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ARTICLE

The Agent's Indispensable Role in International Investment Arbitration

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Abstract—The practice of agents in international adjudication suggests important, under-appreciated roles for agents in international investment arbitration. Government agents generally enhance the State's credibility and reliability as a litigating party; increase the legitimacy of the adjudicative process; improve coordination and management of the State's international disputes; and help the State formulate litigation positions consistent with its broad, long-term legal and policy interests. These roles are no less essential to the effective representation of the State in international investment arbitration, to the legitimacy of the investment arbitration system and to the sound development of international law. Government agents, thus, are arguably as indispensable in international investment arbitration as they are in all other forms of international adjudication.

I. INTRODUCTION

States routinely appoint agents in international adjudication.[2] An agent often is a high-ranking government official who formally represents the State before the tribunal, coordinates and manages the litigation and helps formulate the State's litigation positions. Agents historically have been considered so essential that they were appointed 'universally' in international adjudication, whether or not the instrument establishing the tribunal contemplated their appointment.[3] One type of international adjudication presents a strikingly different practice: international investment arbitration. The ICSID Convention and the ICSID Arbitration Rules expressly contemplate the use of agents,[4] and some States appointed agents in

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[2] See Manley O Hudson, *International Tribunals: Past and Future* (Carnegie Endowment for International Peace and Brookings Institution 1944) 87: 'The representation of States before international tribunals has long been entrusted to persons specially appointed for the purpose, who are commonly designated as agents.'

[3] See eg Jackson H Ralston, *The Law and Procedure of International Tribunals* (Stanford University Press 1926) 192: 'The general management and control of all cases before an International Tribunal is in the hands of the agent, and with or without special reference to him in the protocol the governments are universally represented by such an officer.'

[4] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 22 (opened for signature 18 March 1965, entered into force 14 October 1966) (addressing immunities for 'parties, agents, counsel, advocates, witnesses or experts'); Rules of Procedure for Arbitration Proceedings (April 2006) rule 18(1): 'Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.' Notably,

early cases before the International Centre for Settlement of Investment Disputes (ICSID).[5] Today, however, States rarely appoint agents for international investment disputes. Many States, in fact, turn their investment disputes entirely over to external counsel, retaining no formal role for government lawyers.

At first glance, this departure from ordinary practice is unsurprising. For many States, international investment arbitration remains relatively novel,[6] and most governments lack a dedicated office for representing the State.[7] Investment arbitration also has become highly specialized, and governments may lack internal expertise. Further, international investment disputes may raise enormous financial, political and public-policy stakes. Government counsel may feel ill-equipped to defend the State effectively or even to properly instruct and supervise outside counsel.[8]

Many law firms, by contrast, contain experts in international investment arbitration. Some firms have particular expertise representing States. These firms often have seasoned international practitioners; relationships with arbitrators best suited for the dispute; access to published and unpublished sources; experience working with legal, valuation and industry experts; familiarity with arbitration practice and the various institutional and *ad hoc* arbitration rules; contacts at arbitral institutions; and a wealth of in-house resources that make them invaluable to States in high-stakes investment disputes.[9] Most States thus can benefit greatly from retaining leading international counsel 'who know how things work in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade'.[10]

But should States completely relinquish their international investment disputes to outside counsel? There are good reasons for caution. Outside counsel may not always fully understand a State's unique position in international investment arbitration. All outside counsel, of course, grasp the importance of vigorously defending the State against alleged breaches of its legal and contractual obligations. But a respondent State is no ordinary litigant. Every litigating State has multiple, overlapping roles and interests, which may vary in relative importance from case to case:

- *The sovereign State*—a respondent State is not simply a 'commercial entity'; it is a sovereign authority with a 'special character and responsibilities'.[11] The State may wield immense power over a foreign investor, including through

in the Permanent Court of Arbitration's (PCA) Optional Rules for Arbitrating Disputes between Two States (2012), each party 'shall' appoint an agent (art 4), while the PCA's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (1993) are silent on the appointment of agents.

[5] See eg *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) (identifying Sri Lankan government co-agents).

[6] United Nations Conference on Trade and Development (UNCTAD), *Investment Dispute Settlement Navigator* <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> accessed 31 January 2018 (reporting that, as of 31 January 2018, a majority of the 114 respondent States in investment arbitration have been sued three times or fewer).

[7] See Barton Legum, 'An Overview of Investment Arbitration Procedure' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 91, 92–3.

[8] See Sir Arthur Watts, 'Preparation for International Litigation' in Tafsir Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007) 327, 331 (one cannot 'underestimate the degree of damage which Counsel inexperienced in the ways of international tribunals can do to the effective presentation of the State's case').

[9] See Jeremy K Sharpe, 'Representing a Respondent State in International Investment Arbitration' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 41, 46.

[10] Keith Highet, 'A Personal Memoir of Eduardo Jiménez de Aréchaga' (1994) 88 ASIL Proc 577, 579.

[11] *CME Czech Republic BV v Czech Republic*, UNCITRAL, Final Award (14 March 2002) para 74 (separate opinion of Ian Brownlie, CBE, QC, on the issues at the quantum phase).

police, prosecutors, courts, armed forces, tax authorities and State-controlled press. Counsel must help ensure that the respondent State exercises that power in a manner consistent with its role as a voluntary participant in rules-based dispute resolution, resisting the temptation to abuse power for narrow litigation advantages.

- *The encumbered State*—a respondent State may be strong in principle but weak in practice. State litigants often face severe constraints—legal, political, logistical, financial, bureaucratic—that private parties often do not face. Counsel for the State must understand and manage the inevitable limits on the State's authority, capacity and resources that may hinder its ability to defend itself effectively.
- *The capital-importing State*—a respondent State often receives significant foreign investment. When a State defends an investment claim, it reveals to existing and prospective investors how that State treats an aggrieved foreign investor. Counsel for the State must litigate in good faith and avoid aggravating or politicizing investment disputes.[12] Responsible lawyering not only reduces the risks of provisional measures or costs awards against the State but also helps ensure that investors continue to view the State as hospitable to foreign investment.
- *The capital-exporting State*—many respondent States today export significant capital. The typical respondent State thus increasingly has its own foreign investors to protect.[13] The State also may need to bring claims or counterclaims against investors or espouse claims of its nationals. Counsel for the State must avoid making arguments that the State would not wish to see made against itself or its own investors in other cases.[14]
- *The heterogeneous State*—a respondent State is not a monolith. It comprises various entities at national and subnational levels. The defence of any one State entity may impact several others. Counsel must represent and protect the interests of the entire State, not just those of a single client ministry.
- *The global State*—no international investment dispute is neatly confined to the disputing parties. International investment disputes may implicate the State's broader legal, diplomatic and economic relationships with the investor's home State, other treaty parties and any number of third parties. Counsel for the State must litigate each investment dispute conscious of the State's broader role on the world stage.
- *The law-making State*—a respondent State is both litigant and potential lawmaker.[15] State pleadings before international tribunals are an important source of State practice and *opinio juris* for developing international law.

[12] See eg *Quiborax SA and Non-Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 593 (recognizing the State's obligation under the bilateral investment treaty (BIT) 'to refrain from harming the procedural integrity of the arbitration or aggravating the dispute').

[13] UNCTAD reports that, to date, nationals from 46 per cent of respondent States (53 of 114) have brought investment claims against other States. See Investment Policy Hub <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> accessed 31 January 2018.

[14] See eg *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) para 129 (rejecting a jurisdictional objection based partly on the Respondent's failure to advance the argument in 'a similar dispute'); *Glamis Gold Ltd v United States of America*, UNCITRAL, Claimant's Memorial (5 May 2006) para 530 (citing arguments that the USA had made when acting as a claimant in an espousal case).

[15] See eg Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

> International investment awards, moreover, often are treated as *de facto* precedent, despite their formal status as subsidiary means for determining international law rules. Counsel must ensure that State pleadings, including their treatment of prior arbitral awards, are carefully vetted for compatibility with the State's broader interest in the sound development of international law.

In short, counsel for the State must look beyond any particular investment dispute, keeping sight of the State's manifold roles and interests.[16] Adopting a wider perspective can, and should, constrain counsel's willingness to advance any available argument or win at any price. An overly narrow perspective may lead counsel to argue opportunistically, blind to competing imperatives or broader, longer-term considerations.

How, then, can a government best protect its legal and policy interests when engaging outside counsel for international investment arbitration? Governments may wish to designate a standing agent to represent the State. Through a designated agent, the government can help protect its varied interests while still benefiting from international counsel's experience and expertise.

II. The AGENT'S ROLE IN INTERNATIONAL ADJUDICATION

The practice of agents at other international tribunals offers useful lessons for international investment arbitration. Agents generally play three principal roles in international litigation: officially representing the State before the tribunal; coordinating and managing international litigation; and helping formulate the State's litigation positions. Each of these roles is critical to the effective representation of the State in international litigation.

A. *Agents Officially Represent the State*

An agent's primary responsibility is to officially represent the State before the tribunal.[17] The agent, in that sense, is the formal link between the State and the tribunal, receiving official communications, speaking authoritatively for the State and liaising directly with the tribunal, the secretariat, opposing counsel and interested third parties.[18] An agent thus has 'exclusive control' in respect of that

[16] See Vaughan Lowe, 'The Manifold Respondent: Multiparty Issues Involving States in Investor-State Arbitration' in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement* (OUP 2009) 281.

[17] See eg Convention for the Pacific Settlement of International Disputes (opened for signature 29 July 1899, entered into force 4 September 1900) art 37: 'The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal'; International Law Commission, *Model Rules on Arbitral Procedure with General Commentary* (1958) art 14: 'The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.'

[18] See eg International Court of Justice, 'Contentious Cases' <http://www.icj-cij.org/en/how-the-court-works> accessed 31 January 2018 (stating that the agent receives communications from the registrar concerning the case, sends the registrar all correspondence and pleadings duly signed or certified, opens the argument in public hearings on behalf of the government, lodges the submissions and performs any formal acts required of the State before the tribunal); Claims Settlement Declaration (19 January 1981) art VI(2): 'Each government shall designate an agent at the seat of the [Iran-US Claims] Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.' Abraham Howard Feller, *The Mexican Claims Commission* (MacMillan 1935) 286 (noting that the agent 'was obliged to take notice of all orders of the Commission and was entitled to receive copies of all pleadings and documents filed with the secretaries').

case[19] and 'full power to bind the Government and to take all the decisions necessary in the course of the proceedings'.[20] The appointment of a government agent offers three main advantages in this respect: (i) enhancing the State's credibility before the tribunal; (ii) improving the State's reliability as a litigating party; and (iii) increasing the legitimacy of the adjudicative process.

(i) *Enhancing credibility*

Agents often play a key role in establishing and maintaining a State's credibility before an international tribunal. The agent in international litigation acts not as a member of the bar but, rather, as a diplomatic representative of the litigating State[21] or perhaps even a 'judicial officer'.[22] As the French-Mexican Claims Commission opined:

> [T]he agents must be considered ... not just as lawyers, with freedom to formulate any kind of personal opinions, even if these opinions would be at odds with the views of their government, but as the official representatives of the latter. Were it otherwise, one would never know if the agent were offering personal opinions or the official point of view of his government, and the arguments would assume a hybrid and indefinable character. This interpretation of the role of agents is the only one that is consistent with customary international law in matters of arbitral procedure.[23]

Private agents may undermine a State's credibility in international adjudication. A 'freelance lawyer', Ian Brownlie observes, 'has his or her agenda, which may diverge substantially from that of the applicant State'.[24] But even when a private agent has no personal agenda, his or her very presence can create doubts as to the State's motivations. The *Armed Activities* case illustrates the concern. In June 1999, the Democratic Republic of the Congo instituted proceedings against Uganda before the International Court of Justice (ICJ), alleging 'acts of armed aggression perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter

[19] Shabtai Rosenne, 'The Agent in Litigation in the International Court of Justice' in William Kaplan and Donald McRae (eds), *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (McGill-Queen's University Press 1993) 41, 61. See also Permanent Court of International Law, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings* (1920) 340: '1. there had always to be an agent charged, among other things, with the receipt of formal notifications etc.; 2. the government being always *dominus litis*, the agent must be the representative of the government; 3. the question of the right of an individual to appear in the process on behalf of a government was a matter of the internal arrangements between the government and the person in question.'

[20] Shabtai Rosenne, *Law and Practice of the International Court 1920–2005* (Martinus Nijhoff 2006) 1179. See also *Filleting within the Gulf of St Lawrence between Canada and France*, Award (17 July 1986) reprinted in (1986) 19 UNRIAA 225, 265 (requiring France to use all means at its disposal to respect the declaration made by its agent during oral proceedings); *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (1 September 2006) para 49 (expressing 'no doubt as to the binding character' of statements made by the Argentine agent, who 'represents Argentina' in the proceedings and 'has authority to commit' the State to legal positions).

[21] Shabtai Rosenne, 'International Court of Justice: Practice Direction on Agents, Counsel and Advocates' in Shabtai Rosenne, *Essays on International Law and Practice* (Martinus Nijhoff 2007) 97, 99: 'Since the agent is the diplomatic representative of the appointing Government before the Court and before the other party and alone is authorized to make or confirm statements binding the appointing Government, the agent is not *in that capacity* a member of the bar and does not act as a member of the bar' (emphasis in original).

[22] See Feller (n 18) 317: 'The agent of a government stands in a much different position from the attorney of a private litigant. He should consider himself, to a certain extent, as a judicial officer, and pass upon all claims before their submission so that only such claims as are truly meritorious are presented for decision.'

[23] *Georges Pinson (France) v United Mexican States*, Decision No 1 (19 October 1928) (French-Mexican Claims Commission), reprinted in (1928) 5 UNRIAA 327, 355 (translation).

[24] Ian Brownlie, 'Why Do States Take Disputes to the International Court?' in N Ando and others (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer 2002) 829, 834.

of the Organization of African Unity'.[25] The Application was filed by a Belgian lawyer, acting as agent. During the provisional measures phase, Judge Oda expressed concern that 'a State appearing before the Court was not represented by a person holding high office in the Government acting as Agent, but by a private lawyer from another, highly developed, country'.[26] This had 'rarely been the case in the history of the Court', Judge Oda observed, casting doubt as to whether the case had been 'brought to the Court in the interest of the State involved or for some other reason'.[27] Perhaps to allay such suspicions, the State designated a government agent for the remaining proceedings.

In some instances, the absence of a government agent may fatally undermine the State's case. The *Diplomatic Envoy* case provides a dramatic illustration. In March 2006, the Commonwealth of Dominica accepted the ICJ's compulsory jurisdiction and acceded to the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning Compulsory Settlement of Disputes.[28] A month later, Dominica instituted proceedings against Switzerland before the ICJ, alleging that Switzerland's decision to withdraw accreditation of a Dominican diplomatic envoy violated the Vienna Convention on Diplomatic Relations.[29] Dominica's application was filed by a Swedish professor of international law, acting as agent.[30] Following the application's publication, a 'stunned' Dominican press reported that Dominica's 'diplomatic envoy' was actually a Russian businessman living in Monaco who had paid a substantial sum to obtain a Dominican passport and who had invoked diplomatic immunity in Switzerland to avoid civil liability there.[31] Just three weeks after Dominica filed its Application, the country's prime minister 'informed the Court that his Government [did] not wish to go on with the proceedings' and formally requested that the case be removed from the Court's General List.[32] Dominica's private agent, for her part, stated that she was 'unaware of the complex background of some personalities involved in the case' and was unhappy with the pressure exerted 'to follow instructions from outside sources'.[33]

This problem, in principle, should not arise when the State appoints a government agent. When a government agent appears for his or her State, a tribunal generally has no reason to doubt the government's motivations.[34]

[25] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) Application Instituting Proceedings* [1999] ICJ Rep 1, 5.

[26] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) Request for the Indication of Provisional Measures* [2000] ICJ Rep 131, 132 (Declaration of Judge Oda dated 1 July 2000).

[27] ibid.

[28] See International Court of Justice (ICJ), 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' (Commonwealth of Dominica) <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> accessed 31 January 2018; United Nations, 'Depositary Notification, Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes 18 April 1961, Dominica: Accession' (27 March 2006) <https://treaties.un.org/doc/Treaties/1964/06/19640624%2010-27%20PM/Related%20Documents/CN.253.2006-Eng.pdf> accessed 31 January 2018.

[29] See *Application Instituting Proceedings Concerning Violations of Rules Concerning Diplomatic Relations (Commonwealth of Dominica v. Switzerland)* (March 2006), available at <http://www.icj-cij.org/files/case-related/134/10735.pdf> accessed 31 January 2018.

[30] ibid 7.

[31] Thomson Fontaine, 'How A Russian Became Dominica's Ambassador' *TheDominican.net* (16 May 2006); see also Max Hilaire, 'Case Concerning Violation of the Vienna Convention on Diplomatic Relations Dominica v. Switzerland' *TheDominican.net* (16 May 2006).

[32] See *Case Removed from the Court's List at the Request of Dominica*, ICJ Press release 2006/23 (12 June 2006) (quoting letter dated 15 May 2006).

[33] 'Dominica Government to Withdraw Case against Switzerland at the ICJ' *TheDominica.net* (12 June 2006).

[34] 'What is required of agents', Rosenne observes, 'is that they should act in good faith and candour, and that their personal integrity is never in doubt'. Rosenne (n 20) 1172. But see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgment* [2007] ICJ Rep 43,

The government agent's participation thus strengthens the impression that the litigating State 'is genuinely committed to the positions being presented to the Court'[35]—a concern no less relevant in international investment arbitration.[36]

(ii) *Improving reliability*

A second advantage to using a government agent is that it may enhance the State's reliability as a litigating party. An agent is expected to have sufficient knowledge of the case to address any questions at hand 'fully and faithfully'[37] and sufficient authority to 'make decisions on the spot'.[38] This is particularly relevant for issues bearing on governmental policy and the relationship between the tribunal's authority and the State's prerogatives.[39]

A private agent may be less reliable and, hence, less effective. The *Grand Prince* case is illustrative.[40] In December 2000, French authorities seized a Belize-flagged fishing vessel, the *Grand Prince*, charging its master with unlawful fishing in the exclusive economic zone of the French Southern and Antarctic Territories. Belize lodged a claim against France before the International Tribunal for the Law of the Sea, principally seeking the vessel's prompt release. Belize's application was filed by a Spanish lawyer, acting as agent.[41] The Tribunal found insufficient evidence to establish that, at the relevant time, Belize was the flag State of the vessel and, thus, dismissed the Application for lack of jurisdiction.[42] Judge Ad Hoc Cot expressed concern over Belize's appointment of a private agent to represent the State. Because 'a lawyer-agent is not necessarily in close contact with the authorities of the flag State', the 'reliability of the information he provides as to the legal position of the flag State may be questionable'.[43] He further lamented the 'incomplete and contradictory information on the registration of the vessel and the position of Belize as to the nationality of the *Grand Prince*', implying that a government agent might have better addressed these issues.[44] The agent's reliability is further compromised, Judge Cot later warned, 'if the lawyer has only distant relations with

52–3 (discussing confusion regarding a co-agent's appointment and request to terminate proceedings before the Court).

[35] Michael J Matheson, 'Practical Aspects of the Agent's Role in Cases before the International Court' (2002) 1 L Prac Intl Ct Trib 466, 471.

[36] See section II.C below.

[37] Rosenne, 'International Court of Justice (n 21) 97, 99. See also Statute of the International Court of Justice (opened for signature 26 July 1945, entered into force 24 October 1945) art 49: 'The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.'

[38] See Matheson (n 35); *Pulp Mills on the River Uruguay (Argentina v Uruguay) Request for the Indication of Provisional Measures* [2006] ICJ Rep 113, 134 (relying on statements to the Court by the respondent State's government agent when denying a request for provisional measures by the applicant State).

[39] Matheson (n 35) 472; Eduardo Valencia-Ospina, 'International Courts and Tribunals, Agents, Counsel and Advocates' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2018) para 3 (agents 'play an important role in formulating and implanting the policy tenets on which the judicial position of the State is founded').

[40] *The 'Grand Prince' Case (Belize v France)*, ITLOS Case No 8, Application for Prompt Release, Judgment (20 April 2001).

[41] *Application for Prompt Release of Fishing Vessel 'Grand Prince' under Article 292 of the United Nations Convention on the Law of the Sea* (21 March 2001).

[42] ibid para 93. According to Belize, 'at the time of its detention, the vessel was going to be reflagged and registered in Brazil where the vessel had been allocated a fishing licence': ibid para 33.

[43] *The 'Grand Prince' Case (Belize v France)*, ITLOS Case No 8, Application for Prompt Release (20 April 2001) [2001] ITLOS Rep 51, 53 (Declaration of Judge Ad Hoc Cot) (translation).

[44] ibid (translation).

the government he is supposed to represent, or only with certain branches of the government',[45] as apparently occurred in the *Grand Prince* case.[46]

The appointment of a government agent should lessen these concerns, particularly where the agent has sufficient knowledge and authority to respond to tribunal questions on the spot or to obtain cleared government positions in reasonably short order.[47] States appearing before the ICJ, for instance, often appoint as agent the State's principal international lawyer (such as the foreign ministry legal adviser) partly for this reason.[48] For its international investment disputes, the State may wish to appoint a standing agent with appropriate seniority, subject matter expertise and litigation experience. Although there generally are no formal requirements for serving as an agent in international litigation,[49] the agent should have sufficient authority, knowledge and availability to enhance the State's reliability as a litigating party.[50]

(iii) *Increasing legitimacy*

A third advantage to using a government agent is that it may help promote the legitimacy of the adjudicative process. The appointment of a government agent helps ensure that international litigation is procedurally proper and is perceived as such. The appointment of a private agent may raise legitimacy concerns. The *European Communities–Bananas* case is illustrative.[51] There, the government of Saint Lucia had sought permission to be represented by outside counsel before the World Trade Organization's Dispute Settlement Body. The complaining parties objected, arguing that such private representation in a dispute involving sovereign States raised 'a number of questions concerning lawyers' ethics, conflicts of interest, representation of multiple governments and confidentiality'.[52] Although the Panel accepted the complaining parties' argument, the Appellate Body

[45] Jean-Pierre Cot, 'Appearing "for" or "on behalf of" a State: The Role of Private Counsel before International Tribunals' in Nisuke Ando and others (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer 2002) 835, 842. Despite the caution, Judge Cot argued that a State 'may have good reasons to think a competent New York law firm will more adequately further its interest than a less experienced domestic official', and, thus, he saw 'no ground for formal exclusion of private parties acting as agents, unless the statute of the tribunal stipulates otherwise'). ibid 840.

[46] *The 'Grand Prince' Case (Belize v France)*, ITLOS Case No 8, Application for Prompt Release (20 April 2001), [2001] ITLOS Rep 54 (Separate Opinion of Judge Anderson): 'The Agent appointed by Belize is not well placed, as a non-Belizean lawyer in private practice in Spain, to explain to the Tribunal the seeming inconsistencies in the statements of different government departments and agencies in Belize.'

[47] See Franklin Berman, 'Article 42' in Andreas Zimmermann and others, *The Statute of the International Court of Justice, A Commentary* (OUP 2012) 1078, 1082: 'The Court is entitled to expect that any matter which requires particular knowledge of the country appearing as a party before it should have its authentic expression out of the mouth of the agent, not that of employed counsel; this would include, for example, the political background to a dispute, and its context in the history of the State in question and its international relations, not to mention the policies of the State concerned.'

[48] Matheson (n 35) 476–7: 'The foreign ministry legal adviser is likely to have experience in international litigation and negotiation, or at least to have a staff that has such experience. He or she can easily draw on the personnel and resources of the foreign ministry. He or she is usually close to the foreign minister and other foreign policy officials, is likely to have close working relationships with counterparts in other agencies … and is therefore in a good position to obtain the necessary policy decisions and to speak authoritatively for the party.'

[49] See Valencia-Ospina (n 39) para 3: 'No special qualifications have to be met by the person so appointed [as agent], whether as to nationality, profession or on any other ground.'

[50] See eg Sir Arthur Watts, 'The ICJ's Practice Directions of 30 July 2004' (2004) 3 L Prac Intl Ct Trib 385, 387 (noting that very senior government agents may 'find it difficult to fit suddenly-convened meetings with the President into their schedules'). Berman (n 47) 1083 (recommending against the appointment of co-agents, which 'is liable to introduce a confusion between the position internally, within the litigating team, and the essential role of the agent externally, vis-à-vis the Court').

[51] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body (9 September 1997).

[52] ibid para 9 (reciting complaining parties' concerns).

overturned the decision, powerfully affirming a State's right to designate counsel of its choice.[53] The complaining parties' unsuccessful objection nonetheless highlights valid concerns about private actors standing in the shoes of States in international adjudication.

These concerns are particularly acute in international investment arbitration, where outside counsel may represent multiple private parties and States while simultaneously acting as arbitrator or expert in other investment disputes involving other private parties and States. It is now said to be common for investment arbitration lawyers to wear multiple hats, including as arbitrator, counsel, academic and expert witness.[54] Having the same lawyers advocate, adjudicate and opine on similar issues in different cases for different clients, it is said, can compromise the integrity of the arbitral process.[55]

The North American Free Trade Agreement (NAFTA) Chapter 11 case *Gallo v Canada* illustrates this concern. There, the Claimant challenged the arbitrator appointed by Canada, alleging that his decision to continue providing legal services to Mexico following his appointment in *Gallo* gave rise to justifiable doubts as to his impartiality or independence, given Mexico's right under NAFTA Article 1128 to intervene in *Gallo* on questions of treaty interpretation.[56] Although ICSID's Deputy Secretary-General rejected the challenge, he required the challenged arbitrator to choose between continuing to provide legal services to Mexico and sitting as an arbitrator in *Gallo*. He concluded:

> By serving on a tribunal in a NAFTA arbitration involving a NAFTA State Party, while simultaneously acting as an advisor to another NAFTA State Party which has a legal right to participate in the proceedings, an arbitrator inevitably risks creating justifiable doubts as to his impartiality and independence.[57]

The appointment of a government agent should allay these concerns. When a State appoints a government agent, the State subordinates private counsel to the agent's direction.[58] Whatever that lawyer may do in another capacity—including acting as arbitrator or expert—should be less relevant whenever he or she, acting as counsel, serves under the supervision and control of a State agent.[59] A State may reinforce its superior position by requiring the agent to sign or countersign pleadings,[60] formally state or confirm official positions on procedural and

[53] ibid (concluding that 'representation by counsel of a government's own choice may well be a matter of particular significance—especially for developing country members—to enable them to participate fully in dispute settlement proceedings').

[54] See Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration (17 March 2016), discussing criticisms.

[55] ibid.

[56] *Vito G Gallo v Government of Canada*, UNCITRAL, PCA Case No 55798, Decision on the Challenge to Mr J Christopher Thomas, QC (14 October 2009). North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) (NAFTA).

[57] *Gallo* (n 56) 30.

[58] See Hudson (n 2) 88: 'Appearance by counsel is usually subordinated to the agent's direction'; Keith Highet, 'Problems in the Preparation and Presentation of a Case from the Point of View of Counsel and of the Court' in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff 1997) 127, 129 (observing that 'counsel are not autonomous, but are under their agents' control').

[59] The appointment of government agents, of course, does not concern arbitrators simultaneously acting as counsel for private claimants.

[60] See eg ICJ Rules of Court (ICJ Rules) (1 July 1978) art 52(1): 'The original of every pleading shall be signed by the agent and filed in the Registry'; Feller (n 18) 285–6 (noting that agents at the US-Mexican Claims Commission were 'required to subscribe or countersign every memorial' and 'to file notice ... that a case was ready to be submitted').

substantive matters[61] and make final submissions to the tribunal.[62] In such circumstances, there should be less concern that arguments advanced by the State accurately reflect its own legal and policy views rather than those of any individual member of its counsel team.

B. *Agents Coordinate and Manage International Litigation*

Most international disputes require a diverse team of lawyers, experts and administrative personnel. An agent's active leadership helps ensure that cases are adequately researched, prioritized and coordinated; divergent views are managed and reconciled; and pleadings and arguments are harmonized for clarity, consistency and cogency.[63] International investment arbitration requires no less. Indeed, the States parties to most international investment agreements have given their advance consent to investors to seek money damages for breaches of broad substantive obligations, exposing States to claims by a potentially large number of sophisticated foreign investors.[64] A claimant investor, of course, may have no prior experience in international investment arbitration. But a claimant generally has the advantage of time to carefully assess and prepare its case. A well-prepared claimant may take many months to assemble pertinent documents, interview witnesses, analyse facts, research legal issues, identify the arbitrators most suitable for its case, evaluate and select among available arbitration rules, prepare its arbitration request and raise the substantial funds required to prosecute its claims.[65]

To help ensure an equality of arms in international investment arbitration, governments generally require five things: (i) standard operating procedures for handling notices and claims; (ii) proper authorities to ensure that the responsible government office can take steps necessary to represent the State effectively; (iii) appropriate coordination within and outside the government; (iv) the ability to properly designate, instruct and supervise counsel; and (v) access to adequate financial resources to pay the costs of counsel, experts, the tribunal and any administering institution. The appointment of a standing agent can help the State satisfy each of these essential requirements.

[61] Matheson (n 35) 469: 'The Court may also call on the agent from time to time to state or confirm the formal position of the party on procedural or substantive matters'; Hudson (n 2) 87–8 (noting that the agent must have the capacity to assume the State's 'presentation of its contentions, though the responsibility is frequently entrusted to counsel acting under his direction'); John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (US Government Printing Office 1898) 910 (quoting the US agent's statement in the *Fur Seal* arbitration that he appeared, in the 'proper discharge of [his] duty', to 'present a motion on behalf of the Government of the United States', which counsel for the USA would then argue). *Fur Seal Arbitration (United Kingdom v United States)*, Decision (15 August 1893), XXVIII RIAA 265 (United Nations 2007).

[62] See eg ICJ Rules (n 60) art 60(2): 'At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions.'

[63] See Matheson (n 35) 471–2.

[64] See eg Barton Legum, 'Defining Investment and Investor: Who Is Entitled to Claim' (2006) 22 Arb Intl 521, 525 (host State officials ordinarily 'will *never know* at the time they must take action whether a given company is covered by a given treaty', and, thus, 'the only way to comply with the treaty is for the host state to assume that *all investors*—all companies—are covered by the highest standards of any BIT in force for the state') (emphasis in original).

[65] See Sharpe (n 9) 44; O Thomas Johnson and David Z Pinsky, 'Representing Claimant: Pre-Arbitration Considerations' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 19, 33.

(i) *Standard Operating Procedures for Receiving and Addressing Arbitration Notices and Requests*

States typically require ample time to learn of, investigate and prepare for an international investment dispute. Most international investment agreements seek to give States that time by imposing notice requirements and 'cooling-off' or amicable settlement periods[66] before a dispute can be brought to arbitration.[67] That time is meant to allow 'the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations'.[68] Notice and cooling-off provisions typically are sound in principle but defective in practice. International investment agreements frequently fail to designate an office or person responsible for receiving documents, including during the notice and cooling-off period.[69] Investors thus may send documents to the ministry whose measures gave rise to the dispute. Line ministries, however, may have little understanding of, or experience with, international investment arbitration and, thus, may squander the cooling-off period.[70] Other investors may consider it prudent to send their notices and requests to multiple ministries, perhaps even copying the State's president or prime minister. Each government office may assume that another is responsible, and no one takes charge. Vietnam's neglect in assigning responsibility early in an investment dispute, for example, reportedly led to its failure to appoint an arbitrator and meet arbitration deadlines, jeopardizing its defence.[71]

The State must ensure that the right government official receives and takes action on any notices and requests without delay. This requires the State to put in place, across the government, standard operating procedures for handling such documents. Vietnam, for instance, has learned from experience and now requires State agencies to transmit to the 'presiding agency' within three days any notices or requests received.[72] Peru similarly established an investment dispute coordination and response system, which requires Peruvian State agencies to report notices and requests within five days.[73] Such procedures minimize the risk of the

[66] Cooling-off periods require that a certain period has elapsed before arbitration can begin but do not require parties to engage in negotiations. Amicable settlement provisions, by contrast, generally call for a bona fide attempt to consult and negotiate to reach an amicable settlement.

[67] Joachim Pohl and others, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (2012) OECD Working Papers on International Investment 17: 'Almost 90% of the treaties with ISDS provisions require that the investor respect a cooling-off period before bringing a claim.'

[68] *Western NIS Enterprise Fund v Ukraine*, ICSID Case No ARB/04/2, Order (16 March 2006) para 5.

[69] See eg Legum (n 7) 92–3: 'It is now perhaps more the rule than the exception for there to be lack of clarity as to which ministry is responsible for the file' in international investment arbitration.'

[70] See eg Nguyen Thanh Tu and Vu Thi Chau Quynh, 'Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform' (2014) TDM 1, 5, n 19: 'A few officials involved in the beginning of ISDS proceedings even argued that foreign investors might not bring an action against Vietnam because Vietnam had independent sovereignty and immunity.'

[71] Nguyen and Vu (n 70) 5 (discussing the serious difficulties arising from a 'lack of institutional coordination among relevant agencies and a permanent lead agency in charge of ISDS'); see also Vilawan Mangklatanakul, 'Thailand's First Treaty Arbitration, Gain from Pain' in Susan Franck and Anna Joubin-Bret (eds), *Investor-State Disputes: Prevention and Alternatives to Arbitration* (UNCTAD 2011) 81, 82–3 (reporting that Thailand similarly failed to assign such responsibility early in the proceedings, inviting criticism of the government for the ensuing loss).

[72] See Vietnam, Prime Minister's Decision No 04/2014/QD-TTg (14 January 2014) art 11(2) (Vietnam Decision). If no 'presiding agency' has been identified, notices must be sent to the 'directly superior agency and the Ministry of Justice'. ibid.

[73] Law No 28933 Establishing the State Coordination and Response System for International Investment Disputes (15 December 2006) art 5.1.b; Vanessa Rivas Plata Saldarriaga, 'Challenges of Addressing Investment Retention: The Peruvian Case' APEC Capacity Building Workshop on Approaches to Implementing Investment Commitments (7–8 December 2017). See also Presidential Decree No 303-15 on the System for Prevention of Disputes (1 October 2015) art 6 (Dominican Republic Decree) (requiring public entities and agencies in the Dominican Republic to inform the lead State agency (LSA) of potential investment disputes within three working days).

State compromising its defence during the critical, early months of a dispute through mere inattention, disorganization or confusion.[74]

A standing agent should be appointed to receive all notices and requests. The agent may then publish his or her contact information, informing investors where to send arbitration documents.[75] This practice also helps line ministries immediately know where to turn when investors raise questions, complaints or disputes, thus promoting proper use of cooling-off or amicable settlement periods. A standing agent also may issue guidance to investors on the form, content and language of any notice of dispute. Because international investment agreements typically demand few details from prospective claimants, investors may not reveal information sufficient for the State to properly assess prospective claims. To facilitate information sharing, a standing agent may wish to publish a template notice of dispute. The three NAFTA parties, for instance, published a simple form notice of intent to submit a claim to arbitration.[76] This 'recommended' form invites prospective claimants to provide basic information about themselves, their investment and their claim, including relevant facts, legal provisions allegedly breached and the precise relief being sought. The form ostensibly helps prospective claimants satisfy the procedural requirements of NAFTA Chapter 11. But it also helps the NAFTA States better understand the nature of the dispute before it has crystallized into an arbitration claim. A more detailed notice form allows an agent to gauge the strength of the claim on jurisdiction, merits and quantum.[77] This helps the agent better determine whether to seek to mediate or settle the claim or to begin actively preparing for arbitration.

(ii) *Authorities*

Standard operating procedures are necessary but not sufficient. The State also must establish laws, regulations, decrees or directives to ensure that the responsible government official has authority to take all steps necessary to represent the State effectively.[78] States are advised first to designate a lead State

[74] See eg 'Pakistan Continues to Show Up Late to Defend Itself in Investor Arbitrations, Thereby Losing a Voice in Selection of Arbitrators' *IAReporter* (8 August 2013) (discussing three cases in which the State defaulted in the selection of its party-appointed arbitrator in international investment arbitrations).

[75] See eg US Department of State, 'International Claims and Investment Disputes' <https://www.state.gov/s/l/c3433.htm> accessed 31 January 2018 (providing contact details for the service of 'notices and other documents in disputes' under US international investment agreements). Many modern international investment agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, not yet entered into force). <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> (accessed 17 July 2018) (CPTPP), include relevant contact information.

[76] Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration <https://www.state.gov/documents/organization/38792.pdf> accessed 31 January 2018.

[77] Some States fear that preparing a draft notice of intent will encourage claims by making them easier to file. The opposite is probably more often the case. Offering prospective claimants a checklist for viable claims invites them to make an early assessment of whether they are proper 'investors' with covered 'investments' with actual treaty claims against the State giving rise to compensable damages.

[78] See eg Procedures Ensuring Representation in International Investment Dispute Settlements, Cabinet of Ministers Legal Provision No 228 (10 May 2017) (Latvia); Decree 125 Creating an Interministerial Committee for the Defense of the State in International Investment Disputes and Regulating the Coordination for the Settlement of such Disputes (23 August 2016) (Chile); Dominican Republic Decree (n 73); Decision to Create an Inter-Department Commission to Act on Requests from Foreign Investors in Connection with Disputes Arising from Bilateral Treaties of the Republic of Croatia in the Field of Providing Incentives for and Protecting Investments (27 March 2014) (Croatia); Vietnam Decision (n 72); Regulations for the Prevention and Management of International Trade and Investment Disputes, No 35452-MP-COMEX (11 August 2009) (Costa Rican Law); Law No 28933 Establishing the State Coordination and Response System for International Investment Disputes (15 December 2006) (Peru).

agency (LSA) for international investment disputes.[79] The LSA might be a ministry—such as the finance, foreign affairs, justice or trade ministry—or an interagency group.[80] Within the LSA, a standing agent then should be given primary authority to represent the State during all phases of an international investment dispute.[81] The agent thus should have enumerated powers to:

- serve as a primary interlocutor for aggrieved foreign investors;[82]
- serve as a central resource for, and advisor to, government agencies and State enterprises on investment dispute prevention, mitigation and management;[83]
- engage in mediation, conciliation and negotiation and to conclude binding settlement agreements and awards on agreed terms;[84]
- obtain necessary documents, interview personnel and procure witness testimony from State agencies and enterprises[85] involved in international investment disputes;[86]
- receive confidential or sensitive information from all government entities and enterprises and assert available privileges for the State;[87]
- select, instruct, supervise and pay (or facilitate payment of) outside counsel, experts and consultants;[88]
- formally represent the State in international investment arbitration, including on procedural and substantive matters;

[79] See eg David A Pawlak and José Antonio Rivas, 'Managing Investment-Treaty Obligations and Investor-State Disputes: A Guide for Government Officials' in Mary Mourra and Thomas Carbonneau (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* (Kluwer 2008) 163, 177: '[T]he designation of a Lead State Agency (LSA) is critical to the State's ability to address the investor's complaint.'

[80] See Iryna de Meyer and others, *Best Practices in Conflict Prevention and Management* (Energy Charter Secretariat 2016) (identifying various LSAs, including the finance ministry (Bulgaria, Czech Republic and Slovak Republic), justice ministry (Vietnam), foreign ministry (USA), and interagency groups (Chile, Costa Rica and Peru).

[81] See eg Sharpe (n 9) 58–60; Pawlak and Rivas (n 79) 177–8; de Meyer (n 80).

[82] Some States have established investment ombudsmen or other independent public offices to help resolve investor disputes and, potentially, issue binding or non-binding recommendations to state institutions. See de Meyer (n 80) 6–23. For such States, the agent can add valuable institutional perspectives and assistance.

[83] The agent may wish to provide information for government personnel to use before disputes arise (such as a readable, user-friendly pamphlet or handbook on relevant legal obligations), once disputes arise (such as a template memo for agency lawyers and non-lawyers about the arbitration process and requirements, including document retention and production) and during or after disputes (such as talking points for engaging with media, other investors and foreign-government officials).

[84] See Feller (n 18) 288 (noting that the rules of the British-Mexican Claims Commission provided that 'agents might meet as often as they thought necessary for discussion of a claim with a view to reaching an agreement, that such discussion should be on a confidential basis and should not deprive an agent of the right to contest the case without reference to any offers exchanged or concessions made in negotiations if no settlement was arrived at and providing for the filing of agreements to settle').

[85] Where the State cannot exercise legal authority or control over a government entity—such as a state, province or other subnational entity—the agent may need to engage in outreach, education and confidence building to ensure cooperation and support throughout the proceedings. See eg Government of Canada, *International Trade Agreements and Local Government: A Guide for Canadian Municipalities* (2017 Update).

[86] See eg Costa Rican Law (n 78) art 2: 'Public entities and agencies shall … [provide] information and documentation required by law and the technical staff that may be required to prepare the defence of State interests, as determined by the entities appointed in these Regulations to manage such disputes' (translation); Dominican Republic Decree (n 73) art 10(6) (requiring government entities and agencies to provide the LSA with 'information, documents, files or other matters necessary for the defense of the State' within five working days of any request) (translation).

[87] See *Apotex Holdings and Apotex Inc v United States of America*, ICSID Case No ARB(AF)/12/1, Award (25 August 2104) para 8.72 (discussing the legal impediment preventing the USA from obtaining documents from a federal agency, for 'which the Respondent must accept the legal consequence').

[88] It is essential to have the agent's or LSA's contracting authorities sorted early to prevent confusion and delay. See eg Dominican Republic Decree (n 73) art 10(4) (authorizing the LSA '[t]o coordinate the contracting of legal counsel, experts and external advisors for defense proceedings … and fully execute the procedures established in public procurement regulations in light of the special nature of the cases and matters involved') (translation).

- consult with other government officials on existing and potential cases and on significant developments in international investment law and policy;[89]
- serve as the primary voice to the media, parliament and others outside the government on international investment disputes;[90]
- centralize and retain records of international investment disputes for policy-makers and counsel;
- publish relevant arbitration documents, including pleadings, non-disputing party submissions and awards;
- consult with the State's own investors who may have existing or potential claims against other States, including local procedures for resolving disputes (for example, administrative procedures, local courts), international procedures (for example, negotiation, mediation, arbitration)[91] or possible espousal of claims;[92]
- make non-disputing party submissions or other official statements on treaty interpretation and on arbitral awards;
- participate in any joint interpretations of international investment agreements;
- engage in formal or informal discussions with other agents, counsel, members of parliament, civil society and interested third parties on matters of international investment law, policy and practice;[93]
- advise the State on the negotiation of international investment agreements and the preparation of model investment agreements;[94]
- participate in capacity-building programs, such as conferences, seminars and workshops;
- coordinate the State's compliance with tribunal orders, decisions and awards; and
- coordinate any post-award remedies, including set-aside or annulment applications.

These responsibilities are mutually reinforcing and promote effective management. An agent with early awareness of investor grievances is better placed to help resolve disputes amicably. An agent with clear responsibility and authority for

[89] See eg Arthur W Rovine, 'The Role of the United States Agent to the Iran-U.S. Claims Tribunal, 1981–1983' (1992) 3 Am Rev Intl Arb 223, 231 (one of the agent's 'most significant functions' is reporting to the government on 'all significant developments', with an analysis of issues, recommended solutions and responses to inquiries).

[90] See eg Meg Kinnear and Aïssatou Diop, 'Use of Media by Counsel in Investor-State Arbitration' (2006) ICCA Congress Series No 13, 40, 47 (recommending a government media strategy early in the arbitral proceedings); ICSID Practice Notes for Respondents in ICSID Arbitration (2015) 12; Dominican Republic Decree (n 73) (establishing LSA as the government's sole official channel for communicating to third parties on international investment disputes).

[91] See eg US State Department's Office of the Legal Adviser, Office of International Claims and Investment Disputes, 'Bilateral Investments, Other Bilateral Claims and Arbitrations' <https://www.state.gov/s/l/c7344.htm> accessed 31 January 2018 (reporting that the office has lead responsibility in the US government for pursuing 'claims under international law brought by U.S. nationals against foreign governments', which 'most often relate to the expropriation of property and investment disputes'); Rovine (n 89) 228: '[O]ne of the key functions that [the agent] would have to perform was consultation with claimants, most often with their attorneys, in order to advise on Tribunal jurisdiction, procedures, practices, legal precedents, and the UNCITRAL Rules.'

[92] See eg *Republic of Italy v Republic of Cuba*, Ad Hoc State–State Arbitration, Final Award (15 January 2008) (concerning Italy's diplomatic espousal of claims of companies linked to Italy under the State–State provision of the Italy–Cuba BIT). Agreement Between the Government of the Italian Republic of the Government of the Republic of Cuba on the Promotion and Protection of Investments (signed 7 May 1993, entered into force 23 August 1995).

[93] States should use their international diplomatic networks to liaise with treaty partners and third parties abroad.

[94] Despite the slowdown in the pace of negotiations in recent years, some 150 States currently are negotiating nearly 60 new international investment agreements (IIAs) (including several important 'mega-regional' agreements), and at least 60 States have developed or begun developing new or revised model agreements. See UNCTAD, *World Investment Report* (2016) 101; UNCTAD, 'Taking Stock of IIA Reform' IIA Issues Note (March 2016) 5–8.

resolving investment disputes is better placed to defend the State in international investment arbitration. And an agent with experience litigating international investment disputes is better placed to advise the government on international investment policy and the negotiation of the State's future international investment agreements.

(iii) *Coordination*

Government officials may view international arbitration as a 'loss of liberty' or an 'attack on the sovereignty of the State'.[95] Claims against the State may lead to turf battles, blame shifting and recrimination.[96] With millions or potentially billions of dollars at stake in international investment arbitration, a respondent State must ensure a whole-of-government approach. A standing agent can help minimize bureaucratic dysfunction and maximize cooperation and collaboration inside and outside of the government. The agent first must coordinate disputes within the government. After identifying relevant State actors, the agent can begin educating them on the arbitration process, advising on dispute-resolution options, establishing a working relationship based on trust and mutual understanding and ensuring timely cooperation going forward.

The agent can then begin preparing the State's case. Proceedings before international tribunals generally require large teams to research facts; assemble and produce documents; prepare fact and expert witnesses; and draft pleadings.[97] A standing agent can serve both as a manager and a primary point of contact within the government, including for outside counsel. The State may wish to designate an interagency group to support the agent's coordination and management efforts. An interagency group can provide:

- points of contact across the government and state enterprises, who may have relevant knowledge and experience;
- a forum for discussing and agreeing on legal and policy positions to ensure that the State advances reasonable, balanced and consistent arguments in

[95] Hazel Fox, 'States and the Undertaking to Arbitrate' (1988) 37 ICLQ 1, 4: '[U]nlike the situation of the private party who chooses flexibility of the arbitral process as an escape from the strict requirements of litigation, arbitration in any form is for the State a loss of liberty, an acceptance of constraints from which it is otherwise free.'; Pierre Lalive, 'Some Threats to International Investment Arbitration' (1986) 1 ICSID Rev—FILJ 26, 33: 'In the case of investment, many host countries still regard recourse to arbitration as an attack on the sovereignty of the State and on the jurisdiction of its national courts in the field of state contracts.'

[96] See eg Nicolas Palau van Hissenhoven, 'Colombia' in *Participation in UNCTAD's High-level IIA Conference–Geneva* (10–11 October 2017) <http://investmentpolicyhub.unctad.org> accessed 31 January 2018 (following the receipt of 11 notices of dispute in 2016–17, 'a mini crisis ensued', in which '[t]he Ministry of Mining blamed the Ministry of Environment, the Ministry of ICT blamed the Constitutional Court, everyone blamed the Ministry of Trade for what it had signed, the Ministry of Finance blamed everyone'); Nguyen and Vu (n 70) 5: 'In the process of preparations of submissions and document production in most of the cases, the ad hoc lead agency did not receive cooperation and coordination in a timely and effective manner from relevant agencies, including the agency responsible for the dispute, such as a municipality. Relevant agencies sometimes failed to provide the lead agency with important evidence relating to the dispute.'

[97] Watts (n 8) 331: 'While the external Counsel may be at the sharp end of the State's preparation and presentation of its case, they are only a part of the much larger team which the State will need to assemble for the purposes of the litigation. The team taken as a whole will comprise representatives of all the disciplines which are relevant to the particular case, and may include the State's own nationals or persons from other States: the essential requirement is that the State should have at its disposal the best possible expertise, from wherever it might come.' See also Ian Brownlie, 'Problems of Specialisation' in Bin Cheng (ed), *International Law: Teaching and Practice* (Stevens & Sons 1982) 109, 111: 'The Practitioner is, or should be, particularly aware of the absurdities of approaching problems in terms of supposedly autonomous areas of international law.'

international disputes and that negotiated treaties properly reflect and advance those positions;[98]

- broad government support for and concurrence with important litigation decisions, such as counsel and arbitrator appointments, case strategy and principal lines of argument; and
- appropriate political cover, to facilitate claims settlement, insulate the agent against pressure from inside and outside of the government and prevent excessive risk avoidance by the agent (such as overspending on outside counsel or refusing to consider non-binding dispute-settlement options).[99]

Interagency coordination by can be formal, even compulsory.[100] Colombia, for instance, formally established a 'High Level Government Body' to support the LSA in international investment disputes, comprising the ministers of justice and law; finance; foreign affairs; trade, industry and tourism; the general counsel to the office of the president; and two external advisors.[101] Interagency coordination also can be informal. In the USA, for instance, the Department of State, as the LSA, engages in extensive interagency coordination with other federal agencies, including on individual submissions in investment disputes in which the USA is a party or non-disputing party.[102]

The NAFTA Chapter 11 case *Loewen v United States* illustrates the benefits of robust interagency coordination in international investment arbitration.[103] There, the claimants sought $750 million in damages for injuries arising out of civil litigation in Mississippi state courts in the mid-1990s. A disagreement arose within the US government about whether court decisions could be deemed 'measures' giving rise to State responsibility under NAFTA Chapter 11. In interagency discussions, the Department of Justice asserted that the 'strongest defense lies in advancing the broadest jurisdictional arguments'.[104] This required asserting that NAFTA Chapter 11 'does not apply to the judgments of domestic courts in private disputes, but is instead concerned only with legislative and regulatory actions that affect trade and investment'.[105] The Justice Department considered

[98] See N Jansen Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39(3) Legal Issues of Economic Integration 301, 317.

[99] See eg Thomas Buergenthal, 'Justice 2018, Charting the Course' (13 March 2008) 7 <https://www.brandeis.edu/ethics/pdfs/publications/BuergenthalTalk.pdf> accessed 31 January 2018: 'The attempt to settle [international] disputes by negotiations is frequently more difficult or risky than referring them to adjudication ... because a settlement arrived at by negotiations makes a government vulnerable to charges by its domestic opponents that it negotiated a bad deal, that it gave away national rights or territory, or that it somehow betrayed the nation. The political consequences of losing a case in a court are much less serious because the legitimacy of an adverse judicial decision is more difficult to challenge. That also explains why in many cases before the ICJ, for example, countries unnecessarily in my opinion, hire the most renowned international lawyers to represent them. This enables them [to] avoid the charge, if they lose the case, that they mounted a weak legal defense of their country's claims.'

[100] See eg Vietnam Decision (n 72) art 3.2 (stating that 'relevant agencies, organizations and individuals shall be responsible before law about consequences arising because they fail to coordinate' within the terms of the regulation); Costa Rican Law (n 78) art 2: 'Public entities and agencies shall cooperate with entities appointed by these regulations to prevent and manage international trade and investment disputes.'

[101] Colombia, Ministry of Industry, Business and Tourism (2012) <http://www.mincit.gov.co/englishmin/publicaciones.php?id=4298&dPrint=1> accessed 31 January 2018.

[102] See eg Lee M Caplan and Jeremy K Sharpe, 'United States' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 755, 762–3.

[103] The *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3.

[104] See Draft Memo to White House Chief of Staff on Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in *Loewen* NAFTA Arbitration (February 2000) 2 <https://www.italaw.com/sites/default/files/case-documents/italaw4030.pdf> accessed 31 January 2018.

[105] See US Draft Jurisdictional Brief (2000) at 24, attached to Memo to White House Chief of Staff (10 February 2000) <https://www.italaw.com/sites/default/files/case-documents/italaw4030.pdf> accessed 31 January 2018.

this argument both legally sound and good policy because 'allowing foreign investors to attack the decisions of our domestic courts through international arbitration could severely undermine our system of justice and, as a result, threaten continued public and political support for the NAFTA and, perhaps, other international agreements as well'.[106] This, in turn, 'would establish a dangerous precedent' that 'could result in a flood of arbitrations against the United States, the cost of which could be extraordinary'.[107]

The US State Department disagreed, rejecting the proposed argument as 'both unpersuasive legally and undesirable from a policy standpoint'.[108] To exempt 'judicial action from international review', the State Department argued, 'would be a serious step backward in our advocacy of U.S. investor interests abroad'.[109] The Office of the United States Trade Representative similarly rejected the Justice Department's proposal as contrary to 'traditional canons of treaty interpretation' and a 'radical departure from customary international law'.[110] It also considered the proposal bad policy:

> Excluding some or all types of judicial decisions from the scope of Chapter 11 would conflict with the U.S. policy goal of protecting investors from a broad range of abusive government action. This is true whether or not one of these arguments actually prevail, since our pleadings will almost certainly be made public and other countries will be quick to cite our arguments to the detriment of U.S. investors.[111]

Following extensive interagency discussions, the US government abandoned the proposal, arguing instead that NAFTA Chapter 11 tribunals generally lack jurisdiction over claims involving 'non-final' judicial decisions.[112] The *Loewen* Tribunal accepted this argument, as have other investment tribunals and leading commentators.[113]

This process of internal debate—ideally led by an experienced agent—should facilitate reasonable, balanced and consistent arguments across cases and over successive government administrations, while protecting the interests of the agency whose actions gave rise to the dispute. Opportunistic arguments advanced by the State, even if unsuccessful, may have negative consequences for the State, its

[106] See Memo from Associate Attorney General to Counsel to the President (5 August 1999) 3 <https://www.italaw.com/sites/default/files/case-documents/italaw4031.pdf> accessed 31 January 2018.
[107] ibid
[108] Memo from J Duncan to G Sperling and others re Meeting of Senior Agency Officials in Attempt to Resolve Interagency Litigation Strategy Dispute—*The Loewen Group, Inc. v. United States* NAFTA Arbitration (18 November 1999) 3 <https://www.italaw.com/sites/default/files/case-documents/italaw4031.pdf> accessed 31 January 2018 (citing 'State and USTR Arguments').
[109] ibid
[110] Memo from USTR Associate General Counsel to Associate Counsel to the President (16 December 1999) 1 <https://www.italaw.com/sites/default/files/case-documents/italaw4031.pdf> accessed 31 January 2018.
[111] ibid
[112] *The Loewen Group, Inc and Raymond Loewen v United States of America*, ICSID Case No ARB/AF/98/3, Counter-Memorial of the United States of America (30 March 2001) 124: 'The international minimum standard incorporated into Article 1105(1) requires the Tribunal to consider the United States' system of justice as a whole—including its mechanisms for correcting any lower court errors on appeal—in assessing whether there was a denial of justice in this case.'
[113] *The Loewen Group, Inc and Raymond Loewen v United States of America*, ICSID Case No ARB/AF/98/3, Award (26 June 2003) paras 161–2 (affirming 'the requirement that, in the context of a judicial violation of international law, the judicial process [must] be continued to the highest level'); *Apotex Inc v United States of America*, ICSID Case No UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) para 298 (finding no jurisdiction *ratione materiae* because of the Claimant's failure to seek judicial finality); Jan Paulsson, *Denial of Justice* (OUP 2005) 107 (asserting that 'the *Loewen* tribunal was surely right' on the judicial finality requirement).

foreign investors and the sound development of the law.[114] There are obvious disadvantages to extensive interagency coordination. All government agencies have their own institutional interests, priorities and resource constraints, which may affect their willingness and ability to provide meaningful and timely input. The process of negotiating government-wide consensus, moreover, can compromise efficiency and diminish the quality and cogency of State pleadings.[115] To avoid 'arbitration by committee', the agent must have sufficient legal authority and institutional support to steer the process through the bureaucracy and obtain cleared government positions in time to meet arbitration deadlines.

External coordination is equally important. A standing agent must monitor other investment disputes, coordinating closely with the State's treaty partners about possible non-disputing party submissions and joint interpretations. The agent likewise should coordinate with third parties, to share information about (and experience with) international investment arbitration. Despite the increasing 'multilateralization' of international investment law,[116] there is still no multilateral forum for government arbitration counsel to meet regularly to discuss the full range of relevant issues, both legal (such as developments in jurisprudence and treaty making) and practical (such as experience with counsel, arbitrators, institutions and experts).[117] The creation of standing agents may facilitate better information sharing among State lawyers and, perhaps, the development of best practices in case management and coordination.

(iv) *Counsel*

Few States engage in sufficient international litigation to justify a heavy investment in establishing, training and sustaining a dedicated office to represent the State, including for international investment arbitration.[118] Most States thus cannot match within their bureaucracies the experience and expertise of the lawyers typically retained by foreign investors.[119] For most States, therefore, outside

[114] See generally Stefan A Riesenfeld, 'The Doctrine of Self-Executing Treaties and *US v Postal*: Win at Any Price?' (1980) 74 AJIL 892, 903 (lamenting the impact of the US government's win-at-any price arguments before US courts on treaty interpretation questions and the failure to consult the State Department on relevant issues).

[115] See eg Jeremy P Carver, 'The Strengths and Weaknesses of International Arbitration Involving a State as a Party: Practical Implications' (1985) 1 Arb Intl 179, 183: 'However complex the issues, few things distort the effective presentation of arguments to a tribunal more than a multiplicity of advisers'; Nguyen and Vu (n 70) 5 (discussing Vietnam's delay in appointing an arbitrator 'because relevant agencies could not reach a consensus on such appointment').

[116] See eg Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 256–61.

[117] The various fora for discussing investment arbitration-related issues typically are not well represented by State arbitration counsel (eg, United Nations Commission on International Trade Law (UNCITRAL), Organisation for Economic Co-operation and Development (OECD) and UNCTAD working groups) or have been sponsored by individual States (eg, Ecuador, Czech Republic).

[118] See eg Makhdoom Ali Khan, 'Response to the Report' in *Mauritius International Arbitration Conference 2010, Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat* (Mauritius Government Printing Office 2012) 329: 'The bureaucracy was averse to allocating any funds for creating even a small office where lawyers could be retained to work on these issues. The official view was that this was a passing phase and three cases did not justify setting up an office no matter how small.'

[119] See eg Luis Ignacio Sánchez Rodríguez, 'Litigation Practice before the International Court of Justice: Some Specific Problems of Developing and Small Countries' in UN Office of Legal Affairs (ed), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations 1999) 459, 461: 'While it is true that many small or poor countries have some civil servants with good or excellent knowledge of global international law, on the whole such persons represent isolated, individual cases, with little real possibility of relying on the support of national legal teams with sufficient experience to initiate the necessary strategies for handling a contentious case and even less for assuring its further development'; Lalive (n 95) 36: 'Within bureaucracies, moreover, governments can have 'great difficulty in obtaining independent and objective information on the dispute and the arbitration', given the 'human desire to bring good news over bad and downplay or cover up personal or institutional responsibility.'

counsel will continue to play an essential role in international investment arbitration. Indeed, a State's inability to use outside counsel can create a gross inequality of arms in such cases.[120] The appointment of a standing agent offers a middle path between full in-house representation and complete outsourcing. A standing agent provides at least four key benefits in this respect. First, an agent can help the State develop or improve counsel procurement policies and counsel-selection formalities.[121] Agents can then identify, evaluate and pre-approve outside counsel, preferably before investment disputes arise.

Second, a standing agent can help control costs through better allocation of government personnel and resources. Counsel fees generally constitute the bulk of arbitration costs.[122] State lawyers invariably cost less than experienced outside counsel.[123] Much arbitration work can be performed even within those governments that lack significant experience in international investment arbitration. Government lawyers, for instance, may retrieve and review documents; identify and interview potential witnesses; prepare timelines and memoranda on key issues; and research local law. Performing such time-consuming work internally can substantially reduce the State's litigation costs.

Third, a standing agent can help develop in-house expertise in international dispute resolution, including through training seminars and workshops for other government lawyers. The State can build its capacity over time, allowing it to defend itself more effectively in future cases, including before non-investment tribunals.[124] The State also can draw on this practical litigation experience when negotiating future international investment agreements.

Finally, a standing agent can promote standards of conduct in State representation.[125] Counsel ethics has become a serious issue in international investment arbitration.[126] The dramatic increase in the number of international investment disputes in recent years has generated many new participants from diverse legal

[120] See eg Eric Gottwald, 'Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?' (2007) 22 Am U Intl L Rev 237, 261–2 (discussing efforts by an attorney general to represent a developing State in an ICSID arbitration, with no prior experience or even a treatise on international investment arbitration).

[121] See eg ICSID Practice Notes (n 90) 9–10; Republic of Bulgaria, Ministry of Finance, 'Procedural Representation and Legal Advice in International Arbitration Cases and in Proceedings before Foreign Jurisdictions, as well as Legal Advice and Representation in Negotiations and Mediation Related to Resolution of Legal Disputes' (21 February 2018).

[122] See eg Chartered Institute of Arbitrators (CIArb), *CIArb Costs of International Arbitration Survey 2011* (CIArb 2011) 2, 10–11 (reporting survey results showing that external counsel fees constituted 74% of party costs in international arbitration).

[123] See eg *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) para 12 (providing figures showing that the legal costs incurred by the Claimant's private counsel were four times greater than the legal costs incurred by the Respondent's government counsel); Nguyen and Vu (n 70) 5, n 20 (reporting that the monthly salary of a Vietnamese government lawyer in charge of an investor–State dispute settlement case was less than the hourly fee of outside counsel).

[124] See eg Hugo Siblesz, 'What Role for the Permanent Court of Arbitration Today' (2013) <https://pca-cpa.org/showfile.asp?fil_id=2110> accessed 31 January 2018: '[D]ispute resolution in different fields are not separate phenomena, but processes that build on and gain from one another' through 'cross-pollination.'

[125] See eg Bassett Moore (n 61) 1474 (reporting that the Chilean agent moved that a pleading filed by private counsel at the US-Chile Mixed Claims Commission 'be stricken from the files on the ground that it contained language offensive to his government, to the commission, and to himself; and that the commission directed the brief to be withdrawn, and ordered that in future the briefs of private counsel be considered by the board only when it appeared that they were presented with the approval and upon the responsibility of the agent of the government on behalf of whose citizens the claims was filed.'

[126] See eg James Crawford, 'The International Law Bar: Essence Before Existence' in Jean d'Asprement and others (eds), *International Law as a Profession* (CUP 2017) 338, 351 (noting that international investment tribunals have faced counsel who have 'had connections with arbitrators, acted against former clients, lacked competence, solicited bribes, commenced futile proceedings, and engaged in excessive delay').

and cultural backgrounds.[127] There currently is no common understanding of appropriate counsel conduct in international investment arbitration, and no international bar to promulgate binding codes, rules or standards. The result is an increase in 'guerrilla tactics', including unjustified delays, baseless arbitrator challenges, trumped up due process complaints, evidence suppression, phone tapping, and witness intimidation.[128] Government lawyers themselves may have deployed or condoned such tactics.[129] Standing government agents arguably can help prevent or mitigate sharp or unethical practices through training, experience and professional socialization. Over time, government agents may come to form a *de facto* bar in international investment arbitration, potentially developing best practices for State representation in international investment arbitration.

(v) *Funds*

International investment arbitration, like other forms of international litigation, typically is expensive and protracted.[130] Funding demands may not follow the State's ordinary budget cycle, and a lengthy approval process can impede case preparation.[131] States nonetheless must ensure the availability of adequate funds throughout the proceedings for the continuous preparation and presentation of the case.[132] A standing agent, in addition to helping control litigation costs, can assist with budgeting and accounting. An agent can monitor prospective and pending investment disputes to ensure proper budgeting of costs; help ensure that the State timely complies with funding requests from tribunals or administering authorities; and provide oversight bodies with a proper accounting of arbitration-related expenses.[133]

A standing agent also can assess likely outcomes in ongoing cases and periodically prepare contingency budgets for possible awards against the State. The agent may need to liaise with other ministries or subnational government entities concerning the possible payment, or the apportionment of payment, of arbitral awards. If awards are paid from the central government budget, the agent may wish to seek a permanent fund to satisfy international investment awards.[134]

[127] See Catherine Rogers, *Ethics in International Arbitration* (OUP 2014) 1–2.

[128] See Günther J Horvath, 'Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?' (2011) Austr YB Intl L 297; Lucy Reed, 'Ab(use) of Due Process: Sword vs Shield' (2017) 33 Arb Intl 361.

[129] For the 'top ten notorious cases or scenarios where claimants have made specific complaints that the respondent States have abused their sovereign powers', see Lucy Reed and Lucy Martinez, 'The Convenient Myth of David and Goliath in Treaty Arbitration' (2009) 3 World Arb Med Rev 443, 447.

[130] See David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment No. 2012/3, 19 (reporting average legal and arbitration costs of US $8 million per case).

[131] See ICSID Practice Notes (n 90) 13.

[132] See eg Dominican Republic Decree (n 73) art 11 (providing that the general State budget will cover the expenses of defending the State but that the 'public entity or agency responsible for the measure, action or omission giving rise to the potential conflict or dispute shall be liable' for those costs) (translation).

[133] See ibid 13; Vietnam Decision (n 72) art 27 (the expenses associated with international investment disputes are funded by central or local budgets but the Prime Minister retains the ability to decide on funding for special cases). States that anticipate recurring investment arbitrations may wish to establish an ongoing or permanent litigation fund. See eg Sánchez (n 119) 463. The USA, for instance, created such a fund in 1994 'to provide the Department of State with a dependable, flexible, and adequate source of funding for the expenses of the Department related to preparing or prosecuting a proceeding before an international tribunal.' See Expenses Relating to Participation in Arbitrations of Certain Disputes 22 USC § 2710(d) (2013). Although this 'International Litigation Fund' was created primarily to provide a steady stream of funds for the Iran–United States Claims Tribunal and, secondarily, for the ICJ, it has proven invaluable for international investment arbitration.

[134] The USA, for instance, established a Judgment Fund, which is a permanent, indefinite appropriation available to pay final money judgments and awards against the USA. Judgments, awards, and compromise settlements 28 USC § 2214.

States, of course, are not required to appoint a standing agent to satisfy the five prerequisites to effective representation in international investment arbitration. The appointment of a standing agent, however, encourages a concerted and holistic approach to the coordination and management of the State's defence, promoting an equality of arms in disputes with sophisticated claimant investors.

C. *Agents Formulate Pleadings, Shaping the Development of International Law*

Agents frequently play a key role in helping States formulate litigation positions. In this respect, agents help ensure that pleadings accurately reflect the State's considered legal and policy views. State pleadings, as expressions of State practice and *opinio juris*, are important sources of international law.[135] International investment arbitration presents unique opportunities and challenges in this regard. Many international investment agreements contain broad, indeterminate standards, providing arbitrators with minimal interpretive guidance. In theory, international investment arbitration affords States—through their pleadings and non-disputing party submissions—a direct hand in guiding the development of this dynamic area of law.[136] In practice, however, States face at least two key challenges. First, tribunals, unlike national courts, frequently reject pleadings as accurately reflecting the State's considered views of international law. As Christoph Schreuer argues:

> [a] more traditional approach would view the pleadings of States before investment tribunals as part of State practice or as expression of *opinio juris*. The problem with such a theory is that these pleadings are made in adversarial situations as part of a litigation strategy. Therefore, they do not necessarily reflect the considered position of the State concerned. Moreover, where a law firm is hired to fend off a claim represents the State, it is even less obvious that a particular argument corresponds to the State's genuine position.[137]

Such suspicions may lead tribunals to discount State pleadings, even in cases involving the State's own nationals. The Tribunal in *Enron v Argentina*, for instance, disregarded the legal views expressed by the USA in a prior NAFTA Chapter 11 arbitration, stating:

> The Tribunal must note in this connection that what the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is a party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic

[135] See eg International Law Commission, *Report of the Work of the Sixty-Eighth Session*, Doc A/71/10 (2016) (citing 'assertions made in written and oral pleadings before courts and tribunals' as evidence of *opinio juris*); International Law Association, Committee on the Formation of Customary (General) International Law, *Final Report* (2004) 14 (same); Roberts (n 15) 218–19 (citing additional sources); Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 16: 'In contemporary international law … pleadings by States are the clearest example of State practice.'

[136] Many States, of course, are actively engaged in the process through the negotiation of more detailed investment treaties. It is difficult, time-consuming and costly to amend or replace international investment agreements, and most such agreements protect investments for many years post-termination. See eg UNCTAD, 'Reform of the IIA Regime: Four Paths of Action and a Way Forward' IIA Issues Note No 3 (June 2014).

[137] Christoph Schreuer, 'The Development of International Law by ICSID Tribunals' (2016) 31(3) ICSID Rev—FILJ 728, 737. See also Stephan W Schill, 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J Benton Heath' (2017) 111 AJIL 914, 927: '[P]leadings as respondents in investor-state arbitration are usually, if not always, made not in order to express an abstract and disinterested position on the correct interpretation of a treaty provision with binding effect for any existing or future dispute, but with the concrete purpose of prevailing in a concrete dispute as party.'

> protection where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim.[138]

Even when intervening as a non-disputing party, a State's submissions may be viewed sceptically. Dissenting in *Mesa v Canada*, Judge Brower opined:

> I have never experienced a case in which the other Party or Parties to a treaty subject to interpretation, appearing in a non-disputing capacity, have ever differed from the interpretation being advanced by the respondent State. Inevitably, they club together. Moreover, the interpretation given by a State Party in actual litigation cannot be regarded as an authentic interpretation.[139]

Such suspicions defeat a central safeguard in the investment arbitration system: States' ability to shape the interpretation and development of the law under their international investment agreements. This is particularly problematic in international investment arbitration, given its inherent asymmetry. International investment disputes typically involve a State and a private party rather than two States. This has important consequences for the way in which the cases are pleaded and decided.[140] States are repeat players in international adjudication. They play multiple roles and pursue multiple goals. States thus have a long-term interest in the proper development of their international investment agreements. Private claimants, by contrast, typically are one-off participants in international investment arbitration. They generally seek to win money damages, not to promote the sound development of the law or a balanced interpretation of international investment agreements.[141] This asymmetry, Vaughan Lowe observes, can 'distort the development of international law'.[142]

The appointment of a standing agent—as the State's official, diplomatic representative—should help allay arbitrator suspicions. A pleading submitted by a government agent cannot easily be dismissed as a mere instrument of litigation, the parochial views of a single ministry or the personal opinions of outside counsel. These pleadings, on the contrary, may be considered one of the 'very few authoritative sources' of State practice, particularly when evidencing the State's consistent legal views.[143] Further, a State's prior statements on the law cannot be

[138] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2014) para 48.

[139] *Mesa Power Group LLC v Government of Canada*, UNCITRAL, PCA Case No 2012-17, Concurring and Dissenting Opinion of Judge Charles N Brower (25 March 2016) para 30; see also Schill (n 137) 927 (asserting that 'many non-disputing party submissions pursuant to Article 1128 of NAFTA ... equally may serve the purpose of winning in a concrete dispute, rather than establishing binding interpretations once and for all').

[140] See Jeremy K Sharpe, 'The Potential Impact on Investment Arbitration of the ILC's Work on Customary International Law' *AJIL Unbound* (23 December 2014).

[141] See eg Thomas Wälde and Todd Weiler, 'Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation' (2004) 1 TDM 7 (observing that a claimant investor may 'have few compunctions about deploying any argument or precedent that might further its cause').

[142] Vaughan Lowe, *International Law* (OUP 2007) 24: 'Individuals tend to have neither the breadth of interest nor the long-term views of States. There is, accordingly, much less of a restraint upon the manner in which companies and individuals pursue their interests in international law. For example, a company claiming compensation for the violation of its rights under an investment protection treaty has every reason to pitch its claim at the highest level. It has no fear that its words will later be cited against it, because it can never find itself in a position where it is called to account for the treatment of foreign investors. This asymmetry ... will, I suspect, distort the development of international law.'

[143] See eg *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (9 June 2009) para 603: 'The evidence of such "concordant practice" undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings'; Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016): 'On matters of *treaty interpretation*, substantial weight should be given to pleadings showing a State's uniform and consistent position' (emphasis in original).

equated with 'diplomatic protection', which is an entirely separate procedural right of States.[144] A government agent's signature on a pleading or submission should remind tribunals that the document reflects State practice and *opinio juris* and should be treated accordingly. A government agent, moreover, is not just the outward manifestation of the State. The agent's foremost responsibilities arguably include helping the State put forward reasonable, consistent arguments across cases, avoiding opportunism and myopia. The State's ability to shape the law through pleadings and submissions necessarily rests on a tribunal's confidence that such documents faithfully reflect the State's considered and consistent views.

A second challenge is the 'opposability' problem. There are now hundreds of publicly available investment arbitration awards. Most of these awards are not directly opposable to any particular State, but they may be cited against that State in its investment disputes. As Daniel Bethlehem asks, in a related context:

> [w]hat does one do if you are the UK or some other indirectly interested state in such circumstances, both to protect your own interests and to ensure that the development of the law stays on a sensible track? These statements or determinations are not directly opposable to you, but they nonetheless form part of a growing body of dispositive legal principles that in many cases is of very variable quality.[145]

This is one of the central challenges in investment arbitration today. Formally, arbitration decisions are not binding precedent. Yet they are routinely cited for persuasive authority, including against States that were not party to the dispute and that had no role in the underlying case. How do States protect themselves against bad 'precedent'?

Arbitrating parties, including respondent States, primarily address arbitral precedent though their pleadings—opining on the relevance, correctness, and persuasiveness of arbitral decisions and awards. This practice, the Tribunal in *Railroad Development Corp v Guatemala* observed, 'is an efficient [way] for a party in a judicial process to show what it believes to be the law'.[146] States also may seek to shape arbitral precedent as non-disputing treaty parties.[147] There are perhaps four primary avenues. First, States may make non-disputing party submissions to tribunals. In the NAFTA Chapter 11 case *Mesa v Canada*, for example, Mexico and the USA accepted the Tribunal's invitation to make non-disputing party submissions exclusively to address the impact of the award in *Bilcon v Canada*.[148]

[144] See eg John Dugard, 'Diplomatic Protection' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2018): 'Diplomatic protection is the procedure employed by the State of nationality of the injured person to secure protection of that person, and to obtain reparation for the internationally wrongful act inflicted.'

[145] Daniel Bethlehem, 'The Secret Life of International Law' (2012) 1 Cambridge J Intl Comp L 23, 31–2.

[146] *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Award (29 June 2012) para 217.

[147] See eg Andrea Menaker, 'Treatment of Non-Disputing State Party Views in Investor-State Arbitrations' in Arthur W Rovine (ed), *Comtemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Martinus Nijhoff 2009) 59; Roberts (n 15); Jeremy K Sharpe, 'Possible Paradigmatic Changes in the Settlement of International Investment Disputes' (2014) 104 ASIL Proc 193.

[148] *Mesa Power LLC v Government of Canada*, UNCITRAL, PCA Case No 2012-17, Award (24 March 2016) paras 192, 194, 473–4. For an example of a tribunal soliciting a non-disputing party submission where the relevant treaty did not expressly provide for such a mechanism, see *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objection to Jurisdiction (21 October 2005) para 258 (inviting the legal adviser of the Netherlands Foreign Ministry to opine on certain Dutch government documents submitted to the tribunal by the respondent). *William Ralph Clayton and others v Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015).

Second, States may make official statements on international investment awards.[149] Following the jurisdictional decision in *SGS v Pakistan*,[150] for instance, the Swiss government wrote to ICSID regarding the Tribunal's failure to solicit the Swiss government's views on the scope of the umbrella clause in the Switzerland–Pakistan BIT.[151] The Swiss government sought to minimize the decision's precedential effect, urging 'all parties concerned' to take Switzerland's views into account when examining similar treaty provisions.[152]

Third, States may issue joint interpretations of their international investment agreements. The best-known example is the NAFTA parties' joint interpretation of NAFTA Article 1105 on the 'minimum standard of treatment', in direct response to earlier NAFTA Chapter 11 tribunals' interpretation of that provision.[153] More recently, India has proposed joint interpretations with 25 treaty partners, including in response to the interpretation of the 'effective means' provision given by the Tribunal in *White Industries v India*.[154]

Fourth, States may intervene in annulment or set-aside proceedings.[155] In the NAFTA Chapter 11 case *Cargill v Mexico*,[156] for instance, Canada and the USA intervened in set-aside proceedings at the place of arbitration in support of Mexico's argument that the Tribunal had exceeded its jurisdiction by awarding damages suffered by the Claimant in its capacity as a trader, not an investor.[157]

Each of these mechanisms allows courts and tribunals to hear the views of all treaty parties, not just the claimant and respondent State.[158] States may also publish their pleadings and non-disputing party submissions, allowing others to build on that practice. This process should lead to better arbitral decision-making and provide greater clarity and predictability for investors and States alike.

Outside of the adjudication context, parties routinely seek to control arbitral 'precedent' through treaty making. Traditionally, there have been two general ways

[149] States have many forums in which to make such statements, including in Sixth Committee (Legal) of the UN General Assembly, the International Law Commission, and UNCITRAL.

[150] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003).

[151] 'Note Accompanying Letter of Swiss Secretariat for Economic Affairs to ICSID Deputy Secretary General dated 1 October 2003' (2004) Mealey's Intl Arb Rep E3. Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (signed 11 July 1995, entered into force 6 May 1996).

[152] ibid.

[153] 'Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions' (31 July 2001).

[154] Government of India, Ministry of Finance, 'Office Memorandum on Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties' (5 February 2016) 5. *White Industries Australia Ltd. v Republic of India*, UNCITRAL Award dated 30 November 2011, para 16.1.1(a).

[155] See, e.g., Letter from US State Department Assistant Legal Adviser L Grosh to ICSID Ad Hoc Committee Secretary re '*Siemens AG v. Argentine Republic* (ICSID Case No ARB/02/8) Annulment Proceeding' (1 May 2008) (offering US government views to Ad Hoc Committee 'regarding a Contracting State party's obligation to abide by and comply with adverse ICSID awards').

[156] *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award (18 September 2009) para 523 (deciding that 'losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS [high fructose corn syrup] are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico').

[157] *United Mexican States v Cargill, Inc*, 2011 ONCA 622, 107 OR (3d) 528 (Court of Appeal for Ontario), Decision on Application to Set Aside the Award (4 October 2011) para 79.

[158] The treaty parties' common, consistent and concordant views may constitute a 'subsequent agreement' or 'subsequent practice' for the interpretation of the treaty. See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) art 31(3) (providing that any subsequent agreement between the parties regarding the interpretation of the treaty, or any subsequent practice in the application of the treaty that establishes the parties' agreement regarding its interpretation, 'shall be taken into account, together with the context'); Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 137: 'The value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.'

in which States address specific awards in their agreements and model agreements.[159] The first is 'positive incorporation'. When a State agrees with a tribunal's decision or award on a particular point, it might reflect that in its future agreements or model bilateral investment treaty (BIT). The US Model BIT, for example, implicitly incorporates certain factors in the definition of investment from *Salini v Morocco*[160] as well as the *Methanex v USA* Tribunal's decision on transparency.[161]

The second is 'negative incorporation'. When a State disagrees with or disfavours a tribunal's decision or award on a particular point, it might reflect that in its future agreements or model BIT. The CPTPP for example, seeks to 'correct' the *Cargill* Tribunal's decision on the awarding of trade-related damages.[162] More broadly, States appear to have largely eliminated umbrella clauses from their recent international investment agreements, following some divergent interpretations given to such clauses by tribunals in recent years.[163]

Beyond these traditional techniques, the TPP has introduced a new approach to shaping arbitral precedent. The agreement contains a 'Drafters' Note' on the interpretation of the 'like circumstances' requirement under the agreement's national and most-favoured nation treatment provisions.[164] The note expressly incorporates various tribunals' interpretations of similar provisions of NAFTA Chapter 11 and then instructs future tribunals to 'follow' the approach set out in the note. This novel mechanism affords States an additional means for controlling the development of arbitral precedent, essentially instructing tribunals to follow certain precedent when interpreting a specific treaty provision.

For many States, the various mechanisms for controlling the development of arbitral precedent may be more theoretical than real. Many States lack a dedicated government official with the required knowledge, authority and resources to monitor investment disputes and intervene as a non-disputing party or incorporate the latest arbitral case law into the State's newest international investment agreements. Such States often turn individual disputes over to outside counsel, who themselves may not fully understand the mechanisms available to States to shape the development of international investment law[165] or who may lack insight into the State's other cases and treaty negotiations. Through unawareness or

[159] See Jeremy K Sharpe, 'Negotiating From a Model Bilateral Investment Treaty' in *Treaty-Making in Investment Law*, IAI Series No 10 (Juris 2018).

[160] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (16 July 2001) para 52: '[I]nvestment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction … [and] the contribution to the economic development of the host State.' Art 1 of the 2012 US Model BIT defines 'investment' as 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.'

[161] *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001) para 53: '[T]he Tribunal declares that it has the power to accept *amicus* written submissions from the Petitioners.' Art 28(3) of the 2012 US Model BIT states: 'The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.'

[162] CPTPP (n 75) art 9.29.2: 'For greater certainty, if an investor of a Party submits a claim to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.'

[163] See UNCTAD (n 94) Annex Tables 1–5.

[164] CPTPP (n 75) 'Drafters' Note on Interpretation of 'In Like Circumstances' under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment).

[165] See eg *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No. ARB/11/33, Procedural Order No 12 (14 October 2014) (accepting a US non-disputing party submission filed after the oral hearing, in light of the Respondent's failure to comply with its treaty obligation to deliver relevant arbitration materials to the USA on time).

incapacity, States may unwittingly forfeit their ability to proactively shape arbitral precedent. The appointment of a standing agent arguably is the best, most efficient and easiest mechanism for States to exercise greater control over the development of international investment law. Individually and collectively, government agents can help ensure that States take a lead role in developing international investment law through arbitration and related litigation rather than simply delegating that authority to arbitrators and outside counsel.

III. CONCLUSION

International investment arbitration poses challenges for every State, from resource constraints, to tensions and uncertain lines of authority among ministries, to simply keeping up with constant developments in international investment law and practice. These challenges are compounded by States' heavy dependence on outside counsel, which may lack insight into the State's limitations, overlapping roles and broad legal and policy interests. The appointment of a standing government agent may help States overcome many obstacles. The long practice of States in international litigation suggests that a government agent, with a clear mandate and proper support, can provide essential leadership, authority and credibility for the State in international litigation; an important voice at the counsel table for civility, professionalism and balance; and a necessary check against abuses and opportunism for which States, in the crucible of international litigation, are too readily disposed.

A standing agent, of course, is no panacea. Recent events confirm that agents themselves can harm, rather than help, international adjudication.[166] Nor are standing agents alone a proper substitute for experienced outside counsel, who may offer independent judgment, fresh ideas, practical experience, forensic capabilities and skilled advocacy.[167] The relationship between agent and counsel should be a partnership, not a competition. For the broader international arbitration community, the appointment of standing agents should be welcomed. Even beyond their salutary contribution to arbitral proceedings, experienced State agents can help train the next generation of government lawyers, who may bring valuable perspectives to the field. Over time, we should see an increase in the number of qualified public international law advocates and adjudicators from all parts of the world,[168] helping break the perceived 'aristocratic conception' of international litigation.[169] Most importantly, the process of establishing, authorizing and funding a standing agent should focus States' attention on

[166] See eg *Arbitration between Republic of Croatia v Republic of Slovenia*, PCA Case No 2012-04, Partial Award (30 June 2016) paras 175, 208 (concluding that a State's agent had 'acted in blatant violation of various provisions governing the arbitration' through extensive ex parte communications with a party-appointed arbitrator); Lalive (n 95) 31: 'The history of international arbitration provides a long list of cases in which a State opposed arbitration on the basis of a wide range of arguments and devices, some of which are at least are bound to raise doubts as regards the professional qualifications of the government's advisers or their good faith.'

[167] See Watts (n 8) 331; *The 'Grand Prince' Case (Belize v France)*, ITLOS Case No 8, Application for Prompt Release, Declaration of Judge Ad Hoc Cot (20 April 2001) para 9: 'Lawyers play an irreplaceable role before international tribunals in aiding the administration of justice.'

[168] See Eran Sthoeger and Michael Wood, 'The International Bar' in Cesare Romano and others (eds), *The Oxford Handbook to International Adjudication* (OUP 2014) 639, 652 (observing that some counsel before international courts and tribunals 'first appeared in inter-state disputes as agents or representatives of their state of nationality, later building on that experience and pleading on behalf of other states').

[169] Sánchez (n 119) 477.

improving the institutional framework for dispute avoidance, dispute settlement and legal development.[170] The legitimacy of the investment arbitration system depends upon States' ability to understand and comply with their legal obligations, effectively defend against investor claims and keep the law on a sensible track. A standing agent could help most States better accomplish these goals. The appointment of an agent thus should be considered not merely advisable but imperative.

[170] See eg Nguyen and Vu (n 70) 6 (after promulgating a regulation for international investment disputes in 2014, Vietnam began amending its 2005 Law on Investment to promote investor protections and further prevent or minimize the risks of investment disputes); Lauge Skovgaard Poulsen and Damon Vis-Dunbar, 'Reflections on Pakistan's Investment-Treaty Program after 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan' *Investment Treaty News* (19 March 2009): '[L]ook at the legal costs in the three cases against [Pakistan] so far; I'm sure they exceed US$10 million as a very conservative estimate. For less than a fraction of that amount you can set up a department, hire lawyers—perhaps even get some assistance from outside Pakistan—and start looking at this process properly. But I don't think the will is there because the need is not felt.'