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The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order

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I. INTRODUCTION
II. HISTORICAL CONTEXT AND THE GROWING IMPORTANCE OF INVESTMENT DISPUTE RESOLUTION
  A. *In the Beginning There Were Guns*
  B. *Imperialism Gives Way to Autonomy*
  C. *A Global Law Emerges*
  D. *Empowerment in Enforcement*
  E. *The Final Ingredients*
    1. Advantages to Arbitration
    2. The Calvo Doctrine's Demise
  F. *The Evolution of Investment*
III. BALANCING TRANSPARENCY AND CONFIDENTIALITY
  A. *ICSID and UNCITRAL – Influential Procedural Guidelines*
  B. *NAFTA: An Emerging Transparency*
  C. *CAFTA: Transparency Gains a Foothold*
  D. *Illustrations:* Metalclad *and* Methanex
  E. *Concluding Remarks on Transparency*
IV. GARNERING UNIFORMITY: THE "APPELLATE" PROCESS
  A. *NAFTA: Review and Consistency*
    1. Notes of Interpretation
    2. Reviewing an Award at the Enforcement Stage
    3. Setting Aside the Award at the Seat of Arbitration
    4. An Illustration: *Metalclad*
  B. *CAFTA Reforms: Proficiency or Prolixity?*
    1. Annulment Under the ICSID Convention
    2. Appellate Review
V. CONCLUSION
VI APPENDIX A: DISTINGUISHING INVESTOR-STATE DISPUTE SETTLEMENT IN NAFTA AND CAFTA

I. INTRODUCTION

The Dalton Gang[1] was one of the most notorious gangs to ever roam the Wild West. On the morning of October 5, 1892, the gang rode into Coffeyville, Kansas intent on robbing two banks at the same time.[2] This brazen act did not go unnoticed; before the outlaws were even able to enter the banks, the townspeople recognized the group and issued a call to arms.[3] This town was not going to allow a gang of experienced highwaymen to rob two of its banks uncontested, and no less than twelve townspeople took up arms and positioned themselves around the banks.[4] As the gang was trying to tie their bags of money closed, shots began to ring out. A fierce gun battle ensued lasting less than fifteen minutes.[5] Once the smoke had cleared, four gang members lay dead; their bodies proudly displayed and photographed as a warning to criminals everywhere.[6]

The townspeople that day took part in "vigilante justice."[7] In carrying out "vigilante justice" individuals carry out retributive actions after being wronged. These acts are typically due to either not having or not seeing the value in a legal remedy. In the above example, after recognizing that outlaws were threatening their community, the townspeople of Coffeyville became determined to exact the justice a primitive law enforcement was incapable of providing. Fortunately, today the United States no longer accepts the legitimacy of "vigilante justice"[8] and has come a long way from the days of the Wild West when "vigilante justice" was a way of life. Indeed, the United States has come to recognize the importance of maintaining an orderly society through a judiciary, which ensures "equal justice under law."[9] However, while the dispute settlement system in the United States has evolved into a highly advanced and integrated system, international disputes are still transitioning from a "vigilante justice" system, known as "gunboat diplomacy,"[10] to a system reliant on courts of justice.

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1. The Dalton Gang's Last Raid, 1892, EyeWitness to History, http://www.eyewitnesstohistory.com/daltons.htm (last visited Oct. 2, 2006).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* Vigilantism, Vigilante Justice, and Victim Self-Help, North Carolina Wesleyan College, http://faculty.ncwc.edu/toconnor/300/300lect10.htm (last updated Oct. 28, 2004).

8. There is no mention of the government admonishing the townspeople for their preferred method of executing justice.

9. "Equal Justice Under Law" is inscribed on the façade of the United States Supreme Court. The Supreme Building, Supreme Court of the United States, http://www.supremecourtus.gov/about/courtbuilding.pdf (last visited Oct. 2, 2006).

10. *See* NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 433 (2005); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L.

In the international sphere, courts of justice are more commonly referred to as arbitral bodies or tribunals and continue to be plagued by a myriad of difficulties. These difficulties are frequently cited by scholars and include international tribunals' dubious legitimacy, interpretive incoherency, inconsistent approaches to choice of law, inadequate arbiter accountability, and inability to enforce awards and interim measures—just to name a few. However, because there is no single integrated framework from which international tribunals operate, the corpus of international justice is difficult to critique as a whole. Accordingly, this article focuses on a narrow class of international disputes and issues. Specifically, the discussion pertains to the evolution of transparency and interpretive coherency between the dispute resolution mechanisms in Chapter 11 of the North American Free Trade Agreement[11] (NAFTA) and Chapter 10 of the Central American Free Trade Agreement[12] (CAFTA), which govern disputes between individual foreign investors and states in Central and North America. Although this article focuses on two specific dispute settlement methodologies governing a particular geographical region, the themes of transparency and coherency are

365 (2003); Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 529 (2002) (quoting Matthew B. Cobb, *The Development of Arbitration in Foreign Investment*, 16 Mealey's Int'l Arb. Rep. 2 (2001)); JAMES CABLE, GUNBOAT DIPLOMACY 1919-79: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE (1981).

"Between 1820 and 1914 . . . Great Britain alone engaged in at least forty armed interventions into Latin America." Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 441 (1993). Indeed, "[i]f foreign governments did violate what Europe and the United States considered commercial law or market morality, gunboats could seize the customs houses of the violators and manage them until debts were discharged." W. Michael Reisman, *International Arbitration and Sovereignty*, 18 ARB. INT'L 231, 232 (2002).

11. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2203, Dec. 17, 1992, 32 I.L.M. 605, 702 [hereinafter NAFTA]. For a detailed outline of the history of NAFTA including the legislative history, see Donald J. Musch, *Summary of NAFTA Legislative History*, *in* NAFTA: NORTH AMERICAN FREE-TRADE AGREEMENTS Release 95-1, at 1-10 (James R. Holbein & Donald J. Musch eds., 1995).

12. Central American Free Trade Agreement, May 28, 2004, 43 I.L.M. 514, *available at* http://www.ustr.gov.Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA]. Parties to the convention include the United States, El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica, and the Dominican Republic, but Costa Rica and the Dominican Republic have yet to pass implementing legislation. CAFTA "reflects an understanding that only through political, economic and social development can the Central American and Caribbean parties build enduring democracies based on shared values and principles with the United States." Regional Integration, United States Dominican Republic Central America Free Trade Agreement, *available at* http://www.ustr.gov/ Trade_Agreements/Bilateral/CAFTA/CAFTADR_Final_Texts/Section_Index.html. After CAFTA passed, President Bush issued a statement saying that CAFTA represents "a commitment of freedom-loving nations to advance peace and prosperity throughout the Western Hemisphere." President Bush, U.S. Trade Chief Applaud House Passage of CAFTA, http://usinfo.state.gov/wh/Archive/2005/Jul/28-99143.html (last visited Oct. 2, 2006).

hallmarks of a credible and legitimate dispute settlement system and thus, issues of global import. Indeed, persuading states that international settlement bodies are credible and legitimate remains a major impediment to their continued evolution into reliable and successful tools for the peaceful resolution of international disputes.

This article discusses the evolution of international dispute resolution, principally the reforms to transparency provisions and the arbitral award review process over the last ten years. Part II lays a foundation by reviewing the historical background of investment disputes and their growing importance in the global economy. Part III then highlights reforms to the transparency provisions in CAFTA in the wake of NAFTA. Addressing avenues for post-award review, Part IV examines the means to review an award under CAFTA in light of the methods already implemented under NAFTA. Arbitral decisions are cited where applicable and illustrative. Additionally, Part IV discusses the advantages and disadvantages of establishing an appellate body and proposes one possible framework. Finally, Part V summarizes the observations made in the previous sections.

II. HISTORICAL CONTEXT AND THE GROWING IMPORTANCE OF INVESTMENT DISPUTE RESOLUTION

A. In the Beginning There Were Guns

John Locke in his Second Treatise of Government stated that an effective governing body required three ingredients: (1) "an established, settled, known law, received and allowed by common consent to be the standard of right and wrong;" (2) "a known and indifferent judge, with authority to determine all differences according to the established law;" and (3) "power to back and support the sentence when right, and to give it due execution."[13] In its early stages from the 18th century to the 20th century, the international investment world lacked all of the ingredients prescribed by Locke for a successful governing body. At that time, disputes were resolved through "gunboat diplomacy."[14] This Darwinian model, divorced from law, was prevalent and frequently displayed through exertions of force or threats of force by imperial states to extract concessions from weaker host states.[15]

13. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 124-26 (C.B. Macpherson ed., 1980) (1690).

14. *See supra* note 10.

15. *See* Alvarez & Park, *supra* note 10, at 367.

B. Imperialism Gives Way to Autonomy

As the grip of the colonial powers waned, "gunboat diplomacy" slowly evolved, at least in Latin American states, into a policy of state autonomy referred to as the Calvo doctrine.[16] Carlos Calvo, an Argentine jurist in the late 19th century, developed this novel doctrine based on two criteria:

> (1) sovereign states, being internationally equal and independent, should enjoy the right to absolute freedom from interference by other states, either through force or diplomacy; and (2) while aliens should be given equal treatment with nationals, they are not entitled to "extra" rights and privileges and thus may seek redress in local courts.[17]

This doctrine was a double-edged sword in paving the road for modern day arbitral tribunals.[18] On the one hand, it slowed advancement by limiting rights to those provided in the host state's law, which often precluded suits against the government.[19] Thus, the doctrine effectively prevented recovery for foreign investors.[20] Paradoxically, the Calvo doctrine was also novel by providing an equal footing for both foreign and national investors.[21] However, in practice, local courts did not react favorably to foreign

16. Jones, *supra* note 10, at 529-30. The Calvo doctrine is embodied in Article 27 of the Mexican Constitution. Constitución Política de los Estados Unidos Mexicanos, art. 27 (1917). This doctrine has also been accepted in most Latin American jurisdictions. James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere, in* NORTH AMERICAN FREE TRADE AGREEMENTS TREATY MATERIALS 32 (James R. Holbein & Donald J. Musch eds., 1994).

17. Jones, *supra* note 10, at 530; *see also* DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 9-32 (1955).

18. *See* Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169, 1169 (1995).

19. Before the United States enacted the Federal Sovereign Immunities Act, "the United States applied the doctrine of restrictive immunity to claims against foreign states, but the doctrine of absolute immunity to the execution of resulting *judgments*." Charles H. Brower II, *Emerging Dilemmas in International Economic Arbitration:* Mitsubishi, *Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 923 (2005).

20. Indeed, "the settlement of investor-state disputes . . . constitutes a departure from traditional practice in this field where . . . a foreign investor was limited to bringing claim[s] against the host state in a domestic court or having its home state assume his claim against the host state (diplomatic protection)." Maryse Robert, *Investment, in* TOWARD FREE TRADE IN THE AMERICAS 186, 202 (José M. Salazar-Xirinachs & Maryse Robert eds., 2001).

21. Manning-Cabrol, *supra* note 18, at 1169 (observing that "in a new world order based on supranational organizations and individuals . . . one of the primary principles of the Calvo Doctrine will be vindicated: equality of foreign and national investors").

investors.[22] Despite its inequities, the Calvo doctrine, as the prevailing view in Latin American countries, served an important role during a transitional period, which afforded arbitral institutions the time necessary to develop advanced procedures for greater effectiveness and reliability in resolving investment disputes.

C. A Global Law Emerges

At the center of the great transition from sovereign individualism to collective harmonization was the destruction and tragedy of World War II. The widespread collaboration in the after-math of World War II resulted in a push for supra-national law, a critical development for successful governance.[23] This led to the establishment of the United Nations (UN), which immediately outlawed the use of force for disputes, including investment disputes, between states.[24] From these peaceful political underpinnings came a rise in economic interaction between members of the global community.[25]

The General Agreement on Trade and Tariffs (GATT),[26] which was drafted concurrently with the UN Charter, received widespread support as the economic equivalent to the politically minded UN.[27] GATT was initiated to lower trade barriers between states as a means of developing a world market.[28] The agreement was revised and amended through the years by various rounds of negotiations each often lasting several years.[29] Despite many revisions, GATT never reached it fullest potential because its dispute resolution mechanism was unable to issue binding decisions for disputes arising from its provisions.[30] But in 1994, the Uruguay Round agreements forever changed the landscape of the world economy by providing a process

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22. Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 413-14 (1997).

23. LOCKE, *supra* note 13 and accompanying text.

24. U.N. Charter art. 2, para. 4, *available at* http://www.un.org/aboutun/charter/chapter1.htm ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."). This was contrary to the long held belief by international scholars that recovery of property was adequate justification for use of force under the law of nations. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS ch. 1 § 2, ch. 2 § 13 (A.C. Campbell trans., 1814), *available at* http://www.constitution.org/gro/djbp.htm.

25. Robert, *supra* note 20, at 187 (noting that "the first BITs originated in Europe in the late 1950s").

26. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

27. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 211-16 (4th ed. 2002).

28. *Id.* at 209.

29. *Id.* at 211-16.

30. *Id.*

through which disputes could be definitively resolved.[31] Specifically, the Uruguay Round's sweeping reforms included the creation of an institution to regulate and remedy violations of GATT free trade provisions.[32] This institution is known as the World Trade Organization (WTO)[33] and is a major contributor to what we know today as globalization.[34]

The growth of a world market also led to the increase of domestic legislation governing international economic issues. Specifically, the rise in the number of foreign investors led to the development, particularly in developing nations, of domestic investment laws, which often provided for dispute resolution through a binding international arbitration in a neutral country.[35] Fueled by competition between developing countries for foreign investors and an increase in global trade, the late 20th century saw a rapid proliferation of Bilateral and Multi-lateral Investment Treaties, (BITs and MITs respectively), fostering the development of a supra-national investment law.[36] Indeed, "[a]t least thirty years before [NAFTA] took

31. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994) [hereinafter Final Act].

32. "[W]hether dispute settlement works is going to be the litmus test of whether the WTO is seen as a success or failure." Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime For Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 647 (1995) (quoting Alan W. Wolff, Comment, *in* MANAGING THE WORLD ECONOMY 152, 154 (Peter B. Kenen ed., 1994)).

33. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

34. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).

35. RUBINS & KINSELLA, *supra* note 10, at xxxiii.

36. *Id.*; Jones, *supra* note 10, at 530 (noting the "veritable explosion" in the number of BITs entered into worldwide); Robert, *supra* note 20, at 186 ("Trade rules governing foreign investment in the Americas have begun to converge in the 1990's."); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1528-29 (2005) ("In the 1990s alone, investment treaties were negotiated at a rate of one every other day . . . . [and] the provisions . . . are remarkably similar."). Furthermore, "in just the first quarter of 2004, ICSID registered as many new cases as the entire ICSID caseload for the first fifteen years of the Centre's existence." Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. INT'L ARB. 383, 383 (2004). BITs foster more than the development of supra-national investment law. A recent study shows that adding a BIT "play[s] a significant role in stimulating the inflows of investment" raising "inflows by an average of 2.3 percent . . . in South, East, and South-East Asian nations." Kim Sokchea, *Bilateral Investment Treaties, Political Risk, and Foreign Direct Investment* 30-31 (2000), *available at* http://ssrn.com/abstract=909760.

effect, BITs had begun to both grant direct investor standing and to waive the local remedies rule."[37]

Although these BITs and MITs contain more expansive provisions than the WTO, they are permitted under the WTO framework.[38] It is hoped that, while technically not creating a uniform platform for trade amongst all the member states, these more expansive provisions between a few states will encourage other nations to adopt expansive provisions and eventually lead to adoption by the WTO.[39] In particular, NAFTA and CAFTA are noteworthy MITs because they not only further decrease trade barriers beyond that which the WTO requires, but they also include provisions protecting foreign investments.[40] The inclusion of investment provisions is unique[41] under the WTO framework because investments are not extensively regulated in the WTO.[42] Specifically, NAFTA and CAFTA provide a distinct investment disputes settlement process described as hybrid arbitrations. The arbitrations are a combination of the WTO system[43] and the Calvo doctrine framework[44] by allowing an individual to bring a claim against a foreign sovereign for a violation of international law.[45]

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37. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1414 (2003) [hereinafter Coe, *Taking Stock*].

38. GATT, *supra* note 26, art. XXIV, ¶ 5 (stating that "the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area"). NAFTA and CAFTA are such multi-lateral agreements existing within the WTO framework. This is so despite NAFTA (and other BITs and MITs) entering into force before the formation of the WTO.

39. *See* Pierre Sauvé, *Canada, Free Trade, and the Diminishing Returns of Hemispheric Regionalism*, 4 UCLA J. INT'L L. & FOREIGN AFF. 237, 248-49 (2000); *see also* J. Michael Taylor, *Dispute Settlement Under the FTAA: An Apparent Melding of WTO, NAFTA and MERCOSUR Approaches*, 19 J. INT'L ARB. 393, 395 (Oct. 2002) ("An important underpinning of the GATT/WTO framework is the idea that bilateral and regional trade agreements can lead to the ultimate facilitation of international trade.").

40. Scott R. Jablonski, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Policy*, 32 DENV. J. INT'L L. & POL'Y 475, 476 (2004) (observing that Chapter 11 "is unique among trade agreements in that it contains an entire chapter dealing with foreign investment and the protection of such investment").

41. Chapter 11 provisions in and of themselves are not unique. Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L. J. 531 (2002). Typically, investment dispute provisions are governed in separate treaties known as Bilateral Investment Treaties (BITs) or Multi-lateral Investment Treaties (MITs). *See* Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287, 287-88 (1997).

42. Robert, *supra* note 20, at 189 ("Several agreements resulting from the Uruguay Round include investment provisions, but there is no comprehensive agreement on investment."). For a discussion on the implications of the Uruguay Round and the WTO on international investment disputes, see Brewer, *supra* note 32, at 633.

43. State to State disputes for violations of international law (GATT/WTO provisions).

44. *See supra* notes 16-22 and accompanying text.

45. Coe, *Taking Stock*, *supra* note 37, at 1389-93; *see also* Jack J. Coe Jr., *The Mandate of Chapter 11 Tribunals-Jurisdiction and Related Questions*, *in* NAFTA INVESTMENT LAW AND

D. Empowerment in Enforcement

Yet another of Locke's key ingredients for successful governance[46] emerged from the cooperation during the after-math of World War II—the establishment of a reliable means for enforcing international arbitral awards. The vehicle that transformed this area of international arbitration was the New York Convention.[47] The New York Convention entered into force in 1959 and has since been ratified by 142 States.[48] The widespread acceptance is of great import because each signatory State must enforce arbitral awards subject only to the limited exceptions contained in the Convention.[49] Indeed, municipal courts are limited to review for fraud, noncompliance with an agreement to arbitrate, or contrary to public policy, but may not review an award on its merits.[50] Thus, all international commercial disputes between members of signatory States, who choose to settle their grievances through arbitration, will have a reliable means of enforcing their award. A reliable means for enforcing arbitral awards is important because it reduces the risks associated with cross-border transactions and thereby enhances international economic cooperation.[51]

E. The Final Ingredients

As Locke concluded, a successful governing body must also have "a settled law" and "a known and indifferent judge, with authority to determine

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ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 215, 218 (Todd Weiler ed., 2004) [hereinafter Coe, *The Mandate*] ("Compared to the traditional espousal model, Chapter 11 presents a striking departure. To a limited extent a private entity, not ordinarily endowed with international personality, may bring its own claim for breaches of international law—a prerogative not dependent on the investor's state adopting the claim as its own."); Franck, *supra* note 36, at 1538 ("[P]lac[ing] the enforcement of public international law rights in the hands of private individuals and corporations . . . w[as] a major innovation.").

46. LOCKE, *supra* note 13.

47. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (1959) [hereinafter New York Convention]; *see* 9 U.S.C. § 201.

48. The United Nations Commission on International Trade Law (UNCITRAL) keeps track of the signatories to the New York Convention. UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 31, 2007).

49. New York Convention, *supra* note 47, art. III. ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.").

50. Judith Wallace, *Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resources Law: The Implications of Glamis Gold's NAFTA Chapter 11 Claim*, 17 GEO. INT'L ENVTL. L. REV. 365, 384 (2005).

51. William W. Park, *Private Disputes and the Public Good: Explaining Arbitration Law*, 20 AM. U. INT'L L. REV. 903, 904 (2005).

all differences according to the established law."[52] This encompasses both an independent adjudicator and a mechanism that prevents disparate judgments. While increases in foreign investments have prompted the adoption of uniform investment laws and a uniform enforcement mechanism, the procedural aspects of adjudicating investment disputes adopted by international dispute settlement bodies, such as the International Center for the Settlement of Investment Disputes (ICSID)[53] and the United Nations Commission on International Trade Law (UNCITRAL),[54] remain widely varied,[55] despite attempts to integrate and formalize the process.[56] A robust dispute resolution process is essential to effectuate one's rights because an increasing number of unresolved investment disputes or disparate outcomes will have a negative impact on future investment and development and strain diplomatic relations between the governments involved.[57]

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52. LOCKE, *supra* note 13 and accompanying text.

53. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, *available at* http://www.worldbank.org/icsid; International Center for the Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (1985), *available at* http://www.worldbank.org/icsid/.

54. UNCITRAL Arbitration Rules, G.A.R. 98, U.N. GAOR, 31st Session, Supplement No. 39 at 182, U.N. Doc. A/31/39 (1976); UNCITRAL Model Law on International Commercial Arbitration, G.A.R. 72, U.N. GAOR 40th Session (1985), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. The difference between the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Arbitration is that the Model Law provides arbitration provisions for national governments to incorporate into their domestic law and the Arbitration Rules govern the conduct of a tribunal during a proceeding. UNCITRAL, *FAQ – UNCITRAL and Private Disputes/Litigation*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html#difference.

55. United Nations Conference on Trade and Development, Dispute Settlement, at 3-4, *available at* http://www.unctad.org/Templates/Page.asp?intItemID=2741&lang=1 (noting that UNCITRAL and the WTO have general commercial arbitration provisions and NAFTA, the Association of South-East Asian Nations (ASEAN), and the Southern Common Market (MERCOSURE) have arbitration provisions specific for the settlement of investment disputes). In addition, there remain a myriad of institutions from which to choose to govern international investment disputes. These include ICSID, the International Chamber of Commerce (ICC), UNCITRAL, the LCIA (formerly known as the London Court of International Arbitration), the American Arbitration Association (AAA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Fortunately, NAFTA and CAFTA refer the parties in a dispute to particular institutions. For example, in Articles 1120 and 10.16(4) of NAFTA and CAFTA respectively, parties are referred to ICSID or UNCITRAL arbitration.

56. The development of the ICSID in 1985 and the UNCITRAL Model Law on International Arbitration in 1985 was significant in forming basic procedural guidelines for arbitral tribunals in investment disputes. Jones, *supra* note 10, at 530 (ICSID and UNCITRAL "enabled private investors to bring claims before binding arbitral bodies without dependence upon their home governments").

57. *See* Brewer, *supra* note 32, at 636-37; *see also* Rosine M. Plank-Brumback, *Dispute Settlement, in* TOWARD FREE TRADE IN THE AMERICAS 255 (José M. Salazar-Xirinachs & Maryse Robert eds., 2001) ("The dispute settlement provisions within trade agreements serve as an important guarantor that the parties will fulfill the substantive commitment they have made and realize the benefits they expected to derive from these agreements.").

1. Advantages to Arbitration

Business managers traditionally favor arbitration over foreign courts in overseas transactions. First, foreign claimants often avoid foreign courts because of the inherent bias associated with host state judges.[58] Furthermore, arbitration affords the parties autonomy to tailor the proceedings to meet their needs.[59] From a pragmatic standpoint, arbitral awards are easier to enforce than judgments from foreign state courts.[60] In practice, businesses will be more likely to invest when there are reliable means available to recover losses for improper conduct.[61] In sum, the advantages of arbitration are a "level litigation playing field" where "[r]ules of an impartial institution can be applied by a relatively neutral tribunal convened in a mutually accessible country . . . in a common language according to rules that give neither side an undue advantage."[62]

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58. Alvarez & Park, *supra* note 10, at 369 (noting that "the real or imagined bias of host country judges can create an anxiety that inhibits wealth-creating transactions and discourages cross-border economic cooperation, and will inevitably either thwart cross-border economic cooperation or add to its cost").

59. Autonomy includes:

> [T]he freedom to select those who will settle the dispute, the place of arbitration, the law that will govern the resolution of the dispute, and the applicable language . . . . In addition, arbitration is considered expeditious, cost effective, and a more flexible procedure than one governed by the technicalities of the law court.

Remigius Oraeki Chibueze, *The Adoption and Application of the Model Law in Canada: Post-Arbitration Challenge*, 18 J. INT'L ARB. 191, 192 (2001).

60. *See supra* notes 36-51 and *infra* notes 191-97 and accompanying text (discussing the New York Convention). A foreign court's judgments are often difficult to enforce because "there are no world-wide treaties relating to either forum selection agreements or judicial judgments." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 8 (2d ed. 2001); *see also* Chibueze, *supra* note 59, at 192 (observing that "given the absence of multilateral conventions for the recognition of foreign judgments, even where a foreign judgment is satisfactory, there is often doubt about whether the decision can be enforced in another country") (citation omitted); Richard M. Mosk & Ryan D. Nelson, *The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions*, 18 J. INT'L ARB. 463, 463-66 (2001) (discussing the differences between enforcing a foreign judgment and an international arbitral award).

61. Alvarez & Park, *supra* note 10, at 368 (noting that "[u]ntrustworthy enforcement mechanisms tend to chill cross-border economic cooperation to the detriment of those countries that depend most on foreign capital for development").

62. William W. Park, *Private Disputes and the Public Good: Explaining Arbitration Law*, 20 AM. U. INT'L L. REV. 903, 905 (2005); *see also* Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 65 (2003) ("To depoliticize investment disputes, and to level the playing field between foreign investors and host states, Chapter 11 commits investment disputes to the process of international commercial arbitration . . . .").

2. The Calvo Doctrine's Demise

Despite receiving the same benefits of arbitration,[63] State systems entrenched with the Calvo doctrine[64] may enter into the arbitration fray with greater trepidation.[65] Scholars have noted:

> It is at first sight perhaps difficult to understand why governments would voluntarily limit their sovereignty by submitting to such processes of arbitration-enforced discipline. One needs to realise, though, that by accepting such external, politically less malleable, discipline a country gains in reputation, in lowering its political risk reputation and by enhancing its ability to participate and benefit fully from the global economy. Governments who don't are seen as higher risk and therefore penalised, usually with good reason, in many ways by investors and the global markets. Submitting to such external disciplines also provides governments with a defense against domestic pressure groups—business lobbies and ideological interest groups—which can often capture the domestic regulatory machinery and manoeuvre it for protectionist policies which in the end damage the country at large and wealth-creating potential of the global economy.[66]

Implicitly agreeing with this reasoning, Mexico broke with a century of tradition in putting aside the Calvo doctrine and replacing it with the dispute resolution mechanism in Chapter 11 of NAFTA when NAFTA came into effect on January 1, 1994.[67] This was also the case for Costa Rica, Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic, who replaced the Calvo doctrine with the dispute resolution mechanism found in Chapter 10 of CAFTA.[68] Turning from a sheltered, protectionist stance that

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63. W. Michael Reisman, *International Arbitration and Sovereignty*, 18 ARB. INT'L 231, 235 (2002). ("[T]he government that hosts an international transaction or is a party to it is, ordinarily, unwilling to subject itself to the jurisdiction of the national courts of the foreign investor. Hence the need for a neutral forum, which modern international commercial arbitration provides."). The author continues: "Because governments are committed to national development and are perforce involved in the global wealth process, they and their agencies will inevitably be involved in arbitrations with foreign entities." *Id.* at 239.

64. *See supra* notes 16-22 and accompanying text.

65. *See supra* note 16 and *infra* note 68.

66. RUBINS & KINSELLA, *supra* note 10, at xxxiv (2005) (quoting THOMAS WALDE & TODD WEILER, INVESTMENT ARBITRATION UNDER THE ENERGY CHARTER TREATY IN THE LIGHT OF NEW NAFTA PRECEDENTS, INVESTMENT TREATIES AND ARBITRATION 159, 161 (G. Kaufmann-Koehler & B. Stucki, eds., 2002)).

67. Office of NAFTA and Inter-American Affairs, http://www.mac.doc.gov/nafta/implement.html (last visited Mar. 31, 2007).

68. *See* SHEA, *supra* note 17, at 21 (stating that the Latin American republics of Costa Rica, Salvador, Guatemala, and Honduras used the General Treaty of Peace and Amity, Arbitration, and Commerce, concluded on September 25, 1906, to eliminate diplomatic protection);

allowed only municipal courts to have jurisdiction over foreign investment disputes, to a stance that cedes jurisdiction over foreign investment disputes[69] to international arbitral tribunals under NAFTA and CAFTA constituted a dramatic development.

F. The Evolution of Investment

Before looking in detail at the differences between the provisions and structure of NAFTA and CAFTA dispute resolution mechanisms, it is important to understand the scope of "investment," which is the subject of the protective provisions in Chapter 11 and Chapter 10 of the respective agreements and traditionally referred to as "foreign direct investment."[70] Historically, "foreign direct investments" referred to direct and indirect control of at least a ten to twenty-five percent in assets or in an enterprise.[71] Once this threshold is met, the investment is considered a direct investment rather than a "portfolio investment."[72]

> Foreign direct investments "may best be defined as the creation, acquisition or endowment in the host country of enterprises, either incorporated as branches, subsidiaries, or associate companies, or in the form of unincorporated enterprises or joint ventures. The desired result is to acquire a lasting interest, with powers of management and control, where the investor's return depends upon the performance of the enterprise."[73]

However, Chapters 11 and 10 of NAFTA and CAFTA respectively cast a wide net in defining investment.[74] The definition includes both foreign

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see also Pellerano & Herrera, *Jurisdiction of Dominican Courts*, DOMINICAN TODAY, http://www.dominicantoday.com/app/article.aspx?id=3455 (last visited Dec. 23, 2006); Bernardo M. Cremades, *Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, DISPUTE RESOLUTION JOURNAL (May-July 2004), *available at* http://www.findarticles.com/p/articles/mi_qa3923/is_200405/ai_n9377090; Gonzalo Biggs, *The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement*, ICSID REVIEW—FOREIGN INVESTMENT LAW JOURNAL, *available at* http://72.14.207.104/search?q=cache:LIMLhq49IQMJ:www.camsantiago.com/html/archivos/espanol/articulos/03Biggs%2520article.pdf+nicaragua+calvo+doctrine&hl=en&gl=us&ct=clnk&cd=7&client=firefox-a.

69. Provided the foreign investor is a national of a signatory state to CAFTA or NAFTA.

70. *See generally* Brewer, *supra* note 32.

71. *Id.* at 634 n.2.

72. *Id.*

73. Klaus Peter Berger, *The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach Towards Development*, 15 SYR. J. INT'L L. & COM. 13, 17 (1988).

74. Coe, *The Mandate*, *supra* note 45, at 239 ("The activities establishing the essential

direct investments and portfolio investments, and tribunals have yet to restrict its scope.[75] CAFTA's definition is particularly noteworthy because of its introductory statement that does not appear in NAFTA's definition.[76] CAFTA defines investment as "*every asset* that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[77] CAFTA, thereby, broadens the scope of investment beyond the already expansive language in NAFTA.[78] Examples of investments include mortgages, liens, licenses, intellectual property rights, moveable or immoveable property, stocks, bonds, or enterprises.[79] Because of the ubiquitous reach of investment,[80] tribunals, have unbridled discretion to hear disputes arising under Section A of Chapters 11 and 10 of NAFTA and CAFTA,[81] which provide substantive rights to foreign investors. The most frequently disputed rights[82] include national treatment,[83] fair and equitable treatment,[84] and expropriation.[85]

'investment' are broadly defined in Article 1139, and the continuum of qualifying investor activity that definition includes—'seeks to make, is making or has made'—extends standing to activity spanning the life of an investment. Indeed, the 'or has made' language of Article 1139 was influential in *Mondev*, where it did not defeat the claim that the investment in question had come to an end, and indeed had done so before January 1, 1994—NAFTA's effective date." (citing *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2 ¶ 80 (Sept. 20, 1999))).

75. Robert, *supra* note 20, at 192; Coe, *Taking Stock*, *supra* note 37, at 1399.

76. CAFTA, *supra* note 12, art. 10.28.

77. *Id.* (emphasis added). The definition of investment in CAFTA is analogous to the definition in the Model U.S. BIT, which incorporates the exception found in NAFTA Chapter 11's definition excluding tangible or intangible property not "acquired in the expectation or used for the purpose of economic benefit or other business purpose." NAFTA, *supra* note 11, art. 1139.

78. Rajesh Singh, *The Impact of the Central American Free Trade Agreement on Investment Treaty Arbitrations: A Mouse that Roars?*, 21 J. INT'L ARB. 329, 330 (2004).

79. *See* CAFTA, *supra* note 12, art. 10.28; *see also* NAFTA, *supra* note 11, art. 1139 (definition of investment).

80. Investment does not include a minimum threshold of ownership interest and incorporates both foreign direct investments and portfolio investments.

81. Coe, *Taking Stock*, *supra* note 37, at 1399.

82. *Id.*

83. National treatment requires the host nation to treat foreign investors the same as local investors. Robert, *supra* note 20, at 196 ("The intent is to avoid cases in which investments—and investors—of other parties cannot compete on equivalent terms with those of the host state."). A similar provision known as most favored nation treatment creates an obligation that the state treat foreign investors from a particular country the same as a foreign investor from any other foreign country. *Id.*

84. *Id.* at 194 ("Fair and equitable treatment is a general concept without a precise definition."). It requires certain minimum protections for a foreign investor in compliance with international law separate from the requirements of the domestic laws. *Id.* It is effectively an international due process standard requiring access to courts and police protection at the level required by international law. CAFTA, *supra* note 12, art. 10.5(2)(a); NAFTA, *supra* note 11, art. 1105, 1115; *see also* Alvarez & Park, *supra* note 10, at 394. This provision has taken preeminence as the "alpha and omega" of Chapter 11 disputes. Brower, *supra* note 62, at 68.

85. Expropriation involves government interference with private property, usually transferring ownership from a private person to the state or another person. James W. Weller, *International*

Now that the types of claims brought before an arbitral tribunal under CAFTA and NAFTA have been reviewed, the following compares and evaluates the transparency provisions and the award review processes within the respective agreements' dispute resolution mechanisms.

III. BALANCING TRANSPARENCY AND CONFIDENTIALITY

Traditionally, the United States has favored settlement of international investment disputes through arbitration.[86] In the past decade, however, a contagion of disfavor has taken hold.[87] The cause of this attitude swing from the time NAFTA was enacted to the time CAFTA was negotiated is not difficult to find.[88] Criticism was sparked because a foreign investor invoked, for the first time, the private right of action, so novel to the dispute settlement mechanisms in investor disputes, against the United States.[89] After a foreign investor was able to sue the United States, the public viewed this individual and the foreign tribunal rendering the award as usurping democratic control.[90] Due to the considerable criticism regarding the ceding

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Parties, Breach of Contract, and the Recovery of Future Profits, 15 HOFSTRA L. REV. 323, 325-26 (1987) (stating that "[e]xpropriation is usually defined as conduct by the host state which deprives an alien of substantially all benefits derived from property interests within the host state"). It is allowed, however, if the expropriation is for a public purpose, done in a non-discriminatory manner and in accordance with due process, and compensation is "prompt, adequate, and effective." NAFTA, *supra* note 11, art. 1110; CAFTA, *supra* note 12, art. 10.7; Robert, *supra* note 20, at 201 (citing U.S. Secretary of State Cordell Hull).

86. *See* International Centre for Settlement of Investment Disputes, *List of Contracting States and other Signatories of the Convention*, (Jan. 25, 2006), http://www.worldbank.org/icsid/constate/c-states-en.htm.

87. *See* Brower, *supra* note 62, at 59 ("While recognizing that Chapter 11's drafters apparently took measures to overcome legitimacy problems, it suggests that the remedies frequently prove more troublesome than the disease."). It seems the dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* is now becoming the popular view. 473 U.S. 614, 665 (1985) (Stevens, J., dissenting) ("Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well—the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results.").

88. Alvarez & Park, *supra* note 10, at 393 (highlighting the *Methanex*, *Loewen*, and *Mondev* cases to show Americans "[c]hanging hats from a capital exporter's fedora to a host state's sombrero").

89. Permitting a private right of actions cuts both ways. This was the first time the United States, and for that matter any industrialized country, was forced to act as a respondent due to the mandatory arbitration agreement within NAFTA. Alvarez & Park, *supra* note 10, at 370 (noting that American attitudes toward arbitration were favorable when the tribunals correct behavior of foreign host states but turns sharply against arbitration when the United States is accused of wrongdoing).

90. Indeed, "[a] dispute resolution process that had been fair for the rest of the world came to be

of sovereignty to these tribunals on key political and economic matters Congress passed legislation limiting arbitration in international treaties.[91] Accordingly, this part focuses on the transparency reforms incorporated into CAFTA's dispute resolution mechanism, and the next part discusses the reformed process for review of arbitral decisions.[92]

First, it is important to distinguish transparency from its counterpart confidentiality. Transparency is the full and timely disclosure of information, whereas confidentiality is the withholding of information relating to a party.[93] Confidentiality has been hailed as one of the great advantages of arbitration.[94] Confidentiality serves the parties' interests in several ways. By keeping proceedings confidential, parties are able to keep allegations of bad faith and bad business practices from the public, thus enabling the party to maintain a good business reputation.[95] Furthermore, the public remains unaware of losses suffered resulting from adverse tribunal decisions.[96] In addition, party autonomy inherent in arbitral proceedings allows parties to agree on the level of confidentiality so that they are able to keep from the public, and sometimes the other party,[97] information critical to the livelihood of a business like trade secrets and other sensitive business information.[98]

Despite these purported benefits of confidentiality, transparent systems also have significant appeal. While businesses may not want the bad press an adverse award would bring, releasing tribunals' decisions and reasoning will "lead to development of and consistency in the law of arbitration."[99] Releasing awards will also allow similarly situated parties to avoid the

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seen as a tool to put business before public interest." Alvarez & Park, *supra* note 10, at 371.

91. *See infra* note 123; *see also* Alvarez & Park, *supra* note 10, at 370-71. NAFTA's creation of a private right of action against signatory states for violations of its substantive provisions rarely exists in trade agreements. JACKSON ET AL., *supra* note 27, at 1146.

92. For a topical list of differences between the dispute settlement systems in Chapter 11 of NAFTA and Chapter 10 of CAFTA, see Appendix A.

93. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

94. Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 122 (2003).

95. *Id.* at 123.

96. *Id.*

97. FED. R. EVID. 508. The Advisory Committee Notes state that the most common measure to protect trade secrets is "simply to take the testimony in camera," but "[o]ther possibilities include making disclosure to opposing counsel but not to his client, making disclosure only to the judge, and placing those present under oath not to make disclosure." *Id.* (internal citations omitted); *see also* CAL. EVID. CODE 1061 (providing that in the courts discretion a judge may require "[t]hat the trade secret may be disseminated only to counsel for the parties").

98. Buys, *supra* note 94, at 123.

99. *Id.* at 136 (adding that "well-written and reasoned awards can and do have persuasive value and 'can coalesce into a collective arbitral wisdom' that may be drawn upon by future parties and arbitrators" (quoting Richard C. Reuben, *Constitutional Gravity: A Unity Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1085 (2000)). A consistent rule of law would have an additional positive affect by deterring re-litigation of a settled issue of law.

mistakes that gave rise to the previous dispute, thus cutting down on future disputes.[100] Finally, bringing transparency to the entire process would enable scholars and practitioners to better critique the system as a catalyst for creating a more responsive and efficient system.[101]

Recent studies have shown that confidentiality may not be as highly valued as previously thought and may in fact depend on the context of the dispute.[102] For example, in a public or semi-public[103] arbitration, arguments in favor of transparency are compelling. Transparency is especially important in the semi-public investment arbitrations under NAFTA and CAFTA because the decisions usually a large number of people than a private arbitration.[104] For example, in a semi-public investment arbitration an adverse decision can affect citizens of a state by requiring a state to change its laws or by requiring a state to pay a specified award, which comes from tax revenue.[105] A state's enforcement of adverse decisions hinges on whether that state supports the tribunal's authority, and a transparent system that advances the precepts of democracy will garner such support in at least two important respects.[106] First, through the franchise, the public fulfills its role as a check on government action, and the more information that is made available, the better the public is able to fulfill this role by holding the government accountable for positions taken in arbitral proceedings.[107] Second, it will allow more people to participate at the various stages of the proceeding as a third party in the dispute or as a voice in the public forum. This will add credibility to and inspire confidence in the system.[108]

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100. *Id.*

101. *Id.* at 137. Information at a lower level of granularity, through a transparent process, parties will be better equipped to determine whether a particular arbitrator is most suitable to be their selection in future arbitral proceedings. *Id.*

102. *Id.* at 122-23 (citing Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want From International Commercial Arbitration?*, AAA DISPUTE RESOLUTION JOURNAL 78 (Nov. 2002/Jan. 2003)).

103. Involving at least one state party.

104. Jack J. Coe Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. INT'L ARB. 185, 190 (2002) [hereinafter Coe, *Achilles Heel*] ("[T]he ability of interested persons to occupy the court's galleries demystifies the process . . . ."); *see also* Buys, *supra* note 94, at 134.

105. Buys, *supra* note 94, at 134.

106. *Id.*; *see also* President George W. Bush, Address at United Nations General Assembly (Sept. 21, 2004), http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html (stating that "democracy simply means good government rooted in responsibility, transparency, and accountability").

107. Buys, *supra* note 94, at 134, 136.

108. Coe, *Taking Stock*, *supra* note 37, at 1434 (stating that "legitimacy of the process and result [would] be enhanced if the rigor and care attending Chapter 11 proceedings were open to public scrutiny"); *see also* Brower, *supra* note 62, at 71 (asserting that "adherence to fundamental values,

A. *ICSID and UNCITRAL – Influential Procedural Guidelines*

Because NAFTA and CAFTA require the parties in a dispute to choose ICSID[109] or UNCITRAL rules to govern the procedural aspects of their dispute,[110] it is necessary to briefly review the pertinent confidentiality provisions in the ICSID and UNCITRAL rules. UNCITRAL, while not incorporating a duty of confidentiality, requires proceedings "be held *in camera* unless the parties agree otherwise"[111] and also requires "[t]he award . . . be made public only with the consent of both parties."[112] Similarly, ICSID does not allow a tribunal to hold open proceedings[113] without the consent of the parties,[114] but does require a tribunal to publish the *legal reasoning* of its award.[115] While nothing in ICSID or UNCITRAL addresses

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such as accountability, transparency, and democratic participation, becomes an element essential to the perceived legitimacy of investor-state arbitration"); Buys, *supra* note 94, at 134, 136 (citing Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency, TN/DS/W/13 (Aug. 22, 2002)). Buys noted further that confidence in the fairness of arbitral proceedings will increase pressure on governments to enforce the awards. Buys, *supra* note 94, at 134, 136.

109. Under NAFTA, neither Mexico nor Canada is a signatory to the Washington Convention. International Centre for Settlement of Investment Disputes, *List of Contracting States and other Signatories of the Convention*, (Jan. 25, 2006), http://www.worldbank.org/icsid/constate/c-states-en.htm. However, the United States is a signatory, so disputes in which one of the parties is, or from, the United States, then the ICSID Additional Facility may be used. International Centre for Settlement of Investment Disputes (ICSID) Additional Facility Rules art. 2(a), at 10-11, (Apr. 2006), http://www.worldbank.org/icsid/facility/facility.htm [hereinafter Facility Rules].

110. NAFTA, *supra* note 11, art. 1120(1); CAFTA, *supra* note 12, art. 10.16(4).

111. United Nations Commission on International Trade Law (UNCITRAL), G.A. Res. 31/98, Rule 25.4, U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

112. *Id.* at Rule 32.5.

> The UNCITRAL Model Law Working Group refrained from inserting a provision on publication of awards. Indeed it was observed: "It may be doubted whether the Model Law should deal with the question whether an award may be published. Although it is controversial since there are good reasons for and against such publication, the decision may be left to the parties or the arbitration rules chosen by them."

Dr. Loukas A. Mistelis, *Confidentiality and Third Party Participation UPS v. Canada and Methanex Corp v. United States*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 169, 174 (Todd Weiler ed., 2005) (quoting UNCITRAL Secretariat's note A/CN9/207; Howard Holtzmann & Joseph Neuhaus, A GUIDE TO THE UNICTRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (Kluwer Law International)).

113. Facility Rules, *supra* note 109, art. 39(2), at 61; International Centre for Settlement of Investment Disputes (ICSID) art. 32(2), at 115 (Apr. 2006), http://www.worldbank.org/icsid/basicdoc/basicdoc.htm.

114. *See* Amco v. Indonesia, Decision on Provisional Measures, 1 ICSID Reports 410, Dec. 9, 1983 (noting that "it is right to say that the Convention and the Rules do not prevent the parties from revealing their case").

115. Accordingly, the names of the parties and the underlying facts of the dispute will remain confidential. *See* Facility Rules, *supra* note 109, art. 53(3), at 68; *see also* International Centre for Settlement of Investment Disputes (ICSID) art. 48(4), at 122 (Apr. 2006), http://www.worldbank.org/icsid/basicdoc/basicdoc.htm.

confidentiality of the written submissions, based on the practice of tribunals, it is clear that they will keep these documents confidential.[116] Consequently, both ICSID and UNCITRAL provide parties with the ability to regulate the transparency of their proceedings. The following discussion pertains to the overriding confidentiality agreements made in NAFTA and CAFTA that govern arbitral proceedings notwithstanding the default provisions in ICSID and UNCITRAL.[117]

B. NAFTA: An Emerging Transparency

While NAFTA may have been a groundbreaking treaty by spreading free trade across the Americas and allowing citizens to sue foreign states before international tribunals,[118] the text is curiously silent as to confidentiality and transparency. The only reference to transparency pertains to the publication of awards. This is found in Article 1137(4), which refers to an annex in which the United States and Canada allow an investor, or the host state, to publish an award if they are a disputing party.[119] However, in this same annex Mexico asserts that it will follow the local arbitration rules,[120] which under ICSID and UNICTRAL only allow publication of awards with consent from both parties.[121]

Because the text of NAFTA is silent, arbitral tribunals proceed according to their standard practice, which is to cloak the proceedings, submissions, and awards in secrecy.[122] The subsequent outcry from the media and scholars regarding the lack of transparency in the arbitral process[123] led to the drafting of The Notes of Interpretation (Interpretations)

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116. *See Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions*, International Institute for Sustainable Development, *available at* http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf.

117. However, the default provisions in ICSID and UNCITRAL remain very important in practice because NAFTA and CAFTA are often silent with regard to confidentiality, thus effectively incorporating the default provisions of ICSID or UNCITRAL absent agreement between the parties.

118. Under Chapter 11, NAFTA "creates 'a private right of action' [for violations of its substantive investment protection provisions] that is quite unusual in the world of trade agreements . . . ." JACKSON ET AL., *supra* note 27, at 1146; *see also* Alvarez & Park, *supra* note 10, at 393 ("The unique aspect of NAFTA lies in its creation of a private right of action by which foreign investors bypass the political hurdles to obtaining the diplomatic protection of their home country.").

119. *See* NAFTA, *supra* note 11, art. 1137(4), Annex 1137.4

120. *See* NAFTA, *supra* note 11, Annex 1137.4.

121. *See supra* notes 109-17 and accompanying text.

122. *See* Int'l Inst. for Sustainable Dev., *Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions*, *available at* http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf [hereinafter *Initiative*].

123. *Initiative*, *supra* note 122.

In one New York Times article NAFTA arbitration was thus described: "Their meetings

for NAFTA Chapter 11.[124] These Interpretations were released in 2001 to "clarify and reaffirm" the meaning of certain provisions.[125] The Ministers involved in drafting the provision clearly indicated that the purpose of the Interpretations was to "impose openness on the proceedings."[126] However, the text of the Interpretations is much less clear. It states: "Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing

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> are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged."

Alvarez & Park, *supra* note 10, at 383 (quoting Anthony DePalma, *NAFTA's Powerful Little Secret*, N.Y. TIMES, Mar. 11, 2001, §3, at 1). Anthony DePalma, *NAFTA's Powerful Little Secret*, N.Y. TIMES, Mar. 11, 2001, §3, at 1 ("The lack of a traditional appeal process, transparency and legally binding precedent, along with the wide scope of what can be challenged under the free-trade investment rules, have made many people wary in all three nations."); Editorial, *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A26 ("[T]he arbitration process . . . is often one-sided, favoring well-heeled corporations over poor countries, and must be made fairer than it is today. Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt . . . . There is no appeal."); HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV. & WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER OF INVESTOR RIGHTS 46 (2001); HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT 7, 62 (1999) (stating that "the absence of transparency leads to a significant loss of democratic legitimacy" and "like a cancer . . . erode the democratic legitimacy of the entire international . . . investment regime").

NAFTA was attacked because the lack of confidentiality provisions left arbitral tribunals to continue their normal practice of keeping every aspect of the dispute secret. *Initiative*, *supra* note 122; *see also* Coe, *Achilles Heel*, *supra* note 104, at 190 (stating that "the *in camera* feature of international arbitration, and the confidentiality that attaches to certain of its aspects, has produced alarm in some quarters"). This was demonstrated in two important cases. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB (AF)/97/1, Award ¶ 13 (Aug. 30, 2000) (determining that neither NAFTA nor the ICSID Additional Facility Rules restrict the parties from disclosing information); The Loewen Group, Inc. v. United States, ICSID Case No. ARB (AF)/98/3, Decision (Sept. 28, 1999) (determining that, although beneficial when a state is a party, there was no duty to disclose certain documents).

For a contrary argument to disclosing information when a state is a party, see Buys, *supra* note 94, at 123 (noting that if a dispute is made public, a state may be forced to take a position to please certain constituencies).

124. NAFTA Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions, Preamble* (July 31, 2001), http://www.international.gc.ca/tna-nac/NAFTA-Interpr-en.asp?format=print [hereinafter *Interpretation*]. "The flurry of investor rights litigation under Chapter 11 has led the NAFTA parties to consider modifying Chapter 11. For now, they have settled on some 'clarifications,' adopted by the NAFTA Free Trade Commission. Some of them relate to procedural matters involving access to confidential information." JACKSON ET AL., *supra* note 27, at 1166.

125. *Interpretation*, *supra* note 124.

126. *Initiative*, *supra* note 122; *see also* Pettigrew Welcomes NAFTA Commission's Initiatives to Clarify Chapter 11 Provisions, News Release, Dep't of Foreign Affairs and Int'l Trade (Aug. 1, 2001), http://w01.international.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104441.htm (quoting Minister Pettigrew: "We are committed to making the investor-state dispute settlement process in NAFTA as open and transparent as possible.").

public access to documents submitted to, or issued by, a Chapter Eleven tribunal."[127]

While remaining neutral on the publication of awards, the Interpretations take a slightly more aggressive stance on the publication of documents submitted to and received from the tribunals. Although the Interpretations are supposed to "clarify and reaffirm," Section A(2)(b) provides for a "positive commitment"[128] by obliging "[e]ach Party . . . to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal."[129] However, there are at least three reasons why this "positive commitment" is not as novel as it may seem. First, the Interpretations make no mention of opening hearings to the public.[130] Second, the Interpretations do not discuss the disclosure of pre-arbitration documents.[131] And third, Section A(2)(b), obliging disclosure of documents submitted to or issued by the tribunal, excludes confidential business information, privileged or protected information under a party's domestic law, and information a party must withhold according to the applicable arbitral rules.[132] While the first two exceptions under Section A(2)(b) reflect international confidentiality standards, the third has the potential to render this "positive commitment" devoid of meaning, because "all tribunals to date have established strong rules of secrecy."[133] In sum, despite the Ministers' lofty aspirations in drafting the Interpretations, they fell short of *imposing* openness but still accomplished a great deal by breaking down the presumption of secrecy in arbitral tribunals and opening a dialogue between the parties and the tribunals on the drafting of confidentiality orders.[134] More recently, in light of Congress' intent to bring transparency to Chapter 11 proceedings and the provisions in other free-trade agreements, the Office of the U.S. Trade Representatives (USTR) and

127. *Interpretation, supra* note 124, § A1.

128. *Initiative, supra* note 122 (noting that "[t]his level of access . . . is beyond even what the Methanex Tribunal had agreed to grant IISD in the event that it is successful in its petition to intervene in that case as a friend of the court"). For a discussion about the legitimacy of the Interpretations, see Alvarez & Park, *supra* note 10, at 397-98; *see also* Brower, *supra* note 62, at 85 (stating that "the Commission's work product may often be vulnerable to allegations that it crosses the line between *bona fide* interpretation and *ultra vires* amendment").

129. *Interpretation, supra* note 124, § A2(b).

130. *Initiative, supra* note 122.

131. *Id.*

132. *Interpretation, supra* note 124, § A2(b)(i)-(iii).

133. *Initiative, supra* note 122.

134. *Id.* (contending that "the success of the statement will depend on whether it is reflected in future orders of the arbitral Tribunals").

Canadian Department of Foreign Affairs issued statements agreeing to open Chapter 11 proceedings to the public.[135]

C. *CAFTA: Transparency Gains a Foothold*

As opposed to NAFTA's lackluster transparency reforms,[136] CAFTA evinces an evolution by requiring transparency during the dispute settlement process.[137] This is a significant departure from the original draft of NAFTA and the Interpretations.[138] CAFTA was designed to comply with Congress' trade objectives. According to the USTR:

> [Negotiators] have taken steps to enhance transparency and public involvement in the investor-State dispute settlement process. [CAFTA] provides that hearings will generally be open to the public and that key documents submitted to or issued by an arbitral tribunal will be publicly available, subject to the protection of confidential business information. It also expressly authorizes tribunals to accept and consider amicus curiae submissions, whereby the public could present views on issues in dispute.[139]

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135. Office of the U.S. Trade Representative (USTR) Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf?ht (last visited Feb. 13, 2007); Canadian Dept. of Foreign Affairs and Int'l Trade, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp (last visited Feb. 13, 2007).

136. While the reforms may have been minimal, it is important to note that "all major interim awards, and all final awards, issued by NAFTA Chapter 11 have been made available to the public." David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 747-48 (2004).

137. This evolution was apparent in earlier free trade agreements such as those signed with Singapore, Chile, Australia, Bahrain and Morocco. U.S.-Sing. Free Trade Agreement, arts. 15. 20, 4.6, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; U.S.-Chile Free Trade Agreement, art. 22.10(1)(a), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file683_4016.pdf; U.S.-Austl. Free Trade Agreement, art. 20, http://ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html; U.S.-Bahr. Free Trade Agreement, art. 17, http://ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html; U.S.-Morocco Free Trade Agreement, art. 18, http://ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html.

138. However, it is congruent with the recent comments made by the USTR and Canadian officials that they will make Chapter 11 disputes open to the public. *See supra* note 130. According to these press releases, arbitral tribunals should not proceed under their default rules but pursuant to the revised agreement between the countries to make the proceedings transparent. *Id.* However, when Mexico is a party to a dispute, the proceedings will still be cloaked in secrecy. *See supra* notes 120-23 and accompanying text.

139. The Dominican Republic-Central America-United States Free Trade Agreement-Impact on State and Local Governments, http://waysandmeans.house.gov/media/pdf/109cong/dr-cafta/CAFTAState-LocalReport-final6-15-051.pdf.

Indeed, CAFTA tracks precisely the language of the U.S. Model BIT.[140] Article 10.21 of CAFTA requires tribunals to open proceedings to the public and make available all written submissions, including the notice of intent, the notice of arbitration, pleadings, memorials, minutes or transcripts of the proceedings, and orders, awards, and decisions.[141] The required disclosures retain exceptions for a party's domestic disclosure laws and essential security interests.[142] However, the provisions expunge the maligned exception for protections afforded under the arbitral rules.[143] CAFTA further fosters a transparent and open process through its amicus provision, which allows non-parties to participate by submitting briefs.[144] The provision authorizes a tribunal to consider amicus briefs without either of the disputing parties' consent.[145] It is hoped that the liberalized amicus brief provision will foster greater confidence in the investor dispute settlement process by placing more information before the tribunals, thus equipping members to reach more equitable decisions.[146] Additionally, opening the submissions and hearings to the public will bolster the credibility of the process and avoid the dreaded label "secret."[147]

D. Illustrations: Metalclad[148] *and* Methanex[149]

The Metalclad Corporation brought a claim against Mexico for preventing Metalclad from opening a toxic waste processing plant, after it was built, for failure to get a municipal permit.[150] The tribunal assembled to handle the dispute addressed the question of confidentiality as a preliminary issue.[151] Mexico requested that the tribunal order Metalclad to keep

140. *Compare* CAFTA, *supra* note 12, art. 10.21(1)-(5) *with* 2004 Model BIT art. 29(1)-(5) (they are identical).

141. CAFTA, *supra* note 12, arts. 10.21(1)(a)-(e), 10.21(2).

142. CAFTA, *supra* note 12, art. 10.21(2)-(5) (protecting information essential for security in order to maintain international peace and security).

143. *See* CAFTA, *supra* note 12, art. 10.21.

144. CAFTA, *supra* note 12, art. 10.20(3).

145. *Id.*

146. *Cf.* U.S. R. 37.1 ("An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.").

147. DePalma, *supra* note 123.

148. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf.

149. Methanex Corporation and the United States of America, NAFTA Claims, http://naftaclaims.com/disputes_us_6.htm.

150. *See Metalclad*, ICSID Case No. ARB(AF)/97/1, ¶28-69.

151. *Id.* Later on in the proceedings, the tribunal purportedly found the requirement of transparency within NAFTA. Alvarez & Park, *supra* note 10, at 376 (stating that the tribunal found

information regarding the dispute confidential.[152] In refusing to issue such an order, the tribunal correctly noted that nothing in NAFTA or ICSID prescribed a duty of confidentiality on the parties, and that absent an express agreement between the parties, no such duty arose.[153] However, the president of the tribunal, imbibed with the historical practice of arbitral secrecy, issued a statement of caution to Metalclad, suggesting that "limit[ing] public discussion of the case to a minimum would conduce the orderly unfolding of the arbitral process and enhance working relations between the parties."[154]

The *Methanex* tribunal handled a claim from a Canadian investor that California was unfairly targeting them by prohibiting the use of MTBE in gasoline.[155] There were, of course, several environmental groups in California that wished to be heard on the issue.[156] The tribunal held that their entrance into the normal private sphere of arbitration was neither allowed nor prohibited by NAFTA Chapter 11 and the UNCITRAL rules.[157] The tribunal decided, based on notes from the Iran-U.S. Claims Tribunal, the WTO, and the practice of the ICJ, that it was within the scope of Article 15(1) of NAFTA to admit amicus petitions.[158] Interestingly, despite the tribunal's determination that a party could submit amicus briefs, the tribunal also decided that Article 25(4) of UNCITRAL, requiring that the proceeding

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that "Mexico breached a NAFTA requirement of 'transparency'"); *see also* Brower, *Emerging Dilemmas*, *supra* note 19, at 922 n.53 (stating that the tribunal in Metalclad "defin[ed] 'fair and equitable treatment' to include an element of transparency"). The tribunal states that imposing a transparency requirement is pursuant to its duty to interpret fair and equitable treatment in accordance with international law, and furthermore, transparency is "[p]rominent in the statement of principles and rules that introduces [NAFTA]." *Metalclad*, ICSID Case No. ARB(AF)/97/1, ¶ 76 (citing NAFTA Art. 102(1)). However, the tribunal limits its transparency requirement "to include the idea that all relevant legal requirements for the purpose of initiating, completing, and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party." *Id.* Thus, despite being a prominent principle of NAFTA and international law, the tribunal's transparency requirement does not carry over to the arbitral proceedings themselves.

152. Clyde C. Pearce & Jack Coe Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311, 330-31 (2000).

153. *Id.* at 331 & n.71; Mistelis, *supra* note 112, at 181 (stating that "neither the NAFTA nor ICSID Additional Facility Rules contained any express limit on the parties' freedom to publicise information divulged during the arbitration"). Also, in *Loewen v. USA*, the tribunal stated that a duty of confidentiality would be undesirable because "it would restrict public access to information relating to government and public matters." *Id.* For an example of a Chapter 11 proceeding implementing UNCITRAL rules where the parties agreed to an open proceeding and the tribunal allowed *amicus* briefs, see *id.* at 191-95 (discussing United Parcel Service of America v. Canada).

154. Pearce & Coe, *supra* note 152, at 331-32.

155. *See* Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), *available at* http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf.

156. *Id.* at ch. F(2).

157. *See generally id.*

158. Mistelis, *supra* note 112, at 188.

be in camera, prevented the amicus petitioner from attending the oral hearings or receiving arbitration materials without the parties' consent.[159] This seriously proscribes amicus petitioners' abilities to meaningfully contribute to the proceedings, as they are forced to proceed based on what limited information is released to the public.[160]

Under CAFTA, the tribunal would not be faced with such a difficult decision because CAFTA adopts a revolutionary stance toward the treatment of third parties in investment arbitral proceedings.[161] CAFTA expressly states, "[t]he tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party."[162] Thus, there will be no doubt that the arbiters may accept and consider third-party submissions, but arbiters also retain discretion to deny amicus curiae submissions, which they are more likely to exercise if accepting the briefs would overburden the parties.[163]

E. Concluding Remarks on Transparency

It is too early to tell how the public will react to the revamped transparency provisions for investment dispute settlement proceedings. However, it is clear that Congress has responded to the criticisms regarding transparency and made significant reforms in their negotiating and drafting

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159. *Id.* at 189.

160. One scholar has contended that amicus provisions in NAFTA are deficient:

> First, because the tribunals did not give potential *amici* the right to receive pleadings or to attend hearings, the decisions contribute little to the promotion of transparency. Second, because potential *amici* have no right to obtain pleadings and because the recent decisions only contemplate the receipt of helpful submissions, one wonders (1) whether potential *amici* can formulate informed submissions, (2) whether tribunals will accept uninformed submissions, and (3) whether the recent decisions really advance the cause of meaningful participation. Third, assuming that tribunals will accept *amicus* submissions from NGOs, this may not promote *democratic* participation because many NGOs have very specific agendas and are not accountable to their own members, much less to the general public. Thus, despite their best efforts, Chapter 11's ad hoc tribunals may seem illegitimate because they do not serve the fundamental values of accountability, transparency, and democratic participation.

Brower, *supra* note 62, at 72-73 (citations omitted).

161. Canada and the U.S. recently agreed to allow amicus petitioners to participate in NAFTA Chapter 11 disputes to the same extent that they participate in CAFTA disputes. Office of the U.S. Trade Representative (USTR) on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf; Canadian Dept. of Foreign Affairs and Int'l Trade, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp (last visited Dec. 23, 2006).

162. CAFTA, *supra* note 12, art. 10.20(3); *see supra* notes 144-45 and accompanying text.

163. Mistelis, *supra* note 112, at 189.

strategy to affect change that reflects democratic ideals.[164] Despite the reforms, if an arbitral award forces domestic policies of the United States to change, criticism is likely to take aim at provisions that ostensibly do not neatly fall within the democratic mold. For example, the validity of an international appellate body and the constitutionality,[165] of the arbitrator selection process will be discussed further.[166] While the greater transparency provisions in CAFTA may quiet the thunder of protest, with larger problems looming, this lull may turn out to only be the eye of the storm.

IV. GARNERING UNIFORMITY: THE "APPELLATE" PROCESS

As a preliminary matter, under both NAFTA and CAFTA, parties are required to waive their rights to bring a claim for the alleged violation in an alternate venue once the claim is submitted to a tribunal.[167] This limits parallel decisions,[168] and the possibility that a court where the judgment or award is brought for enforcement has to choose between enforcing the arbitral award or the foreign judgment.[169] A more serious problem facing the dispute settlement mechanism is "the decentralized nature of Chapter 11 adjudication[, which] naturally results in a measure of divergence among

164. *See supra* notes 136-46 and accompanying text (discussing reforms in CAFTA).

165. Discussed *infra* Part IV. Brower, *supra* note 62, at 68 (noting that "[a]d hoc tribunals based on the commercial arbitration model also create legitimacy concerns due to their perceived failure to conform to historical practice and to incorporate fundamental values of the governed community").

166. *Id.* at 66 (commenting that "creative lawmaking by unrepresentative tribunals seems undemocratic and almost certain to yield unpedigreed outcomes"); *see also* DePalma, *supra* note 123, at C1 (noting that the tribunals are "ad hoc panels drawn from lists of academics and international lawyers almost unknown outside their highly specialized fields"); George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. (SUPP.) 463, 469 (1998).

167. NAFTA, *supra* note 11, art. 1121(1)(b); CAFTA, *supra* note 12, arts. 10.18(2)(b), 10.18(4)(b). CAFTA differs from NAFTA by precluding not only bringing a claim in domestic court after initiating arbitral proceedings, but also precluding arbitral proceedings if the claimant "previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution." CAFTA, *supra* note 12, art. 10.18(4)(b). This provision would have changed the outcome of the *Azinian v. United Mexican States* if the claim had arisen under CAFTA rather than under NAFTA, because Azinian initiated proceedings in the domestic administrative agencies and then appellate courts of Mexico. *See generally* Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2 Award (Nov. 1, 1999), *available at* http://www.worldbank.org/icsid/cases/robert_award.pdf.

168. Under NAFTA especially, parallel proceedings can arise if a claim submitted to a national court before submission to a tribunal or if a claim is submitted concurrently but based on violations of state law rather than violations of NAFTA. For a discussion on the complexities surrounding parallel proceedings, see ANDREA K. BJORKLUND, *The Continuing Appeal of Annulment: Lessons from* Amco Asia *and* CME *in International Investment Law and Arbitration*, *in* LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 471, 516-21 (Todd Weiler ed., 2005).

169. *See supra* note 60 (discussing the difficulty in enforcing foreign state awards).

tribunals."[170] Because of legitimacy concerns due to the potential for inconsistent results, disquiet with the review mechanisms arose concomitantly with the criticism of the lack of transparency.[171]

A. NAFTA: Review and Consistency

Under NAFTA, three avenues have been paved to review or alter arbitral awards.[172] First, this section addresses the ability and effectiveness of the contracting parties to issue binding interpretations of NAFTA. Next, this section discusses the scope of review at the enforcement stage. And finally, this section reviews a municipal court's ability to vacate or annul a tribunal's decision and gives an illustrative example.[173]

1. Notes of Interpretation

One way the drafters of NAFTA tried to bolster coherency, credibility, and predictability in its dispute resolution mechanism was by allowing the parties to agree on binding interpretations of NAFTA provisions, which then become part of the governing case law for Chapter 11 disputes.[174] Allowing binding interpretations could potentially enhance the "pedigree" of the opinions and indirectly incorporate "democratic accountability and participation into the Chapter 11 process,"[175] while at the same time creating uniform case law amongst the tribunals. However, instead of using the

170. Coe, *The Mandate*, *supra* note 45, at 252.

171. *See supra* note 123.

172. Another means provided for in NAFTA, is the ICSID internal review procedures. However, neither Mexico nor Canada is a signatory to ICSID, so this method of review remains unutilized. The World Bank Group: ICSID, *List of Contracting States and other Signatories of the Convention*, http://www.worldbank.org/icsid/constate/c-states-en.htm. In addition, municipal courts may comment on or disagree with arbitral decisions when a party brings an action in municipal court subsequent to an arbitral award. In that case, the municipal court should give the award res judicata effect or at least collateral estoppel for the specific issues decided by the tribunal. *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 578 (2002). However, there remains the possibility that the municipal court may decide to allow the superfluous proceeding to continue and review the merits of the dispute possibly overturning or modifying the arbitral award. *Id.* (discussing Vandenberg v. Superior Court, 982 P.2d 229 (Cal. S. Ct. 1999)).

173. NAFTA, *supra* note 11, art. 1136(3); *see also* Coe, *The Mandate*, *supra* note 45, at 217 n.6 (noting, for example, that "domestic courts, when engaged, functionally are the ultimate arbiter of tribunal jurisdiction"); Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 47 (2001) (commenting on Canada's and Mexico's attempts to use annulment proceedings to "essentially give courts in Canada, Mexico, and the United States the final authority to interpret and apply Chapter 11's substantive obligations").

174. NAFTA, *supra* note 11, art. 1131(2).

175. Brower, *supra* note 62, at 75.

interpretations to bolster the legitimacy of the Chapter 11 dispute resolution mechanism, in practice the first time this procedure was invoked to draft the Notes of Interpretations of 2001, the effect was further discord.[176]

Rather than a panacea, the Interpretations were viewed as an illegitimate amendment to substantive rights in NAFTA and a severe curtailment of other rights.[177] First, the Interpretations require parties to "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal."[178] There is, however, nothing in the original draft of NAFTA that imposes such a duty, and imposing one under the guise of an interpretation is an assault on common sense.[179] After all, the scope of the drafter's authority did not include amending NAFTA provisions.[180] Their duty was to simply interpret the provisions therein.[181] Second, the Interpretations state that "fair and equitable treatment" does not require anything more than "that which is required by the customary international law minimum standard of treatment of aliens."[182] This severe curtailment of rights provided for under the "fair and equitable treatment" clause is contrary to the plain meaning of the language and thus, a violation of the obligation to interpret "in accordance with . . . international law."[183] Specifically, this interpretation is seen as a violation of the Vienna Convention on the Law of Treaties, which has risen to the level of

176. *Interpretations*, *supra* note 124 and accompanying text.

177. *See* Brower, *supra* note 19, at 926 (contending that the Interpretations were a "crude assertion[] of unrefined power"); *see also* Jack J. Coe, Jr., *The State Of Investor-State Arbitration – Some Reflections on Professor Brower's Plea for Sensible Principles*, 20 AM. U. INT'L L. REV. 929, 955 (2005) (observing that "the cardinal risk of undue government interference resides in the interpretive note feature initiated in NAFTA Chapter 11 and found in successor texts").

178. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions § A2(b) (July 31, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp [hereinafter Notes of Interpretation]. *See supra* notes 124-35 and accompanying text (discussing these provisions in greater detail).

179. *See* Pope & Talbot, Inc. v. Canada, at 23 (2002) (UNCITRAL), *available at* http://www.appletonlaw.com/cases/Pope_%20Award%20Re%20Damages_May31-02.pdf (concluding that the Interpretations were really amendments).

180. Amending NAFTA would have required "more formal procedures and a higher degree of political scrutiny." Brower, *supra* note 62, at 84.

181. NAFTA, *supra* note 11, art. 1131(2); Brower, *supra* note 62, at 85-86 (noting that tribunals may not have the authority to determine whether the interpretations are legitimate and may have to accept the interpretations as conclusive or else face "cascading allegations of ultra vires conduct [that] have no logical end"); *see supra* notes 120-35 and accompanying text (discussing the Interpretations); *see also* CAFTA, *supra* note 12, art. 10.22(3) (providing that the Interpretations will be binding on a tribunal established under the Agreements and adding that "any decision or award issued by the tribunal must be consistent with that decision").

182. Notes of Interpretation, *supra* note 178.

183. NAFTA, *supra* note 11, art. 102(2); *see also* Brower, *supra* note 62, at 79-81 (arguing that restricting the plain meaning of fair and equitable treatment to the most egregious forms of government misconduct violates international law and thus "undermines the legitimacy of their work").

customary international law and requires treaties to be interpreted in accordance with their plain meaning.[184]

Moreover, notwithstanding the label attached to these provisions, the text itself "contain[s] significant ambiguities that merely increase the room for debate."[185] For example, fair and equitable treatment is defined in accordance with the "customary international law minimum standards."[186] This language leaves significant room for interpretation by arbitrators, because customary international law is notoriously imprecise.[187] Finally, requiring the Interpretations to be applied to pending disputes without public comment or warning impinges upon their legitimacy. Taken to the extreme, the use of Interpretations may be seen merely as a "tool to gratify narrow self-interests."[188] It was Locke's view that the judge must remain "indifferent" and have "authority to determine all differences according to the established law,"[189] but by allowing parties to change the law to achieve their desired outcome,[190] the Interpretations set a dangerous precedent that undermines the legitimacy of the process Locke envisioned.

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184. Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331.

185. Brower, *supra* note 62, at 78. The Notes of Interpretation mandate that claims be based on customary international law; that fair and equitable treatment only prohibits egregious, outrageous and shocking government conduct; and that external treaty provisions should not be considered in applying Article 1105(1). *See* Notes of Interpretation, *supra* note 178. However, these binding interpretations could lead to disparate results because a tribunal could find that a more inclusive definition of fair and equitable treatment has risen to a level of customary international law or that violation of other treaty provisions constitutes unfair treatment. Brower, *supra* note 62, at 78-79.

186. *See* Notes of Interpretation, *supra* note 178.

187. *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 43 (2005) (suggesting that "the behavioral regularities associated with customary international law lack the universality or robustness posited by the traditional account"); *see also* Coe, *supra* note 177, at 947 (noting that "[i]nternational law specialists, accustomed to the decentralized sources upon which the system depends, tolerate a measure of indeterminacy").

188. Brower, *supra* note 62, at 81-82. The Interpretations were seen as a tool to direct the outcome of the Pope & Talbot case. Howard Mann, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOC'Y INT'L L. PROC. 247, 256 (2003). The Pope & Talbot case was pending at the time the Interpretations were passed, and Canada was both a disputing party in the case and a member of the Free Trade Commission who passed the Interpretations. Pope & Talbot, Inc. v. Canada, PP 6-7 (2001) (UNCITRAL), http://www.appletonlaw.com/cases/Pope_%20Award%20Re%20Damages_May31-02.pdf. The tribunal in Pope had interpreted "fair and equitable treatment" more broadly than the Interpretations allowed, so the tribunal decided to evaluate it under the new standard but still found Canada in breach. *See* NAFTA, *supra* note 11, art. 1105; Mann, *supra* at 256.

189. LOCKE, *supra* note 13 and accompanying text.

190. *See Interpretations*, *supra* note 124.

2. Reviewing an Award at the Enforcement Stage

Another means of review is through "recognition and enforcement" of an award by municipal courts.[191] Article 1136(6) of NAFTA provides for enforcement of arbitral awards under the ICSID Convention, the New York Convention, or the Inter-American Convention.[192] The most amenable for enforcement of awards is the New York Convention. The United States, Mexico, and Canada are all signatories to the New York Convention, which provides limited review by municipal courts of arbitral decisions.[193] Article III of the New York Convention provides that "Each Contracting State shall recognize arbitral awards as binding and enforce them . . . [and] [t]here shall not be imposed substantially more onerous conditions . . . on the recognition or enforcement of arbitral awards . . . than are imposed on the recognition or enforcement of domestic arbitral awards."[194] In this respect, the New York Convention provides uniformity in municipal courts for the enforcement of awards. However, the Convention also gives limited grounds upon which a municipal court *may* refuse to enforce an award.[195] Specifically, there are seven basic grounds: (1) the parties were under some incapacity or the agreement to arbitrate is not valid; (2) insufficient notice of the appointment of the arbitrator or proceedings was given to the party who the award is against, or the party was otherwise unable to present his case; (3) the award or decision is not contemplated or outside the terms of the submissions to the arbitration; (4) the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; (5) the award is not yet binding or was set aside by a competent authority of the country in which that award was made; (6) the subject matter is incapable of settlement by arbitration under the law of the country where the award is being enforced; or (7) the award would be contrary to the public policy of the country where the award is being enforced.[196] Courts in the United States

191. New York Convention, *supra* note 47, art. V(1).

192. NAFTA, *supra* note 11, art. 1136(a).

193. *See* Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); Lander Co. v. MMP Invs., Inc., 107 F.3d 476 (7th Cir. 1997); Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981).

194. New York Convention, *supra* note 47, art. III.

195. *Id.* art. V(1).

196. *Id.* art. V. *See* Gary H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited*, 14 J. INT'L ARB. 141, 145-48 (1997) (discussing the negotiation history of New York Convention art. V(1)(e)). Complications arise when a party attempts to enforce an award in a foreign state after being set aside or annulled in a municipal court. William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 805 (1999) (noting the foreign court's burden of balancing "two rival policies: extending comity to foreign judgments and enforcing arbitral awards"); *see also* Sampliner, *supra*, at 161 (arguing that municipal courts should "permit[] enforcement of nullified foreign awards when the enforcing courts find the nullification decisions to be arbitrary or clearly erroneous, in addition to any decisions that are proven to have

typically view these grounds narrowly and challenges to enforcement are usually unsuccessful.[197] While this "reliable" means of enforcement is in fact narrow, it is also deceptive because of the relatively broad discretion to set aside an award given municipal courts "of the country in which, or under the law of which, that award was made."[198] It is to this area of broad discretion in annulment proceedings that the discussion now turns.

3. Setting Aside the Award at the Seat of Arbitration

Municipal courts at the situs are able to "revise, set aside or annul the award . . . ."[199] This procedure is known as vacatur and is of greater import to the legitimacy of the Chapter 11 dispute resolution mechanism.[200] Because the New York Convention sets strict standards for the enforcement

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stemmed from corruption, bias, or which violate the public policy of the enforcing country [because this standard] would give deference to the decisions of the courts of the country of origin . . . while at the same time honouring the choice of the contracting parties to resolve their dispute by final and binding arbitration").

Compare In re Chromalloy Aeroservices, 939 F. Supp. 907 (D.D.C. 1996) (enforcing an award previously set aside by municipal courts in Egypt) *with* Baker Marine Ltd. v. Chevron, 191 F.3d 194 (2d Cir. 1999) *and* Spier v. Calzaturificio Tecnica S.p.A., 71 F. Supp. 2d 279 (S.D.N.Y. 1999) (refusing to enforce awards that were previously set aside); *see also* Dana H. Freyer, *United States Recognition and Enforcement of Annulled Foreign Arbitral Awards – The Aftermath of the Chromalloy Case*, 17 J. INT'L ARB. 1, 2 (April 2000); Richard M. Mosk & Ryan D. Nelson, *The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions*, 18 J. INT'L ARB. 463, 472-74 (2001); Eric A. Schwartz, *A Comment on Chromalloy Hilmarton, à l'américaine*, 14 J. INT'L ARB. 125, 134 (1997) (concluding that "it is not for the [U.S. District Court in *Chromalloy*] to save U.S. parties from choices imprudently made . . . nor does it serve the cause of international arbitration particularly for the courts of one country to disregard the legitimate right of another country to determine the rules governing arbitrations conducted on its territory . . . ").

197. DRAHOZAL, *supra* note 172, at 536.

198. New York Convention, *supra* note 47, art. V(1)(e). A United States court has held that despite the clause "or under the law of which, that award was made" that "any suggestion that a Court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system." *See* Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172, 176-77 (1990). But a court in India held that its courts were competent to set aside an award made in London like any other domestic award. Charles H. Brower II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 414, 415 (2003) (citing Nat'l Thermal Power Corp. v. Singer Co. 18 Y.B. COM. ARB. 407 (1993)).

199. NAFTA, *supra* note 11, art. 1136(3)(b)(ii).

200. Annulment proceedings will enhance the legitimacy only if the state courts abide by the tradition of limited review. Brower, *supra* note 62, at 74, n.203 (opining that "[i]n modern international practice, courts may use 'annulment' to rectify gross procedural injustices (such as excess of jurisdiction or denial of the right of audience), but not mistakes of law" (citing GARY B. BORN, INT'L COM. ARB. 708-09 (2d ed. 2001))).

of the awards[201] but leaves "setting aside or suspension" of an award to the throws of domestic law,[202] the ambiguity of "revise, set aside or annul" allows "courts to exercise any degree of review permitted by municipal law," which will inevitably differ and lead to disparate results.[203] Furthermore, "even when limited to questions of arbitral excess, courts may define their role so broadly as to firmly abut the boundary between merits review and mere consideration of the tribunal's mandate."[204] For example, while incorporating Article V of the New York Convention into domestic legislation in Chapter 2 of the Federal Arbitration Act[205] for enforcement of arbitral awards, the United States allows a much more liberal standard of review for annulment proceedings.[206] Indeed, in several cases United States courts have adopted a "manifest disregard" standard.[207] This is essentially a heightened level of review for mistakes of law and gives courts in the United States the power to overturn tribunal awards despite the heralded guarantees found within the New York Convention.[208] Furthermore,

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201. *See supra* notes 196-99 and accompanying text.

202. New York Convention, *supra* note 47, art. VI.

203. Brower, *supra* note 62, at 83; *see also* Schwartz, *supra* note 196, at 132 ("[T]he modern trend, as reflected in the UNCITRAL Model Law, is to harmonize the two regimes . . . .").

204. Coe, *Taking Stock*, *supra* note 37, at 1444.

205. Federal Arbitration Act 9 U.S.C. § 207 (2006) ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.").

206. "One of the surprising effects of the legislative reform movement has been to reinforce the concept of the territorial application of arbitration law and the importance of the law of the seat of the arbitration." Schwartz, *supra* note 196, at 130 (quoting W.L. Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 36, 57 (1995)).

207. *See* Carter v. Health Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004); *see also* Spector v. Torenberg, 852 F. Supp. 201, 206 (S.D.N.Y. 1994); Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) ("[A]wards may be vacated, *see* 9 U.S.C. § 10, or modified, *see id.* § 11, in the limited circumstances where the arbitrator's award is in manifest disregard of the terms of the agreement, or where the award is in 'manifest disregard of the law.'" (citation omitted)). *But see* Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434 (11th Cir. 1998); Lander Company, Inc. v. MMP Investments Inc., 107 F.3d 476 (7th Cir. 1997); Brandeis Intsel Ltd. v. Calabrain Chem. Corp., 656 F. Supp. 160, 167 (S.D.N.Y. 1987). For a thorough discussion on the history and applicability of the manifest disregard standard in reviewing arbitral awards governed by the New York Convention, see BORN, *supra* note 60, at 810-13.

208. Brower, *supra* note 173, at 84 ("[T]he United States has already taken the position that Chapter 11 proceedings do not arise out of commercial relationships and that the deferential legal framework for commercial arbitration generally does not apply to Chapter 11 awards."). Moreover, despite the guarantees in the New York Convention, scholars encourage judicial review as giving "precedence to doing justice rather than to the principle of finality." Sarosh Zaiwalla, *Challenging Arbitral Awards: Finality is Good but Justice is Better*, 20 J. INT'L ARB. 199, 204 (April 2003). After all, "an order annulling an arbitral award is of an entirely different character from a decision of non-recognition or a refusal to enforce an award." Schwartz, *supra* note 196, at 133 (further noting that "[w]hen an award is annulled, it ceases to exist (at least in the place where made) and this, in turn, generally permits the parties to commence a new arbitration").

> the governments of Canada and Mexico, having suffered the imposition of liability in three Chapter 11 disputes, recently contrived a more potent device for the restoration of national sovereignty: *de novo* (or at least heightened) review of awards in annulment proceedings conducted by municipal courts at the seat of arbitration.[209]

4. An Illustration: Metalclad

A clear example of the problems inherent in NAFTA was made evident in the review of the *Metalclad* award.[210] Mexico received an adverse judgment from a Chapter 11 tribunal in Canada.[211] Thereafter, Mexico brought annulment proceedings in the municipal courts of British Columbia.[212] Similarly, Canada also submitted arguments,[213] asking the court to review the award with greater scrutiny than was typical for arbitral awards because of the public nature of the dispute and because the awards did not merit judicial deference.[214] Canada's argument went on to suggest

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209. Brower, *supra* note 173, at 46.

210. *See supra* notes 148, 150 and accompanying text. *Metalclad* was the first case to interact with "domestic control mechanisms, raising many questions of first impression." Coe, *The Mandate*, *supra* note 45, at 217 n.6. Other illustrations of annulment proceedings under Chapter 11 claims include the *SD Myers* and the *Feldman* decisions. *See generally* Canada v. SD Myers, Inc., FC 38, FCJ No. 29, 13 January 2004; United Mexican States v. Marvin Roy Feldman Karpa, OJ No. 5070, 16(2) World Trade and Arb. Mat. 167, *aff'd*, 193 OAC 216, 248 DLR (4th) 443 (Ont. CA) (2003) (concluding that "a high level of deference should be accorded to the Tribunal especially in cases where the Applicant Mexico is in reality challenging a finding of facts").

Although each court applied the UNCITRAL Model Law, varying degrees of deference were afforded the tribunal awards, as compared to the *Metalclad* decision. *See* Gus Van Harten, *Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?*, 21 ARB. INT'L 493, 506-07 (2005) (concluding that "Canadian courts applied a mixture of public and private law principles in order to conclude that Chapter 11 tribunals were entitled to a high degree of deference"). According to David Gantz, "[g]iven that these reviews . . . will likely occur in other courts in other countries in the future, the desirability of a more consistent review mechanism is obvious, even if creating a mutually agreeable one may be difficult." David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 763 (2004).

211. *See* Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000) (Award), *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf.

212. *See* United Mexican States v. Metalclad Corp., 2000 BCSC 622 (B.C. Sup. Ct. May 2, 2001), *available at* http://naftaclaims.com/disputes_mexico_metalclad.htm.

213. *See* NAFTA, *supra* note 11, art. 1128.

214. Canada argued the award did not merit judicial deference because:

> [T]he NAFTA architecture indicates that the awards of Chapter Eleven tribunals about public measures are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review. Chapter Eleven Tribunals do not exhibit the features of a specialised or expert administrative tribunal. Chapter Eleven Tribunals are

that the court adopt a "pragmatic and functional" approach. While rejecting an argument to view awards under Chapter 11 as investment awards rather than commercial awards,[215] the court did not strictly apply the International Commercial Arbitration Act (ICAA),[216] which would have given the tribunal a "'powerful presumption'" of acting within their jurisdiction.[217] To the contrary, the court did not even mention this presumption, but rather overturned the tribunal's award because Chapter 11 tribunals only have jurisdiction to hear claims arising under rights within Chapter 11, and the tribunal found a violation of a transparency provision in Chapter 18 of NAFTA.[218] However, because of the "notable omission" of the "'powerful presumption'" in the court's analysis, and because the court noted that the "'pragmatic and functional'" standard of review may "'be of assistance in applying' the ICAA," the court "seems to have opened the door to de novo review."[219] Indeed, the court went on to label the tribunal's interpretation of Article 102(1) to include transparency "incorrect[]" and determined that the tribunal relied on invalid precedent.[220] The heightened standard of review by municipal courts "impairs the development of the rule of law in international economic relations."[221]

> currently appointed ad hoc and for single cases. There is no Chapter Eleven secretariat or in-house specialists or other institutional hallmark of expertise or special authority. This contrasts with the standing secretariat of the World Trade Organization supporting its dispute settlement panels or the staff supporting permanent domestic administrative tribunals.

In re Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States, Outline of Argument of Intervenor Attorney General of Canada (Feb. 16, 2001), ¶¶ 25-27, 30 (B.C. Sup. Ct. 2001), *available at* http://www.naftaclaims.com/disputes_mexico_metalclad.htm.

215. *See* Brower, *supra* note 173, at 69 (arguing that differentiating between commercial and noncommercial is "impossible, or at least highly subjective," and "[t]herefore, the proper inquiry should focus on the evident intent of the NAFTA Parties to subject Chapter 11 proceedings to the deferential legal framework of international commercial arbitration").

216. The International Commercial Arbitration Act is based on the UNCITRAL Model Law for International Commercial Arbitration and provides the applicable domestic standards for review of international commercial arbitration awards. *See* R. Doak Bishop & William W. Russell, *Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement*, 19 J. INT'L ARB. 505, 574 (2002).

217. Brower, *supra* note 173, at 63.

218. The court had, but rejected, the option of reading the transparency into the minimum standard of treatment requirements pursuant to Article 1105. *Id.* at 67.

219. *Id.* at 66 (quoting United Mexican States v. Metalclad Corp., (2001) 89 B.C.L.R.3d 359 ¶ 54). Furthermore, the court "rejected in theory – but accepted in practice – the judicial role advocated by Canada and Mexico." *Id.* at 47, 66 (citing Reasons for Judgment of Hon. Mr. Justice Tysoe, United Mexican States v. Metalclad Corp. ¶ 54 (B.C. Sup. Ct. 2001)).

220. *Metalclad Corp.*, (2001) 89 B.C.L.R.3d ¶ 71. Furthermore, "[t]he Tribunal did not simply interpret Article 1105 to include a minimum standard of transparency. No authority was cited or evidence introduced to establish that transparency has become part of customary international law." *Id.* ¶ 68. The Tribunal also reasoned that the transparency provision was incorporated in the provisions of Chapter 18 but not into Chapter 11 and therefore, not all of the principles and rules in Article 102(1) should be read into every chapter of NAFTA. *Id.* ¶ 71.

221. Brower, *supra* note 173, at 47.

The court also gave a cursory overview of the annulment grounds provided for in ICSID Article 52(1), but immediately rejected those grounds because they are only binding under the ICSID Convention and not the ICSID Additional Facilities.[222] The court then went on to analyze annulment according to domestic legislation.[223] In sum, Canada used its courts to advance its own interests by expanding review at the expense of legitimacy of the Chapter 11 dispute resolution mechanism,[224] and "[t]he practical lesson to be learned from *Metalclad* is that courts at the place of arbitration will have the last word in an arbitration . . . ."[225]

Through this ad hoc and varied approach to review, tribunal decisions will not receive the finality necessary to foster economic growth but will lead to unworkable, incoherent results.[226] Accordingly, the NAFTA appellate review system is in need of refinement to maintain the coherency, reliability, and predictability necessary to foster foreign investments and economic growth.[227]

B. CAFTA Reforms: Proficiency or Prolixity?

CAFTA provisions allow for a greater variety of appellate reform. For instance, while NAFTA allows dispute settlement under ICSID,[228] it cannot

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222. *Metalclad Corp.*, (2001) 89 B.C.L.R.3d ¶¶ 125-26.

223. *Id.* ¶ 126.

224. Howard Mann, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOCY INT'L L. PROC. 247, 254 (2003).

225. Alvarez & Park, *supra* note 10, at 376; *see also* Franck, *supra* note 36, at 1556 (noting that "the ultimate outcome of the award was in part dictated by the application of domestic Canadian arbitration law"); Brower, *supra* note 173, at 72 ("[O]bservers have long discredited the notion that states may invoke domestic laws and policies to disown their arbitration agreements.").

226. Municipal courts cannot remedy "the uncoordinated commitment of creative lawmaking to a series of ad hoc tribunals creat[ing] a considerable likelihood of incoherent results." Brower, *supra* note 62, at 66-67. Specifically regarding NAFTA's "fair and equitable treatment" clause, NAFTA Article 1105, one scholar has noted, "[g]iven the[] high stakes, the inability of ad hoc tribunals to establish a uniform understanding of Article 1105(1) deals a serious blow to coherence and predictability, the necessary foundation . . . for NAFTA's investment chapter." *Id.* at 68. Furthermore, this provision "unhappily juxtaposes the NAFTA Parties' roles as litigants and as states parties" thus "encourag[ing] the courts of the NAFTA Parties to violate the most fundamental tenet of procedural justice common to international law, Chapter 11, and the pertinent rules of arbitration." *Id.* at 77 (citing John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1179, 1195 (1999)).

227. *See* Brower, *supra* note 173, at 86 (noting that the current annulment process "threatens to diminish investor confidence by preventing the speedy resolution of disputes with host states" and "cripple[s] a system of neutral adjudication designed to promote the flow of capital across the borders of NAFTA Parties").

228. *See* NAFTA, *supra* note 11, art. 1120.1(a).

be invoked because neither Mexico nor Canada is a signatory to the ICSID Convention.[229] However, all the countries who are signatories to CAFTA are also signatories to the ICSID Convention.[230] Thus, the ICSID Convention will inevitably govern many of the disputes, and parties may avail themselves of ICSID's internal and exclusive annulment procedure. Because of the likelihood of disputes proceeding under ICSID, an overview of its procedures, as distinct from the ICSID Additional Facility Rules, is in order. Furthermore, CAFTA forges new ground in post-award review by implementing advanced procedures for parties to comment on awards and by laying the groundwork for an appellate body.[231]

Before discussing the ramifications of annulment procedures and the effects of an appellate body, it is important to recognize the distinctions between an annulment and an appeal. An annulment results in the "invalidation of the original decision," whereas a successful appeal results in a modification.[232] Furthermore, annulment addresses the legitimacy of the proceedings and not whether the tribunal applied the law correctly.[233] However, an appeal can modify or overturn an award based on procedural legitimacy concerns as well as errors in applying substantive law.[234] The following section discusses annulment procedures within ICSID followed by an overview of the appellate procedures unique to CAFTA.

1. Annulment Under the ICSID Convention[235]

The main difference between proceeding under the ICSID Convention and proceeding under the ICSID Additional Facilities is that under the ICSID Convention all contracting states are required to recognize and enforce an ICSID award.[236] These awards are not subject to the vagaries of

229. "For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State . . . and the other party must be a 'national of another Contracting State.'" INT'L BANK FOR RECONSTRUCTION & DEV., REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES & NATIONAL OF OTHER STATES 44 (1965).

230. While Costa Rica, El Salvador, Guatemala, Nicaragua, and Honduras have signed and ratified the ICSID Convention, the Dominican Republic has yet to ratify. *See* The World Bank Group: ICSID, List of Contracting States and Other Signatories of the Convention, http://www.worldbank.org/icsid/constate/c-states-en.htm (last visited Oct. 3, 2006).

231. *See* CAFTA, *supra* note 12, arts. 10.20(9), 10.20(10).

232. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 891 (2001).

233. *Id.* at 892.

234. *Id.*

235. It is important to remember that the parties to a dispute may (required for cases involving the Dominican Republic) still elect to proceed under the ICSID Additional Facilities or UNCITRAL, which will result in the same difficulties discussed *supra* at notes 192-209 and accompanying text.

236. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53, Mar. 18, 1956, 17 U.S.T. 1270 [hereinafter ICSID Convention]. Indeed, "[u]pon ratification of the ICSID Convention by Mexico and Canada, a number of the problems associated with domestic court review of Chapter 11 awards would evaporate." Coe, *Taking Stock*, *supra* note

municipal court annulment and enforcement procedures.[237] A disputing party has 120 days to challenge an award through the Article 52 annulment mechanism.[238] Upon challenging the validity of the award, the Secretary-General of ICSID convenes an ad hoc committee that will annul an award if there is a manifest excess of power, a corrupt arbitrator, a serious departure from a fundamental rule of procedure,[239] or a failure to state the reasons on which an award is based.[240] Stated explicitly in case law[241] and implicitly in the ICSID Convention,[242] the annulment procedure is not a review for errors of fact or law. However, annulment committees are prone to look into the merits of the dispute when evaluating two particular grounds of annulment: whether "the Tribunal manifestly exceeded its powers"[243] and whether "the award has failed to state the reasons on which it is based."[244] These grounds are addressed in turn.

The annulment committees will vacate an award if "the Tribunal manifestly exceeded its powers."[245] The scope of "manifestly" remains

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37, at 1450.

237. *See supra* notes 199-209 and accompanying text (discussing problems with annulment proceedings at the situs). "Under the Convention, Art. 52 is the only way of having the award set aside. In particular, domestic courts have no power of review over ICSID awards." SCHREUER, *supra* note 232, at 889; *see also* Coe, *Achilles Heel*, *supra* note 104, at 195 n.72 ("In a treaty-based system to some extent designed to circumvent local courts, it seems incongruous that those planning to arbitrate should be required to sift through and weigh such indigenous idiosyncracies.").

238. ICSID Convention, *supra* note 236, art. 52(2).

239. The *Klöckner* annulment committee held that "any sign of partiality[] must be considered to constitute, within the meaning of Article 52(1)(d), a 'serious departure from a fundamental rule of procedure.'" SCHREUER, *supra* note 232, at 973 (quoting Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 130). In addition, "violation of the right to be heard, absence or abuse of deliberation among the arbitrators and violation of the rules of evidence" have been argued to constitute serious departures from fundamental rules of procedure. *See id.*

240. ICSID Convention, *supra* note 236, art. 52(1); *see* SCHREUER, *supra* note 232, at 928-1008.

241. *See* MINE v. Guinea, Decision on Annulment, December 22, 1989, 4 ICSID Reports 85 ("Annulment is not a remedy against an incorrect decision."); Amco v. Indonesia, Decision on Annulment, May 16, 1986, 1 ICSID Reports 520; Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 97.

242. An "award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention." ICSID Convention, *supra* note 236, art. 53.

243. ICSID Convention, *supra* note 236, art. 52(1)(b); SCHREUER, *supra* note 232, at 935 (noting that in two cases "the *ad hoc* Committee went beyond a *prima facie* examination and undertook a fairly extensive substantive analysis").

244. ICSID Convention, *supra* note 236, art. 52(1)(e); SCHREUER, *supra* note 232, at 989-90 ("The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal [] becomes blurred." (citation omitted)).

245. ICSID Convention, *supra* note 236, art. 52(1)(b).

elusive as committees have yet to articulate relevant factors.[246] Several committees have concluded that as long as a tribunal's decision is tenable or non-arbitrary, the tribunal has not "manifestly exceeded its powers."[247] However, other committees have expanded the scope of scrutiny. For example, one committee considered a failure to apply the proper substantive law[248] as an excess of a tribunal's powers.[249] Other committees have taken this principle a step further by holding that a failure to apply even a part of the proper substantive law constitutes an excess of powers and is grounds for annulment.[250] Committees have also held that implicit in reviewing whether a tribunal exceeded its powers is the authority to review whether the tribunal had jurisdiction.[251] Furthermore, tribunals are not allowed to rule *ex aequo et bono* without the disputing parties permission; to do so has been held to be a violation in excess of the tribunal's powers.[252] Given the broad discretion and myriad of ways an annulment committee may review awards under the manifest excess of powers provision, the annulment process

246. SCHREUER, *supra* note 232, at 933.

247. *Id.* at 934 (citing Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 98 & Bjorn Pirrwitz, *Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 23 TEXAS INT'L L. J. 73, 96, 104 (1988)).

248. The proper substantive law may include international law as well as domestic law agreed upon by the parties. *Id.* at 962-66.

249. *Id.* "Application of a law other than that agreed to by the parties constitutes an excess of powers and is a valid ground for annulment. An error in the application of the proper law, even if it leads to a manifestly incorrect application of the law, is not a ground for annulment." *Id.* at 935, 944; Amco v. Indonesia, Decision on Annulment, May 16, 1986, 1 ICSID Reports 515 (taking it for granted that failure to apply proper substantive law was a violation in excess of power).

250. SCHREUER, *supra* note 232, at 948.

> Despite their self-professed refusal to examine the substantive correctness of the Awards before them, the *Klockner I* and *Amco I* Committees did not restrict themselves to establishing whether the Tribunals had identified the applicable law correctly. Rather, they also looked at the question of how this law had been applied.

Id. The tribunal to whom the case was resubmitted later commented that the excess of powers was "evidenced by a perceived failure to apply the applicable law, by virtue of its having been applied in a manner that reaches a conclusion believed untenable by the *ad hoc* Committee." Amco v. Indonesia, Resubmitted Case: Decision on Jurisdiction, May 10, 1988, 1 ICSID Reports 559. This has led scholars to posit, "a distinction between non-application and erroneous application becomes impossible." SCHREUER, *supra* note 232, at 950 (citations omitted). Still others have expressed concern that "*Amco* illustrates the danger to legitimacy posed by a control mechanism exceeding the bounds of its authority and thereby threatening the viability of the carefully calibrated ICSID Convention system of arbitration." BJORKLUND, *supra* note 168, at 471, 509.

251. SCHREUER, *supra* note 232, at 936-37 ("Clearly, an arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an 'excess of powers' under Article 52(1)(b)." (quoting Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 98)).

252. SCHREUER, *supra* note 232, at 957 (citing Amco v. Indonesia, Decision on Annulment, May 16, 1986, 1 ICSID Reports 119; MINE v. Guinea, Decision on Annulment, December 22, 1989, 4 ICSID Reports 87; & Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 124).

appears to be creeping into a substantive review, rather than a limited review, for manifest excesses of power.[253]

The second ground for annulment under Article 52 of the ICSID Convention is for a tribunal's failure to state the reasons upon which its award is based.[254] "Of all the grounds for annulment, an evaluation of the tribunal's reasoning is most likely to blend into an examination of the award's substantive correctness and hence to cross the border between annulment and appeal."[255] A tribunal's failure to give reasons[256] for a decision is most likely to occur for only a portion of an award rather than a complete absence of reasoning for an award in its totality.[257] The extent to which this reasoning needs to be "pertinent and capable of supporting the results reached by the tribunal" remains unclear and amounts to a considerable grant of discretion to the annulment committee.[258]

There are multiple factors which render this provision particularly susceptible to abuse. First, different legal cultures will have different notions of what constitutes acceptable reasoning.[259] Additionally, the need to forge alliances and make compromises may result in qualified language that does not afford a transparent view of a direct line of reasoning.[260] Furthermore, the standard for language in a decision to constitute a "reason" is whether the explanation is "sufficiently relevant" or "reasonably acceptable."[261] This standard is nothing more than a slippery slope to substantive review as evidenced by the committee's application of the standard.[262] For example, one committee overturned a tribunal's award

253. SCHREUER, *supra* note 232, at 935.

254. *See supra* note 244.

255. SCHREUER, *supra* note 232, at 986 (noting that this provision "was invoked in every application for annulment" and that "it is the one that may be relied upon most easily") (citations omitted).

256. Proffering contradictory reasons is considered a failure to reason at all. *Id.* at 994-97.

257. *Id.* at 987, 989 ("If the decision appears incorrect or inexplicable, the *ad hoc* committee will be more inclined to view the absence of reasons as a ground for annulment."). Furthermore, "[t]he *ad hoc* committees were agreed that a failure to deal with every question could lead to annulment, . . . [b]ut they were less clear as to whether the appropriate ground would always be a failure to state reasons under Art. 52(1)(e)." *Id.* at 1001. The ad hoc committee in *Klöckner I* "did not believe that every single argument needs to be dealt with," but that every question, "in the sense that it could have affected the outcome of the Award," should be addressed. *Id.* at 1003-04.

258. *Id.* at 986.

259. *Id.*

260. *Id.*

261. *See id.* at 990, 992 (quoting Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 143 & Amco v. Indonesia, Decision on Annulment, May 16, 1986, 1 ICSID Reports 520/1).

262. *Id.* at 991.

because the conclusions "d[id] not necessarily follow . . . [and] should have been expressly justified."[263] However, another committee, in an unrelated dispute, chose to adopt a more lenient standard, requiring only that an award "must enable the reader to follow the reasoning of the Tribunal on points of fact and law . . . even if it made an error of fact or of law."[264] The only thing clear about the standard of review to determine whether an award is reasoned is that there is no clear standard, and the level of review depends on the subjective views of the committee member reviewing the award.

Looking ahead, "adopting clearer rules . . . cannot . . . represent[] a complete solution to the legitimacy crisis."[265] Even though CAFTA annulment standards will attain a greater level of uniformity governed by ICSID, these uniform provisions will remain ambiguous, possibly resulting in substantive review and unnecessary delay in finalizing arbitral awards.[266] Due to the particular problems with the wording of two of the ICSID provisions,[267] disputing parties under NAFTA and CAFTA would be better served by annulment procedures if limited to the New York Convention Article V(1)(a)-(d) grounds,[268] with an express limitation that the review should not be substantive. That is, the review should not correct errors of fact or law. Creating a uniform and limited review process for annulments is critical to maintain a reliable yet efficient dispute resolution system.[269] This would prevent the unadvised alternative—courts reviewing the legitimacy of a foreign court's decision—which raises "vexatious questions" and runs contrary to the principle of comity.[270]

Utilizing these limited grounds for enforcement as well as for annulment will not obviate the need for Article V(1)(e) of the New York Convention—giving states where the award is enforced the option to refuse enforcement if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"—because each state will still subjectively interpret the scope of the grounds set forth in subsections (a)-(d).[271] Therefore, states will continue to have the capacity to

263. *Id.* (quoting Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 159).

264. *Id.* at 993 (quoting MINE v. Guinea, Decision on Annulment, December 22, 1989, 4 ICSID Reports 88).

265. Brower, *supra* note 62, at 88.

266. *See supra* notes 235-64 and accompanying text (discussing the problems inherent in the ICSID annulment procedures).

267. *See supra* notes 245-64 and accompanying text (discussing specifically ICSID Convention Arts. 52(1)(b), (e)).

268. Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 12, 29 (1997).

269. Coe, *supra* note 177, at 946 ("Whether one blames a general indeterminacy in rules of decision or the variant proclivities of arbitrators, unfortunate results flow from disarray in the jurisprudence applicable to host state undertakings, at least in extreme cases of disunity.").

270. Paulsson, *supra* note 268, at 29.

271. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10,

perform their primary role of protecting property within their boundaries.[272] Furthermore, based on the principle of comity,[273] other states may decide to give deference to the host-state's interpretation even though that court may disagree with the outcome.

2. Appellate Review

The review mechanisms new to CAFTA are found in two provisions within Article 20: Sections 9 and 10. While both NAFTA and CAFTA permit a tribunal to revise an award to make it more robust,[274] Section 9 of CAFTA provides that at the request of one of the parties, the tribunal shall submit to the parties the *prospective* award for comment.[275] The parties will then have sixty days to submit comments regarding the award, and the tribunal will have no more than forty-five days to issue the award after the comment period.[276] A tribunal is more likely to be accommodating to the parties' critiques of an award before it has been officially issued, and the parties will be less likely to challenge an award that they had a hand in shaping. In that respect, Section 9 of CAFTA provides a more robust review process,[277] but limits this robust review to disputes where there is no recourse to an appellate body.[278]

Section 10 of CAFTA proposes an international appellate body to review arbitral awards and to create binding precedent and uniform interpretations.[279] This was proposed primarily because of the decentralized

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1958, 21 U.S.T. 2518, 2520; Charles N. Brower, Charles H. Brower, II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415, 438 (2003) (observing that "even if every state were to adopt the Model Law verbatim, it is virtually inevitable that different national judiciaries will produce diverging interpretations of the same instrument").

272. *See* LOCKE, *supra* note 13, § 124 ("The great and *chief end* therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property.*").

273. The notion of comity must also be combined with deference given a particular nation, not out of mutual respect, but because of a unique political relationship.

274. *See* NAFTA, *supra* note 11, art 1135.3; *see also* CAFTA, *supra* note 12, art 10.26(6).

275. CAFTA, *supra* note 12, art. 10.20(9)(a).

276. *Id.* Parties may be familiar with this process because the ICSID Additional Facility Rules allow a party to request the Secretary-General to obtain a clarification from the Tribunal within forty-five days after an award has been issued. Facility Rules, *supra* note 109, art. 56.

277. It should be noted that the scope of a party's critique remains unclear. The scope of critique may be especially important if a party discovers new facts or arguments.

278. CAFTA, *supra* note 12, art. 10.20(9)(b).

279. CAFTA, *supra* note 12, art. 10.20(10). NAFTA neither implements nor contemplates an appellate procedure.

> [W]ith the discretion granted to tribunals, the growing volume of disputes, and their importance to ever broader constituencies, the use of ad hoc tribunals without coordinating mechanisms seems likely to provoke crisis. Therefore, without foreclosing

and incongruous NAFTA system, which "allows only episodic substantive review, made less effective by the lack of formal authorization and the associated artificiality that may, therefore, accompany the exercise."[280] Weighing the conflicting interests of finality and coherency, the governments determined "unpredictability is too costly to be tolerated, costly not only in terms of resources but also in terms of public confidence and a heightened potential for backlash against arbitration."[281] Unfortunately, the parties to CAFTA could not agree on an appropriate appellate mechanism and only committed to discussing the creation of an appellate body within three months of the date of entry into force.[282]

A free-standing appellate body would have several positive effects on the dispute resolution process. As opposed to participating in an annulment or enforcement proceeding in a foreign state where one may speculate

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the consideration of alternatives, one should praise the new wave of treaties that contemplate the establishment of appellate bodies for investor-state arbitration.

Brower, *supra* note 19, at 923 (citing U.S. Model BIT art. 28(10); Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 308 (2000) and William S. Dodge, *International Decisions: Metalclad Corp. v. Mexico*, 95 AM. J. INT'L L. 910, 918 (2001)).

280. Coe, *Achilles Heel*, *supra* note 104, at 206; *see also* Bipartisan Trade Promotion Authority Act of 2002 § 2102(b), 19 U.S.C. § 3802(b) (2004) (including as a trade negotiating objective: "providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements").

For a further illustration of the need for a final appellate judgment, one only needs to look to the procedural history of the claims arising out of a dispute between the Czech Republic and a Dutch company, CME Media Enterprises. *See* BJORKLUND, *supra* note 168, at 486-99. In this case, a corporation was afforded the opportunity to take "multiple bites at the apple." *Id.* at 510 (quotations omitted). "*CME* is a primer on the potential for arbitration run amok, so to speak – not in terms of overly intrusive review by the relevant control mechanisms, but with respect to the ability on the part of the parties simultaneously to litigate overlapping claims in different for a and on technically different legal theories." *Id.* at 509. Indeed, "[t]he ability to pursue relief in multiple for a can create a perception of systemic dysfunction." *Id.* at 510. Because contradictory decisions were reached in parallel proceedings, "*CME* threatens the legitimacy of investor-State arbitration on a larger scale; its effects are not confined to one mechanism for resolving disputes, but could bring into disrepute the whole system of BIT arbitration, regardless which regime – whether ICSID or UNCITRAL, or something else besides – governs the cases." *Id.* at 509.

281. Coe, *supra* note 177, at 951. "Although the prospect of a second instance would necessarily affect investors' expectations of finality, the countervailing benefits to legitimacy would be substantial and the consequences would be less deleterious than current fears of heightened review by municipal courts." Brower, *supra* note 62, at 92. The author continues by asserting that "the sources of illegitimacy seem obvious." *Id.* at 93. They include: treaty provisions' lack of "substantial measure of textural clarity;" *ad hoc* tribunals' tendency to create "incoherent doctrine on a key provision;" *ad hoc* tribunals' lack of "pedigree accepted as valid by the governed community and may seem prone to depart from ritual due to inexperience;" and *ad hoc* tribunals' tendency to be "relatively less accountable, transparent, and accessible to democratic processes than permanent tribunals." *Id.*; Franck, *supra* note 36, at 1622 ("The slight cost of sacrificing some degree of finality to create a temporal window for the appellate process is ultimately preferable to a dispute resolution system that renders incoherent decisions and adversely affects the expectations of investors and Sovereigns.").

282. CAFTA, *supra* note 12, art. 10.20(10), Annex 10-F; *see also* David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679 (2004).

"about what nuanced pressures have infected the process,"[283] an appellate system affords a neutral forum to host these proceedings. Indeed, an appellate system that appoints arbitrators from non-party nations would escape even the appearance of bias or partiality.[284] For example, parties will not risk biased domestic laws or interpretations favoring the host state or party if the appellate procedures are based on international standards.[285] In addition, a party would no longer need to worry about a host state or party having greater familiarity with the intricacies and nuances of the law or judge governing the case.[286] An appellate system based on international standards would also have the peripheral benefit of being able to retain the same counsel throughout the entire proceedings rather than obtaining local counsel during the enforcement or annulment proceedings.[287] Finally, an appellate body would provide coherency to the application of substantive law and provide centralized standards for annulment, both of which are markedly lacking in the current framework.[288] "[T]he increased legitimacy that is gained by having a supervising body cannot be overlooked or underestimated."[289]

Despite the perceived benefits, significant concerns continue to plague the formation of an appellate body; as they remain unresolved, each is briefly reviewed.[290] To begin, the nature and composition of an appellate body remains undecided.[291] Much like the International Court of Justice,[292]

283. Coe, *Taking Stock*, *supra* note 37, at 1446 (concluding further that "[a]t a minimum, appearances suffer").

284. *Id.*

285. *Id.*

286. *Id.* at 1447.

287. *Id.*; Brower, *supra* note 62, at 92.

288. Subsequent treaties may be necessary to avoid annulment proceedings under the ICSID Convention, and unless the parties agreed, the award would still be subject to domestic court review under the grounds specified in the New York Convention. Coe, *Taking Stock*, *supra* note 37, at 1447 n.303. After all, "the stakes in investment arbitration are simply too great to sit by idly while issues of public international law are being decided inconsistently, in private." Franck, *supra* note 36, at 1613.

289. Franck, *supra* note 36, at 1624; *see also* BJORKLUND, *supra* note 168, at 513 ("Perhaps the most significant benefit accompanying the establishment of a tribunal is the likely enhancement of the integrity and legitimacy of investor-State arbitration.").

290. Franck, *supra* note 36, at 1607 ("The precise form and mandate of an appellate body leaves room for a considerable amount of debate.").

291. *See* CAFTA, *supra* note 12, Annex 10-F § (1)(a).

292. The International Court of Justice is located in the Hague, Netherlands and handles state-to-state disputes. International Court of Justice, The Court at a Glance, http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html (last visited Dec. 28, 2006). There are fifteen judges who serve nine-year terms on the court. *Id.* The judges are nominated by their respective countries and elected by the UN General Assembly and Security Council. *Id.* Each permanent

each state[293] that agrees to participate and be bound by the permanent[294] appellate body should nominate[295] one appellate member to sit on three-member panels. Furthermore, each appellate member should be assigned to cases randomly, provided they are not of the same nationality as one of the disputing parties.[296] If at first not enough states are members of the appellate body, each country should nominate two appellate members.[297] It may also be useful to link this appellate body with an established institution that can handle the administrative details, like the Permanent Court of International Arbitration in The Hague[298] or the ICSID Convention.[299]

Another concern is the relationship between an appellate body and the arbitral rules.[300] Because of the expense and delay of finality, appellate review should not be guaranteed, but a party may submit a request for appellate review within thirty days of the tribunal's issuing an award.[301] An appellate member designated to handle such requests should decide whether to accept review of a party's dispute. If the submission is accepted for appellate review, the appellate body should be responsible for notifying both disputing parties. The appellate proceedings should then pre-empt annulment proceedings within ICSID or in the municipal courts in the

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member of the Security Council has a representative on the court. *Id.*

293. Franck, *supra* note 36, at 1619 ("Given the overwhelming similarity of the rights promulgated in investment treaties, it is vital to make a comprehensive effort to harmonize and clarify the development of these standards."). Accordingly, signatory states should not be limited to those who are members to a particular multi-lateral or bilateral investment treaty. The appellate process "promotes clarity throughout the network and permits the articulation of a reliable body of international economic and public international law. Such uniformity promotes the confidence of the investment arbitration system." *Id.*

294. *Id.* at 1609 (positing that "a series of ad hoc appellate tribunals could come to inconsistent decisions about an existing inconsistent decision, this exacerbates the challenge of creating a coherent jurisprudence").

295. Nomination of members will lead to the most qualified individuals sitting on the review panel. These individuals will likely possess specific expertise in investor-state arbitration.

296. *See supra* note 58 and accompanying text.

297. That way appellate members will not be overwhelmed by the number of cases and will be able to adequately address the pertinent legal issues before them.

298. Franck, *supra* note 36, at 1623 (citing Judge Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 109 (Martin Hunter et al. eds., 1995)).

299. BJORKLUND, *supra* note 168, at 511 ("Establishing such a mechanism under the auspices of ICSID would be ideal. ICSID has the institutional expertise; highly intelligent, experienced, and competent staff; and the facilities to house such an [sic] body."). ICSID has proposed the addition of an appellate body within its framework. *See* ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration 6 (Oct. 22, 2004) (working paper *available at* http://www.worldbank.org/icsid/highlights/improve-arb.pdf).

300. CAFTA, *supra* note 12, Annex 10-F § (1)(e).

301. Franck, *supra* note 36, at 1622 ("[A] thirty day limitation would ensure that decisions to appeal are made quickly and there is a degree of finality.").

situs.[302] This will avoid double review, which will inevitably lead to contradictory determinations.

In addition, the appellate body's scope and standard of review remains an issue.[303] First, the scope must be limited to mistakes of law and not mistakes of fact.[304] Allowing a de novo review would result in a clogged and inefficient system. Furthermore, reviewing "only . . . the interpretation of law . . . related to both jurisdiction and the merits . . . will enhance certainty about what rights investors have and for what conduct Sovereigns are liable."[305] Second, the appellate body should apply a de novo standard of review to legal interpretations. This is appropriate because due deference is extended to tribunals by limiting the scope of review to legal issues. Because the function of an appellate body is to create a coherent, reliable, and predictable body of law, the legal issues reviewed must be reviewed rigorously.

Yet another concern with the establishment of an appellate body is whether an appellate decision affirming an arbitral award remains subject to enforcement review procedures in domestic laws.[306] In the interests of finality and coherency, this potential problem can be avoided provided the signatory states agree to accept the appellate body decisions as binding, similar to the binding force provided for tribunal awards in Article 54 of the ICSID Convention.[307] Implicit in the authority to issue a binding award is the appellate body's power to uphold an award or to affirm the award for different reasons.[308] Furthermore, if the appellate body's decision yields

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302. *See* BJORKLUND, *supra* note 168, at 511 (stating that "one could speculate that annulment would soon enough whither away, particularly if an appellate mechanism were included in . . . large multilateral treat[ies]"); *see also supra* at notes 200-14 and accompanying text (discussing the problems associated with a party seeking annulment in its own courts as illustrated by the *Metalclad* case).

303. CAFTA, *supra* note 12, Annex 10-F § (1)(b).

304. Franck, *supra* note 36, at 1607 (opining that "an appellate body could focus on establishing a clear and coherent body of law and 'correcting legal errors in specific cases'; meanwhile arbitral tribunals can use their expertise and focus on their own institutional competency: developing a factual record, clarifying issues in dispute, and applying legal principles") (citation omitted).

305. *Id.* at 1620.

306. CAFTA, *supra* note 12, Annex 10-F § (1)(f).

307. ICSID Convention, *supra* note 236, art. 54 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."). Furthermore, while "[i]t is possible that States will give their consent to the appellate body by including the *ICSID Convention's* provision on automatic enforcement of awards; . . . even that safeguard has not completely insulated ICSID awards from national court review." BJORKLUND, *supra* note 168, at 520; *see also* Brower, *supra* note 62, at 92.

308. CAFTA, *supra* note 12, Annex 10-F § (1)(d). An appellate body "must have a mandate not only to decide the appeal but also have the power to effectuate its determinations." Franck, *supra*

only a de minimus modification of an award, the modifications should be incorporated into the award, and it should be given binding effect. This will be both economically efficient and non-prejudicial. However, if the appellate body overturns the award, the case should be remanded to the previously instituted tribunal[309] to re-hear the case in accordance with the legal reasoning propounded by the appellate body. With the modifications suggested in this section,[310] it is hoped that, if not CAFTA, then future free trade agreements will create "a predictable legal framework for investors."[311]

V. CONCLUSION

As far back as 2002, Congress passed a bill stating that their "principal trade negotiation objectives" for foreign investment included "providing for an appellate body" and "ensuring the fullest measure of transparency in the dispute settlement mechanism."[312] CAFTA is much more than a prolix revision of NAFTA; the skilled negotiators instilled principal democratic ideals in an otherwise shrouded enterprise. While the revised transparency provisions may grant only a short reprieve from harsh public critiques, the number of investor-state disputes will continue to rise,[313] and the creation of an appellate body will eventually be necessary to breathe coherency and legitimacy into the Chapter 10 and 11 investor-state dispute resolution mechanisms.[314]

But revolutionary changes do not happen overnight, and while CAFTA represents a significant step in the evolutionary process, the fate of international dispute settlement remains contingent on further advances fully

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note 36, at 1621.

309. Franck, *supra* note 36, at 1621 ("The original tribunal already has an intimate familiarity with the parties, the facts, and the issues that other entities lack. In contrast, establishing a new tribunal and initiating an entirely new set of proceedings would be a waste of resources and create unnecessary delay.").

310. CAFTA, *supra* note 12, Annex 10-F § (1)(c). This section provides that the Negotiating Group should discuss the transparency of the proceedings in a proposed appellate body. *Id.* It seems only natural to extend the same level of transparency and confidentiality to the proceedings that are provided for in the tribunal's procedures. *See supra* Part III.

311. Press Release, United States Trade Representative, U.S. & Central American Countries Conclude Historic Free Trade Agreement (Dec. 17, 2003), http://www.ustr.gov/Document_Library/Press_Releases/2003/December/US_Central:American:Countries_Conclude_Historic_Free_Trade_Agreement.html; *see also* Franck, *supra* note 36, at 1607 (concluding that "an appellate body could restore faith in the system, promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system sustainable and legitimate in the long term").

312. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3802(b)(2)(G)(iv), (H) (2004).

313. Coe, *supra* note 178, at 956 (noting that "neither new investments nor new claim filings are likely to abate anytime soon").

314. BJORKLUND, *supra* note 168, at 515 ("However, it is important that the establishment of an appellate body not be seen as a panacea for all ills.").

incorporating Locke's theories.[315] Suffice it to say, the days of wild-west, gunboat diplomacy are over and a world order is slowly emerging for the peaceful resolution of international commercial disputes.

315. LOCKE, *supra* note 13 and accompanying text.

APPENDIX A:
DISTINGUISHING INVESTOR-STATE DISPUTE SETTLEMENT IN NAFTA AND CAFTA

NAFTA CHAPTER 11	CAFTA CHAPTER 10
Consultation and Negotiation	
"The disputing parties should first attempt to settle a claim through consultation or negotiation." (Art. 1118).	"Consultation or negotiation" becomes "consultation and negotiation." Examples of consultation and negotiation are included: "non-binding, third-party procedures such as conciliation and mediation." (Art. 10.15).
Submission of a Claim to Arbitration	
An investor with standing may bring a claim pursuant to Article 1502(3)(a) and 1503(2), which are State Enterprise and Monopoly provisions. (Arts. 1116(1) & 1117(1)). Notice of Intent for enterprises requires name and address of enterprise. (Art. 1119(a)). A claim is submitted when "the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing party." (Art. 1137(1)).	Rather than bringing a claim under Enterprise and Monopoly provisions, an investor may bring a claim for a breach of an investor agreement or authorization. (Art. 10.16.1). Notice of Intent for enterprises requires the name, address and place of incorporation of the enterprise. (Art. 10.16.2(a)). A claim is submitted when the notice of arbitration "referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent" and shall be deemed submitted on the date of receipt. (Art. 10.16.4.(c)). *New to CAFTA:* Allows for submission of claims under the ICSID Rules of Procedures for Arbitration Proceedings. (Art. 10.16.3(a)).

	The notice of arbitration must also include the name of the arbitrator the claimant wishes to appoint or a consent letter allowing the Secretary-General to appoint an arbitrator. (Art. 10.16.6).
Conditions and Limitations on Consent of Each Party	
Three year statute of limitations beginning to run "from the date on which the investor first acquired, or should have first acquired, knowledge **of the alleged breach** and knowledge that **the investor** has incurred loss or damage." (Art. 1116(2)) (emphasis added). Requires parties to waive their right to bring a claim in front of an administrative tribunal under the laws of a Party except for non-monetary relief (Art. 1121(1)(b)), or if the disputing Party "deprived a disputing investor of control of an enterprise." (Art. 1121(4)).	Three year statute of limitation begins to run from the date the investor first acquired, or should have first acquired, knowledge **of the breach under Section 16(1)** and knowledge that the claimant **or the enterprise** incurred loss or damage. (Art. 10.18.1) (emphasis added). Exempts only non-monetary interim injunctive relief and further requires that the relief must be "for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration." (Art. 10.18.3). *New to CAFTA:* Does not allow a claim to be submitted if the claimant "previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution." (Art. 10.18.4).

Selection of Arbitrators	
Allows ninety days from the date the claim is submitted for the tribunal to be established. If the tribunal is not formed during that time the Secretary-General, at the request of one of the parties, shall appoint an arbiter who is on a designated list and is not a national of either party to the dispute. (Art. 1124(2)).	Allows only seventy-five days from the date the claim is submitted for the tribunal to be established and does not limit the Secretary-General's discretion in appointing arbitrators. (Art. 10.19.3).
Conduct of the Arbitration	
"On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." (Art. 1128).	No notice requirement for oral or written submissions by non-disputing Parties. (Art. 10.20.2). *New to CAFTA:* "The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party." (Art. 10.20.3). Allows for an objection that the claim is not one in which the tribunal has the authority to grant an award. The Tribunal is to assume all claimant's factual allegations are true and consider all relevant facts. (Art. 10.20.4). This objection must be decided within 150 days, but may add thirty days if a hearing is required and thirty days for "extraordinary cause." (Art. 10.20.5). Attorney's fees are recoverable for defending frivolous objections. (Art. 10.20.6). *Interior Appellate Review*: On request of a disputing party, the tribunal shall submit a copy of its proposed decision for comment for sixty days. The tribunal must then

	issue an award within forty-five days after the expiration of the sixty day comment window. (Art. 10.20.9). "[T]he Parties shall strive to reach an agreement that would have [a multilateral] appellate body review awards." (Art. 10.20.10).
Transparency of Arbitral Proceedings	
Either disputing party decides whether to publish the award, unless Mexico is a disputing party in which case the award is published in accordance with the applicable arbitration rules. (Art. 1137(4) & Annex 1137.4).	The notice of intent, notice of arbitration, pleadings, memorials, minutes or transcripts of hearings, orders, awards, and decisions of the tribunal shall be made available to the public. (Art. 10.21.1). *New to CAFTA:* Hearings shall be open to the public subject to necessary arrangements to not disclose protected information. (Art. 10.21.2). Information is protected from disclosure if the party clearly designates the information as protected "at the time it is submitted to the tribunal." However, the party must also "submit a redacted version of the document" that will then be provided to non-disputing parties and to the public. (Art. 10.21.4). "Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws." (Art. 10.21.5).

Governing Law	
"An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." (Art. 1131(2)).	The interpretation is binding on a Tribunal established under this Section and "any decision or award issued by the tribunal must be consistent with that decision." (Art. 10.22(3)). *New to CAFTA:* The law to be applied is that "specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree." If no law is specified then the tribunal shall apply the respondent's law, including its conflict of law rules, and any applicable rules of international law that may be applicable. (Art. 10.22.2).
Consolidation	
A disputing party seeking consolidation shall specify in its request to the Secretary-General the name of the parties against which the order is sought; the nature of the order sought; and the grounds on which the order is sought. (Art. 1126(3)). Within sixty days of the request for consolidation, the Secretary-General shall establish a tribunal by appointing three arbitrators from designated lists consisting of one national from each disputing side. (Art. 1126(5)).	In addition to the requirements already mentioned in NAFTA, the request should also include the addresses of the parties involved. (Art. 10.25.2). Unless otherwise agreed upon, the tribunal (to be established within sixty days of the request for consolidation) shall consist of: one arbitrator appointed by agreement of the plaintiffs; one by the respondent; and the presiding arbitrator appointed by the Secretary-General as long as he or she is not a national of any of the parties. (Art. 10.25.4). If after sixty days the tribunal is not yet constituted, the Secretary-General shall appoint any necessary

	arbitrators – claimant's arbitrator must be a national of one of the claimants and respondent's arbitrator must be a national of the respondent's state. (Art. 10.25.5). *New to CAFTA:* "Unless the Secretary-General finds within [thirty] days . . . that the [consolidation] request is manifestly unfounded, a tribunal shall be established under this Article." (Art. 10.25.3). The consolidation tribunal may order a tribunal previously established under this Section to "assume jurisdiction over, and hear and determine together, all or part of the claims." However, "at the request of any claimant not previously a disputing party before that tribunal . . . the arbitrator for the claimants shall be appointed pursuant to" the consolidation mechanism for appointment of arbitrators. Furthermore, the "tribunal shall decide whether any prior hearing shall be repeated." (Art. 10.25.6).

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