The Center for American and International Law

Institute for Transnational Arbitration

Task Force on Legal Representation of American States In Investment Arbitration

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Institute for TRANSNATIONAL ARBITRATION

Contents

Foreword

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TASK FORCE ON LEGAL REPRESENTATION OF AMERICAN STATES IN INVESTMENT ARBITRATION

Introduction by Elina Mereminskaya
Past Chair of the Americas Initiative of the ITA

This report was produced within the framework of the Americas Initiative of the Institute for Transnational Arbitration (ITA). It delivers exclusive insights in how legal representation of the Americas States is organized and carried out.

The mission of the Americas Initiative is to enrich knowledge, debate, and personal relationships within the international arbitration community in the Americas.

The mission of the ITA is to provide leading educational and professional activities for legal counsel, arbitrators, business executives, government officials, academics and other professionals through programs and publications that examine, critique and seek to improve the practice and study of international arbitration and provide opportunities to enhance the arbitration community.

We believe that this report complies with the two missions, as it aims at producing highly specialized knowledge regarding the practice of international investment arbitration within the Americas.

Most of the Americas States rely on external legal representatives, which creates an interesting twofold policy dilemma. First, how could the American States improve their procedures for hiring the external counsels in a way that complies with the governmental and administrative requirements and, at the same time, allows to access the best talent. Second, how could the best talent reach the American States in a way that would provide a high-quality legal representation keeping the legal costs at a reasonable level.

This report summarizes the current practice within of the American States, their contracting procedures, requirements and priorities, which in turn provides guidelines to law firms that wish to be taken into consideration as possible legal representatives in investment arbitrations.

As the outgoing Chair of the Americas Initiative, I feel that this report is one of the highlights of my two-years term.

On behalf of the Americas Initiative of the ITA, I would like to thank the Co-Chairs of the Task Force, Ricardo Vázquez and Analía González, who coordinated its work and drafted the report, as well as all members of the Task Force for their valuable contributions.

Report of the Task Force on Legal Representation of American States in Investment Arbitration

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I. Introduction

Investment Arbitration at the 2023 ITA Workshop held in Austin, Texas on June 14–16, 2023. The goal of this Task Force was to determine the different ways American States that are involved in investment arbitration proceedings choose their legal counsel. To achieve this goal, the Task Force built a survey for representatives from American States to gather data regarding the hiring of external counsel to defend investment arbitration claims.

The specific objectives of this initiative were:

- Determine whether the States have created internal government structures in charge of their legal defense.
- Determine what capacity building and strengthening measures have been implemented by the States.
- Investigate if the different governmental structures have certain ways or forms of cooperation and information exchange.
- Establish if the regulation in public procurement is applied to the selection of external counsel.
- To find out whether open or invitational public bidding is conducted.
- Determine which Law Firms have been employed by the States as main counsel and local co-counsel.
- Describe the challenges that the States or law firms can face throughout the retainment of legal counsel.
- Provide policy recommendations.

The surveyed States answered questions regarding all aspects of the States' process for hiring external legal counsel, from beginning to end.

This report is organized in **four sections**.

The first section examines the responses to questions which focused on the identity and role of State decisionmakers in the hiring process.

The second section focuses on the hiring process itself, including timing considerations, the bidding process, and submission requirements.

The third section discusses the qualifications that States consider when hiring external legal counsel, including the counsels' experience in defending investment arbitration disputes, counsels' specific language capabilities, and counsels' geographic presence.

The fourth section reviews the States' specific experiences in hiring outside law firms, including the names of the law firms hired and the States' recommendations to improve the hiring of external counsel.

The Task Force is co-chaired by Mr. Ricardo Vásquez (Partner, Vásquez Urra Abogados, Santiago de Chile) and Mrs. Analía González (Partner, Baker Hostetler LLP, Washington D.C.), under the leadership of Americas Initiative's Chair Mrs. Elina Mereminskaya.

The co-chairs extend their gratitude and acknowledge the following contributors from each of the participating States, who were in charge of gathering the relevant information from the States:

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The co-chairs thank Ms. Karina Cherro from Vásquez Urra Abogados and Ms. Jillian E. Timko from Baker Hostetler LLP, Washington D.C. for their invaluable support and contribution to the preparation of this report.

II. Methodology

The Task Force created a Survey composed of 33 questions to collect information regarding how different American States choose their legal counsel for investment arbitration proceedings. The Survey included questions designed to shed light on the key objectives of the Task Force listed above. 19 American States submitted answers to the Survey, either fully or partially[1] To encourage more complete and candid responses to the different questions, the States were required to indicate whether certain answers to the questionnaire should be considered confidential.

Because the purpose of this Task Force was to identify trends on the different aspects relevant for the engagement of counsel by the States, this report does not include the specific answers from each of one of the countries. Therefore, Survey responses are not attributed to individual States.

The questionnaires were completed by current or former delegates or representatives of American States, or lawyers who had prior experience dealing with the corresponding governments or had personal knowledge on the engagement of legal counsel for investment arbitration proceedings that allowed them to provide answers to the questionnaires. The surveys collected both quantitative and qualitative data about how States select their legal counsel.

[1] The participating countries include 19 States: Argentina, Bolivia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, the United States, and Venezuela. Some of the charts below will account for less than 19 States, as some States did not answer all of the questions.

III. Key Findings

Findings of this survey include:

- American States rely heavily on external counsel to defend against foreign investors' claims. Of the nineteen States surveyed, only three indicated that the defense of such claims is usually handled exclusively by the States' in-house lawyers; the rest rely on external counsel.
- All States surveyed except for one have developed an internal structure or office for coordinating the State's defense to investment arbitration disputes. These offices are found in the State's Attorney General's Office, the Foreign Affairs Ministries, and the Trade, Treasury, or Economy Ministries. For five States, the State's defense is coordinated by an interdepartmental group or Committee with representatives from several government bodies.
- Most of the States have developed policies or guidelines for hiring external counsel. The hiring is usually done through either direct contracts or by offering invitations to bid to firms that have already been pre-selected by the States. The processes are in part based on the States' procurement or government contracting laws and guidance.
- The requirement for the selected law firm to submit a preliminary case analysis and a plan to contribute to the improvement of the State's capacity to handle investor-State disputes are requisites that States highly appreciate when receiving the offer of legal services.
- When deciding which law firm the States would hire as external counsel, the financial offer is as crucial for the States as the previous experience the law firm has in investment arbitration and in representing States. The language capabilities of external counsels are likewise a fundamental requirement, firstly, in relation to having a lawyer with native fluency in the language in which the arbitration proceeding is being conducted, and secondly, having lawyers who speak the language of the State on its team.

IV. Analysis of the Data Collected

a. State Decisionmakers Involved with Investor-State Disputes

i. Questions asked to the States

The States were required to provide answers to the following questions:

- Please describe to which government entity an investor should send a notice of intent to submit a claim or dispute to investment arbitration.
- Does the State have an internal governmental structure, commission, agency, or entity in charge of coordinating the State's defense specifically for cases brought by investors against the State?
- What is the role of the government entity in charge of the State's defense in the dispute?
- Does the State hire external counsel for their legal representation in investment arbitration?

ii. Summary of Findings

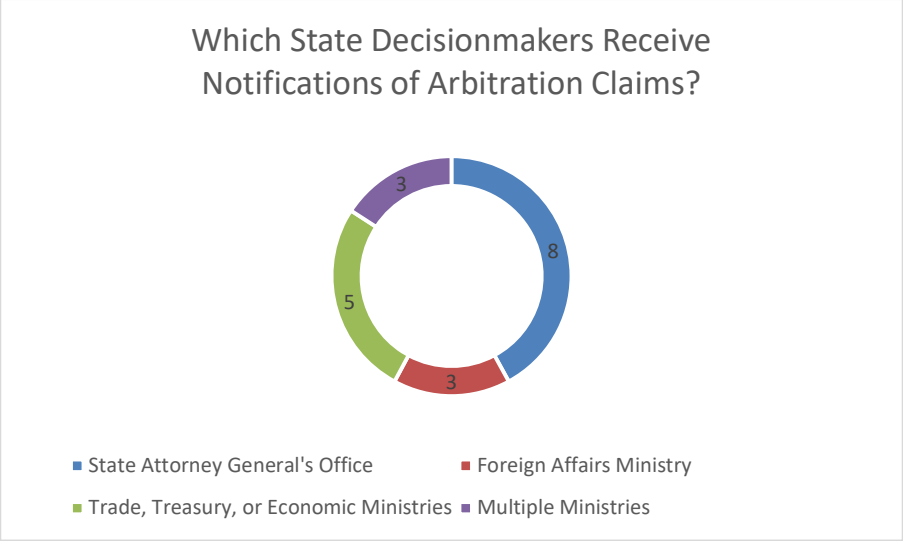
American States rely on three types of State decisionmakers to coordinate the defense of investment arbitration disputes: State Attorney General's Offices, Foreign Affairs Ministries, and Trade, Treasury, or Economy Ministries. These decisionmakers take on several roles in coordinating the State's defense of investment arbitration disputes. Coordinating with other government entities is the most common responsibility. Additionally, more than two thirds of the States surveyed also include tasks related to hiring outside counsel as an important part of the government entities' role in defending investment arbitration claims against the State. This corresponds with the finding that most of the States surveyed hire outside counsel to defend investment arbitration claims, while only three of the States usually have their own government lawyers handle the State's defense.

iii. Analysis of Survey Responses

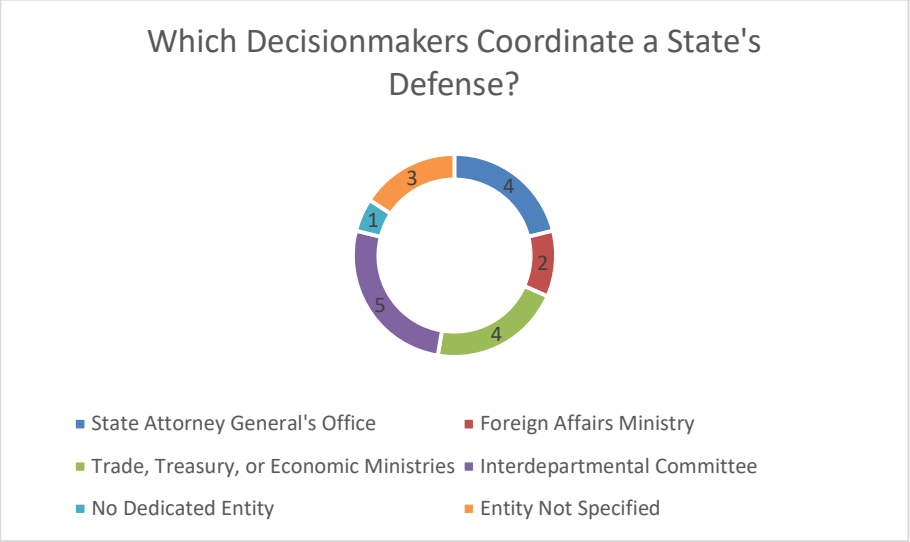
Eight States reported that the Notice of Intent to submit an investment arbitration claim is submitted to the State Attorney General's Office. Three States require that more than one of these government offices or ministries be notified of the intent to submit an investment arbitration claim. In some cases, the State Attorney General's Office or the Ministries who must be notified fall under the authority of the State's Presidential office, indicating that investment arbitration disputes are scrutinized at the highest levels of the States' governments.

Three States also require that, in addition to the State Attorney General's Office, the Ministry of Foreign Affairs, or the Trade, or Treasury, or Economy Ministry, or indeed any other public entities involved in the controversy should also be notified of intent to submit an investment arbitration claim. One of these States noted that if "*the claim concerns the* [State]*, the jurisdiction lies with the Attorney General's Office…*[but] *if the claim concerns a decentralized entity, the notification must be made to the highest management of the entity.*"

One State explained that where the notification should be sent depends on the underlying treaty on which the claims are based. For example, for claims brought under bilateral investment treaties, the notification should be sent to the Ministry of Foreign Affairs, while claims brought under Free Trade Agreements require the notification to be sent to the Trade, Treasury, or Economy Ministries.



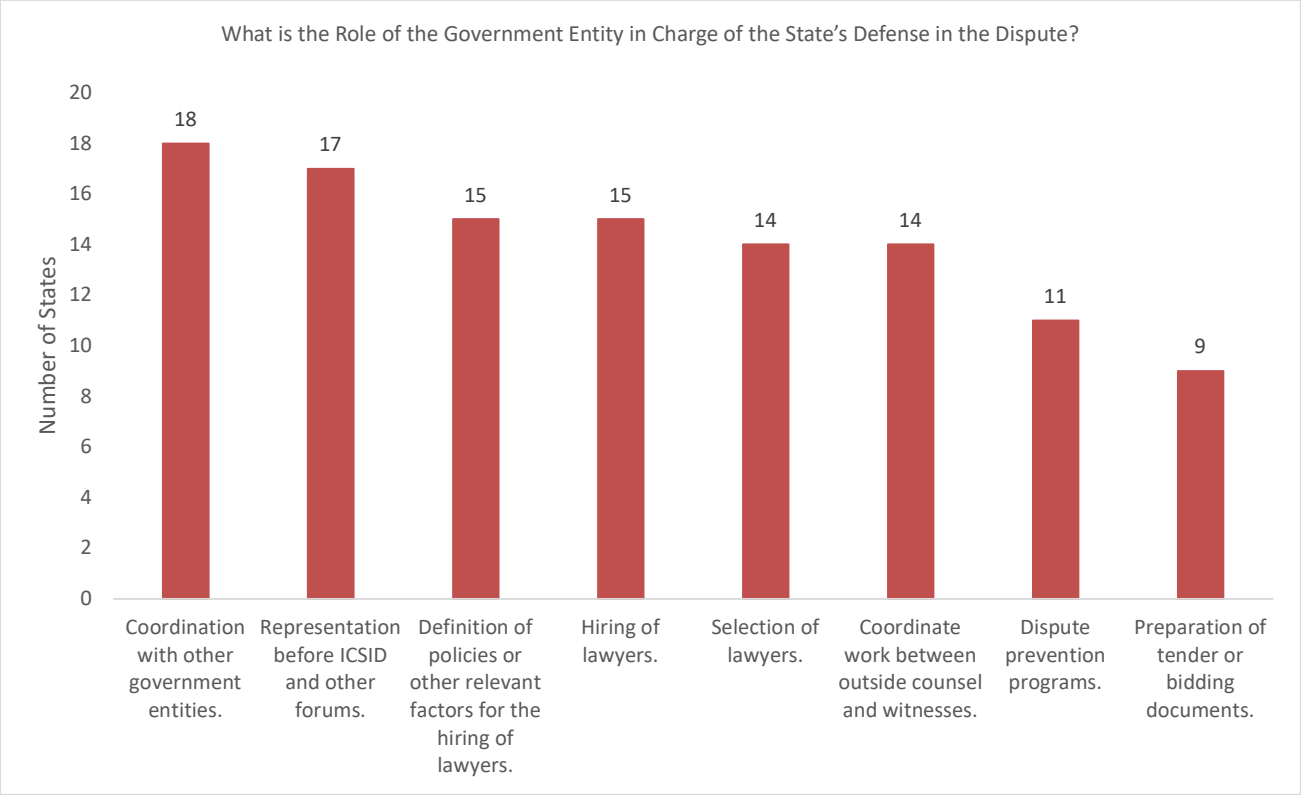
After the Notice of Intent to submit a claim to arbitration is filed, the same categories of State decisionmakers who received the Notice of Intent are in charge of coordinating the State's defense. Five States rely on an interdepartmental committee or group made up of representatives from these different government entities to coordinate the defense of arbitration claims.



Government entities in charge of defending investment arbitration claims take on several roles relevant to the defense of the State. Coordinating with other government entities is the most important task when organizing a State's defense; all surveyed States that answered the question included this task in their survey answers.[2] Representation before ICSID is also a key part of the role of government entities, with seventeen of the nineteen States surveyed also selecting this answer.

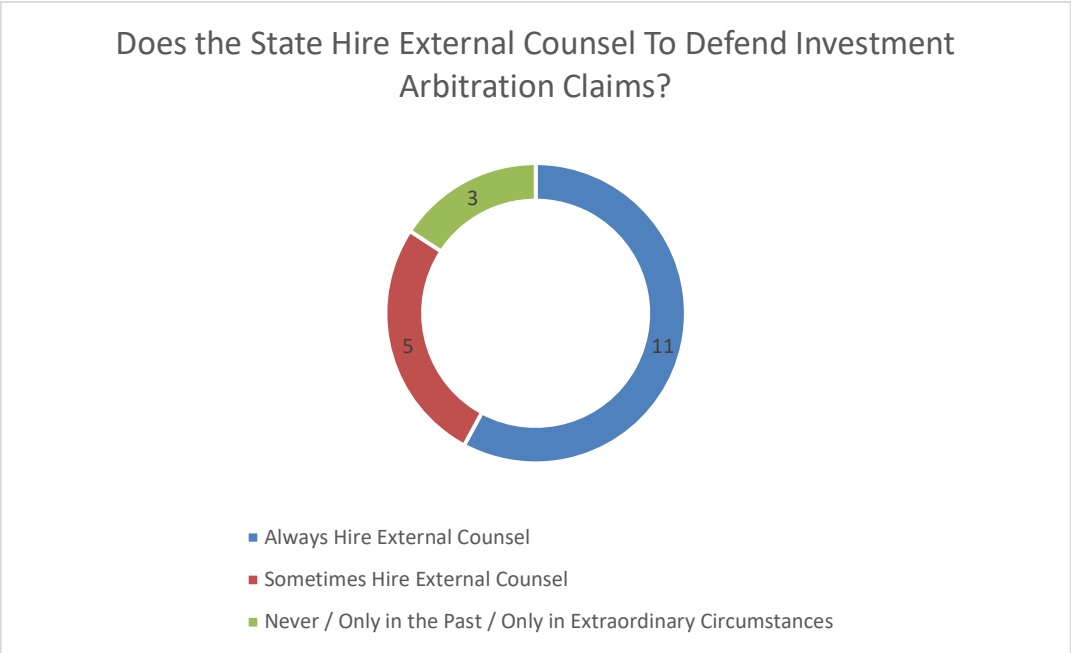
Tasks related to working with external counsel, including defining the policies for hiring external counsel, actually hiring and selecting external counsel, and coordinating the work between external counsel and witnesses also form an important part of the work done by these government entities, with more than two thirds of the States surveyed selecting each of these options in their answers.

[22] The States were directed to select multiple options for this survey question.



Most States hire outside counsel to defend investment arbitration claims. Only three of the States currently rely on their own government lawyers to handle the State's defense; two of them indicated that they hired external counsel in the past or might do so under extraordinary circumstances. Of the States surveyed, eleven States **always** hire external counsel in investment arbitration disputes. A few of these States noted that, while they always hire external counsel, the State's lawyers might handle some initial procedural actions in the early stages of the dispute, potentially including the presentation of preliminary jurisdictional defenses.

Five States indicated that they **sometimes** hire external counsel in investment arbitration disputes. One of these States explained that it has adopted a hybrid model whereby sometimes the State's lawyers assume representation and sometimes they hire external counsel to assist, depending on "complexity and cost-efficiency criteria." Another State similarly indicated that the hiring of external counsel depends on the nature of the dispute. Another State indicated that it sometimes hires external counsel, but did not provide additional details as to the timing or bidding process. This State is not accounted for in the upcoming survey responses.



b. Process for Hiring External Counsel

i. Questions asked to the States

The States were required to provide answers to the following questions:

- At what point does the State initiate the procedure for hiring outside counsel for the State's defense?
- Does the State involve outside counsel during the "cooling-off" or negotiation period between the investor and the State?
- Does the State involve outside counsel in the selection of the State-appointed arbitrator?
- How long does the process of hiring outside counsel take from the time firms are invited until the Contract is signed?
- Is outside counsel hired for investment arbitration on a case-by-case basis or for several cases brought against that State?
- Does the State have guidelines or pre-defined policies in place, or an entity in charge of defining the most important factors to be considered when selecting international law firms to represent the State?
- What mechanism does the State use to hire external lawyers in Investment Arbitration?
- In case of an invitation to bid to a reduced number of firms, how many firms are invited?
- Are there any indispensable requirements for participation in the bidding process and subsequent hiring of external lawyers by the State for the defense of investor-State disputes? If there are any, please describe which ones.
- Is it necessary for the firms participating in the process to be pre-registered with any government entity prior of the submission offering legal services?
- Is the participation of consortiums of law firms allowed for the defense of the State in investor-State disputes?
- Is it a requirement that the offer of legal services be accompanied by a preliminary case analysis prepared by the bidders?
- Is it a requirement for the selected firm to submit a plan to contribute to the improvement of the State's capacity to handle investor-State disputes?
- Is a previous face-to-face interview with the participating firms a requirement for hiring?
- Is it necessary for the selected firm to work jointly with a local firm in the representation of the State?
- Is it required that the team of external counsel have a qualified lawyer from the country of the respondent State as a member of their team?

ii. Summary of Findings

States most commonly hire external counsel either when the State receives a Notice of Intent to submit a dispute to arbitration or when the investor has registered its Request for Arbitration with the arbitration institution. However, the timeframe for hiring external counsel can vary depending on the needs of the case. The hiring process for most States takes between one and four months. States hiring external counsel are likely to have counsel participate in choosing the State-appointed arbitrator, while participation

of external counsel during the "cooling off" period is less common.

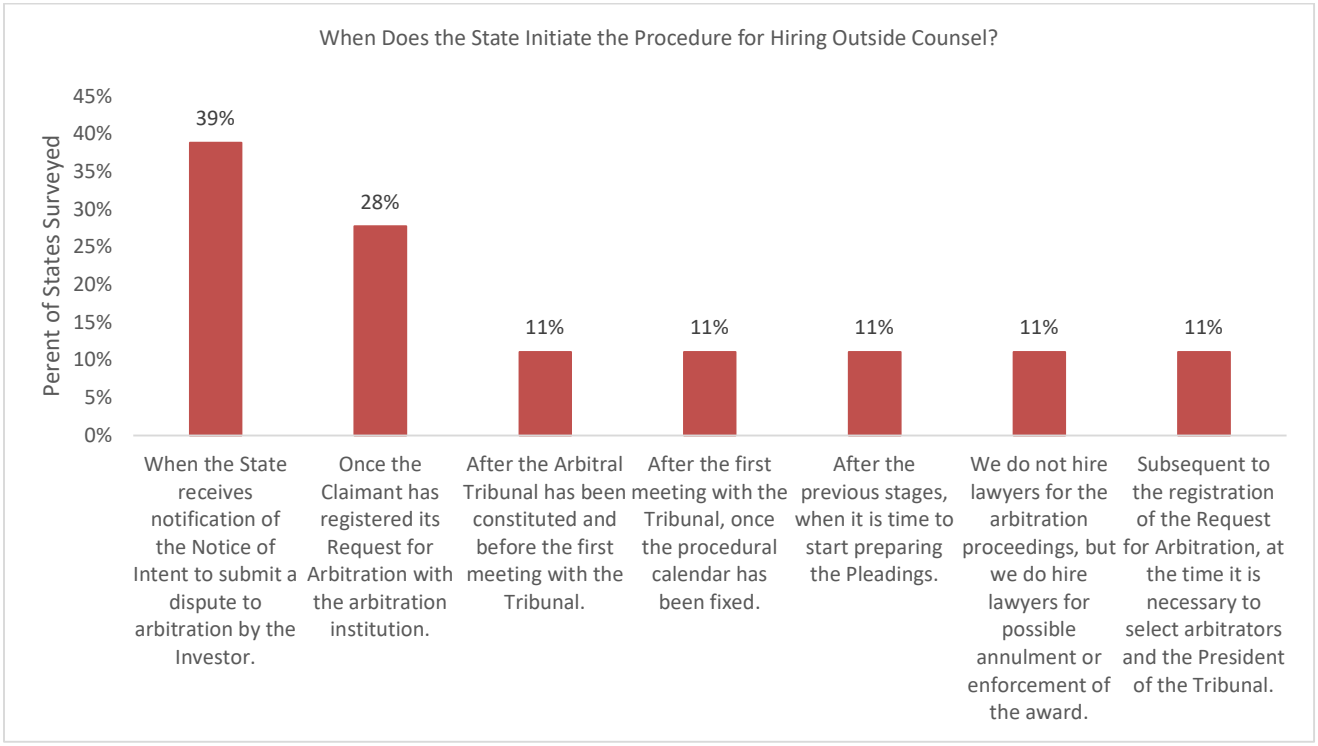
Most of the States have developed policies for hiring external counsel to defend investment arbitration claims. External counsels are usually hired either through direct contracting or by offering invitations to tender to firms that have already been pre-selected by the State. The processes used for hiring external counsel are in part based on the State's procurement or government contracting laws and guidance.

In relation to the submission requirements, the requirement for the selected firm to submit a preliminary case analysis and a plan to contribute to the improvement of the State's capacity to handle investor-State disputes are requirements that States highly appreciate when receiving the offer of legal services. In addition, the fact that the selected firm works jointly with a local law firm in the representation of the State appears to be a requirement that, depending on the case, will be considered important.

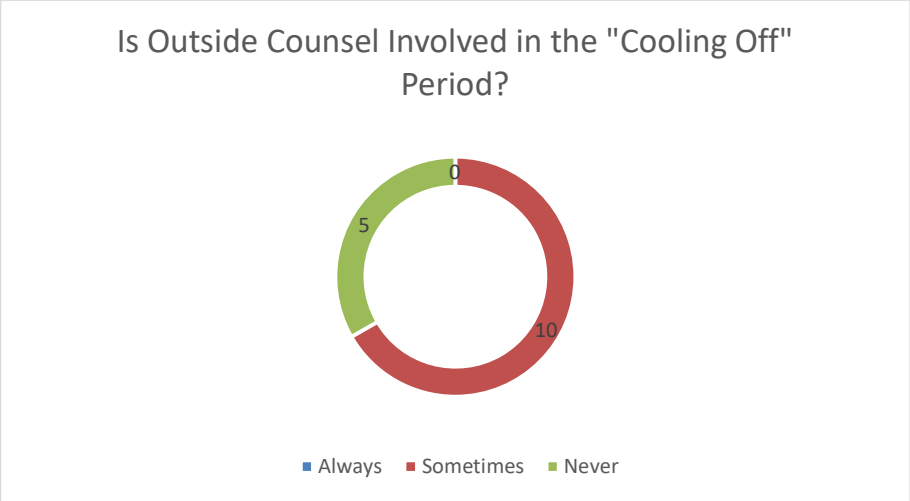
iii. Analysis of Survey Responses

1. Timing Considerations

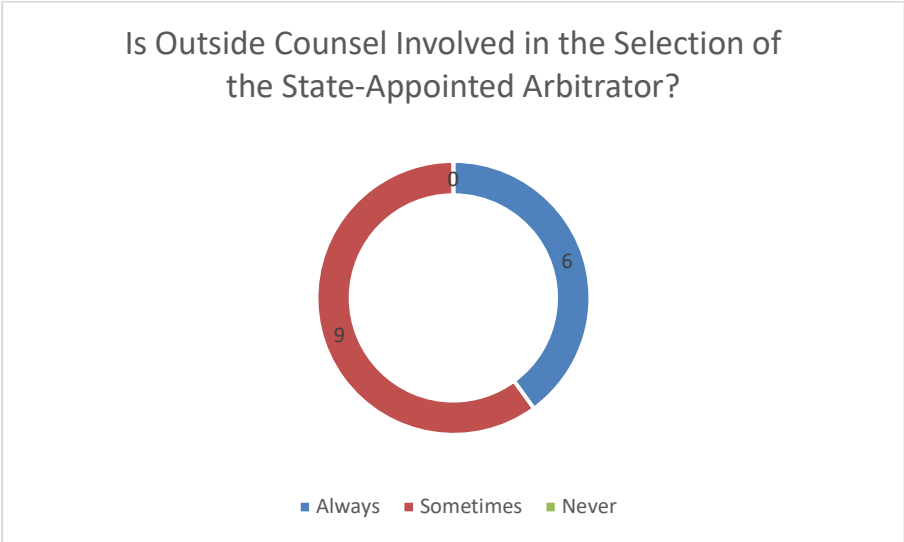
States vary significantly on when they choose to hire external counsel to defend an investment arbitration dispute. The two most common hiring timeframes are when the State receives a Notice of Intent to submit a dispute to arbitration and when the investor has registered its Request for Arbitration with the arbitration institution. However, the States may not begin hiring external counsel at the same point in time for every case. The timeframe for hiring sometimes depends on the needs of the case as well as budget availability.



Of the States that regularly hire external counsel, five States will never involve outside counsel during the "cooling off" or negotiation period between the investor and the State, and ten States will sometimes involve outside counsel during this period. However, many of the States answering this question explained that circumstances would rarely require the involvement of external counsel during this period, as negotiations typically occur directly between the investors and the State. States would likely only involve outside counsel at this stage in "complex cases, of a systemic nature or with high amounts of damages."



In contrast, all fifteen States that regularly hire external counsel for investment arbitration defense will often involve external counsel in choosing the State-appointed arbitrator. Of those fifteen States, six of them always involve external counsel in making this choice, while the remaining States involve external counsel sometimes. These States indicated that the decision to involve external counsel in choosing the State-appointed arbitrator depends predominantly on the nature of the case and is more likely to occur in cases that are "*especially sensitive or complex*." One State said that their lawyers would consider the opinion of external counsel but would conduct their own evaluation of the candidates first.



For twelve of the States surveyed that currently or previously hired external counsel, the process of hiring external counsel takes between one and four months. Five of the remaining States said that they usually take four or more months to hire external counsel. One of these States indicated that the amount of time required for the hiring process depends on what time of year the process begins and the status of the State's budget.

States typically hire external counsel on a case-by-case basis, preferring to tailor the contracting process to the needs of the dispute and hire external counsel with expertise in the relevant fields or industries. One State noted that there could be situations where an external law firm might handle interconnected lawsuits at the same time; however, only one State said that it might intentionally hire the same law firm for several cases brought against the State. This is because the State does the engagement of counsel on an annual basis and takes into account the number of active cases against the State when doing so.

Fifteen of the States that regularly hire external counsel indicated that, once selected, a contract between the law firm and the State would always need to be in place for the firm to start working. However, one State said that efforts are usually made to ensure that signing of a contract does not delay the start of work, and another State added that the contracting process usually only takes a few additional days and the firm selected could start working in the interim period.

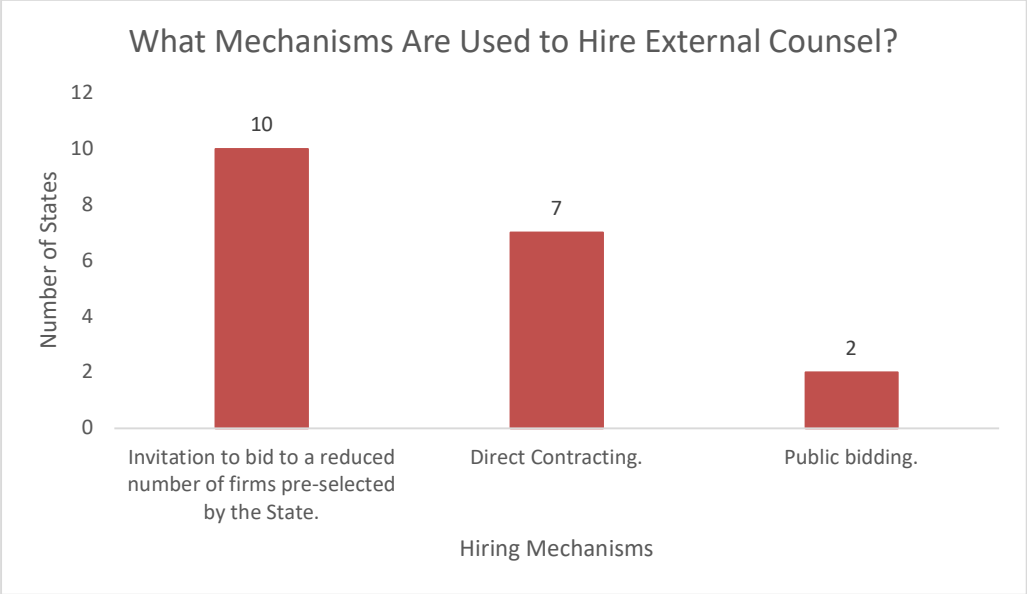
2. Bidding Process

Twelve of the surveyed States that regularly hire external counsel have guidelines or a pre-defined policy in place for doing so. One State explained that it "has a predefined contracting procedure and uses competitive and objective selection criteria to guarantee suitability, experience and [the] best possible economic proposal." Another State described its two-step contracting process, whereby a law firm first joins a predetermined list of firms that are approved to represent the State, as long as the firm "meets the basic requirements of experience and knowledge." Once those requirements are met and a law firm is on the predetermined list, the State will usually "request additional information at the beginning of each contracting process, which allows it to account for the experience that it considers essential for the defense of the case."

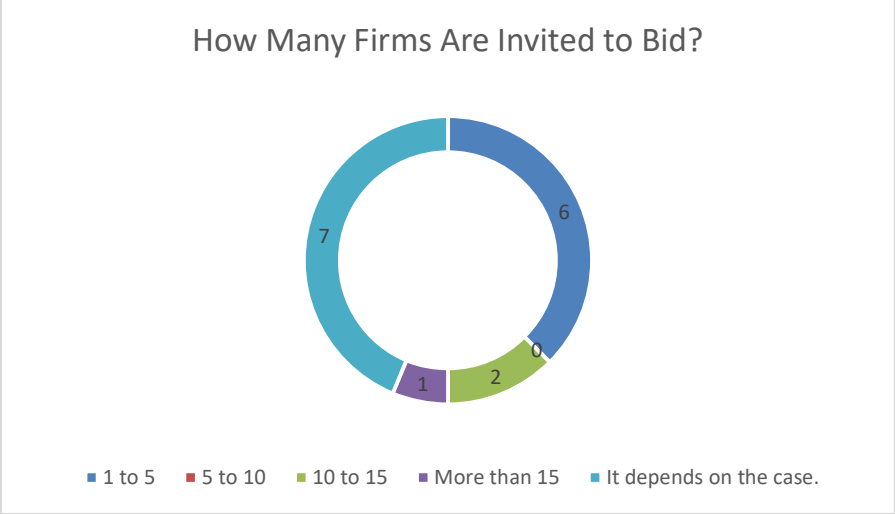
Even States that said they have no predetermined guidelines or policy for hiring external counsel still identify "*certain criteria that have been adopted for the hiring of offices, linked to prestige and experience in the matter*." However, "*they are established for each case, on the basis of the call to present offers, depending on the specific needs*."

For most of the States, hiring is done through a direct contracting process or by offering invitations to tender to firms that have already been pre-selected by the State. The only States that indicated they follow a public bidding process also indicated that they have used at least one of the other mechanisms as well. For one of these States, this is because the default procurement process is through public tender, but direct contracting can be used in certain circumstances, such as in urgent situations.[3]

[33] Some states selected multiple answers to this question, and two states did not respond.



When asked how many firms are invited to bid on a case, most of the States that answered with a specific number indicated one to five firms are invited to bid. Only three States usually invite more than ten firms. However, seven States answered that the number of firms invited will change depending on the needs of the case, such as "*the time available to respond to a Brief or select the party arbitrator*." Another State noted that, because the firms' experience and knowledge is evaluated during a pre-selection phase, the number of firms invited to tender varies highly. As an example "*in some cases the State has invited three legal firms, while in others the invitation has been extended to nine legal firms*."



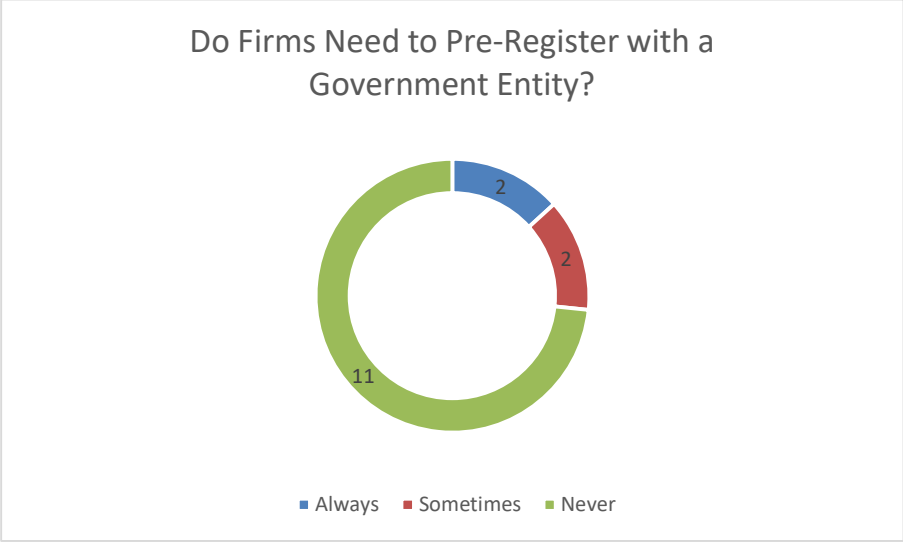
When asked if there are any indispensable requirements for participation in the bidding process and subsequent hiring of external lawyers, ten States indicated there were always indispensable requirements, and two States indicated there were indispensable requirements at least some of the time. Three of the states that regularly hire external counsel did not answer this question.

One of the most commonly mentioned requirements was a lack of conflicts of interest with the State. One State noted that if the law firm had previously represented an investor against the State, the firm would not be eligible to represent the State for five years, beginning on the date of the notification of the award in the investor's case. Several States also indicated that a key requirement was the experience and results achieved in investment arbitration cases by the lawyers. One State said that it would consider the lawyers' "*experience representing sovereign States, the success rates under these headings, the management of the best-known arbitration rules and having a bilingual work team, with sufficient experience at an individual level*." Another State said it would consider

the "*years of experience of the main partners and associates who would participate in the case.*"

One State mentioned that reasonable fees were an indispensable requirement. Another State said that it was indispensable for the lawyers being hired to understand the dynamics of their government and investment arbitration disputes in the Americas.

Most of the States surveyed do not require firms participating in any bidding process to pre-register with a government entity. Specifically, eleven of the States surveyed answered that this was never a requirement; one State explained "*It is enough to show your interest…and demonstrate your experience in investment arbitrations.*" For the two States that said that this was always a requirement, the pre-registration process involves getting onto a list of pre-approved firms to represent the State, or similarly, appearing in the public contracting data base.

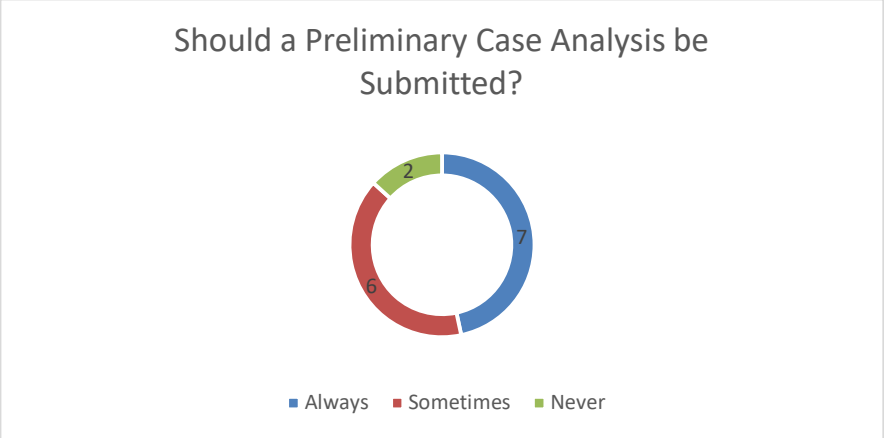


Most States would allow consortiums of law firms to participate in defending the State in investor-State disputes. A few of the States indicated that the most important consideration in this regard is still whether the consortium would meet the requirements of the call to receive offers and any other requirements of contracting with the State. Some of the other States explained that while there was no rule prohibiting a consortium from participating, there was also no rule specifically advancing their participation.

Of the two States that said consortiums would not be allowed to participate, one of the States said that while there is no actual legal limitation on a consortium's participation, it would mean a higher cost to the State and therefore would not be considered.

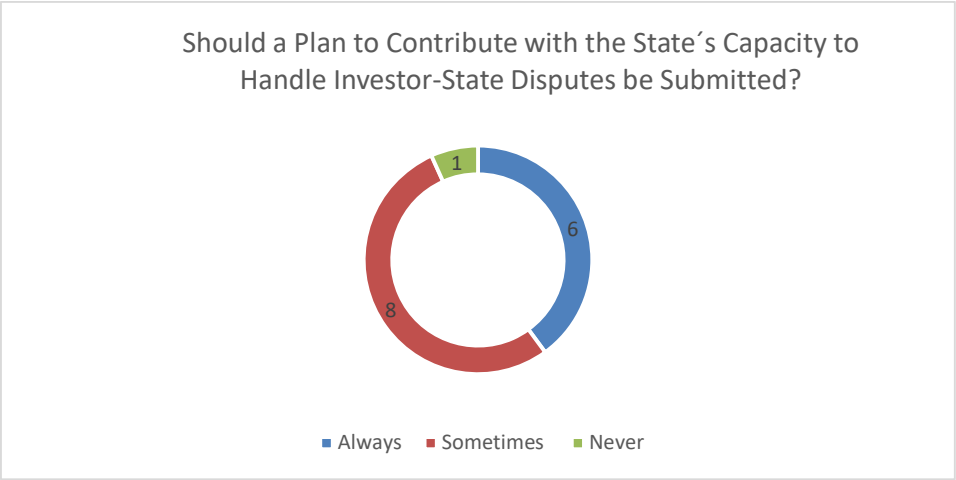
3. Submission Requirements

Concerning the submission requirements, when asked if the offer of legal services should be accompanied by a preliminary case analysis, previously prepared by the bidders, seven States answered that preliminary case analysis was always required, while six States sometimes asked for it. Two States pointed out that this requirement was never considered.[4]

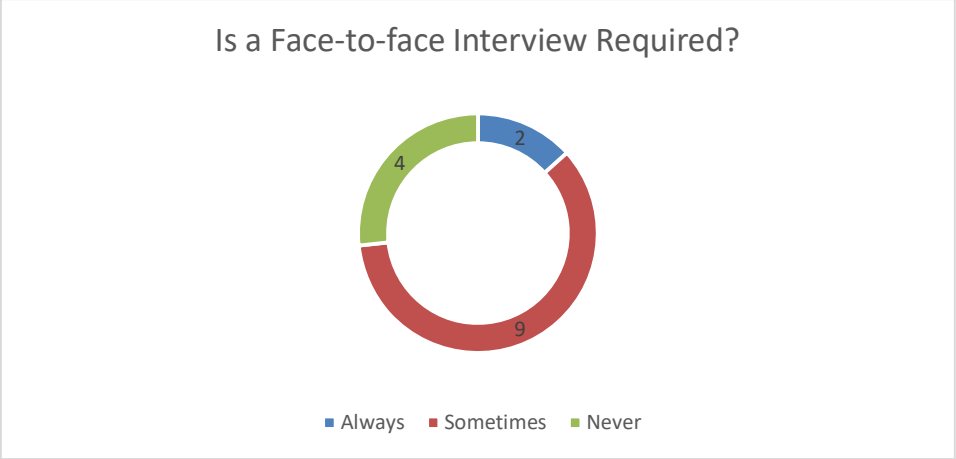


When asked about the requirement for the selected firm to submit a plan to contribute to the improvement of the State's capacity to handle investor-State disputes, six States indicated that submitting a plan was always required; eight States sometimes consider it, and one State never does. Among those States that never hire external counsel, one of them argued that their lawyers were highly skilled and experienced in investment arbitration.

44 It is worth mentioning that in the case of States that usually represent themselves in these procedures, this requirement does not apply.

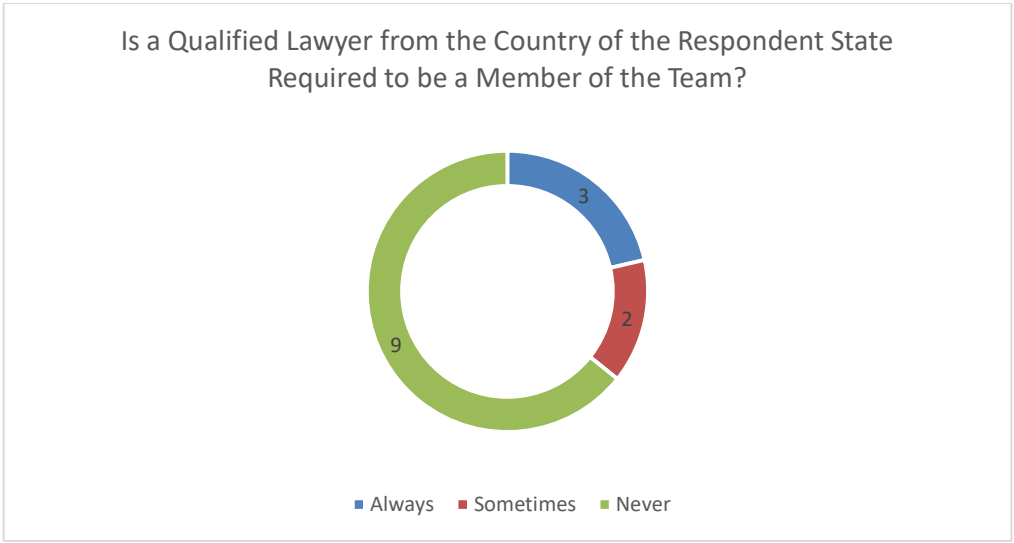


With the same purpose, and taking into account the hiring process, the States were consulted as to whether it was necessary to hold a face-to-face interview with the participating firms. In this regard, only two States answered that they always use face-to-face interviews, while nine States stated that they sometimes use interviews, and four States never conduct face-to-face interviews.



The fact that the selected firm works jointly with a local law firm in the representation of the State is a relatively common practice among the surveyed States: two States declared that they always include a local firm in their representation, while seven States declared that they sometimes resort to this joint advice. Six States declared that they have never made use of this type of joint consultancy. In one particular case, one of the States affirmed working closely with external counsels that were selected in specific circumstances.

The presence of a qualified lawyer from the country of the respondent State does not seem to be a requirement that is strongly demanded by the States that submitted their answers to this Survey: while three States always take this requirement into account, two States sometimes consider it, and nine States never require it. It is worth noting that one of the surveyed States indicated that although this has not been a requirement in previous processes, it could be considered in particular circumstances. Another surveyed State that indicated it regularly hires external counsel did not answer this question.



c. Qualifications Considered When Hiring External Counsel

i. Questions asked to the States

- What is the most important factor to consider when deciding which firm to hire?
- Is it a requirement for the selected firm to have prior experience in investment arbitration disputes?
- Is it a requirement for the selected firm to have previous experience representing States?
- Is it required for the team of outside counsel to have a lawyer with native fluency in the language in which the arbitration proceeding is being conducted as a member of the team?
- How important is it that, in the event that the arbitration is conducted in a language other than that of the State where mandatory translations into the State language are not required, the State's lawyers also provide the client with translations into said language?

- Does the State have preferences for offices located in certain geographical areas?

ii. Summary of Findings

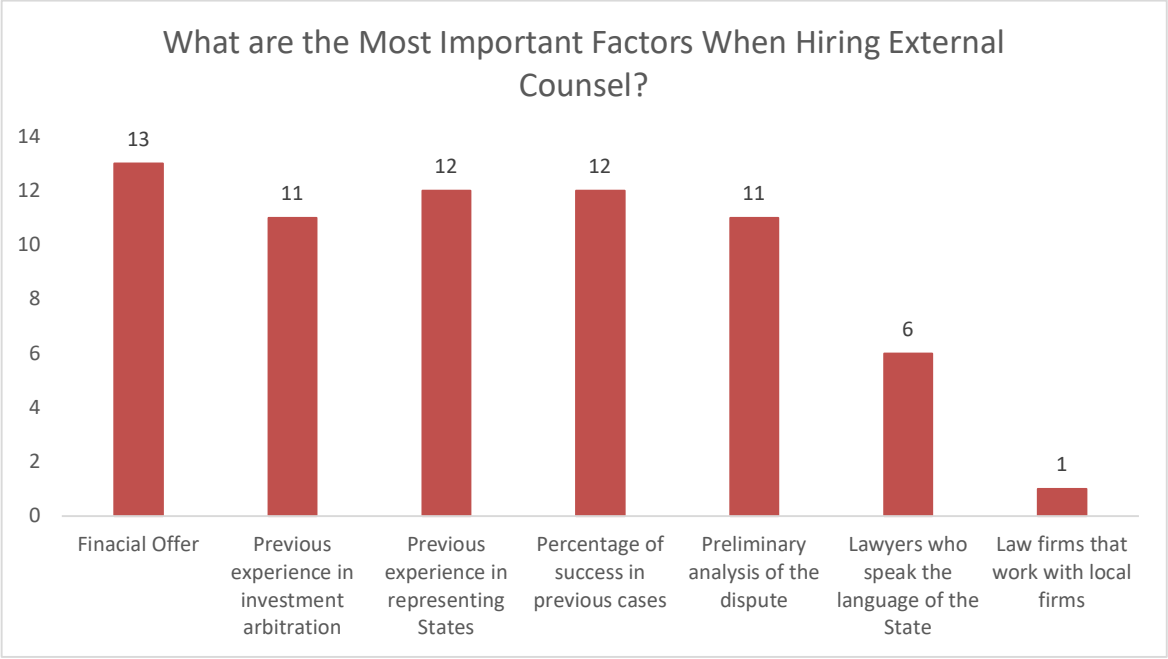
Regarding the qualifications considered when hiring external counsels, the financial offer is as crucial for the States as the previous experience the law firm had in investment arbitration and representing States. Submitting a preliminary analysis of the dispute is also an important factor to consider.

Another fundamental requirement for the States is the language capabilities of external counsel. In first place, this requisite involves including a lawyer with native fluency in the language in which the arbitration proceeding is being conducted. In the second place, it includes having lawyers on the team that speak the language spoken by the State.

iii. Analysis of Survey Responses

All the States surveyed were asked about the most important factors considered when deciding which law firm to hire. Every State was able to choose more than one option, which included: a) Financial offer; b) Experience in investment arbitration, c) Previous experience in representing States, d) Percentage of success in previous cases, e) Preliminary analysis of the dispute; f) Lawyers who speak the language of the State, and g) Law firms that work with local firms.

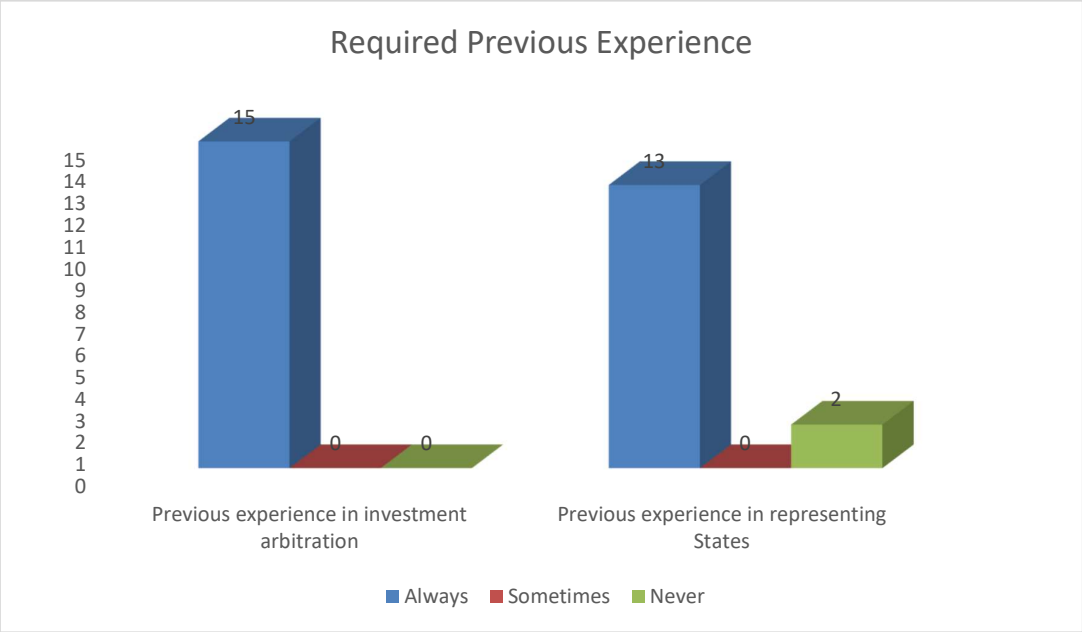
The responses were as follows:



a. Experience of External Counsel

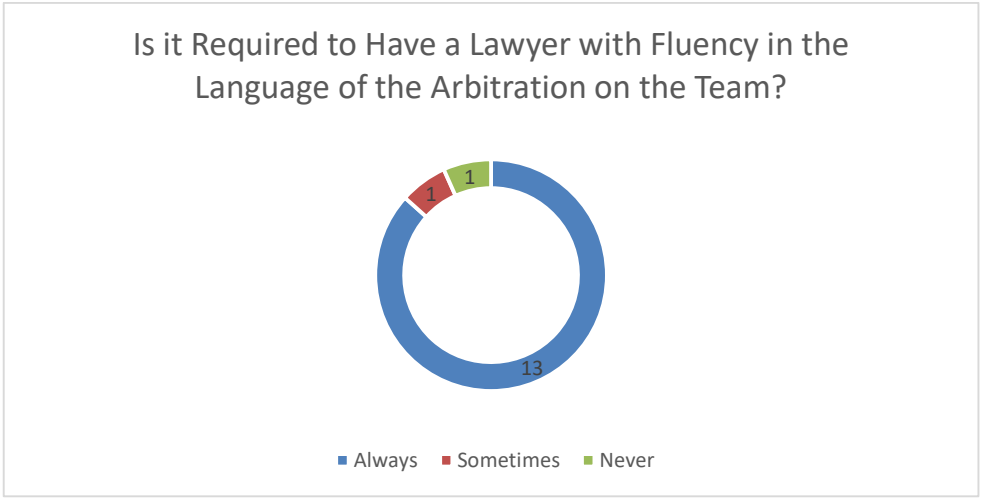
The question regarding the prior experience that law firms must have in order to be selected by the States is related to two key aspects: the experience the law firm has in investment arbitration disputes and its experience in representing States.

In both cases, the answers were extremely conclusive: it is a very relevant factor for the States that the selected law firms have previous experience in investment arbitration as well as in having previously represented the interests of a State.

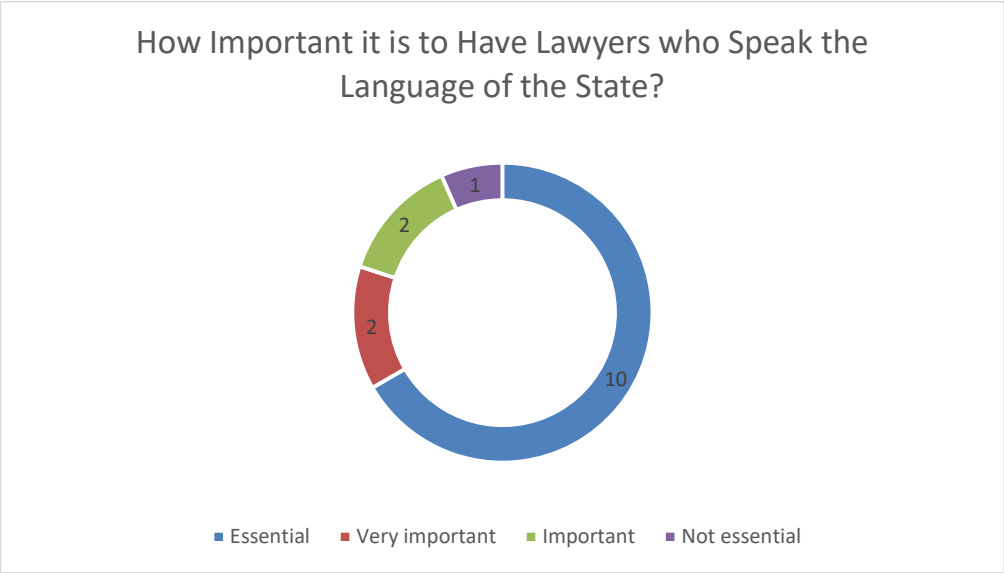


b. Language Capabilities of External Counsel

The surveyed States answered several questions about the required language capabilities of external counsel. The first important point is related to the States' requirement for the outside counsel's team to have, as a member of the team, a lawyer with native fluency in the language in which the arbitration proceeding is being conducted. Thirteen States declared that this requirement is always a priority, one State sometimes consider it, and another State never takes this matter into consideration.

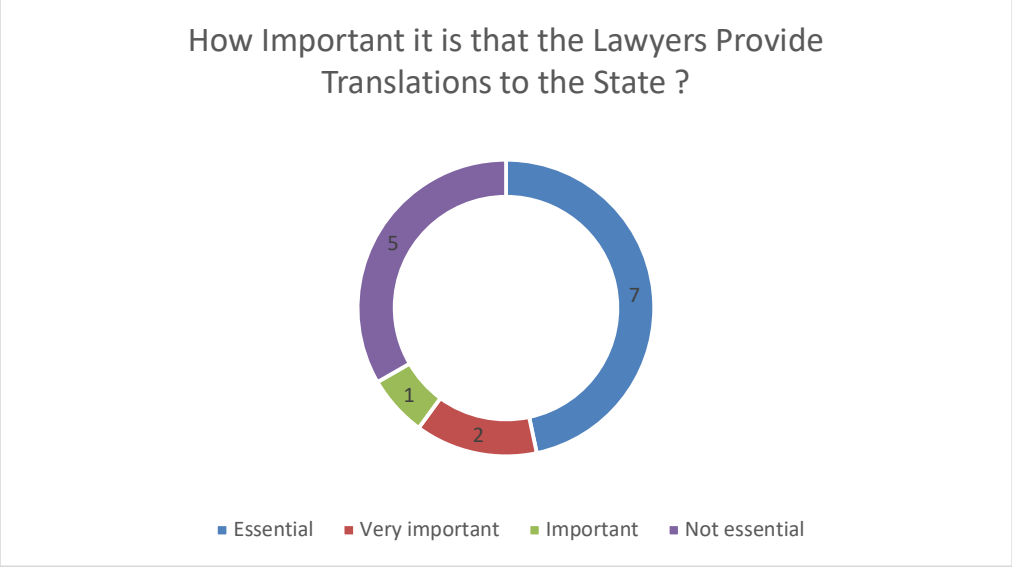


Secondly, the survey asked how important it is for the international firm to include lawyers who speak the language of the State on their team. On this matter, ten States considered this requirement to be essential, two States mentioned it was very important and two States believe it is an important issue. Only one State answered that this is a non-essential requirement. One of the States conducting its own defense made the point by explaining that in its particular case, government counsels have varying degrees of proficiency in at least two languages.



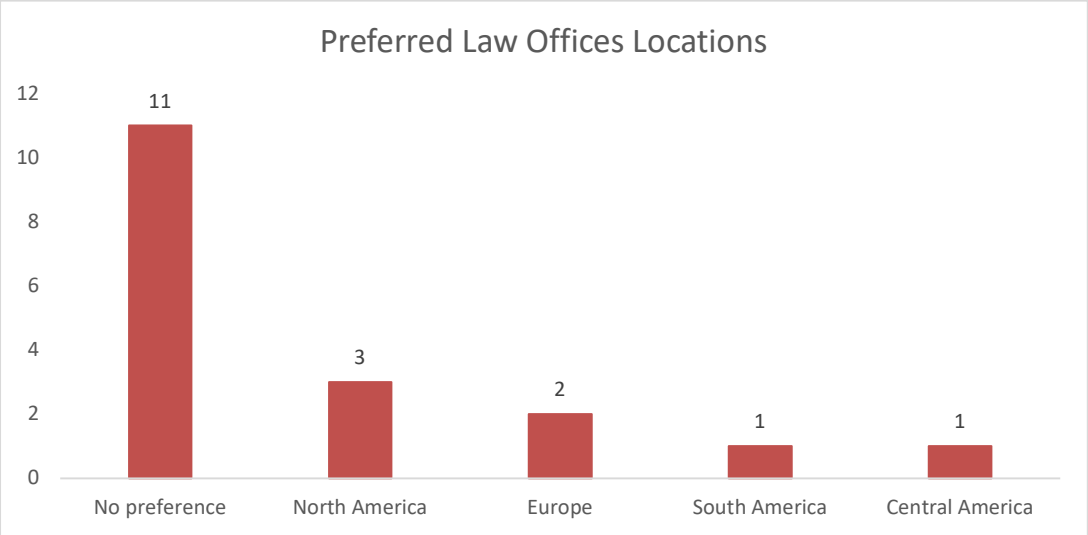
A final question was based on the premise that the arbitration is conducted in a language different than the official language of the State where mandatory translations into the State language are not required. In such a case, how important is it that the State's lawyers also provide the client with translations into said language?

The answers to this question were dissimilar: at one end, seven States considered this to be an essential requirement, while at the other end, five States considered it a non-essential requirement. Moreover, two States mentioned that this is a very important issue and one State said that it was only important.



c. Geographic Presence of External Counsel

The Survey also addressed questions regarding the geographic location of the external counsel. In this regard, when answering about the preferences of each State to rely on law firms located in certain geographical areas, eleven States declared not having any particular preference in this regard. Among those States that claimed to have a specific preference, three States opted for law firms located in North America and two States chose law firm with offices in Europe. In addition, one State opted for South America and another State for Central America, and no preferences were given in relation to offices located in Asia or Africa. In one particular case, a State argued that its preference would depend on the underlying case.



d. External Counsel Hiring Statistics

i. Questions asked to the States

Since the first investor-State dispute faced by the State, how many international outside law firms have advised on this matter?

Please indicate the name of the law firms that have advised or represented the State in investment arbitration.

What would you recommend to the States to improve and make the contracting of external defense more efficient in investor-State disputes?

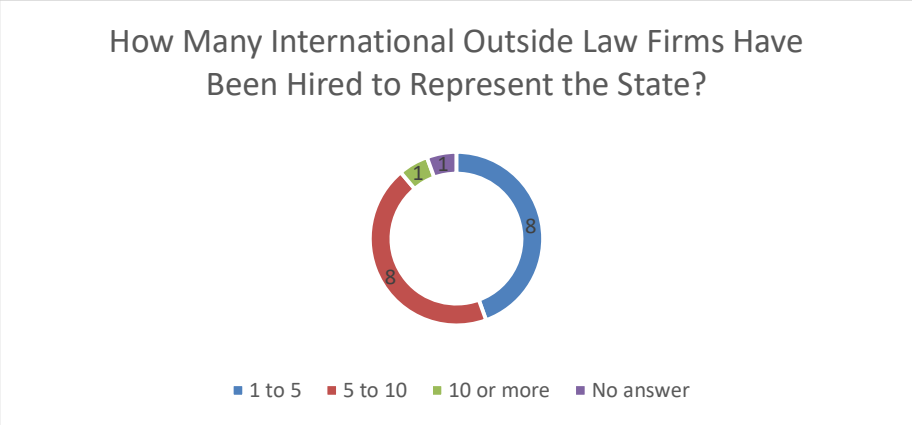
What would you recommend to law firms to improve and make the contracting of external defense more efficient in investor-State disputes?

ii. Analysis of Survey Responses

a. Law firms that already represented the States

In this final section of the Survey, the States were consulted in relation to the outside law firms that have advised the aforementioned State since the first investor-State dispute it faced.

As can be seen from the graph below, eight States declared hiring one to five law firms since its first investor-State dispute, eight States hired five to ten external counsels, and only one State was represented by ten or more law firms.



The identity of the law firms that have advised or represented the States in investment arbitration, as reported by the surveyed States, is as follows, in alphabetical order:

- Allen & Overy
- Arnold & Porter
- Baker Botts LLP
- Baker Hostetler LLP
- Border Ladner Gervais LLP
- Cleary Gottlieb Steen & Hamilton LLP
- Curtis, Mallet-Prevost, Colt & Mosle LLP
- Debevoise & Plimpton
- Dechert LLP
- Dorsey & Whitney
- Eversheds Sutherland
- Foley Hoag LLP
- Freshfields Bruckhaus Deringer LLP
- GBS
- González de Cossío Abogados
- Greenberg Traurig LLP
- GST LLP
- Guglielmino Derecho Internacional
- Herbert, Smith, Freehills.
- Hogan Lovells
- Jana & Gil Dispute Resolution
- Lalive
- Latham & Watkins
- Matrix Chambers
- Quinn Emanuel Urquhart & Sullivan
- Shaw Pittman
- Shearman & Sterling
- Sidley Austin
- Squire Patton Boggs
- Steptoe Johnson
- Tereposky & De Rose
- Venable
- White & Case

b. Recommendations from States Regarding the Hiring of External Counsel

Finally, this last section of the Report will address some recommendations given 1) to the States, to improve and make the contracting of external legal representation more efficient in investor-State disputes, and 2) to law firms to improve and make the contracting of external legal representation more efficient in investor-State disputes.

Among the recommendations given to the States to improve and make the contracting of external defense more efficient in investor-State disputes, it is important to highlight the following:

- It is essential to establish a contracting process and mechanism with clear and transparent rules, capable of considering the basic requirements that make the State's defense adequate, and that allows sufficient flexibility to assess additional requirements that adjust to the reality of each dispute.
- Requests for information on external firms' experience must be specific and clear, in order to maintain objectivity.
- One State has mentioned as an example that in some cases it was very useful to provide pre-established

formats so that the firms could provide their information in a uniform manner, with data that would be easier to process.

- The contracting processes usually take time since it is necessary to comply with several administrative procedures. With this objective in mind, the administrative simplification of contracting procedures is something that the States should work on as part of the continuous improvement processes, in order to speed up the contracting process.
- It is recommended that States establish transparent mechanisms and regulations for tenders and bids, as well as for direct contracting.
- Likewise, it is highly relevant for the States to have information on firms and lawyers who are gaining ground in the investment arbitration space. There are specialized searching tools with restricted access, which provide precise information on the firms and profiles of the lawyers, that can be acquired to improve the contracting processes.
- Finally, the States should consider the possibility of conducting interviews with short-listed firms, especially when no previous experience working with a particular firm does exist.
- One of the States surveyed commented that all applicants should be assessed on an objective point-based system.
- In the financial sphere, States should also consider small firms who submit offers with lower fees and similar experience. One State suggested that economic proposals be submitted with fixed prices, divided by stages, and that a market study be conducted each time a contract for legal representation is to be awarded. Bidders should be required to submit a written strategy memo and a financial proposal.
- It may be optimal to have a team focused on the administration of international disputes where the State has an exhaustive knowledge of the investment arbitrations in which the State in question was a party.
- Additionally, it would be advisable to conduct a thorough investigation regarding the dispute in question and which firms have experience in cases with similar substantive issues.

In relation to the recommendations given to law firms to make the contracting of external defense in investor-State disputes more efficient, the following recommendations were made:

- To submit the information required in a timely and truthful manner, preparing the offer according to the indications or requests of the State.
- To avoid providing generic information.
- To conduct face-to-face interviews with government agencies.
- To have staff with exclusive dedication to comply with the necessary requirements to contract with the State.
- To consider all expenses that could occur and all unforeseen events, so that the economic offer adjusts to reality.
- For States with limited budgets, it would be desirable for large law firms to submit adjusted fees structures.
- Finally, the law firms should always consult the State in case of doubts, to ensure that the correct information is being included in their offers and is being submitted as expected by the State.

V. Final Remarks

This report provides one possible approach to the analysis of the data available within the American States regarding legal representation in investment arbitrations. We would like to urge American governments and law firms, as well as the broader arbitration community to make use of this information for academic and professional purposes.

We also hope that this report would prompt other follow-up studies that would enhance governmental capacity-building and fluid collaboration between the governments and their external counsels leading to satisfying results under the rule of law principle.