and so forth,[78] also improves with time and experience, although it depends to some extent on the nature of the particular case to be arbitrated.

Also, when counsel are retained on multi-year contracts using legal counsel for purposes not directly related to a particular dispute is more feasible. For example, counsel may be asked to aid in the education of lawyers and decision-makers in the host government through seminars and the like. Such a firm can also reasonably be asked to provide occasional internships in the firm's United States, European or Canadian offices for periods of 6-12 months or longer, to work on existing disputes or more generally on investment-related issues. Nor should there be any bar to using such counsel as advisers on the content of new BITs or FTA investment chapters under consideration.

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[77] Mowatt, *supra* note 81 (discussing the use of long-term contracting with the law firm Thomas & Assoc. of Vancouver, B.C., by Mexico).

[78] See ibid (commenting on efficient allocation of work among outside counsel and government attorneys).

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In recent years there has been discussion within Latin America of the creation of a not-for-profit institute which could provide legal services for respondent states, much as the Advisory Center on WTO Law does to developing nations involved in WTO litigation. [79] If such an entity were to be created, and properly staffed and funded, it could produce significant savings in terms of attorneys' fees, assuming of course that the quality of legal representation is equivalent to that offered by private law offices. This result depends in part on whether there is sufficient staff expertise for assuring the presentation of a vigorous defense, particularly when simultaneous arbitrations involving several countries with extensive discovery are proceeding on parallel tracks. Realistically, the Center would not be able to function effectively without substantial financial and initial technical support from the World Bank, the Inter-American Development Bank, the secretariat of UNTAD, and other organizations, as well as from the member states. Should the concept initially function well there is no apparent reason why it could not be expanded to developing nations outside Latin America.

D. Selection of Arbitrators

Many have pointed out the obvious, "an arbitration is only as good as the arbitrators."[80] The choice of the host government-appointed arbitrator is typically made by the NCA in consultation with other concerned agencies and outside counsel, after an investigation of the availability of potential arbitrators. The essential capabilities of potential arbitrators include extensive knowledge of international investment law, prior experience as an arbitrator, and fluency in the language of the host country and that of the other arbitrators if the arbitration is to be conducted in a language other than the one spoken in the host country. For example, in an arbitration in Latin America that involves an English-speaking investor and a Spanish-speaking host country, the ability of the host government-appointed arbitrator to speak English as well as Spanish is important for the numerous informal exchanges with the other arbitrators if they are not all fluent in both languages. Among other considerations, if all arbitrators are able to read and speak Spanish (if that is the language in which most of the documents are

[79] Advisory Centre on WTO Law, available at <http://www.acwl.ch/e/disputes/dispute.html>, accessed 3 October 2011. As WTO Director-General Pascal Lamy has observed, the Center on "has assisted developing and least-developed countries with some 40 WTO disputes, provided training to over 200 delegates, and responded to an ever-growing need for legal advice." WTO, Lamy Lauds Role of Advisory Centre on WTO Law, 4 October 2011, available at <http://www.wto.org/english/news_e/sppl_e/sppl207_e.htm>, accessed 4 October 2011.
[80] Draetta, *supra* note 38, p. 42.

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written), the costs of the arbitration may be significantly reduced by avoiding translation of all documents in English, and some interpretation costs may be avoided during the oral hearings. Choosing an arbitrator because he or she is well-known may be tempting, but there is no substitute for due diligence in seeking as many viable arbitrator options as the NCA and its counsel can identify. Due diligence should also help the NCA to identify unsuitable arbitrators, including those who have insufficient time to devote to the proceedings, arrive at the hearings unprepared, act in an arrogant manner toward counsel and witnesses, show a lack of respect for the procedures or fail to check promptly for possible conflicts of interest.[81] Consultation with governments and outside counsel who have used arbitrators in the past are essential, and there is much to be said for amassing a list of dependable arbitrators, subject to frequent expansion, well ahead of the time when a dispute arises. The NCA should be confident that the government-appointed arbitrator and the chair-person are not involved in other arbitrations that are considered more important than the instant proceeding.

One also hopes that the arbitrators, and particularly the chair-person, possess the necessary skills to facilitate an agreement between the parties without evidencing a lack of impartiality or crossing the line into impermissible functioning as a mediator.[82] A settlement during the arbitration can be formalized as a settlement award approved by the arbitrators, which may make it easier for the officials of the host government to defend it at home. Such a chair-person is also more likely to the qualifications and experience to exercise other chair responsibilities, such as dealing with orders and technical issues and preparing drafts of the opinion in a manner sensitive to the views of the other arbitrators.

Interpersonal considerations are also very important; an effective arbitrator must realize the importance of negotiation in the broadest sense (of seeking a just and mutually satisfactory solution to the dispute), as well as the substantive legal knowledge and ability to build a cordial relationship with the other arbitrators, particularly the chair-person. The choice thus ultimately involves subjective as well as objective factors, and it is desirable for the NCA to obtain as much information as possible informally from counsel and from other host governments that have had experience (whether positive or negative) with specific arbitrators.

In some cases it may worth considering the use of a single arbitrator instead of the normal three,[83] particularly if the amounts in question are relatively low. The main advantage is cost savings although there may be time savings as well because the typical three arbitrators will not likely agree immediately on the

[81] *Ibid,* pp. 54-58.
[82] *Ibid,* p. 30.
[83] *See Astaldi SpA v. Honduras*, Award, ICSID Case no. ARB/07/32, IIC 454, 10 September 2010, where a single arbitrator, Eduardo Sancho González, issued a final award in a construction contract dispute.

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disposition of the case. The risks are also evident: if the arbitration relies entirely on one person, without any opportunity for an exchange of views or exploration of any prejudices, the selection process (based on both parties' agreement or appointment by the Secretary General of ICSID) is critical. Also, data suggest that the costs of the arbitrators' fees are only about 15 percent of the total cost; the rest are the parties' legal fees (85 percent) and the administration charges by the secretariat.[84]

E. Management and Administration of Arbitration Proceedings

In most arbitrations, the NCA has the legal authority and responsibility for gathering evidence and obtaining statements from witnesses of the relevant ministry but in reality, given the directly affected agency's practical control over documents and most witnesses this procedure works well only if the NCA is able to maintain good relations with the responsible agency or cooperation is forced by the head of government. Even if the NCA has clear lines of authority under national law and regulations assuring cooperation within the government achieving that goal in practice may be difficult. Similarly, the NCA will likely have primary responsibility under the law for the management of outside lawyers and other professionals, and in the host government's relations with the Secretariat of ICSID or the *ad hoc* secretariat if the arbitration proceedings are conducted elsewhere. Ultimately, among the greatest challenges for the NCA will be the inevitable inter-agency conflicts and bureaucratic rivalries that occur whenever an investor-state dispute arises. Among other important tasks will be deciding what work must be performed by outside counsel and what can be done by government lawyers in the NCA or other involved agencies (particularly review of agency documents for discovery purposes).

The NCA is responsible in the first instance for assuring that the host government's interests are properly represented in assessment, negotiation and arbitration, but at the same should be aware of the need to manage cost and to avoid unnecessary expenditures, and to the extent possible avoid embarrassing the agency that is responsible for the investor's claim. Typically, the foreign investor chooses the forum for arbitration, but the host government may have some ability to steer the investor toward using ICSID, either under the Convention or the Additional Facility Rules, as applicable, or encouraging retention of ICSID as the secretariat even if the investor prefers arbitration under the UNCITRAL Rules. The ICSID secretariat has a staff of highly experienced lawyers who are available

[84] Draetta, *supra* note 38, p. 78 (citing data provided by the International Chamber of Commerce).

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to assist, on an absolutely objective basis, both the foreign investor and the host government.

Moreover, the costs of using ICSID as the secretariat are likely to be no more expensive and in some cases less expensive than the *ad hoc* secretariat that must be created if the UNCITRAL Rules are otherwise used (since UNCITRAL has no secretariat facilities). The ICSID Secretariat has indicated that it is prepared to provide services under the UNCTAD Rules ranging from limited assistance to full administration.[85] One expert, speaking about arbitral institutions generally, has noted that "arbitration administered by a qualified institution [as distinct from an *ad hoc* process] . . . unquestionably offers the parties both a better guarantee that the proceedings will be properly conducted and a better idea of what they will cost."[86]

III. EXPERIENCES OF THE DOMINICAN REPUBLIC, CHILE, ECUADOR AND COLOMBIA, MEXICO, CANADA AND THE UNITED STATES

Because of the significant number of investor-state arbitrations now being brought,[87] many host governments are acquiring (not necessarily favorable) experience in managing such disputes. Among the most important in have been the NAFTA Parties (Mexico, USA and Canada). All three NAFTA nations have by necessity acquired extensive experience in defending claims brought by investors of one or more of the other Parties. As discussed in the Introduction, after nearly eighteen years some sixty notices of intent to arbitrate have been presented under NAFTA's Chapter 11, and some 25 awards on the merits have been rendered along with many jurisdictional and other procedural decisions.[88] Mexico in particular, because of its high income developing country status, has lessons for other developing countries, even if some of wisdom attained by the

[85] ICSID, ICSID Dispute Settlement Facilities, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=DisputeSettlementFacilitie&pageName=Disp_settl_facilities, accessed 3 October 2011.

[86] Draetta, *supra* note 38, p. 97 (citations omitted).

[87] UNCTAD reported in June 2009 that the number of known investor-state disputes in arbitration reached 318, 202 in ICSID or the ICSID Additional Facility, 83 under the UNCITRAL Arbitration Rules, and 31 in other arbitration centers or on an *ad hoc* basis. UNCTAD, Recent Developments in International Investment Agreements (2008—June 2009), at 2, available at <http://www.unctad.org/en/docs/webdiaeia20098_en.pdf>, accessed 3 October 2011.

[88] In terms of proceedings that resulted in the issuance of awards and decisions (often multiple), the data is as follows: Canada (8); Mexico (12, 11 under NAFTA); and United States (10). Source: *Investment Claims, Awards and Decisions* Listed by Host State (Oxford University Press), available at <http://www.investmentclaims.com/subscriber_awards_by_hoststate1>, accessed 7 June 2011; See also NAFTA Claims, *supra* note 9.

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NAFTA Parties in managing investor-state disputes is difficult or impossible to apply to smaller developing countries that are engaged in less frequent international litigation.

Still, the ability of the NAFTA Parties to manage arbitrations, whether developed or developing, is far different from that of nations such as the Dominican Republic, Colombia, Ecuador and Chile. Most of this latter group with the exception of Ecuador have experienced relatively few investor-state claims.[89] Yet, at the same time these and similar governments are more affected by the costs of arbitration, and the financial (and political) burdens that may arise in the payment of a major award in the tens or hundreds of millions of dollars.[90] Sensitivity to the importance of a favorable investment climate, with predictability and transparency, is less clear outside of Colombia.[91]

Part III(A) includes a detailed discussion of a number of the Dominican Republic's BITs, as well as the CAFTA-DR investment provisions, which are applicable to the Dominican Republic as a Party to CAFTA-DR. The innovations of the investment chapter of CAFTA-DR apply, *inter alia*, to the U.S. FTAs with Chile and Colombia and to many other U.S. and Canadian agreements both within and outside the Western Hemisphere. While this Part III does not purport to be a comprehensive or statistically significant analysis, there is good reason to believe that the range of agreements between smaller and medium-sized developing countries and typical capital exporting countries (and a few others) is similar to those BITs concluded over the past twenty years or so with the other developing countries discussed in this section.

[89] The total claims (excluding OPIC insurance claims and treating multiple decisions and awards in a single dispute as one) were: Chile (3); Colombia (none); Dominican Republic (2); Ecuador (14); Source: *Investment Claims, Awards and Decisions, supra* note 95.

[90] One notice of intent to arbitrate seeks damages in the amount of $800 million. *Renco Group, Inc. v. Republic of Peru*, 29 December 2010, available at <http://italaw.com/documents/RencoGroupVPeru_NOI.pdf>, accessed 3 October 2011.

[91] In terms of the ease of doing business, the World Bank's rankings show the United States at 4, Canada at 13, Chile at 39, Colombia at 42, Mexico at 54, the Dominican Republic at 108 and Ecuador at 130 (of 183 countries ranked). International Finance Corporation, *Doing Business in a More Transparent World 2012*, 18 October 2011, available at <http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf>, accessed 26 October 2011.

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A. The Dominican Republic

The Dominican Republic has negotiated and put into effect at least 16 BITs or investment chapters in free trade agreements over the past fifteen years,[92] most of which are still in force. According to government sources, the nation has been sued in concluded cases for about $7.4 million, and paid approximately $1.3 million in awards or settlements. As of July 2010, claims seeking another $11.4 million were pending.[93]

1. The Administrative Structure

The Directorate of Foreign Trade (DICOEX) has been designated as the NCA for the Dominican Republic, as explicitly stated in Decree 610-07:

> With the issuance of Decree No. 610-07 [DICOEX] serves as national coordinating authority, assigning the tasks set for the settlement of disputes, including, among others, coordination and case management, implementation of procedures and faculties to arrange on behalf of the Dominican Republic, the processes of consultation, negotiation, collaboration, mediation, investigation and conciliation. [94]

While DICOEX under Decree 610-07 has the legal authority to carry out its leadership role in responding to investor-State disputes on behalf of the Government of the Dominican Republic, in practice the full exercise of this authority is likely to be challenging, for reasons discussed more generally in Part II, above.

DICOEX' responsibilities do not include any significant role in negotiating and concluding new BITs or FTAs. That responsibility belongs to the Ministry of Foreign Relations. The dichotomy is not ideal despite the considerable skills of officials in both agencies. First, the consistency of the BIT provisions of one agreement with another is reduced if the shortcomings and benefits of existing agreements, and the need for new provisions, are not considered in the course of negotiations. Realistically, a nation such at the Dominican Republic will often be asked to accept the standard text of another nation's BIT in its entirety or in large part, e.g., the United States or France. However, there are some

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[92] UNCTAD, Total number of Bilateral Investment Treaties concluded, 1 June 2008, available at <http://www.unctad.org/sections/dite_pcbb/docs/bits_Dominica_rep.PDF>, accessed 4 October 2011; CAFTA-DR, *supra* note 27, ch. 10.

[93] Dominican Republic—Dispute Prevention Policies, *supra* note 14.

[94] *See* "Secretaria de Estado de Industria y Comercio Memorias Ano 2007," <http://www.seic.gov.do/baseConocimiento/Documentos%20de%20Planificacin/MEMORIA%20ANUAL%20SEIC%202007.pdf>.

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procedural aspects of BITs that are particularly desirable for the Dominican Republic and other developing countries that could probably be incorporated into any new agreements if Dominican Republic negotiators were to request the inclusion of such provisions. These include, but are not limited to: a) the incorporation of a 90-day notice of intent to file arbitration requirement so that DICOEX and other agencies concerned are made aware of a threat of arbitration before an arbitration request is filed; b) incorporation of arbitral fora that include ICSID, the ICSID Additional Facility and UNCITRAL; c) the incorporation of more detailed provisions encouraging the promotion of mediation and conciliation, and d) limitations on the impact of any MFN provisions on existing or future BITs.[95]

2. Dominican Republic BIT Practice

Although none of the agreements create serious downside risks, some are ineffective or unnecessarily complicate the defense of investor-state claims because of the unusual or very limited potential arbitration forum options. Some of the key differences, as reflected in various BITs, are discussed below.

Disputes concerning the definition of investment, although significant in some cases and in keeping with Article 25 of ICSID,[96] probably need not be discussed at length. However, I note that in some instances, the scope of the term "investment" incorporated in a BIT or FTA is broader than that provided by the ICSID. This means that the investor may be encouraged to choose UNCITRAL rather than the ICSID, or the ICSID Additional Facility (which is available to ICSID Parties if the dispute does not come within Article 25). This is not currently an issue for the Dominican Republic, because the Dominican Republic (like Canada and Mexico) is not a Party to the Convention, nor for Ecuador, which has withdrawn from ICSID, but is relevant to ICSID Parties such as

[95] Such provisions may be interpreted to permit the investor to elect to proceed under a different BIT which provides more favorable treatment to foreign investors.

[96] Article 25(1) provides: "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." In some instances arbitral panels or the ICSID annulment committee have narrowed the breadth of the term "investment." *See, e.g., Mitchell v. Democratic Republic of the Cong, Decision on the Application for Annulment of the Award,* ICSID Case no. ARB/99/7, 27 October 2006, available at http://www.investmentclaims.com.ezproxy.law.arizona.edu/subscriber_article?script=yes&id=/ic/Awards/law-iic-172-2006&recno=3&country=Congo, the Democratic Republic of the, accessed 4 October 2011 (holding that a law firm invested in and operating in the Congo for many years was not an "investment" under Art. 25(1), although it was defined as such under the underlying bilateral investment treaty between the United States and the Congo).

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Colombia, Chile and the United States among the nations discussed in this Part III.[97]

For the Dominican Republic and for most other host states, it is advisable to include at least four forum options: the national courts, plus arbitration under the ICSID Arbitration Rules (because even if the nation is not currently a part to the ICSID Convention it may adhere in the future), the ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules. As long as ICSID arbitration is unavailable, the Additional Facility is a reasonable alternative and may be more favorable to the interests of the Dominican Republic in some cases than UNCITRAL arbitration (although the investor in most BITs is solely responsible for choosing the forum). At the same time, if one party is not an ICSID Convention Party, or a party to a BIT that has accepted the ICSID Convention decides to withdraw, as with Ecuador and Bolivia in recent years, there would remain several alternative arbitration fora for investor-state arbitration if the BIT so provides.

The Dominican Republic BITs with South Korea[98] and Panama,[99] among others, include these usual the four options; CAFTA-DR omits the reference to national courts, although arguably it is implicit. The BITs with Morocco,[100] France[101] and Italy[102] include only ICSID and UNCITRAL. Thus, as long as the Dominican Republic has not adhered to ICSID any investment-related disputes between Moroccan (or French or Italian) investors in the Dominican Republic or vice versa could only be submitted to ad hoc arbitration under the UNCITRAL Rules. The now defunct BIT with Ecuador was effectively useless for the settlement of investor-state even while in force, since it only provided for ICSID

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[97] ICSID, *List of Contracting States and other Signatories of the Convention*, 5 May, 2011, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>, accessed 10 October 2011. The Dominican Republic and Canada signed the Convention in 2000 and 2006, respectively, but neither has ratified it. Ecuador, as noted earlier, withdrew in 2010; Mexico has never signed the Convention.

[98] Acuerdo entre el Gobierno de la República de Corea y el Gobierno de la República Dominicana para la Promoción y Protección de las Inversiones, 30 de junio de 2006, art. 8(3).

[99] Acuerdo de Promoción y Protección Reciproca de las Inversiones entre la República de Panamá y la República Dominicana, 6 de Feb. de 2003, art. IX(2), available (in Spanish) at <http://www.sice.oas.org/Investment/BITSbyCountry/BITs/DOR_Panama_s.pdf>, accessed 4 October 2011).

[100] Acuerdo entre el Gobierno de la República Dominicana y el Gobierno de law Reino de Marruecos sobre Promoción y la Protección Reciprocas de Inversiones, 23 de mayo de 2002, art. 8(2).

[101] Acuerdo entre el Gobierno de la República Dominicana y el Gobierno de la República de Francia para la Promoción y la Protección de Inversiones, 14 de enero de 1999, art. 7(2).

[102] Convenio Entre el Gobierno de la República Dominicana y el Gobierno de la República Italiana sobre la sobre la Promoción y la Protección de Inversiones, de Junio de 2006, art. XI(3).

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arbitration, despite the fact that at the time of signature the Dominican Republic had not even signed the ICSID Convention. [103]

The BIT with the Netherlands includes the International Chamber of Commerce (ICC), among the listed fora.[104] If a Dutch investor were to choose the ICC over other options, Dominican Republic officials or external consultants would be required to learn a different set of rules of procedure, and it could be necessary to conduct the proceedings in Paris, which could mean added costs compared to arbitration in Washington, the most likely locus of arbitration under ICSID and often under the UNCITRAL rules. However, the Netherlands BIT has an interesting feature: while prohibiting the use of diplomatic protection by the investor's home state as provided in the ICSID Convention,[105] the BIT explicitly confirms the validity of "informal" exchanges between the State of the investor and the host State are permissible.[106] To the extent that the host state were to seek informal consultations with the home state under FTA mechanisms, as discussed in Part II, above, the informal exchange language could facilitate such efforts.

Notably, a BIT between two nations, even if there is only limited investment between those two nations, can be much more widely applicable to other foreign investments through the "most-favored-nation" treatment clause (MFN) in many BITs. As one write has observed with regard to China's many BITs, "MFN treatment raises the level of substantive protection guaranteed by each of China's BITs to the level guaranteed by its most protective, investor-friendly, BIT." [107] Suppose, for example, a U.S. investor were to prefer arbitration before the International Chamber of Commerce (ICC) instead of under one of the options that appear in CAFTA—DR.[108] Under the MFN clause in CAFTA-DR,[109]

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[103] The BIT was negotiated at time when Ecuador was a party to the ICSID Convention but the Dominican Republic had not even signed the Convention. Acuerdo para la promoción y protección de inversions entre el Gobierno de la República del Ecuador y el Gobierno de la República Dominicana, 26 de junio de 1998, art. 13(2), available (in Spanish) at <http://www.sice.oas.org/BITS/ecrd_s.asp>, accessed 4 October 2011.

[104] Acuerdo Sobre la Promoción y Protección Reciprocas de law Inversiones entre la República Dominicana y el Reino de los Paises Bajo, 30 de marzo de 2006, art. 9.2(e) [hereinafter "DR—Netherlands BIT"].

[105] The ICSID Convention*, supra* note 19, art. 27 provides in pertinent part that "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

[106] DR—Netherlands BIT, *supra* note 111, art. 9.6(b).

[107] Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice,* 42 Int'l Law (2009), 1301.

[108] CAFTA-DR art. 10.16 provides only for ICSID, the ICSID Additional Facility and UNCITRAL.

[109] CAFTA-DR, art. 10.4.1.

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that investor could opt for arbitration under the BIT between the Netherlands and the Dominican Republic, because it incorporates the ICC forum option. Or, if the newer BIT between Germany and the Dominican Republic does not include the notice of intent found in CAFTA-DR, a U.S. investor might argue that the requirement of a notice of intent is unnecessary if the investor were to elect to proceed under the Germany BIT on the basis of the MFN clause in CAFTA-DR. In fairness, the international investment law regarding the scope of use of MFN clauses, and the extent to which the clause would allow an investor to choose between arbitration clauses in other agreements, is not fully unresolved, but there remains a risk that conclusion of a new BIT or FTA that affords investors significantly more favorable than provided under existing treaties may ultimately be invoked in investment disputes brought initially under a different treaty.

3. Innovations of CAFTA-DR

For reasons explained in the Introduction, U.S. BITs and FTA investment chapters concluded since 2002 are somewhat more government-friendly and less investor-friendly than many of those concluded by other major capital exporting countries. Among the most important innovations of the CAFTA-DR is the requirement that at least 90 days before an investor submits an arbitration claim it must provide notice of its intent to do so.[110] This concept originated in Chapter 11 of NAFTA (Article 1119), at the suggestion of the Canadian negotiators.[111] This notice helps to ensure that the NCA will be aware of the controversy at least 90 days *before* a request for arbitration can be filed and can plan accordingly to fulfill its responsibilities under national law.[112]

CAFTA-DR also provides several important limitations with regard to claims of indirect expropriation (defined as a "series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure") which did not appear in NAFTA, most significantly to state that "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[113] Also, the concept of indirect expropriation is further defined

[110] CAFTA-DR, art. 10.16.1.
[111] Telephone conversation with a former member of the international counsel's office of the Canadian Department of Foreign Affairs and International Trade (DFAIT), September 2010.
[112] Under CAFTA-DR, DICOEX is the agency designated to receive notices of intent, notices of arbitration, and other key documents. See Annex 10-G.
[113] CAFTA-DR, annex 10-C.4(b) (Emphasis supplied.)

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and narrowed by incorporation into the investment chapter of criteria based on the U.S. Supreme Court decision in *Penn Central*.[114]

Other provisions of CAFTA-DR provide the host country with greater flexibility to deny certain investor claims than do most other BITs and investment chapters. For example, in dealing with fair and equitable treatment claims, CAFTA-DR provides in pertinent part that: "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that [customary international law] standard, and do not create additional substantive rights."[115]

CAFTA-DR (and subsequent U.S. FTA investment chapters) also incorporate language that is designed to pressure arbitrators to decide jurisdictional questions at the outset rather than joining them to the merits, a process that if properly implemented could provide considerable cost and time savings for the host government if the arbitrators were to dismiss the case for lack of jurisdiction.[116]

Another important innovation of CAFTA-DR is the requirement of "transparency of arbitral proceedings,"[117] language which appears in similar form in all post-2002 U.S. BITs and FTAs, in large part because pressures for transparency became a requirement in the President's now-expired 2002 trade promotion authority. Consequently, CAFTA-DR Chapter 10 requires a degree of transparency in terms of hearings and dissemination of notices and all other documents related to arbitration that did not originally exist in NAFTA and in most other countries' BITs.[118]

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[114] CAFTA-DR, annex 10-C.4(a); *see Penn Central Transportation Co. v. New York,* 438 U.S. 104 (1978).

[115] CAFTA-DR, art. 10.5.2. Several arbitral awards under NAFTA, such as *Glamis Gold v. United States*, hold that the customary international law standard for fair and equitable treatment is as determined in the 1926 *Neer* arbitration; the threshold for an international law violation has not been lowered, inter alia, by arbitration decisions over the past 85 years or more than 2,000 BITs incorporating fair and equitable treatment. *See Glamis Gold Ltd v United States,* Ad hoc—UNCITRAL Arbitration Rules; IIC 380 (2009), 14 May, 2009, paras. 600, 612, 613, 616 (essentially upholding the continued applicability of the *Neer* standard).

[116] CAFTA-DR, art. 10.20.4 see also United States—Colombia FTA, Art. 10.20.4.

[117] CAFTA-DR, art. 10.21.

[118] NAFTA was effectively modified by action of the Free Trade Commission to increase the transparency of proceedings under Chapter 11; *see* NAFTA Free Trade Commission Interpretations and Statements, Annex I of OECD, Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, June 2005, available at <http://www.oecd.org/dataoecd/25/3/34786913.pdf >, accessed 10 October 2011 (providing for open hearings in NAFTA Chapter 11 and Chapter 20 proceedings as well as access to documents and opportunities for non-parties to file *amicus curiae* briefs).

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Provisions substantially identical to all of these CAFTA-DR provisions are found in other U.S. FTA investment chapters, including those with Chile and Colombia.[119] Although the changes may be characterized as incremental rather than revolutionary, each moves the balance between investor rights and state actions in the direction of protecting state actions.

B. Chile

Chile has been one of the most prolific negotiators of BITs in the Western Hemisphere, with more than 50 concluded, [120] in addition to FTA investment chapters in the U.S.—Chile FTA and many other FTAs with other nations. However, Chile has had relatively few disputes under its BITs (3), presumably because of the nation's relatively effective legal and administrative systems, and high degree of transparency of relevant laws and regulations. This is in significant contrast to the nation's history many years ago, when disputes over foreign investment in natural resources, particularly copper, resulted in a series of highly politicized expropriation disputes.[121]

The principal state agency (NCA) is the Division for Legal & Advocacy in Defense of Foreign Investment Arbitration of the Ministry of Economy, Development and Reconstruction. [122] Negotiations on international trade and investment negotiations are administered by different ministries and the two apparently do not communicate extensively with each other, although officials from Economy are involved in the negotiation of BIT and FTA investment provisions, such as Chapter 10 of the FTA with the United States. The lines of authority, particularly in settlement negotiations, have been blurred; usually in addition to Economy, the Ministry of Finance and the president's office are also involved. In this sense, the administrative structure of Chile is similar to that of the Dominican Republic, where DICOEX, Ministry of Trade and Industry are primarily responsible for addressing investor-state disputes, while the Ministry of Foreign Affairs negotiates agreements.

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[119] See, e.g., United States—Chile FTA, art. 104.2, Annex 10-D(4); United States—Colombia FTA, art. 10.5.2, Annex 10-B(3).

[120] *See* UNCTAD, Total Number of Bilateral Investment Treaties Concluded, 1 June 2011, available at <http://www.unctad.org/sections/dite_pcbb/docs/bits_chile.pdf >, accessed 4 October 2011 (listing 53 BITs).

[121] *See, e.g.,* Edward C. Snyder*, The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995,* 2 Tulsa J. Comp. & Int'l L. (1995), 253, 257-259 (discussing the Allende regime's move toward socialism and the nationalization of both domestically and foreign owned properties).

[122] División Jurídica & Programa de Defensa en Arbitraje de Inversión Extranjera, Ministro de Economía, Fomento y Reconstrucción.

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The Division has historically made good use of consultation and negotiation functions as settlement mechanisms, apparently on an *ad hoc* basis, although it is assumed that the vast majority of BITs in Chile have provisions for negotiation and consultation,. The FTAs with the United States and Canada may be the only ones incorporating the requirement of a "notice of intention" to seek arbitration.[123]

Observers familiar with Chile's practices suggest that negotiated settlements are not generally perceived as beneficial for bureaucratic careers because of the criticism of the government should it make a monetary settlement in the absence of a binding arbitral award.[124] There have been pressures to appeal arbitral awards, even in circumstances where an annulment would lead to a new arbitration, forcing the nation to incur additional arbitration costs that might exceed the amount in dispute.[125]

As often occurs elsewhere, the Division has experienced substantial turnover or lawyers and administrators over the years, due to relatively low wages and in some eyes the lower prestige of work compared with companies in the private legal sectors, and because of the high levels of competence of the lawyers serving in the Division.

C. Ecuador[126]

Ecuador has been forced to defend more investor claims in arbitration than any other country discussed herein, except perhaps Canada under NAFTA. At least thirteen ICSID claims have been brought against Ecuador, and at least six under non-ICSID auspices (primarily under UNCITRAL rules).[127] The estimated dollar value of the awards against Ecuador (2010) is $119 million, more than any other Latin American nations other than Argentina and Mexico.[128] Ecuador has also

[123] United States—Chile FTA, art. 10.15.4; Canada—Chile FTA, art. G-20.
[124] Washington lawyer, *supra* note 42.
[125] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, (under the Spain/Chile BIT), Award, 8 May 2008, with a reported amount of about $10 million; Annulment proceeding registered Jul. 6, 2009; *see* ICSID, List of Pending Cases, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>, accessed 6 October 2011.
[126] This discussion is based on discussions with various attorneys who have knowledge of practices in Ecuador during the summer and fall of 2010.
[127] *IAReporter,*(undated), available at <http://www.iareporter.com/articles/EcuadorExit/print >, accessed 30 September 2011.
[128] UNCTAD data, in Colombia, Management [sic] Investment Disputes in Colombia, APEC Workshop on Dispute Prevention and Preparedness, Washington, D.C., 27 July 2010 (PowerPoint), available at

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concluded nearly twenty BITs, although a few, such as the BIT with the Dominican Republic, were recently terminated after an internal review.[129] A 1993 BIT with the United States remains in force but contains none of the post-NAFTA innovations found in the FTA investment chapters with the Dominican Republic under CAFTA-DR, Chile and Colombia, such as the "notice of intent to submit a claim to arbitration" requirement discussed in Part III(A).[130]

In Ecuador, the Office of the Attorney General (OAG) serves as the NCA, but the agencies directly involved in investor disputes as is usually the case possess the documents and therefore play a vital role in dispute resolution. While initially OAG legal experience in matters relating to investment disputes was considered limited, after a decade of experience, some outside observers believe that OAG has acquired considerable internal expertise and learned from earlier errors. That said, there seems to be no system comparable to the Dominican Republic's or Colombia's institutional arrangements for managing complaints, or any "early warning" system, or formal or informal mechanism for seeking negotiated solutions. However, OAG has had the necessary political support to settle several investment disputes on an *ad hoc* basis, relying in part on the recommendations of outside counsel.

The RFP selection process of attorneys, using a formal point system, has historically been considered very complex, expensive and time consuming, with favoritism issues occasionally encountered and delays in designating counsel in some instances jeopardizing the state's ability to defend its interested.[131] The use of RFPs itself is not faulted and is likely to be required in many nations, but should be streamlined.

Some observers have suggested that in the past the Government of Ecuador has chosen arbitrators on a seemingly random basis, without understanding the dynamics of the panel of three judges, the importance of communication, language fluency and diplomatic skills (as discussed in Part II, *infra*).

It is premature to assess the long-term implications for the Ecuadorian government's decision effective in 2010 to withdraw from ICSID and its unilateral withdrawal from several BITs, including its BIT with the Dominican Republic.

<http://aimp.apec.org/Documents/2010/IEG/WKSP1/10_ieg_wksp1_006.pdf >, accessed 6 October 2011. The Mexican data included approximately $23 million in awards prior to the corn syrup cases, which by themselves aggregated over $180 million.

[129] UNCTAD, Total number of Bilateral Investment Treaties concluded, 1 June 2011, available at <http://www.unctad.org/sections/dite_pcbb/docs/bits_ecuador.pdf>, accessed 4 October 2011 (listing eighteen BITs excluding the terminated BIT with the Dominican Republic)

[130] Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and a Related Exchange of Letters, 27 August 1993, available at <http://www.state.gov/documents/organization/43558.pdf>, 6 October 2011.

[131] Washington attorney, *supra* note 42.

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The impact of the withdrawal on the investment climate of the nation (which in Ecuador is likely affected as much or more by chronic political instability[132] and questions about the rule of law and transparency of the regulatory system) may be adverse even for a nation that possesses substantial petroleum and other minerals. If this turns out to be a rational policy for Ecuador in the medium to long term, or is simply an action taken for domestic political purposes and in light of frustration with a number of arbitral awards against the nation,[133] remains to be seen. In any event, as noted earlier denunciation of ICSID will not protect Ecuador from arbitrations under other rules, such as the recent $78 million award against Ecuador under UNCITRAL rules.[134] Also, it will likely have less impact on investment protection in Ecuador than the continuing validity of some twenty-one BITs (out of 29 originally concluded), most of which also provide for arbitration under UNCTAD rules or *ad hoc* arbitration as well as under ICSID.[135]

For other developing nations that may be tempted to follow suit with ICSID denunciation—although there is little evidence of this to date except for Venezuela— the risk of seriously damaging the investment climate and sending a negative signal to potential investors is significant, particularly when other investment climate factors and generally positive and foreign investment is sought in sectors other than natural resources.

D. Colombia

Colombia, a relatively late-comer to negotiation of BITs (beginning only in 2005), is today a party to at least six BITs[136] and a Mexican—Colombian and El Salvador—Guatemala—Honduras—Colombian FTA with investment

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[132] "Ecuador has been caught in cycles of political instability, reflecting popular disillusionment with traditional power structures and weak institutions . . . [A]fter 4 years in office the [Correa] government's economic policies continue to evolve, creating some uncertainty for the business community." U.S. Department of State, *Background Note: Ecuador,* 8 June 2011, available at <http://www.state.gov/r/pa/ei/bgn/35761.htm>, accessed 10 October 2011.

[133] See, e.g., *Occidental Exploration and Production Co v Ecuador,* (2005) EWHC 774 (Comm); IIC 279 (2005), 29 April 2005, OUP Investment Claims, *supra* note 95.

[134] *Chevron Corporation and Texaco Petroleum Company v Ecuador*, Final award, Ad hoc—UNCITRAL Arbitration Rules; IIC 505 (31 August 2001), available at <http://www.investmentclaims.com.ezproxy.law.arizona.edu/subscriber_article?script=yes&id=/ic/Awards/law-iic-505-2011&recno=2&#law-iic-505-2011-div3-37>, accessed 30 September 2011.

[135] Eleven incorporate the UNCITRAL option and two offer *ad hoc* arbitration. Only two (Germany, Peru) would restrict settlement to domestic. Tolga Yalkin, *Ecuador Denounces ICSID: Much Ado About Nothing?,* EJILTalk, Jul. 30, 2009, available at <http://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/>, accessed 9 June 2011.

[136] UNCTAD, Total number of Bilateral Investment Treaties concluded, 1 June 2011, available at <http://www.unctad.org/sections/dite_pcbb/docs/bits_colombia.pdf>, accessed 5 October 2011.

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provisions.[137] Also, in 2012 the United States—Colombia FTA, which contains an investment chapter incorporating the major features of CAFTA-DR, as discussed in Part III(A), entered into force.

Among the countries discussed in Part III Colombia is unique in that it is the only one that has not been a respondent in an investor-state arbitration. The only investor claims against it have been based on payouts by the Overseas Private Investment Corporation (OPIC) arising out of political unrest and violence in the early part of the twenty-first century.[138] It is assumed that subrogation claims were paid by Colombia after negotiations with OPIC, absent any indication to the contrary. Interestingly, Colombia has not waited for investor-state lawsuits to be filed. Rather, it has been proactive, creating an apparently well-planned administrative structure, including an NCA with substantial power and authority to meet those demands, a structure that has caught the attention of other governments and international organizations.[139] The operating principle for Colombia is "We may be able to avoid disputes if we are organized!"[140]

In Colombia the lead agency is the Directorate of Foreign Investment and Services (Ministry of International Trade) (DIES). Clear legal authority is established on the part of DIES. The legal and administrative authority of DIES requires the agency to "Coordinate with other entities, leading and participating in international negotiations related to investment issues. . . . and "Develop, in coordination with state agencies related to the topic, documents on foreign investment policy. . . ."[141] According to Colombian officials, Decree Law 210 creates a system of identifying, tracking and resolution of barriers to foreign investment "and the early identification of problems under the existing decree."

DIES operates in close coordination with the Office of the Attorney General. The decree appears to have created clear internal administrative procedures for the coordination and management of investor-state disputes with DIES serve as a single channel of communication between the investor and the state. DIES acts as a permanent clearing house of information and advice. The

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[137] Tratado de Libre Comercio entre los Estados Unidos Mexicanos, la República de Colombia y la República de Venezuela, 13 June 1994, Art. 17-17(2), available at <http://www.sice.oas.org/Trade/go3/G3INDICE.ASP>, accessed 5 October 2011 (providing the usual arbitration options, ICSID, ICSID Additional Facility, UNCITRAL); Tratado de Libre Comercio entre la República de Colombia y las Repúblicas de El Salvador, Guatemala and Honduras, Aug. 2007, art. 17-18-2, available at <http://www.sice.oas.org/TPD/COL_Norte/Text/Index_s.asp>, accessed 5 October 2011.

[138] Investment Claims, Awards by Host State, Colombia (Oxford University Press), available at <http://www.investmentclaims.com/subscriber_awards_by_hoststate2?country=Colombia+(OPIC)>, accessed 9 June 2011.

[139] *See*, e.g., Colombia—Investment Dispute Management, *supra* note 135.

[140] *Ibid.*

[141] Decree 210 of 3 February 2003, arts. 17.3, 17.7.

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unit is also responsible for training programs within the Colombian government, which are offered to officials in both the national and regional governments and to members of the private sector, staffed either by DIES officials or experts invited from abroad.[142] It is unclear whether Colombia has so far avoided the investor-state disputes because a system exists for addressing investor challenges before they arise to the level of formal arbitration, or simply because the government generally functions well, with a rule of law based, transparent regulatory system that in general avoids the arbitrary actions that frequently lead to investment disputes. However, in the absence of actual disputes it remains to be seen whether the administrative structure created under Decree Law 201 will function well under the various pressures created by actual claims.

E. Mexico

Mexico, primarily but not entirely because of NAFTA, has gained substantial experience in dealing with investor-state disputes. Observers agree generally that in general Mexican officials deal with such challenges effectively. Like the other nations discussed in Part III, Mexico has been active in concluding BITs, nearly 30 in addition to NAFTA's Chapter 11.[143] Mexico has also lost more cases than any other NAFTA Party, five, totaling about $200 million in awards.[144]

UCPI[145] (in the Ministry of Economy) is the NCA responsible for both international trade and investment disputes, probably one of the best organized and most experienced of all NCAs in either developed or developing countries. Mexico usually has several investment disputes pending at any given time under NAFTA Chapter 11 or BITs, an occasional dispute under the government-to-government dispute settlement mechanism (Chapter 20) in addition to trade disputes under WTO auspices, as well as unfair trade disputes which are subject to review under NAFTA, Chapter 19's unique provisions.[146] This work volume

[142] Colombia— Investment Dispute Management, *supra* note 135.
[143] UNCTAD, Total number of Bilateral Investment Treaties concluded, 1 June 2011, available at <http://www.unctad.org/sections/dite_pcbb/docs/bits_mexico.pdf>, accessed 4 October 2011.
[144] These include the three soft drink tax actions, *Archer Daniels Midland Company v Mexico*, ICSID Case No ARB(AF)/04/05; IIC 329 (2007), 26 September 2007 [hereinafter "ADM"]; *Cargill, Inc v Mexico*, ICSID Case No ARB(AF)/05/2; IIC 479 (2009), 13 August 2009; *Corn Products International Inc. v Mexico,* ICSID Case No ARB(AF)/04/1; IIC 373 (2008), 15 January 2008. Earlier, Mexico paid awards in *Feldman, supra* note 74, and *Metalclad Corp v Mexico*, Award, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (2000), 25 August 2000.
[145] Unidad de Practicas Comercial Internacionales, or Office of International Commercial Practices.
[146] *See NAFTA Chapter 19 Rules Governing the Resolution of Antidumping and Countervailing Duty Disputes, in* Gregory W. Bowman, Nick Covelli David Gantz & Ihn Ho Uhm, *Trade*

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justifies a large internal legal staff. UCPI appears to have been able to maintain a group of experienced lawyers, even though many of the best lawyers are eventually attracted by higher salaries and greater prestige of the private sector. UCPI has had long-term relationships with several well-qualified lawyers in Canada, based on fixed annual retainers.[147]

Among the more apparent successes of UCPI has been the decision to retain an outside law firm to assist UCPI in litigation in the various fora. In so doing, the government has likely enjoyed some cost savings from a long-term legal services relationship, in which the attorneys have necessarily learned how to provide effective representation and to achieve a reasonable balance of responsibilities between UCPI and outside attorneys.[148] The government and private lawyers also demonstrated a relatively efficient level of collaboration for the numerous steps required in defending investor-state claims, ranging from early assessment of the bona fides of the claim to post award management.

As in most countries, political factors in Mexico may make settlement of cases more difficult, as in *ADM, Cargill* and *Corn Products,* the high fructose corn syrup disputes under Chapter 11 and in the WTO,[149] where different branches of the Mexican government were not fully in agreement as to how best to proceed. Here, legislative action and ultimately a Supreme Court decision against the recommendations of (and attempted expropriation by) the executive branch, confirming the imposition of a 20% excise tax on soft drinks made with sweeteners other than sugar (e.g., high fructose corn syrup), bore primary responsibility for the arbitral awards against Mexico.[150] The potential difference of views and interests between the Secretariat of the Treasury (which tends to be concerned about generating tax revenue and paying awards for which Mexico is held liable) and the Secretariat of Economy (which enforces against unfair trade

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Remedies in North America (Kluwer Law Int'l, 2010), pp. 17-39 (explaining Chapter 19). The Chapter 19 mechanism for review of antidumping and countervailing duty administrative actions has resulted in more than 120 appeals of national administrative agency determinations in more than seventeen years. *See also* NAFTA Secretariat, Decisions and Reports, available at <http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312>, accessed 9 June 2011 (listing the determinations).

[147] *See* discussion in Mowatt, *supra* note 81 (Mowatt was one of the Canadian counsel retained by Mexico for multi-year periods).

[148] This paragraph is based on discussions with UCPI officials and Mowatt in August 2010, and on the author's personal experience as an arbitrator or panelist in NAFTA Chapter 11, Chapter 19 and Chapter 20 disputes involving Mexico during the period 1995-2004.

[149] *Mexico - Tax Measures on Soft Drinks and Other Beverages,* Report of the Appellate Body, WT/DS308/AB/R, (24 March 2006).

[150] *ADM*, Award, *supra* note 151, para. 2; *see also* Sergio Puig, *NAFTA, Authority and Political Behavior: the Case of Mexico*, 5 Santa Clara J. Int'l L. (2007), 363, 378-82 (discussing the various actions of the executive branch, legislature and the Supreme Court that contributed to the loss of the arbitrations).

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practices but also seeks to stimulate the economy) can also be a source of delay in responding to challenges, as are potential disputes with the Mexican Congress.

The experience of Mexico and Canada under NAFTA in the defense of investor-state actions may eventually have some indirect benefit for smaller developing nations. For example, in recovering the costs of arbitration and its own legal fees in *Thunderbird v. Mexico*,[151] Mexico set a precedent (reinforced in the U.S. and Canadian victories in *Methanex*[152] and *Chemtura*[153]), which may discourage the filing of frivolous complaints more generally, and discourage lawyers in the United States from providing legal representation on a "contingent fee" basis.[154]

F. Canada

Historically, Canada has had one of the best investor-state defense teams world-wide, with nearly twenty years of experience under NAFTA Chapter 11. The "Joint Legal Team" (JLT) is comprised of attorneys from the Department of Foreign Affairs and International Trade (DFAIT) and the Ministry of Justice. Like UCPI in Mexico, JLT is responsible for a variety of investor-state and international trade disputes, including those before the WTO, under NAFTA Chapters 11, 19 and 20, and in other mechanisms involving Canada and the United States, such as arbitrations before the London Court of International Arbitration under the 2006 Softwood Lumber Agreement.[155] As with Mexico, this significant Canadian case load permits the retention a large in-house professional legal team, representing in the aggregate many years of expertise and experience.

The DFAIT/Justice lawyers are relatively well paid and enjoy a high level of respect within and outside government, so turnover is relatively low compared to NCAs in many other nations. Perhaps most significantly, JLT has sufficient institutional experience and political power to determine which cases should be

[151] *International Thunderbird Gaming Corporation v Mexico,* Civil Action 06–00748 (HHK), IIC 135 (2007), 14 February 2007, OUP Investment Claims, *supra* note 95.
[152] *Methanex Corporation v United States*, Ad hoc—UNCITRAL Arbitration Rules; IIC 167 (2005), 3 August 2005, OUP Investment Claims, *supra* note 95.
[153] *Chemtura Corporation v Canada, Award,* Ad hoc—UNCITRAL Arbitration Rules; IIC 451 (2010), 2 August 2010.
[154] A common mechanism in U.S. domestic tort practice where the lawyer receives legal fees—usually a percentage of the award—only if a result favorable to the client is reached. Use in international arbitrations has apparently been rare except in earlier NAFTA Chapter 11 practice.
[155] Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America, 12 September 2006, art. XIV, available at <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/SLA-en.pdf>, accessed 11 October 2011 (requiring that any disputes be resolved only through the LCIA and explicitly barring resort to the WTO or NAFTA mechanisms).

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resolved, for example, *Abitibibowater v. Canada*[156] and *Dow Agrosciences v. Canada,*[157] and to convince the federal government to ratify the settlement results. The first Canadian Chapter 11 case, *Ethyl Corp. v. Canada*, was dismissed when Canadian authorities, having received an adverse preliminary decision on jurisdiction decided to set aside certain regulatory actions complained about by the applicant and to reimburse Ethyl's legal fees and costs.[158]

Canada operates under a federal system where as in U.S. and Mexican states the provinces have the opportunity to invite foreign investment and thus to create investment disputes, greatly complicating the defense and settlement responsibilities for the JLT. The Canadian provinces have more autonomy than U.S. (and certainly Mexican) states, and often have control of the relevant documents and witnesses in investor-state actions brought against Canada. (NAFTA obligations apply not only to the three federal governments, but also the U.S. states and states of Mexico and Canadian provinces.)[159] To date, the question of whether the federal government or the provinces should be legally responsible for awards reached through arbitration or settlements is unresolved, although as a political matter it seems unlikely that the Canadian federal government would seek reimbursement in any but the most egregious situations.[160]

G. The United States

As noted in the Introduction the United States had little experience as a respondent in multiple investor-state disputes until the advent of NAFTA. There, despite the fact that while the United States has been the subject of nearly 20 Notices of Arbitration and nine definitive awards, it has prevailed in all of them, the result has been a change in investment protection policy as reflected in the post-NAFTA BITs and FTA investment chapters that has led to the earlier-discussed weakening of investor protections, and strengthening of the defenses available to host states.

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[156] Chris Best, *The Federal Government Settles Abitibibowater NAFTA Claim,* 27 August 2010, available at <http://www.thecourt.ca/2010/08/27/canada-settles-abitibibowaters-nafta-claim>, accessed 6 October 2011; see also Notice of Arbitration, 25 February 2010, available at <http://www.naftaclaims.com/Disputes/Canada/Abitibi/Abitibi-Canada-NoA.pdf >, accessed 6 October 2011.

[157] *See Canada Settles another NAFTA Case, with Unpublicized Modest Financial Payout,* Int'l Arbitration Reporter, 9 June 2011, available at <http://www.iareporter.com/articles/20110609_2/print >, accessed 9 June 2011.

[158] *Ethyl Corporation v Canada, Decision on jurisdiction, Ad hoc*—UNCITRAL Arbitration Rules; IIC 95 (1998) , 24 June 1998, 38 ILM 708, OUP Investment Claims, *supra* note 95.

[159] NAFTA, art. 105.

[160] Telephone conversation with a former DFAIT lawyer, *supra* note 118.

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The United States government has benefitted from extensive legal expertise in the State Department's Office of the Legal Adviser, Section for International Claims and Investment Disputes, at least since the 1960s. For the United States BITs have been an important aspect of U.S. foreign economic policy at least since 1983, when the first U.S. BITs were concluded. As the State Department notes, BITs support "several key economic policy objectives from protection of investment interests overseas to promotion of market-oriented policies and exports."[161] Earlier, such protection was primarily implemented through diplomatic means, such as the claims settlement agreement negotiated by the State Department with Peru in 1974,[162] and in reliance on the limited investment protection provisions in various "friendship, commerce and navigation" treaties, where there may be no mandatory investor-state arbitration, but only vague language relating to the payment of just compensation and the requirements of international law.[163] Before NAFTA, the U.S. government had defended arbitration claims against the United States (as distinct from negotiating lump sum settlement agreements such as the 1974 agreement with Peru) only in rare circumstances, such as under the United States - Iran Claims Settlement Agreement (1981).[164] The various large claimants litigated their own claims before the United States—Iran Claims Tribunal, while the State Department was responsible for an aggregate group of hundreds of small claims, and mutual claims against both governments, the latter of which continue unresolved.[165]

At present the responsibility for resolving investor-state disputes rests primarily in the Office of the Legal Adviser, with often substantial input from the Office of the United States Trade Representative (USTR), part of the executive

[161] State Department, Bilateral Investment Treaties and Related Agreements, available at <http://www.state.gov/e/eeb/ifd/bit/>, accessed 6 October 2011; see also K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 Int'l Tax & Bus. Law. (1986), 105 (explaining the historical evolution of the U.S. BIT program).

[162] *See* David A. Gantz, *The U.S.-Peruvian Claims Agreement of February 19, 1974*, 10 Int'l L. (1976), 389 (discussing the negotiations and lump sum settlement).

[163] The jurisdiction of the U.S.—Iran Claims Tribunal rested in part on the legal requirements for protection of foreign property found in Article IV of the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, 15 August 1995, available at <http://www.insaps.org/FTA/Readings/Treaties&Agreements/IranAmity.htm>, accessed 6 October 2011.

[164] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981, available at <http://www.iusct.org/claims-settlement.pdf>, accessed 6 October 2011.

[165] See David D. Caron & John R. Crook, eds., *The Iran—United States Claims Tribunal and the Process of International Claims Restitution* (New York: Transnational Publishers, 2000) (discussing the adjudication process of 4,000 claims that resulted in over 500 awards).

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office of the president that is primarily responsive for international trade disputes at the WTO and the rare government-to-government actions under NAFTA and other FTAs. (The Department of Commerce is responsible for defending itself in unfair trade disputes under Chapter 19.) The Justice Department is primarily responsible for arbitrations arising out of the 2006 Softwood Lumber Agreement, as noted earlier, and for some investor-State disputes (e.g., *Loewen v. United States*) where the arbitral tribunal is effectively reviewing a decision of a U.S. state court.[166]

Thus, the level of involvement of agencies other than the State Department seems to vary from case to case, based in part on whether the State Department lawyers responsible for the arbitration possess extensive experience in defending such actions. The result in the United States is overlapping and varying jurisdiction in which different agencies may be principally responsible for each type of trade and investment dispute. In any event, the favorable results speak for themselves.

The negotiation of BITs and FTA investment chapters is led jointly by the State Department and USTR, not always without minor disagreements over investment policies. The State Department and USTR also jointly chair the interagency committee that began a review of the 2004 model BIT in September 2008, which ultimately may result in a new model for future negotiations with other nations.[167] In the United States the contents of BITs and FTAs are determined by negotiations among the Administration and its agencies, Congress and civil society, including environmental groups and labor unions. The essential elements are incorporated into legislation, such as the now-expired Trade Promotion Authority.[168] No new FTA or BIT investment negotiations have been concluded by the United States since February 2008. While BIT negotiations have been relatively sparse in recent years, the United States negotiated investment protection provisions in virtually all post-NAFA FTAs with countries not already bound by BITs, with the exception of Australia.[169] When and if the negotiation of

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[166] *Loewen Group Inc and Loewen v United States,* ICSID Case No ARB(AF)/98/3; IIC 255 (2004); 10 ICSID Rep 443; 128 ILR 420; 44 ILM 836 (2005), 6 September 2004, OUP Investment Claims, *supra* note 95.

[167] USTR, Notice of Bilateral Investment Treaty Program Review, available at <http://www.ustr.gov/about-us/press-office/blog/notice-bilateral-investment-treaty-program-review>, accessed 6 October 2011; see also Damon Vis-Dunbar, *United States reviews its model bilateral investment treaty,* 5 June 2009, Investment Treaty News, available at <http://www.iisd.org/itn/2009/06/05/united-states-reviews-its-model-bilateral-investment-treaty/>, accessed 6 October 2011.

[168] U.S. Trade Promotion Authority Act, 19 U.S.C. §§ 3803–3805 (2002; expired 2007).

[169] Chile, CAFTA-DR, Singapore, Morocco, Panama, Peru, Colombia and South Korea. Jordan and Bahrain have BITs in force. Only the FTA with Australia, which contains provisions on investment, lacks binding investor-state arbitration. *See* note 27, *supra.*

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a Trans-Pacific Partnership Agreement (TPP) is concluded the TPP will include investment provisions similar to those in the United States—Korea FTA and other recent U.S. FTAs[170] and to the 2012 Model U.S. BIT.[171]

With regard to federalism considerations, the individual states typically do not participate actively in proceedings under Chapter 11 although their attorneys-general may be consulted by the State Department, as appropriate. However, the federal system effectively requires coordination with state authorities where the basis of the Chapter 11 claim is state rather than federal action, as in *Methanex v. United States* (California)[172], *Mondev v. United States* (Massachusetts),[173] etc. The federal government has paid the costs of arbitration, except in cases where the tribunal has required the plaintiff loser pay all expenses, including outside attorneys' fees (e.g., in *Methanex*). One may question whether the *de facto* exemption from liability even when it is state action that resulted in the claim encourages cooperation of state authorities with the federal agencies in the defense of such claims.

The State Department's Office of the Legal Adviser and the legal office of USTR are among the most prestigious U.S. government law offices that consistently attract (and train if necessary) highly qualified and experienced international lawyers, and are thus capable of managing most cases on their own or with the input, as necessary, of other government legal offices. While neither are typically career legal offices, with many attorneys moving on eventually to private practice or academia, they both have been able to consistently attract highly competent replacements.[174]

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[170] *See* note 31, *supra*, and accompanying discussion in text.

[171] U.S. 2012 Model BIT," art. 12.3(2)(b), available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited May 8, 2012).

[172] *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, Ad hoc—UNCITRAL Arbitration Rules; IIC 167 (2005), OUP Investment Claims, *supra* note 95.

[173] Mondev International Ltd v United States, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (2002), 11 October 2002, OUP Investment Claims, *supra* note 95.

[174] See, e.g., Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis; The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010) (while focusing on the heads of the office, the legal advisers, the work provides evidence of a high degree of professionalism within the ranks).

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IV. CONCLUSIONS

To reiterate, there are a number of steps that host countries and their NCAs can take to improve their ability to respond effectively to the challenges of investor-state disputes. Many of these as indicated above relate to the creation of a well-staffed national coordinating agency with clear authority for inter-agency coordination and management of all stages of investor-state disputes including both settlement negotiations and the arbitral process. Experience and methodologies for retaining attorneys and choosing arbitrators wisely also enhances the ability of respondent governments to bring about successful resolution of investor-state disputes. Similarly, the NCA should be involved in the negotiation of new BITs and investment chapters and where appropriate the review of existing agreements to assist with coordination and consistency, and assure that the agreements remain beneficial to the host government. BITs and investment chapters in most instances remain important to facilitating the flow of foreign investment and thus will continue to be negotiated and implemented, but many negative effects when disputes arise can be mitigated by careful planning and organization.

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