

# Resolving *international trade* and investment *disputes*

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This paper analyses the importance to the Latin American countries of the main dispute resolution facilities and conventions applicable to international trade and investment, of which they are the inseparable complement. The spectacular growth in the disputes which these facilities deal with reflects the impact that international trade and investment are now having on economic development. Despite international progress, however, most of the countries have yet to update their domestic legislation, so that this remains a pending task. Accession to the conventions referred to entails numerous responsibilities for both governments and businesses in Latin America. These include paying close attention to the decisions of the international bodies that deal with disputes, and shaping public activities and policies accordingly. Furthermore, to avoid the high cost of the foreign consultancies which regularly advise Latin American governments and companies on such disputes, the countries should train specialists of their own in these areas.

# I

## Introduction

As international trade and investment have become leading agents of economic development, disputes in these areas have burgeoned. Consequently, the workings of public- and private-sector facilities for settling international trade and financial disputes, chiefly arbitration, have assumed particular importance.

In the Latin American countries, different factors have contributed to this trade and investment growth, which can be traced back to the macroeconomic reforms of the 1980s. These reforms did away with old restrictions on the free movement of goods and services and opened up markets to international competition. One consequence of the growth in transactions and in the resultant disputes has been a need to resolve the latter through fast, modern, efficient facilities that are independent of any national jurisdiction. Such facilities are now the inseparable complement of the institutions governing international economic and financial relationships. They operate alike for disputes between private organizations, between States, and between the

latter and the former. A decisive factor in this development has been the repeal by the Latin American countries of legal restrictions that prevented States from submitting to foreign or international jurisdictions. This change has also been contributed to by policies in the industrialized countries restricting the immunities of jurisdiction and enforcement enjoyed by States and foreign public-sector enterprises in their commercial activities. In parallel, these same countries have supported bilateral agreements for the promotion and protection of investments (APPI) establishing that disputes between one State's investors and another Contracting State will be resolved through international arbitration. Anthony Giddens, author of *The Third Way: The Renewal of Social Democracy*, made an important point in an interview<sup>1</sup> when he argued that the importance of globalization lay in its effect not only on the development of markets, but also and mainly on the way it transformed institutions and contributed to the gradual breakdown of traditional ideas of sovereignty.

# II

## The benefits for Latin America

Although quite belatedly, as will be seen, the countries of Latin America have signed up to the main international trade and investment dispute settlement agreements.

While there are still problems, which will be discussed later, acceptance of international jurisdiction over such disputes is the third pillar of the structural reforms initiated in recent decades. To put it another way, the benefits of opening up to international trade and investment would not have materialized had the countries of Latin America insisted on submitting disputes arising from such transactions to the exclusive jurisdiction of their local courts.

By signing up to these agreements, they have benefited in many ways.

From the point of view of international agents, the knowledge that such disputes as may arise will be

resolved by facilities independent of the local authorities is a decisive factor for those trading with or investing in the region, and is taken into account in their risk analyses. If such disputes are subject to the jurisdiction of local courts, uncertainty as to the duration and outcome and doubts about neutrality represent an extra cost that discourages international trade and investment. Conversely, acceptance of the main international jurisdictions encourages such trade and investment.

From the Latin American point of view, access to international jurisdictions, be they private, like the arbitration centres discussed further on, or public, like the World Trade Organization (WTO), the World Bank

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<sup>1</sup> *El Mercurio* (2000), p. E4.

International Centre for Settlement of Investment Disputes (ICSID), APPI or free trade agreements, has also had very positive consequences.

As Latin American exports have had a greater impact on international trade, so too have further obstacles and restrictions of all kinds been placed in their way by competitors. Thus, our exports have continually been beset by accusations (generally unjustified) of unfair trade practices, polluting processes, dumping and subsidization. Until recently, efforts to rebut such accusations could only be made before the administrative or legal authorities of the importing countries, with disappointing results. The high cost and lack of independence of these bodies often meant that complaints were not pursued. Since special procedures for settling trade disputes were created under the auspices of WTO and free trade agreements, circumstances have changed radically. Instead of approaching the authorities of the importing country, Latin American exporters can now defend themselves, at small cost, before the dispute settlement bodies of WTO or the free trade agreement concerned. It is also safe to assume that the need to bring such accusations will be reduced by the mere fact that these options exist.

Something similar has happened with investment disputes which, as is well known, have given rise to the worst international conflicts ever seen in our region. Accession (albeit delayed) to the World Bank ICSID and the inclusion in free trade agreements of procedures for resolving such disputes in a non-confrontational fashion have dispelled old suspicions and helped increase foreign investment. A further consequence, and one which is perhaps not yet well understood by governments, is the need to harmonize national investment policies and measures with the rules and jurisprudence of these arbitration centres.

For all the progress made internationally, there remains the paradox that the countries have not yet updated their domestic legislation. The result is that, with the exception of Mexico and perhaps Peru, no

Latin American country qualifies as a location for international commercial arbitration. The impossibility of keeping arbitral operations detached from the strict controls and procedures of national codes, many of them dating from the nineteenth century, means that international centres for commercial arbitration cannot function normally in the region.

In 1993, the Inter-American Development Bank (IDB) began financing a very timely programme of reform and modernization of its member countries' legal systems. As part of this, US\$ 20 million of funding was approved in 1994 for a programme of alternative methods of dispute settlement, as a result of which it was possible to create national mediation and arbitration centres in 18 countries. Helpful as this programme has been, there remains the need to modernize arbitration legislation so that international trade disputes can be resolved within the region.

In this paper we shall mention the main public- and private-sector settlement facilities for international trade and financial disputes, with particular reference to the Latin American countries. Public-sector facilities include the ones created at the initiative of international organizations such as the United Nations, the Organization of American States (OAS) and the World Bank, and those deriving from international treaties and conventions. Examples of these latter include the facilities established by the conventions of The Hague in 1907,<sup>2</sup> Washington in 1965<sup>3</sup> and Panama in 1975,<sup>4</sup> by free trade agreements, and by the Marrakesh Ministerial Agreement of 1994 establishing WTO. All these will be referred to later.

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<sup>2</sup> Convention for the Pacific Settlement of International Disputes.

<sup>3</sup> Convention on the Settlement of Investment Disputes between States and Nationals of other States.

<sup>4</sup> Inter-American Convention on International Commercial Arbitration

### III

## Latin America and international arbitration

Beginning in the eighteenth century, the European countries, and subsequently the United States, applied the doctrine of diplomatic protection in countries they deemed “uncivilized”. This was developed by Vattel in the eighteenth century and invoked to justify intervention by one State in the internal affairs of another, the argument being that an injury done to the citizen of a State constituted an affront to that State (Vattel, 1820, vol. 2, sec. 342, pp. 349 and 350). It was incorporated into the international policy of Europe and the United States and served to justify a number of interventions in Latin America.

Latin America reacted to these foreign interventions with the doctrines of Calvo and Drago. The Calvo doctrine, developed from 1873 onward, argued that States had exclusive jurisdiction over the behaviour of foreigners within their borders; the Drago doctrine rejected the use of force to collect the debts of States.<sup>5</sup>

Mexico was the first country to apply the Calvo doctrine, beginning in 1873.<sup>6</sup> It rapidly became a generally accepted principle in Latin America and was incorporated into the constitutions and legislation of almost all the countries. Negative international experiences justified the Calvo doctrine and fuelled an attitude of hostility towards international arbitration. Examples include the arbitration finding that justified the military occupation of the Venezuelan ports for the purpose of collecting loans made by different European countries, and the Guiana ruling between Venezuela and Great Britain, which came down entirely on the side of the latter.<sup>7</sup>

The inclusion of non-intervention principles in the charters of the United Nations and OAS meant that diplomatic protection could not legally be invoked. However, the industrialized countries continued to reject the Calvo doctrine, especially when it came to the expropriation of investments. To resolve this

difficulty, in 1964 the World Bank proposed the creation of the International Centre for Settlement of Investment Disputes (ICSID). Its main objective was to remove foreign investment-related conflicts from local jurisdiction and prevent them from turning into conflicts between States. To achieve this, ICSID applied two basic principles. The first was the replacement of national jurisdiction (in the State that had received the investment) by international arbitration. The second was the rejection of diplomatic protection.<sup>8</sup>

To encourage the Latin American countries to sign up to ICSID, subrogation of an investor by that investor’s State of origin was forbidden.<sup>9</sup> This did not prevent Latin America from collectively withholding its support, however.<sup>10</sup>

An equally negative attitude towards international arbitration was displayed in 1970 by Ruling 24 of the Commission of the Cartagena Board, which made it impermissible for investment contracts to include provisions abrogating possible conflicts between national jurisdictions.<sup>11</sup> A similar principle was reiterated in the Charter of Economic Rights and Duties of States approved by the United Nations General Assembly in 1974.<sup>12</sup>

These positions gradually shifted, however, and now most of the countries accept international commercial arbitration. This process began with accession, albeit much delayed, to the New York Convention of 1958. It continued with the Panama Convention of 1975 and with acceptance by debtor States during the 1970s of foreign jurisdiction to resolve disputes arising from lending by international commercial banks. It culminated with agreements for the promotion and protection of investments (APPI) and the accession of most of the region’s countries to ICSID, the exceptions being Mexico and Brazil.

<sup>8</sup> Article 27 (1) of ICSID.

<sup>9</sup> See Szasz (1971).

<sup>10</sup> See declaration of the Chilean delegate, Félix Ruiz, on behalf of the Latin American countries (Ruiz, 1964).

<sup>11</sup> Article 51 of Ruling 24, December 1970, of the Commission of the Board of the Cartagena Agreement, which approved the Foreign Investor Statute. The members of the Board are Bolivia, Colombia, Ecuador, Peru and Venezuela. Chile is not a member now, but was in 1970.

<sup>12</sup> See Resolution 3281 (XXIX) of the United Nations General Assembly, 12 December 1974.

<sup>5</sup> The Drago doctrine was an initiative of the Argentine Minister of Foreign Relations, Luis María Drago (see Conil, 1975, p. 4).

<sup>6</sup> See note of 13 November 1873 from José María Lafragua, Mexican Minister of Foreign Relations, to John W. Foster of the United States Legation in Mexico (Lafragua, 1873).

<sup>7</sup> It subsequently came to light that the ruling had been influenced by a bribe paid to one of the arbitrators.

## IV

### The Permanent Court of Arbitration

Institutional arbitration was born at the first International Peace Conference (The Hague, 1899), which adopted the first Convention for the Pacific Settlement of International Disputes and established the Permanent Court of Arbitration (PCA).<sup>13</sup> This Conference was continued by the second Peace Conference at The Hague in 1907, which recognized arbitration as the most effective way of resolving problems of law or interpretation arising from international treaties. The 1899 Convention was replaced by that of 1907.

The PCA is the oldest arbitration body in the world, and is still fully operational. Its jurisdiction is extraordinarily wide and it may embrace any dispute or only disputes of a certain category.<sup>14</sup> It is not a court but a facility whereby disputes are settled by arbitrators appointed case by case, in accordance with a procedure administered by its International Secretariat. It was the precursor of the Permanent Court of International

Justice, dating from 1919, and it was particularly important in its early years.

It was reinvigorated in 1981 when it was designated by the United States and Iran to resolve their numerous disputes. From then until January 2001, tribunals formed in this way made 680 arbitral awards and set important precedents for international contracts and compensation for expropriation involving, among others,<sup>15</sup> countries in Latin America.<sup>16</sup> One of the best known, and most regrettable, legitimized the blockade of Venezuela's ports by three European countries to obtain payment of their loans out of the country's customs revenues. This ruling led to the Drago doctrine already mentioned and discredited international arbitration in Latin America.

Although it initially covered only disputes between States, its jurisdiction has since extended to disputes between States or international organizations and private bodies. In 2002, 97 States were members of PCA, including most of the Latin American ones.

## V

### The New York Convention of 1958

Another milestone in the development of international commercial arbitration was the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which 120 States were signatories as of 2002. It was approved by the United Nations Conference on International Commercial Arbitration<sup>17</sup> called by the Economic and Social Council of the United Nations.<sup>18</sup> However, the Latin American

countries, which retained an open hostility towards international arbitration, were the last to ratify it.<sup>19</sup>

The fortieth anniversary of the New York Convention was celebrated on 10 June 1998, and the Secretary General of the United Nations, Kofi Annan, pointed out that this Agreement, which had been subscribed to by 117 States, including the main trading nations, was one of the most successful treaties in the area of commercial law (United Nations, 1999). In fact –we might add– the development of international commercial arbitration began with this Convention, which originated in 1953 with a draft presented by the Paris International

<sup>13</sup> See Rosenne, ed. (2001).

<sup>14</sup> Article 39 of the 1907 Convention.

<sup>15</sup> www.pca-cpa.org.

<sup>16</sup> These cases have included Mexico and the United States (Pio Fund in California) in 1902, Venezuela in 1902 and 1910, Peru in 1910 and 1914 and Costa Rica in 1998. This last case related to a financing contract with Italy.

<sup>17</sup> Held in New York from 20 March to 10 June 1958.

<sup>18</sup> Resolution 604 (XXI) of the Economic and Social Council of the United Nations, 3 May 1956.

<sup>19</sup> The first was Ecuador, in 1962, and the last Brazil, on 7 June 2002. Mexico ratified in 1971, Chile in 1975, Colombia in 1979, Peru in 1988, Argentina in 1989 and Venezuela in 1995.

Chamber of Commerce (ICC) to the Economic and Social Council on international arbitral awards. However, the Council limited it to foreign arbitral awards.<sup>20</sup> The proposal corrected the manifest shortcomings of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, which no Latin American country had signed. An earlier instrument, the 1923 Geneva Protocol on Arbitration Clauses, had not found acceptance in the Latin America region either.<sup>21</sup> The New York Convention rendered both the Geneva Convention and the Geneva Protocol inoperative.<sup>22</sup>

The New York Convention applies “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal”,<sup>23</sup> and awards may be made by arbitrators appointed for each case or by permanent

arbitral bodies.

The new features of the New York Convention in relation to the Geneva Convention of 1927 were: i) it did away with the double *exequatur* or judicial approval of arbitral awards by the country where the award was made and the country where enforcement was sought (only the latter authorization was retained); ii) it reduced the grounds for refusing recognition and enforcement of foreign arbitral awards, and iii) it inverted the burden of proof on the party seeking recognition. Instead, it established that grounds for denying recognition and enforcement of an award could only be provided by the party against which it was made.<sup>24</sup> (Under the Geneva Convention, the party seeking recognition had to justify it). For all the contribution it has made to the development of international commercial arbitration, the lack of an institutional structure has undermined the effectiveness of the Convention.

## VI

### The contribution of the United Nations Commission on International Trade Law (UNCITRAL)

When it created UNCITRAL in 1966, the General Assembly of the United Nations recognized that “divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to development of world trade” and expressed the view that, with this Commission, the United Nations could play “a more active role towards reducing or removing legal obstacles to the flow of international trade”.<sup>25</sup>

UNCITRAL was given a mandate to promote the “progressive harmonization” of the “law of international trade”, and over the years it has become the main United Nations legal institution for developing international commercial law.

It consists of 36 member States elected by the General Assembly for periods of six years, representing the world’s different geographical regions and legal and economic systems.<sup>26</sup> It is based in Vienna and has approved, among other things, the UNCITRAL Arbitration Rules (1976) and the Model Law on International Commercial Arbitration (1985).

#### 1. The 1976 Arbitration Rules

These Arbitration Rules<sup>27</sup> were approved after consultation with governments and international

<sup>20</sup> The distinction between a foreign arbitral award and an international arbitral award is a de facto question that the courts have resolved case by case.

<sup>21</sup> Brazil signed the 1923 Protocol, but did not ratify it.

<sup>22</sup> Article 7 (2) of the New York Convention.

<sup>23</sup> Article 1 (1) of the Convention.

<sup>24</sup> Some countries entered reserves when ratifying the Convention. The United States, for example, gave notice that it would apply the Convention on a reciprocal basis and only to disputes deemed commercial under United States law.

<sup>25</sup> General Assembly resolution 2205 (XXI) of 17 December 1966, fifth and ninth points.

<sup>26</sup> As of 2002, Argentina, Brazil, Colombia, Honduras, Mexico and Paraguay were UNCITRAL members.

<sup>27</sup> Approved by United Nations General Assembly resolution 31/98 of 15 December 1976.



arbitration centres. They serve as a reference in commercial contracts and are applied virtually unaltered in ad hoc and institutional arbitration proceedings and by the main arbitration centres.<sup>28</sup>

They are applied so universally because they were drafted with the most diverse legal, social and economic systems in mind. Confirmation of this universal acceptance was provided by the agreement between the United States and the Islamic Republic of Iran to use them to resolve disputes between the two countries (Sekolec, 1987). The Rules confirm the independence and autonomy of arbitration proceedings insofar as they exclude any obligation to conform to non-binding legal provisions applicable to such proceedings. The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.<sup>29</sup>

## 2. The 1985 Model Law

This was the outcome of intensive work and consultation with institutions, governments and

experts in the different regions of the world. The resolution approving it included the recommendation “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”.<sup>30</sup> It supplements the New York Convention of 1958 and the 1976 Arbitration Rules. The latter depend on the binding legal regime within which they are applied. The New York Convention regulates enforcement procedures but does not refer to the substance of arbitration. The Model Law makes the Convention and Rules operative, and is thus the third point in the legal triangle regulating international commercial arbitration.

The need to adopt the Model Law arose out of the obstacles that national laws placed, and continue to place, in the way of independent arbitration proceedings.<sup>31</sup> With few exceptions, however, the Latin American countries have not yet brought their legislation into line with the Model Law.

# VII

## The Inter-American Convention on International Commercial Arbitration

On 30 January 1975, the Inter-American Conference on Private International Law approved this Convention, also known as the Panama Convention. Just as the New York Convention dynamized commercial arbitration in the world, the Panama Convention has tried to do the same on the American continent.

### 1. Historical background

Ten years before the first International Peace Conference (The Hague, 1899), the countries of Latin America approved the 1889 Montevideo Treaty, which

included arbitration provisions. It was ratified by only six countries, however, and was not widely applied (OAS, 1980a). Later, the Bustamante Code of 1928 also included arbitration provisions,<sup>32</sup> as did the Montevideo Convention of 1940 (OAS, 1980b). Once again, though, the effects were few.

In 1934, however, the Seventh Conference of American States created the Inter-American Commercial Arbitration Commission (IACAC), which is still fully operational.<sup>33</sup> IACAC was conceived as an organ of the Pan-American Union (now OAS), with the

<sup>28</sup> Institutions using the Arbitration Rules include, among others, the American Arbitration Association (AAA), the Inter-American Commercial Arbitration Commission (IACAC), the Spanish Arbitration Court, the London Court of International Arbitration and the Arbitration Court of the Stockholm Chamber of Commerce.

<sup>29</sup> Article 15 (1) of the UNCITRAL Arbitration Rules.

<sup>30</sup> United Nations General Assembly resolution 40/72 of 11 December 1985.

<sup>31</sup> See Sekolec, 1987, p. 150.

<sup>32</sup> The Bustamante Code on Private International Law was approved by the Inter-American Conference (Havana, 20 February 1928).

<sup>33</sup> Resolution XLI, 23 December 1933, of the Seventh Conference of American States in Montevideo.

support of the American Arbitration Association (AAA), and its main responsibility was to create an inter-American arbitration system (Norberg, 1975).

In 1967, the Inter-American Juridical Committee approved a draft convention and, on 6 August 1973, the final version. With this version and the contributions of different countries, the present Convention was approved in Panama City in 1975 (Norberg, 1975, pp. 280 and 281).

## 2. The Inter-American Commercial Arbitration Commission (IACAC)

The objective of IACAC<sup>34</sup> is to establish and maintain an inter-American system of alternative settlement methods for commercial conflicts (arbitration, conciliation and other methods) and to spread this system in member countries.

Its main office is at OAS headquarters in Washington, but it has national sections in different countries. Its functions include administering international commercial arbitration proceedings and acting as a mediator or conciliator when the parties have so agreed. Its income derives, among other sources, from the membership dues and ordinary and extraordinary contributions of national sections and associate members.

The national sections, which are designated by the IACAC Executive Committee in accordance with the procedures laid down in its statute, are responsible for implementing its plans and programmes. They have to be legal persons of recognized solvency whose objectives coincide with those of IACAC. They are usually chambers of commerce. Associate members include trade, academic or research associations whose objectives are to promote or disseminate settlement methods for conflicts of a commercial nature.

The Council is the highest IACAC body and its members are the organization's main officials –the president, the three vice-presidents, the director general, the secretary and the treasurer– and the main or alternate delegates from the national sections. The officials are elected by the Council for renewable periods of two years.

## 3. The Panama Convention

The justification for the Panama Convention has been questioned by some authors (Kearney, 1987, p. 736)

on the grounds that it merely replicates the New York Convention. It did have particular importance, however, in that for the first time in the Latin American region it established an international system of commercial law that transcended national legislation.

Its contributions were as follows:

- i) It was the first time the Latin American countries had collectively come out in favour of international commercial arbitration. It is significant that the Panama Convention was approved when the only countries in the region to have acceded to the New York Convention were Ecuador and Mexico, and no country had joined the World Bank ICSID (Norberg, 1975, p. 276).
- ii) No less importantly, the Panama Convention included not only the Latin American countries but the United States as well. This internationalized the system by making it necessary to harmonize the civil law culture of Latin America with the common law tradition of the United States.
- iii) Unlike the New York Convention, which has no institutional structure, the Panama Convention was administered by IACAC.
- iv) The Panama Convention resolved numerous impediments in national laws. Some examples: in half of all cases, national legislation did not recognize arbitration of future disputes. In other cases, it was forbidden for arbitrators to be foreign, or for arbitration proceedings to be conducted abroad or in a language other than Spanish. The Convention did away with these restrictions.<sup>35</sup> As regards the rules of procedure to be applied (about which there was an intense debate), it was established that, in the absence of agreement to the contrary, arbitration would follow IACAC procedures.<sup>36</sup> These procedures came into force in 1978, reproducing the UNCITRAL Rules discussed earlier. Thus was the regional system integrated into the international regime.<sup>37</sup>

<sup>35</sup> Argentina held out against the Panama Convention because it regarded it as contrary to the national Constitution, and because the country did not recognize the validity of arbitration proceedings conducted abroad or by non-Argentine arbitrators (Norberg, 1975, p. 283). Quite some time later, on 15 March 1991, Argentina did sign the Convention, ratifying it on 1 March 1995.

<sup>36</sup> Article 3 of the Panama Convention.

<sup>37</sup> On 14 June 1980, the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards came into force. This Convention has been signed by all the OAS member States other than the United States, Canada and the English-speaking countries of the Caribbean. Where arbitral awards are

<sup>34</sup> The IACAC Statute dates from 1 November 1996.



## VIII

### Dispute settlement in free trade agreements

Until the 1988 Free Trade Agreement between Canada and the United States,<sup>38</sup> trade agreements dealt exclusively with trade in goods or services. This new agreement changed that. In addition to regulating such trade, its 20 chapters established a special administration and rules applicable to all economic relations between the two countries,

including dispute settlement. Its structure has been carried over into the North American Free Trade Agreement (NAFTA), Chile's free trade agreement with Canada, Chile's free trade agreement with the United States and other such agreements. It is also sure to influence the future Free Trade Area of the Americas (FTAA).

## IX

### The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA), signed by the United States, Canada and Mexico, is the main free trade agreement in the American hemisphere.<sup>39</sup>

Rather than supranational institutions with a legal personality, assets and separate, independent administrations, this treaty operates with the direct involvement of the Contracting Parties. The main body is the Free Trade Commission (hereinafter "the Commission") formed by ministerial-level representatives from the three member countries, or designated by them. Unless decided otherwise, their rulings are arrived at by consensus.

NAFTA establishes a general procedure and special procedures for settling disputes. The general procedure of Chapter 20 applies in disputes over the interpretation or application of the Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of the Agreement or cause nullification or impairment of the benefits that could reasonably be expected from it.<sup>40</sup> The special procedures apply to disputes over

investments (Chapter 11), financial services (Chapter 14), antidumping and countervailing duty (Chapter 19) and environmental and labour issues.<sup>41</sup> Of these procedures, it is the one relating to investment that has been most often applied.

The general rule is that only the Contracting Parties can initiate the formation of an arbitral tribunal to settle disputes concerning the Agreement. Investment disputes are the exception, as they can be initiated by an investor from any of the Parties. Furthermore, investors can undertake the action on their own behalf or on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly.<sup>42</sup> As regards the applicable law, the Agreement stipulates that it (the Agreement) is to be interpreted in accordance with its objectives and international law. It does not state, therefore, that tribunals must apply the national law of any of the Parties. However, the Agreement on Environmental Cooperation stipulates that the plaintiff may take action on the grounds that it has experienced "a persistent pattern of failure by that other Party to effectively enforce its environmental law".<sup>43</sup> Concerning the enforcement of arbitral awards, the Agreement lays

concerned, it applies to everything not covered by the Panama Convention.

<sup>38</sup> The Free Trade Agreement between Canada and the United States was signed in 1988 and came into force on 1 January 1989.

<sup>39</sup> It was signed on 17 December 1992 and came into force on 1 January 1994. Environmental Cooperation and Labour Cooperation Agreements were signed in parallel.

<sup>40</sup> Article 2004 of NAFTA.

<sup>41</sup> The Agreements on Environmental Cooperation and Labour Cooperation were signed in parallel with NAFTA.

<sup>42</sup> Article 1117 of NAFTA.

<sup>43</sup> Articles 22 and 23 of the Agreement on Environmental Cooperation.

down special rules in each case. In investment disputes, each Party is obliged to provide for enforcement in its territory, but in the event of non-enforcement the investor may seek enforcement of an arbitration award under ICSID, the New York Convention or the Panama Convention, whether or not a direct request for enforcement has been made to the Commission.<sup>44</sup> In other cases, the rules are more complex. Broadly speaking, the winning party may suspend the application to the losing party of benefits of equivalent effect to the sums owing if the losing party refuses to comply with the award.<sup>45</sup>

### 1. Investment disputes (Chapter 11)

This applies to disputes between any of the Contracting Parties and an investor from another Party in the situations it describes.<sup>46</sup> It operates when an investor from one of the three countries complains that the government of the host country has not complied with the obligations of the Agreement. In these cases, investors may ask for their complaint to be resolved under one of the following procedures:

- The World Bank ICSID
- The ICSID Additional Facility<sup>47</sup>
- The UNCITRAL Arbitration Rules.

Alternatively, the investor may approach the courts of the country hosting the investment. One characteristic of this mechanism is that final arbitral awards are automatically enforceable in the national courts of the host country.

As of 2002, there had been six cases brought under Chapter 11 by investing companies from the United States against Mexico and one against Canada. The

cases against Mexico were brought under the ICSID Additional Facility. The case against Canada, on the other hand, was brought under the UNCITRAL Rules. Of the cases against Mexico, three have been settled and three are pending.<sup>48</sup> Some interpretations of these rulings have broadened different concepts used in international agreements in unprecedented terms. One example of this is the refusal by a provincial Mexican authority to grant a particular construction permit on environmental grounds, something that an arbitration ruling construed as “tantamount to expropriation”.<sup>49</sup>

### 2. Antidumping disputes (Chapter 19)

Article 1903 provides that a party may request that an amendment of another party’s antidumping or countervailing duty statute be referred to a binational panel for a declaratory opinion as to whether or not the amendment conforms to the relevant provisions of WTO or NAFTA, or whether it has the effect of overturning a prior decision of the panel.

Article 1904 concerns the final antidumping and countervailing duty determinations of an importing party, and the existence of prejudice, and stipulates that these determinations may be reviewed by a binational panel as an alternative to judicial review or appeal to the competent national bodies in some of the three countries. As a safeguard against faulty or mistaken panel procedures, article 1904 provides for an “extraordinary challenge procedure”. This gives the right of appeal, in serious cases, to a committee of three judges selected from individuals who have been members of the federal courts of Mexico or the United States or of the higher courts of Canada.

## X

### Private international arbitration centres

Private international arbitration centres have been another factor in the expansion of arbitration, as their importance has steadily grown. The modern trend is towards arbitration by specialist institutions, rather than special arbitration.

Institutional private arbitration is a predictable, stand-alone facility administered without outside intervention, which ensures that standard procedures

<sup>44</sup> Article 1136 of NAFTA.

<sup>45</sup> Article 2019 of NAFTA.

<sup>46</sup> See Alvarez (2000) for a full analysis of Chapter 11 of NAFTA.

<sup>47</sup> See section XV, subsection 3 below.

<sup>48</sup> The cases heard against Mexico and the dates of the respective awards were: i) Robert Azinian, 1 November 1999; ii) Metalclad, 30 August 2000, and iii) Waste Management, 2 June 2000. The cases pending are: i) Técnicas Medio Ambientales, filed on 28 August 2000; ii) Waste Management, filed on 30 April 2001, and iii) Fireman’s Insurance, filed on 15 January 2002.

<sup>49</sup> Metalclad versus Mexico. See ICSID (2001).

will be conducted by independent professionals and that awards will not be challenged. When rulings are made by the leading international centres, furthermore, the prestige of the institution and the New York Convention ensures that they will be promptly complied with in the place of arbitration and the rest of the world. It should be added that States and State enterprises can be (and have been) plaintiffs or defendants at these arbitration centres. Their advantages are speed, low cost, the professional quality of arbitrators, confidentiality, security of enforcement and the elimination of appeals to local courts, assuming in this last case that the country's legislation allows the parties to agree freely on the procedures that arbitration will follow.

The main centres are the American Arbitration Association (AAA), the International Arbitration Court of the International Chamber of Commerce (ICC), the London International Arbitration Court and the Arbitration Court of the Stockholm Chamber of Commerce.<sup>50</sup> The International Federation of

Commercial Arbitration Institutions was founded in 1985 and now has a membership of 74 arbitral organizations in 46 countries, while in 1999 the AAA formed the Global Center for Dispute Resolution Research, which brings together the different arbitration institutions in the public and private sectors. Its objective is research into international arbitration.

The following figures will give some idea of the scale of institutional arbitration.

In 1966, the AAA received 13,000 conciliation and arbitration cases. In 2001 the figure was 218,000, of which 650 were international. The ICC, founded in 1923, has had a similar experience. In a period of 12 years, from 1979 to 1990, it received 3,500 cases, which is as many as it had had in the first 55 years of its existence (1923-1978).<sup>51</sup> A similar trend has been seen at the other international centres, particularly those in Asia, such as Hong Kong and China. By contrast, the International Court of Justice has settled no more than 100 cases in its 58 years of existence.

## XI

### The American Arbitration Association (AAA)

#### 1. Description

The AAA is the world's leading arbitral institution. It was formed in 1926 by businessmen, lawyers, traders and academics in the United States to circumvent the risks and expense of a judicial system that was not responsive to the needs of the industrial age. In 1992 it received its millionth case, and each year more cases are received than the year before. It is run by a board whose members include representatives of leading industrial and commercial concerns, law firms and academic institutions in the United States. It has 35 offices in the United States, 53 cooperation agreements with arbitral institutions in 39 countries, an Advisory Council for Asia and another for Latin America.

The AAA applies UNCITRAL procedures, with some differences depending on whether the arbitration

concerned is domestic or international or concerns specific sectors such as construction, intellectual property or others. The arbitrators are appointed from existing rosters once they have met various requirements, including attendance at specialization courses held by the AAA.

In 1996 the International Centre for Dispute Resolution was set up as a separate division of the AAA. In 2001 the Centre handled 649 cases and became the world's leading institution for the handling of international commercial arbitration. These cases represented claims and counterclaims totalling over US\$ 10 billion, and 43% were over a million dollars. The cases resolved involved arbitrators or parties from 63 countries, and the average settlement time was under 10 months (AAA, 2002).

<sup>50</sup> There is also the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) which, while administratively part of the International Bureau of WIPO, operates independently. It was set up in 1994 and provides mediation and arbitration services for the settlement of disputes among private

organizations. Its areas of specialization are intellectual property, electronic commerce and Internet disputes.

<sup>51</sup> The ICC mainly deals with international arbitration, while the AAA works with both domestic and international cases.

## XII

### The International Chamber of Commerce (icc)

#### 1. Description

The ICC is the world's leading international commercial organization. Its objective is to promote international trade and investment. It was founded in 1919 and its members are companies and commercial organizations from over 130 countries. Through its national committees it has access to governments for issues involving international trade and investment. After the creation of the United Nations, the ICC was granted highest-level consultative status with the UN and its specialized agencies.<sup>52</sup> It currently maintains and coordinates programmes with WTO and ICSID, among others.

The ICC is run by a Council of delegates from the national committees which generally meets every two years.

In 1923, the ICC established the Court of International Arbitration (hereinafter "the Court") as an independent organization to act on behalf of its partners. Since its creation, the Court has played a leading role in the main initiatives to develop international commercial arbitration. It has 112 members in 73 countries, and its responsibility is to organize and supervise, with the support of a Secretariat of 40 professionals, arbitrations carried out under its Rules. Together with the AAA, it is the world's leading commercial arbitration centre.

The Court has handled over 11,000 cases since its inception, and since 1999 more than 500 cases a year have been admitted. In 2001 it received 566 applications from 116 countries, and made 341 awards. Some 54% of cases were for amounts in excess of a million dollars.<sup>53</sup> Cases involving litigants from Latin America and the Caribbean made up 9.2% of the total in 2001.<sup>54</sup>

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<sup>52</sup> [www.iccwbo.org](http://www.iccwbo.org).

<sup>53</sup> [www.iccwbo.org](http://www.iccwbo.org).

<sup>54</sup> The main countries involved were Brazil (28 litigants), Mexico (26) and Argentina (16).

#### 2. Arbitration

The current rules came into force on 1 January 1998 and have applied to arbitration proceedings initiated since then.<sup>55</sup> The Court does not resolve disputes itself; its function is to see that the Rules are applied.

Its characteristics are as follows: i) the Court's direct administration responsibilities include confirmation of arbitrators and prior review of awards to check that they are properly grounded and formally correct; ii) the flexibility and universality of the system means that arbitration can be carried out anywhere in the world.

The tribunal is governed by its Rules and applies the laws agreed upon by the parties. In the absence of agreement, it applies the laws it considers appropriate. Once it has received the dossier, the tribunal drafts the terms of reference (summarizing the claims and counterclaims and defining the issues in dispute) and, once these have been signed by the parties and arbitrators, sends them to the Court for approval. Next, the tribunal proceeds to hear and settle the case. Once this procedure is complete, it has six months to make the award, the draft of which first has to be approved by the Court. The Court may alter the form of the award and draw attention to any substantive issues. No award can be made before the Court has done this. Arbitrators' fees and administrative expenses are determined exclusively by the Court.

Once the award has been notified by the Secretariat, the parties have to comply with it without further formalities, and it is understood that they have waived any right of recourse. The Rules state that the award may be subject (for 30 days after notification) only to requests for the correction of errors of typography, calculation or interpretation.

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<sup>55</sup> See Griguera-Naon (1998).

## XIII

### Differences between the arbitration procedures of the AAA and the ICC Court of Arbitration

The procedures of the AAA and the ICC Court of Arbitration have the following differences:

- In the AAA, the arbitrators are appointed by the parties or, failing agreement, by the AAA, from existing rosters; the Court, on the other hand, does not have rosters of arbitrators, and in the absence of agreement appointments are based on the recommendations of its national committees;
- The Court supervises proceedings from beginning to end, and requires the tribunal to deliver terms of reference within two months of receiving a case.<sup>56</sup> This requirement helps identify the substantive issues and means that a large proportion of cases are resolved amicably during this period. This procedure does not exist in the AAA, which leaves the arbitrator free to take decisions and conduct proceedings freely and without interference or oversight.
- A draft of the award has to be reviewed and approved by the Court, which may also comment on its substantive aspects.<sup>57</sup> The AAA does not carry out such review.
- The procedures of the AAA, unlike those of the Court, require preliminary hearings or pre-arbitration conferences, especially for large and complex cases.
- The main function of the Court is to resolve international arbitration cases. The AAA, on the other hand, concentrates on domestic cases. Only in the last decade have international cases come to account for a substantial proportion of its work.
- Arbitrators are required to have attended training courses before they can be included on AAA rosters. The Court does not have this requirement.

## XIV

### Agreements for the promotion and protection of investments (APPI)

APPI<sup>58</sup> have helped popularize international arbitration as the most expeditious instrument for settling investment disputes. Their development has been so spectacular that the total number of agreements signed is not known with any certainty. In 2000, there were believed to be from 1,400 to 1,800 (Parra, 2000), covering 155 countries.<sup>59</sup>

The first APPI were inspired by the treaties of friendship and freedom of trade and navigation of the nineteenth century. The earliest is believed to have been

the one signed in 1959 between Germany and Pakistan. It included clauses dealing with the resolution of differences between the Contracting States, but not of those between a national of one State and the other State (Parra, 2000).

The contents of APPI have been influenced by ICSID since the creation of the latter in 1965.<sup>60</sup> APPI have thus become fairly uniform and, by signing them, Contracting States are generally agreeing to use international arbitration to resolve any differences between an investor and a Contracting State.

<sup>56</sup> Article 18 of the Court's Arbitration Rules ("Rules of the Court").

<sup>57</sup> Article 27 of the Rules of the Court.

<sup>58</sup> See Dolzer and Stevens (1995) on this subject.

<sup>59</sup> World Bank, [www.worldbank.org/icsid/treaties/intro.htm](http://www.worldbank.org/icsid/treaties/intro.htm).

<sup>60</sup> In 1969, ICSID approved a Model Clause relating to the Convention on the Settlement of Investment Disputes for Bilateral Investment Agreements.

Subsequently, when disputes arise, the existence of this prior consent in the APPI can prevent a Contracting State from raising any valid objection to the arbitration agreed on.

APPI also designate an international arbitral jurisdiction to settle disputes over their interpretation or application, but not over substantive issues.

Another common provision waives diplomatic protection for any dispute that a national of one of the Contracting States and the other Contracting State have agreed to submit to ICSID arbitration.<sup>61</sup> The arbitration facilities most commonly designated are ICSID and its Additional Facility (which can be used by non-members such as Canada and Mexico)<sup>62</sup> and the Rules of UNCITRAL.

## XV

### The International Centre for Settlement of Investment Disputes (ICSID)

#### 1. Description

ICSID (hereinafter “the Centre”) was created by international treaty on the initiative of the World Bank, and its main office operates out of World Bank headquarters.<sup>63</sup>

As of April 2002, there were 134 member countries. The purpose of the Centre is to “provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention”.<sup>64</sup>

It consists of an Administrative Council and a Secretariat, and it maintains panels of conciliators and arbitrators. The Council is composed of one representative of each Contracting State, usually the governor whom each State appoints to the World Bank

and who represents it ex officio at the Centre. The same rule applies to alternates. The President of the World Bank is chair of the Council ex officio, but has no vote. The Council sets the conditions under which the secretary general and the alternate secretaries general work.

The Secretariat is staffed by a secretary general and one or more alternate secretaries general, and by Centre personnel. The secretary general is elected by a two thirds majority of Council members, at the proposal of the president, and serves for a renewable term of six years.

The conciliators and arbitrators on the rosters are qualified individuals who have to meet the requirements set out in the Convention. Each Contracting State may place four people on each roster; these individuals may but need not be nationals of that State. In addition, the chair may choose 10 people of different nationalities for inclusion in each roster.

#### 2. Arbitration

A State or a national of a Contracting State may initiate arbitration<sup>65</sup> by applying to the secretary general. Once the application has been recorded and notified, a tribunal is formed. This may consist of a single arbitrator or an odd number of arbitrators appointed by agreement between the parties. In the absence of agreement, the tribunal will consist of three arbitrators of whom one will be appointed by each party and the third (who will chair the tribunal) by mutual agreement. If there is no

<sup>61</sup> APPI often make article 27 (1) of the ICSID Statute applicable. This states that “No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute”.

<sup>62</sup> On 27 September 1978, the Administrative Council of ICSID authorized the Secretariat to administer, at the request of interested parties, certain procedures between States and nationals of other States that were outside the scope of ICSID. The sphere within which these procedures are administered is stipulated in the Rules of the ICSID Additional Facility.

<sup>63</sup> The treaty was opened for signature by World Bank members on 18 March 1965 and came into force on 14 October 1966.

<sup>64</sup> Article 1 (2) of ICSID.

<sup>65</sup> See Shihata and Parra (1999).



such agreement, the president will appoint the third arbitrator.

The tribunal resolves differences in accordance with the legal rules agreed upon by the parties or, where there is disagreement, applies the legislation of the State that is a party to the dispute. Notwithstanding, the parties may agree that the tribunal should resolve the dispute *ex aequo et bono*. As regards procedures, the tribunal must apply the provisions of the Arbitration Rules, unless the parties agree otherwise.<sup>66</sup>

The decisions of the tribunal must be taken by majority vote among all its members. Once the award has been made it is binding upon all parties, and there is no right of appeal or any recourse other than as set forth in the Convention, which specifies only the rights of clarification, review and annulment.<sup>67</sup>

All Contracting States must recognize the binding nature of awards and are obliged to enforce the monetary obligations they entail within their own territory as though they were a definitive ruling handed down by a court of the State concerned.

As of 1999, claims for monetary prejudice had totalled an estimated US\$ 5 billion, with a case average of US\$ 90 million. The sums awarded, however, ranged from US\$ 400,000 to US\$ 30 million. In other words, they were between 5% and 20% of the sums claimed (Shihata and Parra, 1999, p. 337).

### 3. The Additional Facility

On 27 September 1978, the Administrative Council authorized the Secretariat to administer, at the request of the interested parties, certain procedures between States and nationals of other States that were outside the scope of the Convention. Accordingly, the rules of the Additional Facility were approved. These apply to investment disputes in which one of the parties is not a Contracting State or a national of a Contracting State of the Convention. This is the case with Brazil, Canada and Mexico, which are not ICSID members.

### 4. The development of ICSID

After a slow start, the following events turned ICSID into a major international arbitration centre:

<sup>66</sup> The Arbitration Rules were approved by the ICSID Administrative Council on 25 September 1967. They were amended on 26 September 1984.

<sup>67</sup> Article 52 of the Rules lists five grounds for seeking annulment of an award.

- i) The creation, in 1978, of the Additional Facility already referred to;
- ii) The gradual incorporation of the Latin American countries, other than Mexico and Brazil;
- iii) The development of APPI and the designation in such agreements of ICSID or the Additional Facility of ICSID to settle differences between national investors from any of the Contracting States and these States;
- iv) The 1995 implementation of NAFTA, whose Chapter 11 establishes that investment disputes will be resolved by ICSID, the Additional Facility of ICSID or the Rules of UNCITRAL, and
- v) The lifting by the Commission of the Cartagena Agreement of the ban on referring investment disputes to a non-domestic jurisdiction.<sup>68</sup>

### 5. The Latin American presence

As already noted, the Latin American countries were the last to join the Centre. The first of them was El Salvador, in 1984. Other countries continued to join during the 1990s, until only Brazil and Mexico were left outside. The last to join was Uruguay, in September 2000.

Although they have been members for only a short time, the Latin American countries have already accounted for a large share of the cases handled by the Centre or its Additional Mechanism, or pending before them.

Thus, of the 113 cases recorded up to 2002, 30 have been lodged by foreign investors against Latin American countries. With one exception, all have originated from an APPI, and of the 45 cases pending, 17 are against countries in the region.<sup>69</sup> Argentina, with 12 applications against it, is the country involved in the largest number of cases. It is followed by Mexico, with six cases under the Additional Facility and Chapter 11 of NAFTA.<sup>70</sup>

<sup>68</sup> Article 34 of Decision 220 of the Commission of the Cartagena Agreement, of 11 March 1987, establishes that each country may determine in its own legislation what dispute resolution facility is to be applied to foreign investment.

<sup>69</sup> [www.worldbank.icsid.org](http://www.worldbank.icsid.org).

<sup>70</sup> See ICSID (2002) and [www.worldbank.icsid.org](http://www.worldbank.icsid.org). In all the cases involving Latin American countries, the plaintiffs have been industrialized country investors. The only exception might be Lucchetti, a Chilean company that in 2002 requested arbitration of its differences with the Government of Peru.

# XVI

## The World Trade Organization (WTO)

### 1. Description

WTO replaced the General Agreement on Tariffs and Trade (GATT) of 1947, and is now the institution that guides the multilateral system of international trade. It was created by the Marrakesh Ministerial Agreement of 1994, which ended the Uruguay Round of GATT negotiations and also approved some other important agreements.<sup>71</sup> Among these was the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the “Understanding”). This in turn established the Dispute Settlement Body (DSB), which is administered by WTO<sup>72</sup> and has rapidly become one of its main agencies.

Unlike the other facilities analysed, WTO procedures apply exclusively to commercial disagreements between States. These procedures are also characterized by their gradual approach, and are expressly intended to be non-contentious.<sup>73</sup> Thus, the terms used are “difference” rather than “dispute”, “special group” rather than “tribunal”, and “report” or “recommendation” rather than “ruling” or “judgement”.

The functions of WTO are discharged by the Ministerial Conference, which is empowered to resolve all matters included in the Multilateral Trade Agreements adopted at Marrakesh (hereinafter “the Agreements”)<sup>74</sup> if a member so requests.<sup>75</sup> It is composed of representatives of all member countries and meets at least once every two years. In the intervals, its functions are discharged by the General Council,

which also includes representatives of all member countries. This meets whenever it deems appropriate, establishes its procedural rules, approves those of the different Committees and performs the functions of the DSB.

At the meetings of the Ministerial Conference and the General Council, and at those of the DSB, each member country has a vote and decisions are taken by consensus.<sup>76</sup> The Ministerial Conference appoints the director general and specifies his or her powers and responsibilities. The director general runs the Secretariat and appoints its staff.

### 2. Procedures

The DSB has overcome the inadequacies of the GATT system and successfully coped with the increase in international commercial claims. From 1995 to October 2002, 268 cases were presented, and in over a fifth of these the parties reached agreement through consultation or similar measures.

The new procedure is characterized by a faster and more automatic approach to panel selection and by the creation of a permanent Appellate Body.<sup>77</sup> It is also an integrated system that allows countries to bring up disputes relating to WTO and the Multilateral Trade Agreements already referred to. This makes it possible for the DSB to exercise its authority over the General Council of WTO and also over the Councils and Committees of the Agreements referred to.

The objective of the procedure is not to hand down rulings but to resolve differences between the parties. For this reason, priority is given to consultation, mediation and conciliation, which can take place at any stage of the procedure. The automatic character of the procedure is reflected in the fact that once it has been

<sup>71</sup> The Uruguay Round of multilateral trade negotiations conducted by GATT began in 1984 and concluded with the Final Act of Marrakesh in 1994.

<sup>72</sup> Article III (3) of the Marrakesh Agreement.

<sup>73</sup> Article 3 (10) of the agreement entitled Understanding, which appears as Annex 2 of the Marrakesh Agreement. See WTO (1999).

<sup>74</sup> These agreements are an integral part of the Marrakesh Agreement and are: i) the Multilateral Agreements on Trade in Goods; ii) the General Agreement on Trade in Services; iii) the Agreement on Trade-Related Aspects of Intellectual Property Rights; iv) the Understanding on Rules and Procedures Governing the Settlement of Disputes, and v) the Trade Policy Review Mechanism. The Plurilateral Trade Agreements, on the other hand, form part of the Marrakesh Agreement only in respect of those members that have accepted them.

<sup>75</sup> Article IV (1) of the Marrakesh Agreement.

<sup>76</sup> According to article 2 (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the DSB is deemed to have taken a decision by consensus “if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision”.

<sup>77</sup> Composed of seven people of recognized authority unaffiliated with any government. They are appointed by the DSB for terms of four years and three are involved in each case on a rota system.

initiated by one party, its jurisdiction is binding on the party against which it is directed, merely by virtue of that party being a WTO member.

In contrast to GATT, the DSB procedure is predictable and defined. Under GATT, rulings had to be made by consensus and there was no deadline. Opposition from one country was enough to block a ruling. With WTO, on the other hand, the opposite applies: decisions are deemed to have been approved unless there is a consensus for rejection. Furthermore, proceedings are clearly defined. Unless the parties agree otherwise, they cannot last longer than a year, if there is no appeal, or 15 months, if there is. In the case of perishable objects, the procedure may last no longer than three months.

The procedure has the following four stages: i) consultation; ii) if no agreement is reached, the dispute is resolved by a special group or panel, usually of three members; iii) either of the parties may appeal to the Appellate Body on issues of law in the panel report or ruling; and iv) execution and enforcement of Appellate Body rulings.

Panels are composed of well qualified individuals who may be government officials, but may not be nationals of the countries whose governments are parties to the dispute or third parties, unless the parties agree otherwise. To facilitate the choice, the Secretariat maintains an indicative list of eligible people. Members may periodically suggest names for this indicative list. Panels have three members, unless the parties agree to increase the number to five. The Secretariat proposes candidates, and these may be opposed only for "compelling reasons".<sup>78</sup>

## XVII

### Conclusions

Access to the main dispute resolution facilities analysed and described in this paper entails major responsibilities for Latin American governments and companies. They need to keep themselves constantly informed of the rulings and procedures of the relevant international bodies, and to train professionals to participate in the cases that come up, thereby avoiding the high cost of foreign advisors. Another priority should be modernization of national

The Appellate Body can confirm, amend or revoke the legal findings and conclusions of the report. Its recommendations are adopted by the DSB and accepted unconditionally by the parties to the dispute, unless the DSB decides by consensus not to adopt the report within 30 days of this being distributed to members.

When the recommendations of the special group or Appellate Body conclude that a measure is incompatible with one of the Agreements, the member affected must review that measure and advise, within a reasonable time, how it proposes to apply the recommendations of the DSB, under the latter's supervision. In the event of disagreement, this will be resolved as soon as possible by the special group that originally dealt with the matter.

If the recommendations are not applied, a special procedure allows the member concerned to be asked for some mutually acceptable temporary compensation. If this compensation is not agreed within 20 days, the other party can ask the DSB for authorization to suspend concessions or other obligations under the agreements to a level equivalent to nullification or impairment.<sup>79</sup> If the member concerned challenges the level of suspension proposed or the procedure followed, the matter is submitted to the arbitration of the special group which dealt with it, if available, or of an arbitrator appointed by the Director General. In any case, the suspension of concessions or other obligations is temporary and applies only until the measure declared incompatible with the covered agreement has been reversed, or the member country offers to resolve the nullification or impairment, or a mutually satisfactory solution is found.

legislation to make it possible for international commercial arbitration to be carried out in the countries of the region rather than in another hemisphere, which is what has been happening up to now.

<sup>78</sup> Article 8 (6) of the Understanding.

<sup>79</sup> Article 22 (3) of the Understanding lays down the following order for suspension of concessions or other obligations by the complainant: i) those in the same sector as that in which a violation has been found; ii) if this is not practicable, those in other sectors under the same agreement; and iii) if the circumstances are serious enough, those under another covered agreement.

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