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An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes

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An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges

David A. Gantz[*]

ABSTRACT

At a time when complaints and decisions in investor–state arbitration are proliferating as never before, concerns are being raised by the U.S. Congress, NGOs and some foreign governments over the lack of consistency (or serious errors) among the decisions that emanate from the largely ad hoc arbitral panels that are created under the provisions of bilateral investment treaties and the investment provisions of free trade agreements, such as NAFTA, Chapter 11. As a result, it is suggested that an appellate mechanism, perhaps patterned after the generally successful Appellate Body of the World Trade Organization, be created, possibly under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes. The United States–Central American–Dominican Republic Free Trade Agreement is likely to be the locus of the first serious negotiation aimed at creating such a body, given that such negotiations are mandated under that FTA's provisions. The chances of success, however, particularly in the near term, may well be elusive, in view of the extensive legal and practical challenges to creating a well-functioning mechanism, and the divergent constituencies that would have to be satisfied.

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During the past few years there has been increasing discussion of a new "appellate body," or to avoid confusion with the World Trade Organization (WTO), an "appellate mechanism," for reviewing arbitral decisions in investor-state disputes.[1] While the current interest in the concept appears to have originated in the debate leading up to the United States' Trade Promotion Authority legislation of 2002, Professor Thomas Walde indicates that the idea dates back at least to 1991.[2] The most recent concrete proposal, subsequently recanted and now in limbo, was offered in an October 2004 International Centre for Settlement of Investment Disputes (ICSID) Secretariat document.[3]

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1. *See* William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option*, 11 AM. REV. INT'L ARB. 531 (2000) (suggesting that internal appeals processes for investment disputes have a role for high-stakes and complex arbitrations); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L.R. 1521 (2005) (arguing that the expanding volume of investor-state arbitral decisions call for, among other things, an appellate court to discourage inconsistent decisions).

2. Email from Thomas Walde to OGEMID (Nov. 7, 2004, 16:25) (on file with Author) (giving credit for the idea to Sir Eli Lauterpacht).

3. ICSID Secretariat Discussion Paper, *Possible Improvement of the Framework for ICSID Arbitration*, Oct. 22, 2004, Part VI [hereinafter ICSID Discussion Paper]. The principal drafter of that paper, Antonio R. Parra, explained at a June 2005 ICSID conference that the proposal for an ICSID-based investment dispute appellate mechanism had been premature, and the subsequent version of the discussion paper makes no mention of that proposal. *See* News Release, ICSID Secretariat, Suggested Changes to the

The appellate mechanism issue, however, is no longer simply an academic or theoretical one. Once the United States-Central American-Dominican Republic Free Trade Agreement (CAFTA-DR)[4] enters into force, presumably some time in 2006 for most of the signatories,[5] an annex to CAFTA-DR requires the parties to establish a negotiating group for an "appellate body or similar mechanism" within three months and to prepare a suitable amendment to CAFTA-DR within a year thereafter.[6] It is thus reasonably possible that some sort of more concrete proposal for an appellate mechanism will evolve in the CAFTA-DR context. If the process outlined in CAFTA-DR succeeds, there will be renewed pressure to agree on a similar mechanism on the parties to the North American Free Trade Agreement (NAFTA)[7] (United States, Canada, Mexico) and signatories to other recent U.S. bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment provisions.

Actual implementation of an investment appellate mechanism for CAFTA-DR, NAFTA, or other FTAs or BITs is, of course, another matter entirely. Such a process, which requires an amendment to each of the agreements by each party through its constitutional processes, could take years to complete, or may never reach fruition. The controversial nature of the appellate mechanism and the political sensitivity, after CAFTA-DR, of submitting *any* trade agreement or amendment thereto to the U.S. Congress or other legislatures, make prompt creation of an appellate mechanism highly problematic, even assuming that the

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ICSID Rules and Regulations (May 12, 2005), http://www.worldbank.org/icsid/sug-changes.htm [hereinafter ICSID Suggested Changes].

4. United States-Dominican Republic-Central America Free Trade Agreement (United States, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua), Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Aug. 8, 2005) [hereinafter CAFTA-DR].

5. While it had been hoped that CAFTA-DR would enter into force January 1, 2006, for all seven members (United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua), this did not occur. The U.S. Trade Representative's Office announced on December 30, 2005, that CAFTA-DR would be implemented on a "rolling basis," and that the United States "will continue to work intensively with CAFTA-DR partners to bring them on board as quickly as possible." (USTR also noted that all of the parties except Costa Rica, which has not yet ratified the FTA, were working together to complete the process as soon as possible.) USTR Press Release, *Statement of Spokesman Stephen Norton Regarding CAFTA-DR Implementation*, Dec. 30, 2005, *available at* http://www.ustr.org. As of April 1, 2006, the Agreement had entered into force for El Salvador, Honduras, Nicaragua, and the United States.

6. CAFTA-DR, *supra* note 4, Annex 10-F. It is unclear from the text whether the Annex is triggered before the Agreement enters into force for all of the seven parties. Under the circumstances, the outset of formal negotiations should probably be deferred until at least most of the seven have become parties.

7. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

CAFTA-DR negotiating group actually produces a "draft amendment" in a timely manner.

This Article discusses how the investment appellate mechanism concept originated; reviews the current "appeal" process for investor-state arbitral decisions, with particular attention to the three NAFTA Chapter 11 arbitral decisions that have been reviewed to date; sets forth the rationale supporting an appellate mechanism; and considers the key legal issues, standard of review, and other major political, procedural, and legal hurdles. The Article concludes with a few comments and recommendations.

I. THE GENESIS OF THE APPELLATE MECHANISM CONCEPT

The current impetus in the United States for an investment appellate mechanism in investor-state dispute arbitration comes primarily from non-governmental organizations (NGOs), several domestic government agencies (e.g., Environmental Protection Agency and Department of Justice), and Congressional concerns regarding NAFTA Chapter 11. Chapter 11 contemplates the likelihood of disputes between a foreign investor or service provider and the host government or an agency.[8] Under Chapter 11, foreign investors may seek arbitration under Chapter 11 of any of the rights and obligations guaranteed in Section A: most favored nation treatment, fair and equitable treatment, freedom from export or local content performance requirements, the right to make most financial transfers, and restrictions against expropriation, whether direct or indirect.[9] Among the concerns that NGO and Congressional critics have raised is the claim that "normal" regulatory actions, including but not limited to those in the environmental or health fields, would constitute compensable takings. These issues were raised, inter alia, in *Methanex Corp. v. United States*[10] and *Sun Belt Water v. Canada.*[11]

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8. *See generally* NAFTA, *supra* note 7, ch. 11.

9. NAFTA, *supra* note 7, arts. 1103, 1105, 1106, 1109, 1110. Procedures for international arbitration between NAFTA nationals and the NAFTA governments are contained in Section B.

10. Methanex Corp. v. United States, Partial Award, (NAFTA Arb. Trib. Aug. 7, 2002), *available at* http://www.state.gov/documents/organization/12613.pdf [hereinafter *Methanex*, Partial Award]. *See* Pleadings, Orders and other documents, http://www.naftaclaims.com/disputes_us_6.htm (currently ending with the hearing transcripts dated June 2004).

11. Sun Belt Water, Inc. v. Canada, Notice of Claim and Demand for Arbitration, (NAFTA Arb. Trib. Oct. 12, 1999), http://naftaclaims.com. The action, claiming that Canada had discriminated against the firm in denying it the right to export water from Canada, was never pursued.

With regard to "regulatory" takings, the focus has been on *Methanex*. The Canadian firm Methanex challenged the action of the State of California in banning MTBE, a gasoline additive, because of the perceived risks of MTBE pollution of the underground water supply.[12] Methanex manufactured methanol, the principal ingredient in MTBE, and argued that the measures taken by California constituted a "substantial interference and taking of Methanex US' business and Methanex's investment in Methanex US. These measures were characterized both directly and indirectly tantamount to expropriation."[13] The original tribunal did not reach the question of whether California's action constituted a compensable taking under Article 1110; it dismissed the original complaint on grounds that the connection between the California MTBE ban and Methanex's operations was not "legally significant" enough to satisfy the "relating to" language in NAFTA Article 1101.[14] All claims against the United States contained in a revised claim, both jurisdictional and substantive, were also dismissed; the United States was awarded attorneys' fees and court costs that will likely exceed $4 million.[15]

The concerns raised by *Methanex* were thus ultimately unfounded. NGOs and other NAFTA critics, however, continue to argue that were a future tribunal reviewing similar facts to require compensation, it could lead to a chilling effect on national and state government regulation in these areas.[16] Some, including a majority of the Congress, as noted below, have felt that an appellate mechanism to review investment decisions could deal with the possible "rogue" arbitral decision, although others have argued that this would not be a panacea for the many perceived shortcomings of Chapter 11.[17] Whether members of the

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12. Exec. Order No. D-5-99 of the State of Cal., (Mar. 25, 1999), as modified by Exec. Order No. D-52-02 (Mar. 14, 2002), *available at* http://www.governor.ca.gov.

13. Methanex Corp. v. United States, Methanex Notice of Intent to Submit a Claim to Arbitration, (NAFTA Arb. Trib. Aug. 7, 2002), *available at* http://www.international-economic-law.org/Methanex/Methanex%20-%20Notice%20of%20Intent.pdf.

14. *Methanex*, Partial Award, *supra* note 10, ¶ 172(2).

15. Methanex Corp. v. United States, Final Award, at 300 (NAFTA Arb. Trib. Aug. 3, 2005), *available at* http://www.naftaclaims.com/disputes_us_6.htm. *See* Press Release, U.S. State Dept., NAFTA Tribunal Dismisses Methanex Claim (Aug. 10, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/50964.htm (noting that Methanex is required to pay the United States "more than $4 million in legal costs and arbitral expenses).

16. *See, e.g., U.S. Dodging Bullet in Methanex Ruling Does Not Remedy Threats from NAFTA Chapter 11 Foreign Investment Protection Mechanism*, PUBLIC CITIZEN, Aug. 10, 2004, http://www.citizen.org/pressroom/release.cfm?ID=2017 ("Today's dismissal of a NAFTA 'Chapter 11' challenge to California's phase-out of MTBE does little to ease public concerns about the extraordinary foreign investor protection rules in NAFTA-style agreements and does nothing to alleviate the unusual and radical threat to other local, state and federal public interest policies.").

17. *See* Letter from the Center for International Environmental Law to Robert Zoellick, U.S. Trade Rep. (Dec. 7, 2004), available at http://www.ciel.org/Tae/CAFTA_7Dec04.html (stating that "it is vital to emphasize at the outset that the

business investment community will support the idea of an appellate mechanism remains to be seen. Presumably, this will turn in large part on the following factors: the scope of appellate review; the likelihood that payment of an award will not be unduly delayed by appeal, as has happened on some occasions with the ICSID Annulment Committee Process (Annulment Committee)[18]; the belief by some claimants that "betting the farm" high-stakes arbitrations of very complex matters require a solid and predictable appellate process[19]; and whether support for such a mechanism might head off efforts to substantively weaken the Chapter 11 protections in subsequent BITs and FTAs. The objectives of the proponents for an investment appellate mechanism, however, are clearly broader than these concerns. Supporters of an investment appellate mechanism desire greater consistency among the increasing volume of ICSID, UNCITRAL, and other investment tribunal decisions[20] that are increasingly adopting conflicting interpretations of similar treaty provisions on "fair and equitable treatment" or indirect expropriation.[21]

The most extreme example of such conflicting interpretations is evident in the "Lauder" cases, which involved a dispute between a U.S. investor and the Czech Government. One action was brought in London by Ronald S. Lauder under the United States-Czech BIT, while the other was brought in Stockholm by CME Czech Republic B.V. (a Dutch company owned by Lauder) under the Netherlands-Czech BIT. The two tribunals reached radically different results despite the similarity of the two BITs; most significantly, the London tribunal declined to find an expropriation, while the Stockholm tribunal, on the same facts, determined that an expropriation had indeed taken place.[22] On review of the Stockholm decision, a Swedish court concluded that it lacked

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introduction of an appellate mechanism fails to address the significant underlying problems with both the substantive and procedural provisions in the investment chapter of CAFTA.").

18. *See* Anthony F.T. Fernando, *The Requirement to Provide a Bank Guaranty, In Return for a Continuation of the Provisional Stay of Enforcement of the Award Under Article 52(5) of the ICSID Convention—Can This be Justified?*, at 4 (2004) (on file with Author) (noting that in several ICSID arbitrations subject to multiple tribunal and Annulment Committee review the entire arbitration process required seven and ten years).

19. Knull & Rubins, *supra* note 1, at 564.

20. The ICSID Secretariat reports that of the 159 cases submitted to ICSID from the outset until mid-2004, 85 were before ICSID in one form or another during 2004, and 30 new cases were registered during the year. ICSID Annual Report 2004, at 3–4 (Sep. 10, 2004), *available at* http://www.worldbank.org/icsid/pubs/1998ar/2004_icsid_ar_en.pdf.

21. For a discussion of some of the jurisprudence in these areas, *see* 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, 708–40 (2004).

22. *See* Franck, *supra* note 1, at 1565, 1559–65 (discussing the Lauder cases in detail); Ronald S. Lauder v. Czech Republic, Final Award (London Ct. of Arb. Sept. 3, 2001), *available at* http://www.cetv-net.com/iFiles/1439-lauder-cr_eng.pdf.

jurisdiction to reconcile the two decisions, in part because the awards involved different parties (Lauder in the London action and the Dutch company in the Swedish case).[23] Numerous other conflicts, however, exist among tribunals considering the same BIT language.[24]

For many commentators, the question is not simply whether one is for or against an appellate mechanism, but is a twofold inquiry: whether one favors a particular mechanism and standard of review, and how one would deal with the practical problems in making the concept a reality. Even within a particular government, it seems reasonable to assume that there may be different views among agencies: those principally responsible for protection of foreign investment worldwide are perhaps less enthusiastic about de novo review than the domestic agencies responsible for implementing environmental policies or defending the government against foreign investor claims.[25]

Insofar as this Author has been able to determine, the appellate mechanism concept—at least in the United States—appears formally for the first time in the Trade Promotion Authority provisions of the Trade Act of 2002:

> [T]he principal negotiating objectives of the United States regarding foreign investment are . . . to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by . . . providing for an *appellate body or similar mechanism* to provide coherence to the interpretations of trade agreements . . . ."[26]

The Senate Report provides the rationale:

> [N]egotiators should seek to establish a single appellate body to review decisions in investor-state disputes. As the United States enters into more investment agreements and the number of investor-state disputes grows, the need for consistency of interpretation of common terms—such as

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23. *See* Franck, *supra* note 1, at 1567 (recounting the rationale of the Svea Court of Appeal in declining to resolve the conflict between the two awards); Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919 (Swed. Ct. App. 2003).

24. *See, e.g.*, SGS v. Islamic Rep. of Pak., Decision on Jurisdiction, Case No. ARB/01/13 (ICSID 2003), 16 WORLD TRADE & ARB. MATERIALS 167 (2004), *available at* http://www.worldbank.org/icsid/cases/SGS-decision.pdf, [hereinafter Pakistan Award] (holding that an "umbrella clause" in a BIT does not convert a contract breach into a treaty breach). *But see* SGS v. Rep. of the Phil., Decision on Jurisdiction, Case No. ARB/02/6 (ICSID 2004) http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf [hereinafter Philippines Award] (reaching the opposite conclusion). *See also* Franck, *supra* note 1, at 1569–1574.

25. When the Author suggested in a telephone conversation with one of the U.S. officials involved of the discussions of an appellate facility agreement within the U.S. Government may have been more difficult than the upcoming negotiations with the other CAFTA-DR parties, the official did not disagree. Telephone Interview with U.S. Official (Aug. 23, 2005) (memorandum on file with Author) [hereinafter U.S. Official's Observations].

26. Bipartisan Trade Promotion Authority Act, 19 U.S.C. § 3802(b)(3)(G)(iv) (2002) [hereinafter TPA] (emphasis added).

> expropriation and fair and equitable treatment—will grow. Absent such consistency, key terms may be given different meanings depending on which arbitrators are appointed to interpret them. This will detract from the predictability of rights conferred under investment agreements. A single appellate mechanism to review the decisions of arbitral panels under various investment agreements should help to address this issue and minimize the risk of aberrant interpretations.[27]

The "Trade Negotiating Objectives" set out in the President's Trade Promotion Authority (TPA) provide in pertinent part that

> [T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment . . . and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by
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> . . . .
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> (G) seeking to improve mechanisms used to resolve disputes between an investor and a government through-
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> . . . .
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> (iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements . . .[28]

Accordingly, the first two FTAs concluded under TPA, the U.S.-Chile FTA and the U.S.-Singapore FTA, provide:

> Within three years after the date of entry into force of the Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism.[29]

Similar language is found in the U.S.-Morocco FTA and the 2004 U.S.-Model BIT.[30] If an agreement creating a Free Trade Area of the Americas (FTAA) is ever concluded, such appellate mechanism language might also find its way into an FTAA investment chapter. This

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27. *See* Bipartisan Trade Promotion Authority Act, 19 U.S.C. §§ 3801 et seq.; S. REP. NO. 107–139, at 16 (2002) [hereinafter TPA Senate Report].

28. 19 U.S.C. § 3802(b)(3)(G)(iv).

29. Free Trade Agreement, U.S.-Chile, Annex 10-H, June 6, 2003; Exchange of Letters from Robert Zoellick, U.S. Trade Rep., to George Yeo, Minister for Trade and Industry (May 6, 2003) (on file with Author).

30. Free Trade Agreement, U.S.-Morocco, Annex 10-D, June 15, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html; U.S. Model Investment Bilateral Treaty, Nov. 2004, Annex E, http://www.state.gov/e/eb/rls/othr/38602.htm (last visited Aug. 8, 2005). Note that the provision is entitled, "Possibility of a Bilateral Appellate Mechanism," indicating a somewhat lukewarm endorsement.

possibility, however, is increasingly remote; that such an agreement would cover investment is even more remote.[31]

CAFTA-DR offers a much more detailed instruction on developing an appellate mechanism, possibly because of Congressional dissatisfaction with the bare-bones formulation of the Singapore and Chile FTAs and the lack of a short deadline for negotiations:

> 1. Within three months of entry into force of the Agreement, the [Fair Trade] Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the Negotiating Group to take into account the following issues, among others:
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> (a) the nature and composition of an appellate body or similar mechanism;
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> (b) the applicable scope and standard of review;
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> (c) transparency of proceedings of an appellate body or similar mechanism;
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> (d) the effect of decisions by an appellate body or similar mechanism;
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> (e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 10.16 and 10.25; and
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> (f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.
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> 2. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. Upon approval of the draft amendment by the Parties, in accordance with Article 22.2 (Amendments), the Agreement shall be so amended.[32]

Once the CAFTA-DR enters into force, it will trigger after ninety days a one-year negotiating process that may result in some sort of an agreement contemplating the establishment of an appellate mechanism, at least for the seven CAFTA-DR partners.[33] The CAFTA-DR language, however, leaves open key issues, including whether the appellate mechanism will: (1) guard against aberrant interpretations of the treaty or international law that jeopardize major public policy objectives, (2) correct erroneous arbitral decisions on law and fact, or (3) serve both purposes. Most significantly, despite the short deadline proffered for initiating and completing the negotiations, there is no timetable for submission of the agreement as an amendment to the parties' congresses

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31. *See* David A. Gantz, *The Free Trade Area of the Americas: An Idea Whose Time has Come and Gone?*, 1 LOY. INT'L L. REV. 179 (2004); Kevin C. Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts*, 1 LOY. INT'L L. REV. 121 (2004) (both discussing the problems that have led to a suspension of negotiations).

32. CAFTA-DR, *supra* note 4, Annex 10-F.

33. *See supra* note 6 and accompanying text.

for approval. Thus, it is entirely possible that parties could comply with the CAFTA-DR language on negotiation of an appellate mechanism agreement without taking any implementing action for months or even years.

Presumably, the Senate Report and extended inter-agency discussions have provided the necessary guidance to U.S negotiators in this respect, but it is unclear whether the proponents in Congress and elsewhere have given much thought as to how the concept would be implemented. It is also difficult to see how negotiators from only seven nations—parties to a single FTA—could themselves establish an appellate mechanism with broader jurisdiction without the active participation of other interested nations or the ICSID Secretariat. Even so, an all CAFTA-DR appellate mechanism could be a significant first step. The agreement could always provide for an ad hoc appellate mechanism initially, to be used under other U.S. BITs and FTAs to the extent such agreements are negotiated and, ultimately, for folding this mechanism into one at ICSID if and when one is established there.

It is also notable that all seven CAFTA-DR parties are also parties to the ICSID Convention; their association with the Convention provides a respected and widely used framework for investor-state disputes.[34] In contrast, under NAFTA, use of the ICSID Convention provisions and ICSID Arbitral Rules are impossible because neither Canada nor Mexico is a party to ICSID.[35] The ICSID facilities are, however, available to some non-parties under the ICSID Additional Facility Arbitral Rules (Additional Facility), as long as either the government of the investor claimant or the respondent government is a party to ICSID.[36] The provisions of the ICSID Convention, including those that relate to the Annulment Committee, do not apply to Additional Facility proceedings.[37] A non-ICSID appellate mechanism, however, may create a conflict with the CAFTA-DR parties' obligations to use the Annulment Committee for ICSID Arbitrations should the parties to a dispute elect to arbitrate under the ICSID Convention's investment chapter.[38] This problem could be avoided if the scope of the appellate mechanism were limited to non-ICSID Convention arbitrations, leaving ICSID arbitrations for review by the Annulment Committee.

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34. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

35. *See* List of Contracting States and Other Signatories to the Convention, http://www.worldbank.org/icsid/constate/c-states-en.htm (last visited Aug. 8, 2005).

36. ICSID Additional Facility Rules, Rule 2(a), http://www.worldbank.org/icsid/facility/facility.htm (last visited Aug. 11, 2005). This means the Additional Facility is not available under CAFTA-DR, since all seven Parties are also Parties to the ICSID Convention, despite the inclusion of the Additional Facility in the list of alternative mechanism open to the parties to a dispute. CAFTA-DR, *supra* note 4, art. 10.16(3)(b).

37. *Id.* at art. 3.

38. *Id.* art. 10:16:3(a).

The appellate mechanism idea is not solely a U.S. and CAFTA-DR concept, even if the inclusion of appellate mechanism negotiating commitments in U.S. FTAs is likely driving discussions elsewhere. In October 2004, the ICSID Secretariat issued its own proposal for an appellate mechanism to be located at ICSID, presumably to stake out its claim as a logical situs for a single investment appellate mechanism.[39] The ICSID "Discussion Paper" asked "whether an appellate mechanism is desirable to ensure coherence and consistency in case law generated in ICSID and other investor-to-state arbitrations initiated investment treaties"[40] and concluded in the affirmative. The paper further asserted that setting up different appeal mechanisms under each treaty concerned would run counter to the objectives of coherence and consistency. Efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms.[41]

While the ICSID paper, as noted earlier, no longer formally exists, it was quite useful bureaucratically in making a forceful argument for locating any investment appellate mechanism at ICSID. Many of the ideas espoused will undoubtedly be revived, and at least be considered by the CAFTA-DR negotiators, if the negotiations under CAFTA-DR move forward as mandated.

II. REVIEW OF ARBITRAL TRIBUNAL DECISIONS: THE GENERAL APPROACH

An initial question asks why a new or separate appellate mechanism for investment disputes is needed when tribunal awards are already subject to review by the ICSID Annulment Committee or by national courts. As indicated below, a limited form of review is currently a feature of investor-state arbitration.

A. *Review of ICSID Arbitral Awards*

An award by a tribunal operating under the ICSID Convention Arbitration Rules is already to subject to limited review, to annulment "on one or more of the following grounds":

> (a) that the Tribunal was not properly constituted;
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> (b) that the *Tribunal has manifestly exceeded its powers;*
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> (c) that there was corruption on the part of a member of the Tribunal;

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39. *See* ICSID Discussion Paper, *supra* note 3, Annex.
40. *Id.* at 4.
41. *Id.* at 15.

> (d) that there has been a serious departure from a fundamental rule of procedure; or
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> (e) that the award has failed to state the reasons on which it is based.[42]

An ad hoc committee of three is appointed from a panel of arbitrators with the authority to annul any part of the award; if the award is annulled, either party to the arbitration may request that the dispute be submitted to a new tribunal.

The ICSID Annulment Committee overturned some ICSID decisions in favor of investors, particularly in the early years; the first three awards reviewed by the Committee were set aside.[43] It has been suggested that this was less a result of "appellate scope or systemic weakness" than inexperience of the arbitrators and the committee with ICSID rules.[44] Several recent annulment committee decisions have found in the investor's favor. For example, in *Wena Hotels, Ltd. v. Egypt*,[45] the Committee rejected Egypt's claims that the ICSID tribunal had failed to apply the applicable law or had departed from a fundamental rule of procedure. In *Vivendi Annulment*,[46] the Committee accepted the investor's claim and annulled the tribunal's refusal to exercise jurisdiction even where its jurisdiction existed. The Committee determined that by so refusing, the tribunal had manifestly exceeded its powers under ICSID Convention's Article 52(1)(b).[47] One observer has concluded that "if there were any doubt before, there is no doubt now that parties cannot routinely expect to be able to annul ICSID awards."[48]

The ICSID Annulment Committee, however, has its shortcomings. First, like the ICSID Convention itself, it is available only for disputes in which both the investor and the home state are parties to the Convention.[49] Secondly, the Annulment Committee is not a single body, but a panel of arbitrators from which an ad hoc committee is chosen in each instance.[50] Thus, the likelihood of consistency among decisions of the Annulment Committee is at best moderate, since different arbitrators are deciding different cases.

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42. ICSID Convention, *supra* note 34, art. 52 (emphasis added).

43. *See, e.g.*, Holidan v. Cameroon, Case No. ARB/81/2, 1 ICSID REV. FOR. INV. L. J. 90 (ICSID 1986); Amoco Asia Corp. v. Indonesia, Decision Setting Aside Award on the Merits, 25 I.L.M. 1441 (ICSID 1986).

44. Knull & Rubins, *supra* note 1, at 553.

45. Wena Hotels Ltd. v. Arab Rep. of Egypt, 41 I.L.M. 933 (ICSID 2002).

46. Compania de Aguas del Aconquija S.A. v. Arg. Rep., 41 I.L.M. 1135 (ICSID 2002).

47. ICSID Convention art. 52(1)(b) (2003) ("Either party may request annulment of the award by an application in writing to the Secretary General on [, among other things,] that the tribunal has manifestly exceeded powers.").

48. Daniel Q. Posin, *Recent Developments in ICSID Annulment Procedures*, 13 WORLD ARB. & MEDIATION REP. 170, 171 (2002).

49. ICSID Convention, *supra* note 34, art. 25.

50. *Id.* art. 52(3).

B. *Court Review of NAFTA Chapter 11 Awards*

Of course, the ICSID Annulment Committee procedures are not available for arbitral awards rendered under NAFTA, since as noted earlier neither Mexico nor Canada is a party to the ICSID Convention. Arbitration under NAFTA must proceed under either the UNCITRAL Rules or the ICSID Additional Facility Rules.[51] While the use of the ICSID Additional Facility has historically been largely limited to NAFTA cases, arbitration under the UNCITRAL Arbitration Rules is common in investor-state arbitration under both NAFTA and BITs.[52]

In either instance, a court proceeding may be brought to set aside or annul the award in the state that is the situs, or place, of the arbitration.[53] For apparent reasons of expediency, Canada had been designated as the situs of most arbitrations under NAFTA to date,[54] although arbitration under NAFTA Chapter 11 can be held in any nation that is a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards.[55] It is generally accepted that the national courts, functioning in the place of arbitration, cannot be deprived of jurisdiction over arbitral decisions rendered in their territories (except to the extent that the parties to the ICSID Convention have agreed otherwise, as for example, in their acceptance of the Annulment Committee as the sole body for review).

Some states, however, do restrict the scope of court review of arbitral decisions within their territories, in part because those involved in international commercial arbitration tend to avoid siting arbitral proceedings in states where the scope of review is broad. Many, including several jurisdictions in Canada, have adopted the UNCITRAL Model Law on International Commercial Arbitration:

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51. NAFTA, *supra* note 7, art. 1120.

52. *See* Occidental Exploration & Prod. Co. v. Rep. of Ecuador, Final Award, Case No. UN 3467 (London Ct. of Arb. 2004), *available at* http://www.asil.org/ilib/OEPC-Ecuador.pdf (arbitration under the U.S.-Ecuador BIT administered by the London Court of Arbitration under UNCITRAL Rules); Lauder, *supra* note 22, and accompanying text.

53. *See* NAFTA, *supra* note 7, art. 1136–3.

54. For example, in *Feldman v. United Mexican States*, 42 I.L.M. 625 (ICSID 2002), where the claimant was a U.S. citizen and the respondent was Mexico, it seemed logical to the tribunal (and, apparently, to the parties), to choose Ottawa, Ontario, Canada as the place of arbitration, and that is what happened.

55. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention], *available at* http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html *See* NAFTA, *supra* note 7, art. 1130–1.

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration,* provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> (b) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) *the award is in conflict with the public policy of this State.*[56]

Thus, Article 34 of the UNCITRAL Model Law, which closely follows Article V of the New York Convention,[57] sets forth a very limited scope of review. Investors (and arbitral tribunals) are likely to seek states that have adopted the UNCITRAL Model Law as the situs of arbitration, where experience indicates that the courts will undertake only a limited review, rather than a de novo review of either the facts or the law as determined by the tribunal. Despite this attempt at uniformity of approach, however, national court review is not likely to provide a high level of consistency even in a particular country, because

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56. UNCITRAL Model Law on International Commercial Arbitration, art. 34 (1985), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_ arbitration.html (emphasis added).

57. New York Convention, *supra* note 55.

inevitably different judges sit on different cases, and some have more experience with arbitral award review than others.

Under NAFTA Chapter 11 to date, all three annulment actions have been brought in Canadian provincial or federal courts in the province designated as the situs of the arbitration. These courts have applied the grounds set forth in Article 34 of the UNCITRAL Model Law on Commercial Arbitration, as adopted in Canada.

First, in *United Mexican States v. Metalclad*, the British Columbia Supreme Court (a court of first instance) concluded that the tribunal acted beyond the scope of the submission to arbitration. The court found a transparency requirement in Chapter 11 as its basis for determining that Mexico had violated NAFTA Articles 1105 and 1110 on fair and equitable treatment and expropriation, respectively.[58] (The tribunal's finding of indirect expropriation was upheld on other grounds.) The decision does raise some confusion as to the proper scope of review under Article 34 of the UNCITRAL Model Act as applied in Canada; the principal arbitral holding was characterized as a "misstatement of the applicable law."[59] In so finding, the court implicitly determined that it had jurisdiction to review alleged errors of law.

Second, in *S.D. Myers v. Mexico*, a federal court sitting in Ottawa upheld the arbitral tribunal.[60] Employing a very formalistic approach, the court declined to review a jurisdictional challenge based on Canada's allegation that there was no "investment" by S.D. Myers. Since Canada raised a jurisdictional issue without labeling it as such in its Statement of Defense, Canada effectively waived its right to submit the issue as a "jurisdictional" challenge. More broadly, the court applied what it said was a "correctness" standard of review for legal issues (such as the meaning of the word "investor") and a "reasonableness" standard for application of facts to legal issues: "Article 34 of the [UNCITRAL Model Code as adopted in Canada] does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal."[61]

If the court in *Metalclad* had applied this standard it presumably would have affirmed the tribunal. Also, in *S.D. Myers*, presumed concerns over court review led to determinations "in the alternative." Subsequent to the issuance of the court's opinion, S.D. Myers and Canada apparently both accepted the judgment.

Third, in *United Mexican States v. Feldman,* an Ontario court of first instance dismissed a challenge, affording the tribunal a high degree of deference: "In my view, a high level of deference should be accorded to

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58. United Mexican States v. Metalclad Corp., [2001] 89 B.C.L.R. 3d 359.
59. *Id.* ¶¶ 70, 72.
60. Attorney General of Can. v. S.D. Myers, Inc., [2004] FC 38, ¶ 77.
61. *Id.* ¶ 42.

the Tribunal, especially in cases where the Appellant Mexico is in reality challenging a finding of fact. The panel who has heard the evidence is best able to determine issues or credibility, reliability and onus of proof."[62] The *Feldman* court also indicated that the public policy exception to enforcement should be invoked only when the award "must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the arbitral Tribunal."[63] The appellate court affirmed the denial of the Mexican government's appeal.[64] Interestingly, despite the continued participation of the Attorney General of Canada in support of Mexico, the Court of Appeal for Ontario, the province's highest court, noted that "quite apart from principles of international comity, our domestic law in Canada dictates a high degree of deference for decisions of specialized tribunals generally and for awards of consensual arbitration tribunals in particular."[65]

III. THE RATIONALE FOR AN APPELLATE MECHANISM

As noted earlier, some members of the U.S. Senate and Congress, government agencies, and NGOs have been concerned about the lack of an appellate process under NAFTA Chapter 11; they fear that ad hoc arbitrators cannot be controlled and that legal errors cannot be effectively corrected for current or future cases. Such fears are particularly acute where major public policy issues are being decided—for example, whether regulatory action can be considered expropriatory as in *Methanex*, or whether imposition of unfair trade remedies such as anti-dumping and countervailing duties are subject to challenge under NAFTA Chapter 11.[66] Concerns over tribunal errors are not unknown among foreign investors themselves, particularly in "bet the company" arbitrations with foreign states.

Under NAFTA Article 1131:2, "[a]n interpretation of the [Fair Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." This power of interpretation may offer some relief from such errors, but its utility is uncertain. For an

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62. United Mexican States v. Feldman Karpa, No. 03-CV-23500, ¶ 77, ICSID No. (AF)/99/1 (Ontario Super. Ct. Dec.3, 2003), *available at* http://www.canlii.org/on/cas/onsc/2003/2003onsc11923.html.

63. *Id.* ¶ 87.

64. United Mexican States v. Feldman Karpa, No. C41169 (Ontario Ct. App. Jan. 12, 2005), *available at* http://www.ontariocourts.on.ca/decisions/2005/january/c41169.htm.

65. *Id.* ¶ 37.

66. *See* Canfor Corp. v. United States, Notice of Intent to Submit A Claim to Arbitration, (NAFTA Arb. Trib. May 23, 2002). This action alleges that the United States violated various provisions of NAFTA Chapter 11, in assessing anti-dumping and countervailing duties against softwood lumber imported from Canada.

interpretation to be issued, the three NAFTA governments must agree that an interpretation is appropriate regarding the affected issue *and* agree on the text. Only one interpretation has been issued during the first twelve years of NAFTA.[67] Also, at least one tribunal[68] has suggested that it was appropriate for the tribunal to determine whether the interpretation really an *ultra vires* effort by the parties to amend NAFTA. (The tribunal in *Mondev*[69]disagreed.) While the NAFTA parties who are not parties to a particular Chapter 11 arbitration are free to "make submissions to a Tribunal on a question of interpretation of this Agreement," the tribunal has no obligation to accept such views.[70]

Moreover, despite the lack of formal precedential value of earlier arbitral decisions—NAFTA Article 1136:1 states that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case"—prior decisions *are* being regularly cited by parties to arbitrations, which effectively requires tribunals to discuss, distinguish, or follow those earlier decisions.[71] This increases the risk for concerned governments, NGOs, or private investor groups in leaving an allegedly erroneous decision unchallenged.

There is obviously some dissatisfaction with national court review (particularly in recent Canadian NAFTA cases), either because courts (1) have only limited experience with the issues, (2) make flawed interpretations of complex treaty provisions or principles of international law, or (3) give too much (or too little) deference to the tribunals. Judges generally have limited expertise in issues such as enforcement of foreign arbitral awards and sovereign immunity, except for the those serving in the Southern District of New York, on the Court of Appeals for the Second Circuit, or on federal courts in Washington, D.C. Most judges have less experience with these issues than one could reasonably expect from an appellate mechanism of investment law experts. After the Canadian experiences, some of the pending NAFTA arbitrations have selected Washington, D.C. as the situs, but to date there have been no reviews in D.C. courts of NAFTA arbitral decisions. With court annulment procedures, the result may ultimately be a three step process (as in *Feldman*): (1) an arbitral award under ICSID Additional Facility or UNCITRAL Rules, (2) an appeal to a court of first instance, and (3) an appeal of the court decision to an appellate court in the same

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67. *See* NAFTA Free Trade Commission, *Dispute Settlement–Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp?format=print.

68. Pope & Talbot v. Canada, Damages Award, (NAFTA Arb. Trib. May 31, 2002), *available at* http://naftaclaims.com/Disputes/Canada/Pope/PopeAwardOnDamages.pdf.

69. Mondev Int'l Ltd. v. United States, 42 I.L.M. 85 (ICSID 2002).

70. NAFTA, *supra* note 7, art. 1128.

71. *Id.* at art. 1136

jurisdiction. The cost and time burdens for the parties are potentially significant.

For governments and major companies, there is probably less concern with time and cost considerations for an extended arbitral process (including an appeal) when the issues are of broad public interest or involve "bet the company" issues. Few today few really believe that international arbitration, particularly between private investors and states, is any quicker or cheaper than U.S. federal court litigation, for example, even though the discovery process is more circumscribed in an international arbitration. Small investors (e.g., Marvin Feldman) or governments of developing countries, however, may be discouraged from using the process by the existence of a more formal appellate process and the greater prospect that it will be used on a regular basis.

Consideration of the investment appellate mechanism concept has and will continue to be influenced by the general success of the WTO's Appellate Body[72] in resolving international trade disputes. During the past eleven years, the WTO Appellate Body has generally proven itself able to produce consistent decisions in a very timely fashion—ninety days—and with a high level of expertise. A total of seventy-seven appeals were filed between 1995 and the end of 2005, although none were filed in 1995.[73] The number of appeals peaked in 2000 at thirteen, and has fluctuated between five and ten annually in the ensuing years.[74] Over the period 1995–2005, 68% of all panel reports were appealed to the Appellate Body.[75] (The total number of consultations under the Dispute Settlement Understanding[76] reached 332 by mid-August 2005.[77]) Many, including some high-ranking U.S. government officials and members of Congress—some of whom are currently supporting an investment appellate mechanism—have been critical of some of the WTO Appellate Body decisions, but few have attacked the concept in general.

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72. The Appellate Body is created by Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU or Dispute Settlement Understanding, and Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization. World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 2, http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited Apr. 14, 2005) [hereinafter DSU]; Agreement Establishing the World Trade Organization, Annex 2 (2002), http://www.wto.org/english/docs_e/legal_e/legal_e.htm [hereinafter Marrakesh Agreement].

73. World Trade Organization, Appellate Body, *Annual Report*, Annex 2 (2005) [hereinafter Appellate Body 2005 Report].

74. *Id.*

75. *Id.* at Annex II.

76. *See* DSU, *supra* note 72, art. 4 (establishing that trade dispute resolution under the DSU begins with consultations between the affected WTO Members).

77. World Trade Organization, Disputes Settlement: The Dispute- Chronological List of Disputed Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Aug. 11, 2005).

The experience of the WTO is not fully transferable to the investment appellate mechanism concept. In particular, the WTO's Appellate Body is applying a limited number of international trade agreements while an ICSID Appellate Body could ultimately be applying the differing provisions of hundreds of BITs and FTAs. There are obvious useful parallels, however.

IV. STRUCTURING AN APPELLATE MECHANISM: THE LEGAL AND PRACTICAL HURDLES

The legal and practical challenges to the concept are enormous. In addition to choice of the appropriate standard of review, many other questions arise: the power of the appellate mechanism to confirm, set aside, and remand; issues relating to choice of law; the relationship of the appellate mechanism process to national court review; transparency considerations; the appropriateness of bonding requirements for appeals membership; and the complexities of structuring one or more appellate bodies to deal with multiple agreements. Needless to say, it could be very difficult to reach agreement on these issues among investor groups, civil society, and governments, and within the U.S. government.

A. *Standard of Review: Level of Deference to Tribunals*

Perhaps the single most important issue facing negotiators of an appellate mechanism, upon which governments and private investors are likely to differ, is the standard of review. The possible range of standards runs the gamut from the high degree of deference and narrow standards of review incorporated in the ICSID and UNCITRAL Model Law standards to de novo review at the opposite end of the spectrum. As noted above, the ICSID Annulment Committee normally vacates an arbitral decision only when "the Tribunal has manifestly exceeded its powers." Under Article 34 of the UNCITRAL Model Law, a court is to annul the tribunal's award when "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration." The court is also instructed to annul on other grounds, such as when the award is contrary to public policy.

In Canadian practice, where the UNCITRAL Model Law standards have been adopted, annulment on other grounds has been interpreted as correctness on law, reasonableness on applying the law to facts under *S.D. Myers*, and a "high degree of deference" under *Feldman*, although the application of the standard has not been fully consistent, as noted above.

Where the arbitral situs is outside the United States, the international provisions of the Federal Arbitration Act (the same grounds that apply to enforcement under the New York Convention)

would apply for review by U.S. courts.[78] Where the situs of the international arbitration is in the United States—Washington, D.C., for example, as in several pending NAFTA cases—both the domestic and international sections of the Federal Arbitration Act would be applicable, including the criterion of "manifest disregard of law."[80] While no U.S. court decisions reviewing NAFTA arbitrations exist to date, it is reasonable to expect that U.S. court review will afford a high degree of deference to NAFTA and similar investment arbitrations; such deference similarly occurs with review of other types of arbitral awards and in enforcement actions under the New York Convention.

Presumably, the NGOs and at least some government supporters of the appellate mechanism concept, have in mind a broader scope of review. For example, Canada, the respondent in *S.D. Myers*, argued unsuccessfully that the appropriate standard of review is "correctness" not only with regard to the law but to the application of facts to the law, a broader standard than that applied to review of arbitrations involving only private parties. [81] One possibility is the WTO Appellate Body standard for review of panel decisions, which empowers the Appellate Body to review "issues of law covered in the panel report and legal interpretations developed by the panel."[82] In practice, the WTO Appellate Body has essentially followed this approach. The panels are given relatively little leeway with regard to issues of law, but considerable discretion with regard to their factual determinations.[83]

The *Chevron v. Natural Resources Defense Council* standard calls for deference to the expert tribunal below, contemplating affirmation even where the reviewing court might have reached a different conclusion, but requiring reversal where the tribunal below makes legal errors.[84] The *Chevron* standard could logically be adapted in principle

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78. *See generally* 9 U.S.C. §§ 201 et seq.

79. *See* Knull & Rubins, *supra* note 1, at 544.

80. *Id.*

81. S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408, 33 (2001), *available at* http://www.naftaclaims.com (follow "The Disputes" hyperlink; then follow "Canada" hyperlink; then follow "S.D. Myers" hyperlink).

82. DSU, *supra* note 72, art. 17, ¶ 6.

83. Thus, in Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, ¶ 222, WT/DS245/AB/R (Nov. 26, 2003), the Appellate Body rejected certain challenges to the Panel's fact-finding, indicating that it would not "base a finding of inconsistency under [DSU] Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached." *Id.* at 222 (quoting Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/D5135/AB/R (Mar. 12, 2001)). The Appellate Body also suggested that certain other panel conclusions were within the panel's "margin of discretion" in evaluating the relevant evidence. *Id.* at 221. For a comprehensive analysis of WTO standard of review practice, *See* Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT'L ECON. L. 491 (2004).

84. Chevron U.S.A., Inc., v. Natural Res. Def. Council, 467 U.S. 837, 844–45 (1984).

for an appellate mechanism for investment disputes, given the obvious specialized expertise of most investor-state arbitration tribunals. Effectively, that standard has been adopted for panel review of administering agency decisions under the WTO's Antidumping Agreement.[85]

One interesting approach to the standard of review approach is found in the ICSID Secretariat's Discussion Paper, which proposes the following:

> An award could be challenged pursuant to the Appeals Facility Rules for a clear error of law or on any of the five grounds for annulment of an award set out in Article 52 of the ICSID Convention.[86] A further ground for challenging an award might consist in serious errors of fact; this ground would be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal.[87]

The inclusion of "errors of law" is consistent with the earlier discussion, and is likely to be found in any appellate mechanism proposal that reaches fruition. It is doubtful, however, that there could be review of "serious errors of fact" without the review process leading to an effective de novo review by the appellate mechanism. There is obviously a significant risk that this could become a Pandora's Box for both parties to the proceedings at the tribunal level: either party could submit a voluminous factual record reintroducing existing facts or introducing new facts to buttress its case that the tribunal had made "serious" errors. Surely any factual error important enough to change the result of the case would necessarily be considered "serious" by the party allegedly adversely affected.

Accordingly, inclusion of the broad power of the appellate mechanism to review factual determinations made by the original arbitral tribunal is likely to be strenuously opposed by the investment bar. It might well be supported by Canada and Mexico, among other state respondents, however, as a means of further reducing the risk of an adverse tribunal ruling directing the government to pay money to a foreign investor.

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85. [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 17.6, The Legal Texts–Results of the Uruguay Round of Multilateral Trade Negotiations (1999).

86. *See* discussion *supra* Part II(A).

87. ICSID Discussion Paper, *supra* note 3, Annex, at 4.

It is reported that the U.S. government, in preparation for the CAFTA-DR negotiating group, has internally agreed on a middle ground.[88] Review of legal issues would not be de novo or subject to the more limited *Chevron* standard, but would be guided by an intermediate "clear legal error" standard.[89] Review of alleged factual errors would be narrow, limited to situations where the complaining party could demonstrate that "no reasonable trier of facts" could have reached the conclusion found by the tribunal.[90] If this approach could be negotiated with the other CAFTA-DR parties, it would represent a reasonable compromise among divergent interests both in the United States and in the other party nations.

B. *Procedural and Jurisdictional Issues*

There is no reversal authority under NAFTA Chapter 19 on unfair trade disputes; the agreement only confers the authority to affirm or remand.[91] The ICSID Annulment Committee may affirm or annul, but not effectively remand; at the request of either party, the dispute is to be submitted to a new tribunal, presumably to start over.[92] The WTO Appellate Body has no remand authority to panels, but only to "uphold, modify or reverse the legal findings and conclusions of the panel."[93] (Among the reforms of the Dispute Settlement Understanding being considered by the WTO as part of the Doha Development Round is creating authority for the Appellate Body to remand cases to the panels for further proceedings in appropriate circumstances.[94])

Under NAFTA, a claimant may not enforce an award until 120 days have elapsed without a party seeking annulment under ICSID, or until three months have elapsed without any disputing party having sought revision or annulment under the ICSID Additional Facility Rules or UNCITRAL Arbitration Rules.[95] (CAFTA-DR contains similar language.[96]) The ICSID Annulment Committee is granted specific authority to stay enforcement of the underlying award pending the committee decision.[97]

Is, as most assume, the investment appellate mechanism to be a substitute for situs court review, or would it be an *additional* step? If

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88. U.S. Official's Observations, *supra* note 25.
89. *Id.*
90. *Id.*
91. NAFTA, *supra* note 7, art. 1904(8).
92. ICSID Convention, *supra* note 34, art. 52(6).
93 DSU, *supra* note 72, art. 17(13).
94. *See* Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/9 (June 6, 2003).
95. NAFTA, *supra* note 7, art. 1136(3).
96. CAFTA-DR, *supra* note 4, art. 10.26(6).
97. ICSID Convention, *supra* note 34, art. 52(5).

part of the problem with the current system is court review in the state of the situs, shouldn't that step be eliminated and effectively replaced by the appellate mechanism? One selling point of an appellate mechanism to the investment community is the possible elimination of two situs court appeals—to the court of first instance and then to the appellate level—a costly process in both time and money. Some NGO groups opposed to NAFTA Chapter 11, however, have expressed their "strong opposition to any provisions in an appellate mechanism that would eliminate domestic legal review of relevant arbitral decisions,"[98] even though such court review is very circumscribed today, as discussed in Part II above.

C. *Transparency of the Proceedings*

NAFTA itself provides that the final award may be made public if either the government or the private party wishes to do so—in the cases involving Canada or the United States—or in accordance with the applicable arbitration rules in cases involving Mexico.[99] Even the formal notice initiating arbitration may not be public if neither party decides to release it. Most of the NAFTA transparency rules were add-ons. In July 2001, the NAFTA parties stated that "nothing in NAFTA imposes a general duty of confidentiality" and agreed that they would "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal" subject to certain exceptions for confidential or privileged information.[100] In October 2003, Canada and the United States, but not Mexico, issued statement indicating that they would consent—and request disputing investors and tribunals to consent—to holding hearings that are open to the public, subject to measures to protect confidential business information.[101] At the same time, a statement was issued setting forth procedures for non-disputing party (amicus curiae) participation in Chapter 11 proceedings.[102]

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98. CIEL/NGO Letter, *supra* note 17, at 1.

99. NAFTA, *supra* 7, Annex 1137.4.

100. NAFTA Free Trade Commission, *Notes on Interpretation of Certain Chapter 11 Provisions*, at A(2)(b) (July 30, 2001), *available at* http://www.dfait-maeci.gc.ca./tna-nac/NAFTA-Interpr-en.asp.

101. NAFTA Commission Joint Statement No. 152 (Oct.7, 2003), *available at* http://www.dfait-maeci.gc.ca; Statement on Open Hearings in NAFTA Chapter 11 Arbitrations (Oct. 7, 2003), available at http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp. Transparency rules are written into the investment chapter of CAFTA-DR, *supra* note 4, art. 10.21.

102. *Statement of the Free Trade Commission on Non-Disputing Party Participation* (Oct. 7, 2003), *available at* http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf. *See also* USTR Press Release, NAFTA Commission Announces New Transparency Measures (Oct. 7, 2003), *available at* http://www.ustr.gov/Document-Library/Press_Releases/2003/October/NAFTA-Commission-Annouces-New-Transparency-Measures.html.

Subsequent agreements, such as CAFTA-DR and the 2004 U.S. Model BIT, incorporate similar transparency and third-party participation language directly in the text of the agreements.[103] They also reflect transparency requirements in the TPA.[104] NGOs, in commenting on the appellate mechanism concept, have urged, among other things, that it incorporate provisions for amicus curiae briefs and open hearings.[105] Even the ICSID Secretariat has proposed modifications in the Arbitration Rules that would facilitate open hearings and the receipt of amicus briefs when the tribunal so determined after consultation with the parties.[106] It can thus be reasonably assumed that any appellate mechanism agreement negotiated by the CAFTA-DR parties will incorporate transparency provisions similar to those applicable in CAFTA-DR to the conduct of tribunal proceedings, perhaps simply by reference.[107]

D. *Bonding Requirements*

Should an appealing government be required to protect investors by posting a bond equal to the amount of the arbitral tribunal's award pending appeal? This is a common requirement in U.S. courts as a precondition for appeal due to the lengthy delays that occur when review takes place. The bonding requirement was a key element in *Loewen*.[108] Because the claimant allegedly could not meet bonding requirements for an appeal set at $625 million, Loewen settled the case for $175 million "under conditions of extreme duress" and brought a Chapter 11 claim.[109]

There is no specific provision in ICSID for such a requirement that would apply in most instances to an appealing government. At least four of the ad hoc ICSID Annulment Committees, however, have continued the stay against enforcement for the tribunal's award only on the condition that the applicant for the stay (the respondent government) provide a bank guaranty or bond for payment of the award.[110] Such a

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103. CAFTA-DR, *supra* note 4, art. 10.21; Model BIT, *supra* note 30, art. 29.

104. The principal negotiating objectives include, "[E]nsuring the fullest measure of transparency in the dispute settlement mechanism . . . ." TPA, *supra* note 26, § 3802(b)(3)(H).

105. HOWARD MANN, ET AL., COMMENTS ON ISCID DISCUSSION PAPER, "POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION 8–9 (2004), *available at* http://www.iisd.org/pdf/2004/investment_icsid_response.pdf.

106. ICSID Discussion Paper, *supra* note 3, at 10–11.

107. U.S. Official's Observations, *supra* note 25.

108. Loewen Group v. United States, Final Award, (NAFTA Arb. Trib. June 26, 2003) 42 I.L.M. 811 (2003) *available at* http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf.

109. *Id.* ¶ 6; Loewen Group v. United States, Decision on Respondent's Request for a Supplementary Decision, (NAFTA Arb. Trib. Sept. 13, 2004), *available at* http://naftaclaims.com/Disputes/USA/Loewen/Loewen DecisionRequestConsideration.pdf.

110. Fernando, *supra* note 18, at 1.

stay has been continued only once under circumstances where no bond or other security was required.[111] The ICSID Discussion Paper proposes that the appealing state be required to post a bank guaranty or bond in the amount of the award.[112] (The bonding issue would not likely arise where the investor is seeking review of the tribunal's award, since the investor would not be appealing unless the investor's request for compensation had been denied.) This feature of the proposal would likely be strenuously opposed by the ICSID member governments negotiating an appellate mechanism. It may well be a make-or-break issue with the investment bar, however.[113] Thus, it makes eminent sense for the United States to include the bonding requirements in its negotiating proposal for CAFTA-DR.[114]

E. *Choice of Law*

If the investment appellate mechanism is to review issues of law decided by investment tribunals, it, like the tribunals, will have to decide what law applies. One of the differences between the WTO Appellate Body and any proposed tribunal for investment disputes is that the WTO Appellate Body applies in all cases a defined body of international trade law: the "covered agreements."[115] Reference to outside international law sources, other than the Vienna Convention on the Law of Treaties for interpretative purposes, has been rare.[116]

The choice of law issues tend to be even more complex under BITs and FTAs. Even NAFTA is less straightforward than might be imagined from the text: Chapter 11 tribunals are directed to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[117] Yet this has led to considerable litigation under NAFTA over the concept of "international law." For example, Article 1105 states that "[e]ach Party shall accord to investment of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[118] The

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111. *Id.* at 6.

112. ICSID Discussion Paper, *supra* note 3, Annex, at 6.

113. Informal interview with Anthony Parra, Secretariat, ICSID (June 3, 2005).

114. U.S. Official's Observations, *supra* note 25.

115. DSU, *supra* note 72, art. 1(1). These agreements consist of the Marrakesh Agreement Establishing the World Trade Organization and its more than twenty annexed agreements dealing with trade in goods, trade in services, trade-related intellectual property rights, and resolution of disputes. *Id.* at app. 1.

116. In *EC—Hormones*, the Appellate Body considered whether the "precautionary principle" used in part by the EC to justify its ban on imports of hormone-fed beef was a principle of customary international law, deciding in the negative. Appellate Body Report, *EC Measures Concerning Meat and Meat Products*, WT/DS 2648/AB/R (Feb. 13, 1998), *available at* http://www.wto.org.

117. NAFTA, *supra* note 7, art. 1131(1).

118. *Id.* at art. 1105(1).

scope of the concept "fair and equitable treatment" under international law has never been clear, and the water was muddied early on when the Tribunal in *Pope & Talbot* initially determined that this quoted language provided claimants with a right that existed *in addition to* rather than limited by the phrase "treatment in accordance with international law."[119]

The concerns of the NAFTA parties over this *Pope & Talbot* deviation prompted the first and, to date, only binding "Interpretation" of NAFTA Chapter 11.[120] The interpretation stated, among other things, stated that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the *customary* international law minimum standard of treatment of aliens."[121] In subsequent agreements such as the FTA with Chile, the governing law is explicitly "customary international law"[122]; customary international law is explicitly defined as resulting from "a general and consistent practice of States that they follow from a sense of legal obligation,"[123] presumably to discourage tribunals from relying too extensively on other agreements and arbitral decisions as a source of customary international law. The 2004 Model BIT and the CAFTA-DR both contain essentially identical language.[124]

Even in U.S. FTAs, however, this is not the end of the matter. In the U.S.-Chile FTA, for example, the governing law for general claims is "this Agreement and applicable rules of international law," as in NAFTA; however, when a claim is submitted based on a specific investment agreement or investment authorization, the tribunal is directed to decide the manner

> in accordance with the rules of law specified in the pertinent investment agreement or investment authorization . . . . If the rules of law have not been specified or otherwise agreed, the tribunal shall apply the law of the respondent (including its rules on the conflict of laws), the terms of the investment agreement or investment authorization, such rules of international law as may be applicable, and this Agreement.[125]

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119. Pope & Talbot v. Canada, Merits, Phase II, at 110 (NAFTA Arb. Trib. Apr. 10, 2001), *available at* http://naftaclaims.com/Disputes/Canada/Pope/PopeFinalMerits Award.pdf.

120. NAFTA, *supra* note 7, art. 1131(2) provides that "[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

121. *See* Notes of Interpretation of Certain Chapter 11 Provisions, (July 31, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/Nafta-Interpr-en.asp.

122. U.S.-Chile FTA, *supra* note 29, art. 10.4(1).

123. *Id.* at Annex 10-A.

124. Model BIT, *supra* note 30, art. 5, Annex A; CAFTA-DR, *supra* note 4, art. 10.5, Annex 10-B.

125 U.S.-Chile FTA, *supra* note 29, art. 10.21(1)-(2).

A similar bifurcation—and challenge to the tribunal and any reviewing body—appears in the CAFTA-DR.[126]

Such differences obviously would not raise major problems if there was a separate appellate mechanism for each FTA and BIT, as is contemplated with CAFTA-DR. If a single appellate mechanism, at ICSID or elsewhere, however, is ultimately created with jurisdiction over dozens or hundreds of BITs and FTA investment provisions, or even covering only the nearly fifty U.S. FTAs and BITs,[127] the level of complexity will be high.

F. *Structure and Membership of an Appellate Mechanism*

Should an investment appellate mechanism be structured with permanent members, like the WTO Appellate Body, or as an ad hoc tribunal formed in each instance from a standing roster, like the ICSID Annulment Committee? The WTO Appellate Body calls for a standing roster of seven members, three of which serve on each case in rotation.[128] In "a practice of collegiality," however, all seven members review briefs, attend hearings, and participate to some extent in the decision-making process; this approach adds to the consistency of decisions.[129] In the WTO's Appellate Body, there have been six to twelve cases a year, and the members are effectively kept busy by the WTO at least half-time. In contrast, the ICSID Annulment Committee actions are rare: less than fifteen in forty years.[130]

The caseload of an investment appellate mechanism will ultimately depend not only on how many investor-state disputes are filed, but on how many of the more than 2,000 BITs and dozens of FTAs with investment provisions replace the ICSID Annulment Committee and situs court review with exclusive jurisdiction for the appellate mechanism, if and when such a mechanism is created under ICSID auspices. A potentially large volume exists, but the number of cases in actual practice is very difficult to predict.

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126. CAFTA-DR, *supra* note 4, arts. 10.22(1), 10.22(2).

127. Once those already approved by Congress (CAFTA-DR, Morocco) enter into force, the United States will have FTA based investment protection with eleven nations (Canada, Mexico, Chile, Singapore, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica, and Morocco). Free Trade Agreements, http://www.state.gov/eleb/tpp/cl0332.htm (last visited Aug. 9, 2005). As of March 2005, the United States had negotiated 47 BITs and 40 were in force. U.S. Bilateral Investment Treaty Program, http://www.state.gov/e/eb/rls/fs/22422.htm (last visited Aug. 9, 2005). Several others FTAs are in various stages of negotiation or ratification (Morocco, Bahrain, Panama, Ecuador, Colombia, and Peru).

128. DSU, *supra* note 72, art. 17(1).

129. Debra P. Steger & Peter Van den Bossche, *WTO Dispute Settlement: Emerging Practice and Procedure*, 92 AM. SOC'Y INT'L L. PROC. 79, 79 (1998).

130. *See* ICSID, List of Concluded Cases, http://www.worldbank.org/icsid/cases/conclude.htm (last visited Aug. 11, 2005).

Of course, if there are separate appellate mechanisms for each agreement or even group of agreements, the caseload for any individual agreement could be very small. Under NAFTA, there have been about forty investment cases filed in eleven years[131]; roughly half were brought under the UNCITRAL Arbitration Rules,[132] and the rest were brought under the ICSID Additional Facility Rules.[133] Had there been an appellate mechanism with jurisdiction, there might have been more referrals to the appellate mechanism (rather than to a reviewing court) than there have been to date; all involved the relatively rare monetary awards against NAFTA parties.[134] If an appellate mechanism existed and had been authorized to exercise a broader standard of review than Article 34 of the UNCITRAL Model Law, at least some of the investor claimants whose claims against the NAFTA parties have been rejected[135] might have brought appeals. Even then, however, it is unlikely that more than an additional handful of cases would have been appealed.

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131. Based on the best information available (the Todd Weiler website, http://naftaclaims.com), approximately forty-one Chapter 11 actions had been filed as of September 2005, including those which may be dormant. NAFTA Claims, http://naftaclaims.com. While this is believed to be a comprehensive list, the secrecy surrounding the Chapter 11 filing process does not assure that disputes and the documents filed during the proceedings will be made public. *Id.* NAFTA has no such requirements. An "Interpretation" issued by the parties on July 31, 2001, however, requires all documents relating to Chapter 11 provisions, excepting those containing confidential information, to be made "available to the public in a timely manner." Compliance by the governments, claimants, or both appears to be very good.

132. UNCITRAL Arbitration Rules (1976), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

133. ICSID Additional Facility Rules (Jan. 2003), *available at* http://www.worldbank.org/icsid/facility/facility.htm.

134. Only four cases, *Metalclad, S.D. Myers, Pope & Talbot*, and *Feldman* have resulted in monetary damages awards against Canada or Mexico, and there have been no monetary damages awarded to date against the United States. Metalclad Corp. v. United Mexican States, ICSID (W. Bank), Case No. ARB (AF)/97/i (Aug. 26, 2000), 40 I.L.M. 36 (2001); Pope & Talbot v. Canada, (NAFTA Arb. Trib. May 31, 2002), 41 I.L.M. 36 (2001); S.D. Myers v. Canada, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408; Marvin Feldman v. United Mexican States, (NAFTA Arb. Trib. Dec. 16, 2002). All except *Pope & Talbot* were appealed, unsuccessfully. An earlier case was settled after the Government of Canada agreed to change certain regulations and pay costs. Ethyl Corp. v. Canada, (NAFTA Arb. Trib. June 24, 1998), 38 I.L.M. 708 (1999).

135. The rejected claims include: Methanex v. United States, Final Award, (NAFTA Arb. Trib. Aug. 9, 2005); Waste Mgmt., Inc. v. Mexico, Final Award, (NAFTA Arb. Trib. Apr. 30, 2004); Gami Invs. v. Mexico, Award, (NAFTA Arb. Trib. Nov. 15, 2004); Loewen Group v. United States, Decision on Request for Reconsideration, (NAFTA Arb. Trib. Sept. 13, 2004) [hereinafter *Loewen II*]; UPS v. Canada, Award on Jurisdiction, (NAFTA Arb. Trib. Nov. 22, 2003) [hereinafter *Feldman*]; Loewen Group v. United States, Award, (NAFTA Arb. Trib. June 26, 2003) [hereinafter *Loewen I*]; ADF Group, Inc. v. United States, Final Award, (NAFTA Arb. Trib. Jan. 9, 2003); Mondev v. United States, Final Award, (NAFTA Arb. Trib. Oct. 11, 2002); and Azinian v. Mexico, Final Award, (NAFTA Arb. Trib. Nov. 1, 1999), 39 I.L.M. 537 (2000), *all available at* http://www.naftaclaims.com/disputes.htm.

Since the CAFTA-DR mechanism will likely cover that FTA alone, at least initially, it would make little sense to create a standing body as in the WTO. Rather, as the United States is likely to propose,[136] the only cost-effective option would be a roster system similar to that used in the ICSID Annulment Committee; in such a system, each CAFTA-DR member government nominates a list of acceptable individuals, and when an award is referred to the appellate mechanism, three members are chosen from the rosters. Presumably, if normal practice is followed, one member would be nominated by the claimant-investor, one by the responding state, and the third chosen by the other two; failing agreement, the third member would be chosen by an appointing authority, presumably the ICSID Secretary General, as in CAFTA-DR arbitrations.[137]

Whether party nationals should be permitted to serve in an investment appellate mechanism is a related issue. Party nationals serve in investment tribunals under ICSID and NAFTA, but are excluded from the ICSID Annulment Committee and WTO panels (although not from the Appellate Body). Given the relative shortage of highly experienced arbitrators, excluding arbitrators from the countries whose nationals are the more frequent claimants, such as the United States, could make the process difficult or impossible to administer.

Would fifteen or more outstanding investment arbitrators be willing to accept nomination to serve on an appellate mechanism under CAFTA-DR? Probably, as long as listing on the roster did not foreclose their continued work as arbitrators. The ICSID Secretariat had proposed a panel of fifteen persons of "recognized authority, with demonstrated expertise in law, international investment and investment treaties," each from a different nation, with three sitting on each appeal.[138] With the CAFTA-DR appellate mechanism, it would make sense initially to require each government to nominate at least two, and probably not more than five, individuals who need not be nationals of the CAFTA-DR nations. Having non-nationals on the roster would provide alternatives for chairpersons who were perceived as independent from any of the parties, and the U.S. negotiating proposal apparently contemplates such nominations.[139]

If there is a large roster, should some of the members be persons with experience in environmental law or labor law in addition to—or instead of—international investment law? There is no general bar to such appointments for a roster—as distinct from a standing body—as

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136. U.S. Official's Observations, *supra* note 25.

137. CAFTA-DR, *supra* note 4, art. 10.19(2).

138. ICSID Discussion Paper, *supra* note 3, Annex at 3. These criteria are similar to those required under the WTO's DSU, *supra* note 72, art. 17(3).

139. Telephone Interview with Member of the State Department's Advisory Committee on Investment (Aug. 24, 2005) (memorandum on file with Author).

the parties could presumably influence the selection or non-selection of the roster members for individual disputes. The investment bar in the United States would, however, almost certainly oppose the appointment of roster members other than recognized international investment law experts with prior arbitral experience.

Presumably, the costs of individual appeals would be borne by the parties, as is now the case at ICSID for both tribunals and the Annulment Committee. The ICSID rate is currently $300 per hour or some higher agreed rate; certainly, the CDN $800 per day rate currently paid to NAFTA Chapter 19 and 20 arbitrators[140] would not attract the skilled arbitrators required to make a CAFTA-DR appellate mechanism a success.

G. *Conflicts of Interest*

The problem of actual and potential conflicts of interest arises wherever ad hoc arbitrators are used. Unless the appellate mechanism effectively becomes a permanent tribunal, the members are all likely to serve part-time. When they are not engaged in work for the appellate mechanism they are likely to be involved in their area of expertise (i.e., investment disputes) either as arbitrators or counsel in investor-investor or investor-state disputes. The potential for conflicts is thus significant.

The ICSID Convention and Arbitral Rules encompass no code of conduct as such. Instead, Rule 6 provides a declaration by the arbitrators disclaiming any reasons for non-service or lack of independence.[141] Apparently because of some dissatisfaction with such a bare-bones approach, the ICSID Secretariat has proposed a requirement for a much broader disclosure requirement designed to identify possible conflicts at the outset:

> Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.[142]

Because of the obvious sensitivity of the appellate mechanism process, particularly in the earlier year, a stronger code of conduct would

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140. Email from U.S. Secretary, NAFTA Secretariat, to Author (Aug. 25, 2005) (on file with Author).

141. ICSID Rules of Procedure for Arbitration Proceedings, Rule 6(2), *available at* http://www.worldbank.org/icsid/basicdoc/partF.htm (last visited Sept. 8, 2005).

142. *Suggested Changes to the ICSID Rules and Regulations* (ICSID Secretariat, Working Paper May 12, 2005), *available at* http://www.worldbank.org/icsid/sug-changes.htm.

be appropriate, perhaps patterned after the NAFTA Code of Conduct[143] or the WTO DSU Rules.[144] For example, the NAFTA Code of Conduct (which is not applicable in Chapter 11 investment disputes but only to those arising under other chapters) requires, among other things, that

> *A candidate shall disclose any interest, relationship or matter that is likely to affect the candidate's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the proceeding.* To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.
>
> . . . .
>
> Once appointed, a member shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in section A and shall disclose them. The obligation to disclose is a *continuing duty* which requires a member to disclose any such interests, relationships and matters that may arise during any stage of the proceeding.[145]

The WTO requires self-disclosure by panelists or members of the Appellate Body of "any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principles of these rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality."[146] The rules include "an Illustrative List (Annex 2) of examples of the matters subject to disclosure," as well as a continuing obligation to "also disclose any new information . . . ."[147]

H. *Situs and Secretariat*

For efficiency and consistency reasons, a single multilaterally-supported appellate mechanism, as contemplated in the Senate Report, would be preferable to separate bodies for various agreements, *if* the volume is likely to be sufficient to justify such bureaucracy. ICSID is an obvious situs for a broadly based appellate mechanism, assuming that there is a significant number of ICSID Convention parties who are interested in an alternative (or addition) to the Annulment Committee. Among other things, there is a highly competent ICSID secretariat. Even if that staff were to require augmentation for such new responsibilities,

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143. Code of Conduct for Dispute Settlement Procedures Under Chapters 19 [unfair trade disputes] and 20 [disputes among parties] of the North American Free Trade Agreement, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=75 (last visited Aug. 9, 2005) [hereinafter NAFTA Code of Conduct].

144. Appellate Body, Working Procedures for Appellate Review, WT/AB/WP/5 (2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#20 (last visited Sept. 8, 2005) [hereinafter WTO Code of Conduct].

145. NAFTA Code of Conduct, *supra* note 143, at II.A, II.C (emphasis added).

146. WTO Code of Conduct, *supra* note 144, art. VI(2).

147. *Id.* at art. VI(1)(a), VI(5). *See also Id.* at Annex 2.

this would be much more cost-effective than starting from scratch. Unfortunately, there does not seem to be much support among ICSID members for an investment appellate mechanism instead of, or more likely in addition to, the Annulment Committee, as indicated by the Secretariat's withdrawal of the proposal.[148] (The nations likely most concerned, Canada and Mexico, are not members of ICSID.)

In some respects this may be just as well. Because amendment of the ICSID Convention requires unanimous approval or ratification or acceptance of the now more than 140 members,[149] it would be impractical to incorporate the appellate mechanism as an amendment to the Convention. Rather, as the ICSID Secretariat suggested, it would be preferable to have the earlier proposed ICSID Appeals Facilities Rules approved by ICSID's Administrative Council (as the Additional Facility Rules were some years ago).[150] If the Appeals Facilities Rules were drafted in a manner similar to the Additional Facility [Arbitral] Rules, they would be largely procedural in nature. Consent to the use of the Appellate Facilities Rules, agreement to forego the use of the Annulment Committee, and the substantive law rules to be applied, would presumably be determined by the underlying BITs or FTA investment chapters,[151] as the availability of the Additional Facility Rules is determined.[152] Another alternative might be to conclude a "plurilateral" protocol to the ICSID Convention, rather than an amendment, which provided that as among the parties to the protocol the Appellate Facilities Rules would be substituted for the Annulment Committee.

The Organization of Economic Cooperation and Development (OECD), a group of wealthy countries (in addition to South Korea, Mexico, and a few in Eastern Europe),[153] is in some respects another logical home for a broadly-based appellate mechanism. Presumably, an agreement creating an appellate mechanism, entirely procedural in nature, would be easier to negotiate than the failed multilateral agreement on investment.[154] As such it could be made available to non-OECD members, although some might be reluctant to participate in an instrument prepared largely by capital-exporting nations. Furthermore,

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148. U.S. Official's Observations, *supra* note 25.

149. ICSID Convention, *supra* note 34, art. 66.

150. ICSID Discussion Paper, *supra* note 3, Annex at 1.

151. *Id.*

152. *See, e.g.*, Model BIT, *supra* note 30, art.24(3) (providing the usual three alternative fora, ICSID Arbitral Rules, ICSID Additional Facility Rules, or UNCITRAL Arbitral Rules, as well as any other forum agreed to by the parties to the dispute); CAFTA-DR, *supra* note 4, art. 10.16(3) (same).

153. *See* About OECD, http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html (last visited Aug. 11, 2005) (explaining the objectives of the OECD, its work and members).

154. Draft Multilateral Agreement on Investment (1995–1998), *available at* http://www.oecd.org/document/35/0,2340,en_2649_201185_1894819_1_1_1_1,00.html.

the failure of the OECD's efforts to conclude the Multilateral Agreement on Investment in 1998 may make the OECD locus unattractive to others. Because there are hundreds of BITs in force similar to the OECD model between developed and developing nations, this nexus might provide a rationale for non-OECD member accession.

One commentator has suggested that the WTO's Appellate Body might be given jurisdiction over investment disputes as well as trade disputes.[155] While attractive from an efficiency point of view, this option has a number of disadvantages, including the fact that WTO Appellate Body members are chosen for trade law rather than investment law expertise (although a number of present and former members have investment law experience). Most WTO members have opposed a comprehensive WTO investment agreement as one of the "Singapore Issues" in the Doha Development Round of WTO negotiations[156] and would likely strenuously oppose giving the WTO Appellate Body jurisdiction over investment disputes, viewing it as an undesirable first step in expanding the WTO's current very limited coverage of investment issues.[157] This reluctance seems likely even if the agreement creating an investment appellate mechanism were a "plurilateral" agreement, with accession optional for the WTO Members.

There are, of course, ad hoc alternatives, and these undoubtedly represent the most practical arrangement for an appellate mechanism that may have, as the U.S. government apparently intends, very few cases before it from year to year.[158] One could, for example, envision an

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155. Brian Schwartz, Professor, Manitoba Law School, suggestion made at conference on NAFTA chap. 11, American University (March 2004).

156. The relationship between trade and investment was among the topics included in the Ministerial Declaration (Nov. 14, 2001) initiating the Doha Development Round of WTO negotiations, although the decision as to whether to include negotiations on investment issues was explicitly left for later. World Trade Organization, *Ministerial Declaration of November 14, 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). Disagreement over the inclusion of the so-called Singapore Issues (competition law, investment, transparency in government procurement, and trade facilitation) in the negotiations was partially responsible for the collapse of the negotiations at the Cancun Ministerial in September 2003. World Trade Organization, *Ministerial Declaration of September 14, 2003*, WT/MIN(03)/20. The Doha Work Programme adopted August 1, 2004, contains an explicit understanding that competition, investment, and government procurement issues "will not form part of the Work Programme . . . and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round." Doha Work Programme, *Decision Adopted by the General Council on August 1, 2004*, ¶ 1(g), WT/L/579.

157. Agreement on Trade-Related Investment Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/English/docs-e/legal_e/18-trims.pdf (applying the GATT principles of national treatment, transparency, and restrictions on quantitative restraints to investment, and prohibiting most performance requirements).

158. U.S. Official's Observations, *supra* note 25.

appellate mechanism created by the seven CAFTA-DR parties and then opened up to other parties to U.S. FTAs containing investment provisions, or parties to BITs with similar provisions now being negotiated by the United States. If, for example, the NAFTA parties were to decide to amend NAFTA Chapter 11 to include an appellate mechanism in lieu of court review in Additional Facility and UNCITRAL cases—a political Pandora's Box of considerable dimension—they could graft on to the CAFTA-DR appellate mechanism. Assuming that within a few years the United States has treaty relationships contemplating binding investor-state arbitration with at least fifty nations,[159] such a limited appellate mechanism might be reasonable in terms of efficiency, although probably less efficient cost-effective and politically acceptable than an ICSID body.

One of the problems of an ad hoc appellate mechanism is the need for secretariat services. Arrangements, however, could likely be made with the ICSID Secretariat to conduct the CAFTA-DR appeals on a case-by-case basis, as has been done with a number of NAFTA Chapter 11 cases brought under the UNCITRAL rules.[160] This would effectively limit any operational costs to the actual appeals filed. This is an important feature of the appellate mechanism, given the likely great reluctance among the CAFTA-DR member governments—including the United States—to fund an entity that may have no cases for a number of years.

Other convenient options are few. There are of course many commercial arbitration sites, such as the International Chamber of Commerce in Paris[161] and the London Court of Arbitration.[162] Neither, however, is well-suited to disputes involving the United States and Central American or the Dominican Republic governments, compared to the use of the ICSID facilities in Washington, D.C. At least in theory, the CAFTA-DR parties could call upon the facilities of the Canadian or Mexican sections of the NAFTA Secretariat. Those secretariats,

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159. *See supra* note 127.

160. *See* International Thunderbird Gaming Corporation v. United Mexican States, Procedural Order no. 1 (Jun. 27, 2003), para. 4, *available at* http://naftaclaims.com/Disputes/Mexico/Thunderbird/ThunderbirdProceduralOrder1.pdf (stating that the "Secretariat of ICSID shall render administrative services in relation to the arbitral proceedings similar to those rendered in arbitrations under the ICSID Facility Rules"); Grand River Enterprises et al. v. United States of America (NAFTA/UNCITRAL Arbitration), Minutes of the First Session of the Tribunal (Mar. 31, 2005), at 3–4, *available at* http://naftaclaims.com/Disputes/USA/GrandRiver/Grand%20River%20v.%20USA_Minutes%20First%20Session.pdf (indicating that ICSID is providing administrative services to the tribunal).

161. ICC, International Court of Arbitration, http://www.iccwbo.org/index_court.asp (last visited Aug. 24, 2005).

162. London Court of International Arbitration, http://www.lcia-arbitration.com/ (last visited Aug. 24, 2005).

conceived to manage NAFTA Chapter 19 and 20 cases,[163] are generally under-utilized, particularly in Canada where no Chapter 19 or Chapter 20 cases are even pending.[164] Canada, in particular, would provide a reasonably well-staffed secretariat in a neutral country, probably at costs below those charged by the ICSID Secretariat.[165]

I. *Modifications to Existing BITs and FTAs*

Incorporating an appellate mechanism would require the amendment of bilateral investment treaties, the investment provisions of NAFTA, and other FTAs, as CAFTA-DR explicitly contemplates.[166] In most instances, changes in domestic law would also be required.[167] Where an investment treaty contemplates the use of ICSID arbitral rules, with exclusive resort to the ICSID Annulment Committee, modifications in ICSID party obligations would likely be required to substitute an appellate mechanism for the ICSID Annulment Committee. The amendment of BITs would be politically easier than amending investment provisions of NAFTA and FTAs, since it could be difficult to limit the modifications to inclusion of an appellate mechanism if NAFTA and FTAs are reopened. Given the need for Senate advice and consent to protocols to existing BITs, however, the process could take years to implement, unless the legislation creating one or more appellate mechanisms could be included with other, important but less controversial trade or trade-related legislation.

V. CONCLUSIONS AND RECOMMENDATIONS

Overall, the appellate mechanism concept seems to be more generally favored by some states—including some officials in the United States—than by private investors and their counsel. There are indications, however, that with the right structure an appellate mechanism would be preferred over substantial delays at ICSID or

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163. NAFTA, *supra* note 7, art. 2002(3).

164. NAFTA Secretariat, Status of Panel Proceedings, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=9 (last visited Aug. 24, 2005) (listing no Canadian section cases, and only four cases being administered by the Mexican section).

165. As far as the Author is aware, the Canadian secretariat has never provided secretarial services for an investor-state arbitration, and has never published a schedule of rates that might be applicable.

166. CAFTA-DR, *supra* note 4, Annex 10-F.

167. In the United States, the Federal Arbitration Act (9 U.S.C. §§ 1–14) would have to be amended to deprive federal courts of jurisdiction to review arbitral awards rendered where the situs of the arbitration (as at ICSID in Washington) were the United States.

review by multiple national courts.[168] This is not surprising, given that historically, most (but not all) of the requests for court or ICSID Annulment Committee review are brought by respondent states, not by investors. Also, there appears to be some concern among states that are already reassessing the desirability of BITs that the existence of an ICSID (or some other) appellate facility would effectively pressure states concluding BITs to include the facility in new agreements.

In the Author's view, the investment appellate mechanism is a proposal that could be beneficial to both governments and the investment community, *if* it could be properly implemented. A well-structured and staffed appellate mechanism could improve the jurisprudence in investment-related arbitration by increasing consistency and annulling the occasional wrong decision. A CAFTA-DR mechanism, in particular, would provide some modest increase in consistency over the current national court process. There, one can be reasonably sure that one of several U.S. roster members would sit on most or all of the cases, regardless of whether a U.S. investor was seeking compensation from one of the other CAFTA-DR governments (the most likely scenario) or vice-versa. As such, the appellate mechanism could allay some of the fears of investment agreement critics without detracting from the generally high level of investor protection in NAFTA, the recent FTAs and BITs. This assumes of course—and this is a major assumption—that those critics were supportive of the two or three persons selected for the U.S. roster.

An investment appellate mechanism is not, however, a cure-all for all or even most of the problems (real or apparent) that emerge in investor-state arbitration. Even if, as hoped, the appellate mechanism would substitute a single appellate step for what today may be multiple levels of court proceedings when arbitral decisions are reviewed by national courts, it probably would not significantly reduce expenses, particularly if the appellate mechanism has the authority to review key facts on a de novo basis. Nor it would satisfy those groups that are broadly opposed to NAFTA Chapter 11 and similar mechanisms in BITs and FTAs.[169] Further, it would not assure that governments unhappy with decisions against them would receive relief.

Moreover, putting the idea into practice is fraught with practical and legal problems. There is potential for enormous political controversy, even if the scope of review is limited largely to legal issues in a manner that gives considerable deference to the determinations of arbitral tribunals. Those with significant interest in the creation and operation

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168. Telephone Interview with Member of the State Department's Advisory Committee on Investment (Aug. 24, 2005) (memorandum on file with Author).

169. *See* CIEL/NGO Letter, *supra* note 17 (setting out the objections to an appellate mechanism that does not, among other things, permit national court review, apply local law and assure that not only investment experts are appointed to the body).

of an investment appellate mechanism—nations, foreign investors, and NGOs, among others—will not likely see eye to eye on the major structural and procedural issues. No mechanism satisfactory to the foreign investment community is likely to be fully acceptable to governments in their defendant roles, to environmental organizations, or to other NGOs; this is particularly true with regard to standard of review, posting of bonds, eliminating the role of national courts, and choice of roster members.

CAFTA-DR is the likely laboratory for an initial effort to create an appellate mechanism, once the agreement goes fully into effect.[170] Whether it is realistic for the CAFTA-DR nations to conclude negotiations regarding such a novel concept within one year remains to be seen. Nor can those in the U.S. Congress who supported the concept of an appellate mechanism in the TPA legislation in 2002, but opposed CAFTA-DR in 2005, be expected to support an amendment to CAFTA-DR to establish an appellate mechanism. It would also be unreasonable to assume that the Bush administration, having won CAFTA-DR in the House of Representatives only by putting the full prestige of the presidency (and some "carrots") behind it,[171] would have any strong interest in proposing a CAFTA-DR amendment to Congress for an appellate mechanism or any other purpose. Thus, under the best of circumstances—prompt agreement on an appellate mechanism by the CAFTA-DR parties in the mandated negotiations—it could be some years (if at all) before the CAFTA-DR is amended and even longer before the first case reaches the appellate mechanism.

Notwithstanding these very substantial political challenges in the United States and the complexities of legal drafting and negotiating, CAFTA-DR does have several advantages as a guinea pig: there will be seven nation parties (eventually), rather than only two, as in most other FTAs, or three as in NAFTA.[172] All seven CAFTA-DR parties are already parties to ICSID (unlike Canada and Mexico),[173] which will allow flexibility in designating ICSID as the ad hoc secretariat or even ultimately as the seat of a broader appellate facility. Having accepted the existing investment provisions in CAFTA-DR, none of the other six parties are likely to have significant opposition to an appellate mechanism; it should have modest cost advantages—at least over a multiple level situs court review process—and lead to greater predictability than national courts. Since several CAFTA-DR parties,

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170. *See supra* note 5 (including the CAFTA-DR parties for which the Agreement in full force as of April 1, 2006).

171. *See* Sophie Walker, *CAFTA Win Sends Mixed Signals on U.S. Gov't-Analysts*, REUTERS, July 28, 2005.

172. *See supra* note 127 (listing other U.S. FTAs negotiated in recent years, all of which are bilateral except CAFTA-DR).

173. *See supra* note 35 (referencing a list of ICSID Members).

particularly Costa Rica and Nicaragua, have a history of expropriation or other adverse actions against U.S. investors,[174] it is reasonable to predict that an appellate mechanism applicable to investment disputes under CAFTA-DR will eventually be utilized if it ever becomes operational. There *will* be cases, although probably not many. A well-structured investment appellate mechanism negotiated in the CAFTA-DR context should also serve as the model for broader applicability of the concept. Is an appellate mechanism really worth all the effort, now and in the future, to the governments, the investment communities, and civil society?

The current system of the ICSID Annulment Committee for ICSID arbitrations and national courts for all other cases would benefit from a modest increase in the likelihood of consistency and the elimination of multi-layer appeals in the national court systems. But is it really cost-effective in the broadest sense to create an investment appellate mechanism when the benefits over the existing system are so limited? Certainly, in retrospect, there is serious doubt. The process, however, has by now gained sufficient momentum to be likely to continue through at least a good faith attempt at the drafting of a CAFTA-DR amendment. For adoption and implementation, however, don't hold your breath!

174. *See* U.S. Department of State, Background Notes: Costa Rica, *available at* http://www.state.gov/r/pa/ei/bgn/ (last visited Aug. 11, 2005). ("There have been some vexing issues in the U.S.-Costa Rican relationship, principal among them longstanding expropriation and other U.S. citizen investment disputes, which have hurt Costa Rica's investment climate and produced bilateral tensions."); Dept. of State, Background Note: Nicaragua (Feb. 2005) ("The resolution of U.S. citizen claims arising from Sandinista-era confiscations and expropriations still figures prominently in bilateral policy concerns.").