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Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System

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FINALITY VERSUS CONSISTENCY: DOES INVESTOR-STATE ARBITRATION NEED AN APPELLATE SYSTEM?

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I. INTRODUCTION

Investor-state arbitration is so new that the vast majority of claims and decisions in this area have only occurred in the last six or seven years, and many areas of the law and procedure remain to be developed. The combination of international commercial arbitration procedure[1] and the substantive obligations arising under public international law[2] has created

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1. Bilateral Investment Treaties (BITs), such as the North American Free Trade Agreement (NAFTA), generally provide for arbitrations under the auspices of the International Center for the Settlement of Investment Dispute (ICSID) rules, or the United Nations Committee on International Trade Law (UNCITRAL) Arbitration Rules. The ICSID is an organ of the World Bank Group, while UNCITRAL is a Committee of the United Nations. As such, both sets of rules enjoy high credibility.

2. The substantive obligations in BITs most often cited are those of (1) expropriation—no expropriation or measures equivalent to expropriation are permitted without compensation; (2) most-favored nation treatment and national treatment (as found in NAFTA articles 1102 and 1103)—discrimination is not permitted on the basis of nationality. In particular, the best treatment provided to local companies, or third-country investors, must also be provided to other foreign investors; and (3) fair and equitable treatment (as included in NAFTA article 1105)—regardless of the host state's domestic law, the international law standard of treatment must be applied to all foreign investors. It is a broad and widely accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality.

many challenges for those interested in the development of this new and fast-growing area of the law. Many of these challenges relate to the application of fundamental principles of the administration of justice. One such challenge is deciding whether there is a need for an appellate mechanism in investor-state arbitration.

There are over 2,200 Bilateral Investment Treaties (BITs) in the world today.[3] These international instruments provide foreign investors with a direct means for redress against states for breaches of international law obligations. This is referred to as "investor-state arbitration."[4] The provisions found in Chapter 11 of the North American Free Trade Agreement (NAFTA)[5] are a well-known example of this type of instrument. BITs, like the provisions in NAFTA's Chapter 11, are not homogenous and provide ample room for a diversity of tribunal opinions. With an explosion of investor-state disputes and new decisions arising from those arbitrations, concern has developed over whether there are sufficient means to assure consistency and correctness in the ad hoc arbitral process. This concern cuts to the heart of what is clearly one of the fundamental features, and benefits, of arbitration: finality. The debate divides scholars and practitioners into two camps, one consisting of those who believe it is more important to have an arbitration process that provides finality, and one composed of those who advocate that consistency and correctness in decisionmaking should be the primary objective of the process.[6]

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3. The number of BITs increased dramatically during the 1990s, resulting in a rise in number from 385 in 1989 to a total of 2,265 in 2003. They now involve 176 countries. United Nations Conference on Trade and Development (UNCTAD), *UNCTAD Analysis of BITS*. Also available at http://www.unctadxi.org/templates/Page____1007.aspx (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

4. In comparison with more traditional "state-to-state" arbitration involving the espousal of investor claims by states.

5. *North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States* (Dec. 17, 1992), ch. 11, 32 ILM 612, 639-49 [hereinafter NAFTA]. A copy of the NAFTA text can be accessed at http://www.naftaclaims.com/commission.htm (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

6. This question was posed by Sir Eli Lauterpacht in his seminal work. *See* Eli Lauterpacht, *Aspects of the Administration of International Justice* 110 (Cambridge U. Press 1991).

The drive towards an appellate mechanism is partly in response to the fact that, in three recent cases, domestic courts in Canada have been effectively asked to help in determining the future viability of investor-state arbitration. In addition, powerful political influences intent on preserving American sovereignty have targeted investor-state arbitration as a threat, thus helping to force the issue to the fore.

The substantive portion of this paper is divided into three parts. The first two parts examine the main impetuses for a new investor-state appellate mechanism, with Part II providing a brief overview of the judicial review of NAFTA Chapter 11 in the Canadian Courts, and Part III containing a discussion of the push in the United States to add an appellate mechanism to the investor-state arbitration process. Finally, Part IV explores some of the key issues in the creation of a new appellate mechanism.

II. JUDICIAL REVIEW OF INVESTOR-STATE AWARDS UNDER THE NAFTA

First, we look to NAFTA Chapter 11 as one of the key elements of this unfolding drama. Under NAFTA, which is procedurally based on the model of international commercial arbitration, a judicial review of an arbitral award can be initiated by a disputing party in the national courts of the place of arbitration under the local law of that jurisdiction. Once review is initiated in the national courts, the challenging party can seek to vacate or annul the award.

In the early 1990s, the drafters of NAFTA Chapter 11, like the drafters of other BITs, decided to adopt many elements of the international commercial arbitration model into the procedures of those arbitrations. This likely seemed a workable and balanced model with the appropriate safeguards. It had the benefits of adopting a well thought out system without the need of creating a new process. It recognized the inherent flexibility of arbitration and was consistent with the way these things had been viewed with regard to other BITs. Under NAFTA Article 1120, claimants may choose from one of two basic sets of rules,

the UNCITRAL Arbitration Rules[7] and the rules of the International Centre for the Settlement of Investment Disputes (ICSID).[8]

The UNCITRAL Arbitration Rules, originally designed for commercial arbitration, are presently being used in a variety of investor-state arbitrations. In international commercial arbitration, as in much of investment arbitration, the only permissible review is by a domestic court at the place of arbitration. The standard of review under the UNCITRAL Model Law Article 34(2),[9] which has been applied in Canada in these judicial reviews, is limited to six grounds: (1) invalidity of the agreement to arbitrate; (2) lack of notice to a party or other inability to present the case; (3) inclusion in the award of matters outside the scope of submission; (4) irregularity in the composition of the tribunal or arbitral procedure; (5) non-arbitrability of the subject-matter; and (6) violation of domestic public policy. This type of challenge does not extend to the

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7. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, GA Res. 31/98, U.N. UNCITRAL, 99th Plen. Mtg. (Dec. 15, 1976). Also available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

8. Under the NAFTA, the ICSID Additional Facility Rules are available to Canadian and Mexican Claimants since their states are not signatories to the ICSID Convention, whereas U.S. Claimants could conceivably avail themselves of the Convention itself. *See* Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, ICSID/15/Rev. 1 (Jan. 2003), also available at http://www.worldbank.org/icsid/basicdoc-archive/9.htm (accessed Jan. 25, 2006; copy on file with Journal of Appellate Practice and Process) [hereinafter ICSID Convention, but also known as the Washington Convention]; the World Bank Group International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (Intl. Ctr. for Settle. of Inv. Disputes 2003), also available at http://www.worldbank.org/icsid/basicdoc/basicdoc.htm (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process). The Convention entered into force on October 14, 1966, when it had been ratified by twenty countries. As of May 25, 2005, 142 countries have ratified the Convention to become Contracting States. The World Bank Group International Centre for Settlement of Investment Disputes, *ICSID List of Contracting States*, http://www.worldbank.org/icsid/constate/c-states-en.htm (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

9. UNCITRAL Model Law on International Commercial Arbitration, GA Res. 40/72, 112th Plen. Mtg. (Dec. 11, 1995), also available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter UNCITRAL Model Law]. The UNCITRAL Model Law has been adopted in its entirety into the Canadian Commercial Arbitration Act, R.S., 1985, c. 17 (2d Supp.), also available at http://laws.justice.gc.ca/en/c-34.6/35646.html (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

review of errors of law, or a review of the application of the facts to the law. It is not an appellate style review.

The determination of the place of arbitration, or the *lex loci arbitri*, thus becomes critical to the determination of judicial review and enforcement.[10] If one is going to ask a domestic court to review an international arbitral decision, the claimant in particular wants to be sure that it will receive a fair hearing. Of course, this adds an element of forum shopping.[11]

The main exception in investment arbitrations is the example of the ICSID Convention. The review process for arbitrations under the ICSID Convention is an internal annulment process pursuant to Article 52,[12] but has similar standards to that of a judicial review under the UNCITRAL Model Law or New York Convention.[13] Disputes can go to ICSID where arbitration is entirely removed from the domestic court system. Whereas an appeal is concerned with the substantive correctness of the decision and a court is permitted to substitute its view, annulment voids a decision in whole or in

10. For a complete discussion of these issues, see Noah Rubins, *Judicial Review of Investment Arbitration Awards*, in *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 359 (Todd Weiler ed., Cameron May 2004).

11. The reason is that, typically, it is the Claimant in an investor-state arbitration that chooses the arbitration rules under which the arbitration will operate. For example, see NAFTA 1120.

12. ICSID Convention Regulations and Rules, *supra* n. 8. The permissible grounds for annulment under Article 52 are (1) the Tribunal was not properly constituted; (2) the Tribunal has manifestly exceeded its powers; (3) there is corruption of a Tribunal member; (4) there has been a serious departure from a fundamental rule of procedure; and (5) the award does not state the reasons on which it is based. *Id.* at 26. Recent annulment awards include *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4 (UK/Egypt BIT Feb. 5, 2002), also available at http://www.investmentclaims.com/decisions/Wena-Egypt-Annulment-5Feb2002.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process); and *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3 (France/Argentina BIT July 3, 2002), also available at http://www.investmentclaims.com/decisions/Compania-Argentina-Annulment-3Jul2002.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

13. UNCITRAL, United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), also available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter New York Convention]. The Convention is now in force in over 130 countries.

part and sends the case back to a new tribunal for a new decision.[14]

Underlying the judicial review and annulment processes is implicit support for the concept of finality. This is such an important benefit of arbitration because it is understood that the decision of the tribunal is the final word on the facts and law of the case before it. This provides a great deal of predictability to the process. There is no appeal to a superior body, unlike in domestic court systems, or as in the international context, the World Trade Organization's Appellate Body.

The balancing of finality with consistency and correctness hits the wall at this point. Is justice being met when there is no second opinion on the issues of fact and law of an arbitration? Are other values, such as correctness and consistency, in conflict with the benefits of finality? This brings us to the part of the story involving domestic courts and one of the main arguments that is being made for the need of an appellate-style review of investment awards.

For those in the "correctness and consistency" camp, judicial review is simply an insufficient level of review. There is evidence, as discussed below, that the NAFTA governments take this point of view. It appears that they are looking for a safeguard that provides a high level of consistency, with the equivalent of a full standard of appellate review. However, if the intent is that the courts are only permitted a limited scope of review, as was contemplated in the UNCITRAL Model Law or the New York Convention, then clearly domestic courts are entirely appropriate for the task.

The first judicial review of a NAFTA Chapter 11 arbitral award occurred in British Columbia in May 2001 with the review of the final award in the *Metalclad Corporation* v. *Mexico* arbitration.[15] There have subsequently been two further judicial reviews of the final awards in the *Feldman* v. *Mexico* and *S.D. Myers* v. *Canada* arbitrations. All three claims were

14. Thomas Johnson, Presentation, *Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?* in *ICSID Annulment: Factual Review*, 2(2) Transnational Dispute Management 32 (April 2005).

15. *United Mexican States v. Metalclad Corporation*, Reasons for Judgment (2001) BCSC 664, also available at http://www.investmentclaims.com/decisions/Metalclad-Mexico-BCSCReview-2May2001.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

initially brought under the NAFTA's Chapter 11 provisions. The latter two judicial review processes were concluded in January 2005 and January 2004, respectively.[16]

The *Metalclad* judicial review decision is controversial and has been the subject of a great amount of discussion and angst in the Canadian arbitration community. The consensus opinion about that award is that it was not supportive of arbitration in Canada. More directly, some criticized Judge Tysoe for saying the right things in his decision, but failing to apply the law consistently with the spirit of deference to arbitral awards. He "talked the talk," but did not "walk the walk."[17]

As a result of the adoption of the UNCITRAL Model Law in British Columbia in 1986,[18] which was about when most other provinces in Canada also adopted it, and the New York Convention, a pro-arbitration policy position was adopted by Canadian governments, and then subsequently by the courts.[19] Such earlier court decisions as *Quintette Coal Ltd. v. Nippon Steel Corp.*[20] demonstrated this pro-arbitration position in a very

16. The final judicial review decision in *Mexico v. Feldman* came down in January 2005. *United Mexican States v. Karpa*, http://www.investmentclaims.com/decisions/Feldman-Mexico-OntarioCourtofAppeal-11Jan2005.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process). The lower court decision is available online at http://www.investmentclaims.com/decisions/Feldman-Mexico-OntarioReview-3Dec2003.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process). The *Canada* v. *S.D. Myers* judicial review before the Federal Court of Canada was concluded with the judgment of the court in January 2004. The decision was not appealed. *See* http://www.investmentclaims.com/decisions/SDMyers-Canada-Judicial Review-13Jan2004.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

17. For example, see the debate between Professor Chip Brower and Christopher Thomas referred to in Charles H. Brower, II, *Structure, Legitimacy and NAFTA's Investment Chapter*, 36 Vand. J. Transnatl. L. 37 (2003), and Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 Colum. J. Transnatl. L. 465 (2002).

18. International Commercial Arbitration Act, R.S.B.C. 1996 c. 233, also available at http://www.qp.gov.bc.ca/statreg/stat/I/96233_01.htm#part1 (accessed Nov. 19, 2005; copy on file with Journal of Appellate Practice and Process).

19. There had been, as noted by Yves Fortier, Q.C., a sea change since the adoption of the UNCITRAL Model Law across Canada, "from doubt to deference in the attitude of courts toward arbitration." Yves Fortier, *Delimiting the Spheres of Judicial and Arbitral Power: "Beware, My Lord, of Jealousy"*, 80 Can. Bar Rev. 143 (2001).

20. In *Quintette Coal Ltd.* v. *Nippon Steel Corp.* (1990), 50 B.C.L.R. (2d) 207 (C.A.) affirming (1990), 47 B.C.L.R. (2d) 201 (S.C.), Gibbs J.A. (for the Court), relied upon United States and New Zealand case law in adopting a deferential approach, noting that "The [International Commercial Arbitration] Act severely circumscribes the jurisdiction of the Court to interfere with arbitrations to which it applies," and that the grounds

concrete manner.[21] One of the key elements of the adoption of the UNCITRAL Model Law and the New York Convention is the deference accorded to arbitral awards.

However, a very real concern arose in all three of the NAFTA judicial review cases with respect to the position of the Governments of Canada and Mexico on this point of deference. In each of the cases, strong arguments were made that the courts should not use the usual standard of review applied to commercial arbitration awards, and that the courts ought to show very little deference to the decisions of NAFTA panels. Arguments advanced by Canada and Mexico indicated a standard that would have effectively amounted to an appeal of the arbitral awards rather than a limited judicial review. The standard of review sought by Canada is referred to in Canadian administrative law as the pragmatic and functional approach. In the *Metalclad* judicial review, Canada argued before Mr. Justice Tysoe of the British Columbia Trial Division that,

> [g]iven the characteristics of NAFTA Chapter Eleven dispute settlement, and applying the pragmatic and functional approach, it is clear that in interpreting NAFTA, Chapter Eleven tribunals should not attract extensive judicial deference and should not be protected by a high standard of judicial review.[22]

One of the worrisome results of the *Metalclad* judicial-review saga was the uncertainty it cast over commercial

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empowering courts to set aside such awards are "narrow." *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (holding that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context") and *CBI NZ Ltd.* v. *Badger Chiyoda*, [1989] 2 N.Z.L.R. 669, 687 (C.A.) (Richardson J.) (noting that "the trend in international commercial arbitrations is clearly towards giving greater emphasis to party autonomy and contracting judicial control over the legal content of the reference and the award.")).

21. Other decisions cited on the same point in Canada include *Corp. Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.* (1999), 45 O.R. (3d) 183 (S.C.), *aff'd* 49 O.R. (3d) 414 (C.A.); *Food Servs. of America, Inc.* v. *Pan Pacific Specialties Ltd.* (1997), 32 B.C.L.R. (3d) 225 (S.C.).

22. Outline of Argument of Intervenor Attorney General of Canada at ¶ 30, *United Mexican States v. Metalclad Corporation*, (2001) BCSC 664, also available at http://www.dfait-maeci.gc.ca/tna-nac/documents/canada_submission-e.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

arbitration in Canada. There was much conjecture in Canada at the time as to whether the *Metalclad* judicial review decision had damaged Canada's reputation as a friendly place of arbitration.[23]

The judicial review decisions of both of the courts in *S.D. Myers* and *Feldman* have now put those concerns to rest. In rejecting the challenges of Mexico and Canada, both of the Canadian courts unambiguously confirmed a high degree of deference to arbitral awards, including arbitral awards by investor-state tribunals like those under NAFTA Chapter 11. As Chilcott J. of the Ontario Superior Court stated in *Feldman*,

> In my view, a high level of deference should be accorded to the Tribunal, especially in cases in which the Applicant Mexico is in reality challenging a finding of fact. The panel who has heard the evidence is best able to determine issues of credibility, reliability and onus of proof.[24]

He then concluded that he "accept[ed] the proposition that judicial deference should be accorded to arbitral awards generally and to international commercial arbitrations in particular."[25]

The *S.D. Myers* Court also confirmed that it possessed a limited scope of review when it stated that

> [t]he Canadian submission that the Tribunal erred in law in applying Articles 1102 and 1105 in this case is a matter outside the Court's authority under Article 34 [of the Commercial Arbitration Code] to judicially review. A dispute falling within the terms of the submission to

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23. Two NAFTA panels suggested as much. "The Tribunal is troubled by Canada's submission on this issue in the *Metalclad* case." *UPS v. Canada*, Decision of the Tribunal on the Place of Arbitration, Oct. 17, 2001 at ¶ 11, also available at http://www.dfait-maeci.gc.ca/tna-nac/documents/PA_oct.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process); *Pope & Talbot, Inc. v. Canada*, Ruling Concerning the Investor's Motion to Change the Place of Arbitration, March 14, 2002 at ¶ 20, also available at http://www.dfait-maeci.gc.ca/tna-nac/documents/ruling-investor-motion.pdf) (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process). The *Pope* Tribunal indicated that it was "also troubled by Canada's submission on reviewability and could have reached the same result [as the *UPS* tribunal] on weighing Canada's suitability were these proceedings just starting." *Id.*

24. *United Mexican States* v. *Feldman*, Decision, Dec. 3, 2003 (Ontario Superior Court) at ¶ 77, http://www.investmentclaims.com/decisions/Feldman-Mexico-Ontario Review-3Dec2003.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process) ("*Feldman*").

25. *Id.* at ¶ 97.

> arbitration, even if wrongly decided on a point of fact or law, cannot be judicially reviewed.[26]

One question that is raised by the trio of judicial review cases before the Canadian courts is: If the standard of review under the UNCITRAL Model Law was not sufficient to safeguard the interests of the NAFTA parties, why did they not originally insert a more robust appellate mechanism when the NAFTA was drafted? Recent developments confirm that, at least in the case of the United States, corrective measures are being taken to address this apparent short-fall.

III: THE UNITED STATES'S SUPPORT FOR AN APPELLATE MECHANISM

Scholars and practitioners advocating correctness rely on the rationale that there is a need to legitimize the investor-state arbitration process by creating greater consistency, predictability and objectivity. The position taken by the correctness camp raises a critical question: Is investor-state arbitration sustainable?[27] The question must be asked in this way because it involves the United States government. If the United States has concerns about an international mechanism, such as investment arbitration, that concern carries a great deal of weight. Moreover, the reason for this debate about appellate bodies for investor-state arbitration is largely due to the fact that the US Congress thinks it is a good idea.[28] This is the second main

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26. *Attorney General of Canada* v. *S.D. Myers, Inc.*, Reasons for Order, Jan. 13, 2004 (Fed. Ct.-TD) at ¶ 76 (10). The Court also cited in support of this conclusion, *id.* at ¶ 42, Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 433 (3d ed. Sweet & Maxwell 1999):

> [T]here is no provision in the Model Law for any form of appeal from an arbitral award, on the law or on the facts, or for any judicial review of an award on its merits. If the tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award—good, bad or indifferent—is final and binding on the parties.

27. Doak Bishop, *The Case for an Appellate Panel and Its Scope of Review*, 2 Transnatl. Dispute Mgt. 8 (April 2005).

28. On August 6, 2002, President George W. Bush agreed to what is called trade promotion authority (or TPA) when he signed into law the Trade Act of 2002, P.L. 107–210; the full text is available through GPO Access at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=publ210.107&directory=/diskc/wais/data/107_cong_public_laws (accessed Dec. 21, 2005; copy on file with Journal of Appellate Practice and Process). In particular, TPA Section 2102(b)(3)(G)(iv) instructs the US Trade

motivating factor behind the push for an investor-state appellate mechanism.

The idea of international entities having superior jurisdiction over the United States is one that is anathema to many of its political decisionmakers. Look at the example of the refusal by the United States to participate in the International Criminal Court, for example. BIT provisions, like those of NAFTA Chapter 11, are seen by many as an affront to US sovereignty.[29] An appellate mechanism is regarded as a means to rein in wild arbitral decisions that may not be in the United States's best interests. As the United States has yet to lose a NAFTA or BIT case, it may be difficult to understand the underlying basis of this concern. Moreover, the Tribunal members appointed to these arbitrations have been of the highest calibre.

The *Loewen* v. *US* NAFTA Chapter 11 arbitration,[30] with its challenge of what is uniformly agreed to be an appalling decision by a Mississippi court, has been viewed as one of the key wake-up calls to the potential dangers of international investment arbitrations to United States sovereignty. The mere idea that a United States court could be reviewed in some manner by a international arbitral panel is considered incendiary. Even the *Loewen* Tribunal, in its Final Award, sounded a note of caution about the dangers to the sustainability of the NAFTA if it made an award against the United States:

> As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the

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Representative to "[establish] a single body to review decisions in investor-to-government disputes."

29. For example, see Public Citizen's extensive treatment of NAFTA Chapter 11: *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005*, http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf (accessed Nov. 19, 2005; copy on file with Journal of Appellate Practice and Process).

30. *The Loewen Group, Inc. & Raymond L. Loewen* v. *United States*, Final Award (ICSID Case No. ARB (AF)/98/3 (NAFTA), also available at http://www.investmentclaims.com/decisions/Loewen-US-Award-26Jun2003.pdf) (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter *Loewen*]. A full set of the pleadings and awards in the *Loewen* arbitration can be found at http://www.naftaclaims.com/disputes_us_5.htm (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

> courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.[31]

However, the United States won the *Loewen* case. Perhaps, if the United States had lost, an appellate mechanism, if it had upheld the decision, would have provided more legitimacy to such a challenge to a United States court and thus aided in preserving the sustainability of the NAFTA. But if the basic issue is that of American distaste to the application of foreign jurisdiction, then surely an appellate review by yet another international tribunal would be no more satisfying for those worried about infringements of state sovereignty.

The end result of these types of concerns has been the inclusion of provisions in a number of recent United States investment treaties requiring the creation of an appellate body. For example, the October 2004 US-Uruguay BIT states in Annex "E" that

> [w]ithin three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.[32]

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31. *Loewen* at ¶ 242.

32. *Treaty Between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (Oct. 25, 2004), available at http://www.ustr.gov/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file583_6728.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process). Similar provisions can also be found in the recent Free Trade Agreements negotiated with Chile, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (accessed Jan. 26, 2006;

In direct response to the actions of the United States, the World Bank's ICSID, a prominent international-investment arbitration institution, published a discussion paper titled *Possible Improvements of the Framework for ICSID Arbitration* in October 2004 which sought to kick-start the creation of an appeals facility to be administered at the ICSID.[33] As noted in that paper, by mid-2005 as many as twenty countries may have signed treaties with provisions on an appeal mechanism. The main justification mentioned in the ICSID paper for an appeals mechanism is to foster coherence and consistency in the case law emerging under investment treaties.[34] If there are to be appeals, then the suggestion of a single appeal mechanism, administered by the ICSID, makes a great deal of sense.

The impetus for the creation of such a mechanism administered by the ICSID seems to have slowed with the publication in June 2005 of a further working paper titled "Suggested Changes to the ICSID Rules and Regulations."[35] In this latest paper, the ICSID confirms that it will continue to work on the development of an appellate body concept, but that "it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper."[36]

IV. KEY ISSUES IN THE CREATION OF AN APPELLATE MECHANISM

The foregoing discussion addressed the factors driving the creation of an appellate mechanism in investor-state arbitration. Such a discussion would not be complete without exploring

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copy on file with Journal of Appellate Practice and Process), and Singapore, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html) (accessed Jan. 26, 2006; copy on file with Journal of Appellate Practice and Process).

33. *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Working Paper #1 (Oct. 22, 2004), available at http://www.worldbank.org/icsid/improve-arb.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

34. *Id.* at ¶ 21.

35. *Suggested Changes to the ICSID Rules and Regulations*, ICSID Working Paper #2 (May 12, 2005), available at http://www.worldbank.org/icsid/052405-sgmanual.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

36. *Id.* at ¶ 4.

some of the key issues that must be addressed in determining whether an appellate mechanism is desirable.[37]

Clearly, if you add another entire full appeals step to the overall arbitration process, the finality benefit of arbitration is severely undermined. In particular, arbitrations will become much longer and more expensive, and the risks of an adverse decision to the claimant will dramatically increase. The benefit of lengthening the process will go to large, well-resourced governments and corporations. Thus, claims by smaller investors, and defences by developing countries, will correspondingly become much more difficult.[38]

To mitigate some of these problems associated with lengthening the process, at a minimum it would be necessary to move away from an ad hoc arbitral format, in which the disputing parties cover the costs of the panels, to an institutional format with permanent members. This does not eliminate extra attorney costs, which tend to be the largest expense in arbitration, but does alleviate some of the overall increased costs. Moreover, to avoid additional expense and duplication, the judicial review process would have to be folded into any new appeal process.

The question of precedent also becomes an important factor. For there to be true consistency between arbitral awards, one might expect that some formal system of precedence may have to be adopted, otherwise the goal of consistency would be difficult to achieve. However, the danger of inconsistent decisions is a facet of any legal system. National courts have a system of binding precedent; yet, as a reasonable observer must admit, they are not immune from contradictory decisions. In investor-state arbitration each case is considered to be unique. Many treaties have provisions stating that there is no precedent

37. Some concerns raised include: (1) Should there be a standing body? (2) Would multiple appellate bodies be needed so there could be one for each treaty? (3) Who would pay for it? (4) What would be the standard of review? and (5) Who will appoint members? Doak Bishop envisages a single appellate body which would review issues of jurisdiction and admissibility, fundamental errors of procedure, due process issues that are encompassed in the ICSID and New York Conventions, and errors of law. Bishop, *supra n.* 27, at 8-12.

38. *See* Thomas Walde, *Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation*? 2 Transnatl. Dispute Mgt. 71 (April 2005).

or binding effect between arbitral awards.[39] Although arbitral awards are not considered binding precedent, they are certainly viewed by arbitrators as being persuasive authority. Soft precedent in some form or another already exists in investor-state arbitration, whereby decisions are widely available,[40] and arbitral panels closely consider and sometimes adopt the reasoning of other tribunals. For those who are concerned about consistency, there appears to be a good argument that such consistency is already developing in investor-state arbitration.

If consistency is truly an overriding objective, then perhaps a closer examination of other types of provisions tailored to deter or address the dangers of parallel proceedings and the possibility of overlapping damages awards[41] is warranted. For example, procedures for the consolidation of claims, fork-in-the road provisions or *lis pendans* and *res judicata*, may be more effective approaches to address inconsistency than the creation of an appellate mechanism.[42]

There have also been recent decisions in a number of BIT arbitrations raising concerns about the dangers of inconsistency in decisionmaking. For example, in the now notorious CME and Lauder BIT arbitrations against the Czech Republic,[43] many

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39. "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of a particular case." NAFTA Article 1136, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=161#A1136 (accessed Nov. 19, 2005; copy on file with Journal of Appellate Practice and Process). This is similar to Article 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case." United Nations & International Court of Justice, *Charter of the United Nations and Statute of the International Court of Justice* (United Nations 1968), also available at http:www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm (accessed Nov. 19, 2005; copy on file with Journal of Appellate Practice and Process).

40. They are, for example, available through publicly available web sources such as http://www.investmentclaims.com and http://www.naftaclaims.com.

41. See, for example, the discussion concerning the SGS cases against the Philippines and Pakistan: Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims—The SGS Cases Considered*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 325 (Todd Weiler, ed., Cameron 2005) [hereinafter *Leading Cases*].

42. In some of the Argentina BIT arbitrations, for example, one solution employed by the ICSID to avoid duplication of effort has been to have arbitrators sit on more than one panel where there are overlapping facts and issues.

43. *CME Czech Republic B.V. v. Czech Republic.* Foma; Award. <arcj 14. 2003 (UNCITRAL, Netherlands/Czech Republic BIT), also available at http://www.investment claims.com/decisions/CME-Czech-FinalAward-14Mar2003.pdf (accessed Nov. 17, 2005;

have seen the decisions by the two panels as an example of the need for an appellate body. In those cases, Mr. Lauder, the controlling shareholder of CME, brought a separate and personal arbitration claim under another treaty against the Czech Republic, while at the same time CME brought its claim. The facts and law underlying the two arbitrations were essentially identical, with the main differences being that the arbitrations were under different treaties brought by different, if related, claimants. While Mr. Lauder lost his arbitration, CME won handsomely against the Czechs. Would an appellate body really have made a difference? Would investment law have been more consistent if both those arbitrations had been appealed?

The answer in both cases is that there is no guarantee that an appellate review would have improved the result. The problem with the CME and Lauder cases is that the claims should have been consolidated into a single arbitration. If the two cases had been brought under the NAFTA, for example, this exact scenario could have been addressed under the NAFTA consolidation provisions.[44] In fact, the claimants in both arbitrations proposed consolidation of their claims to the Respondent, the Czech Republic, but were rejected. Hypothetically speaking, even if a multilateral appellate body had existed, applicable to both arbitrations such that a single panel could have reviewed both decisions, there is no guarantee that the appellate tribunal would necessarily have made a better or different decision in either case. High level appeals can be inconsistent as well.

In the final result, it appears to be rather premature, and perhaps alarmist, to suggest that the present model is broken on

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copy on file with Journal of Appellate Practice and Process); *Ronald S. Lauder v. Czech Republic*, Final Award, Sept. 3, 2001 (UNCITRAL, United States/Czech Republic BIT), also available at http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

44. NAFTA Article 1126(2) provides:

> Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order: (a) assume jurisdiction over, and hear and determine together, all or part of the claims.

Available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=161#A1126 (accessed Nov. 17, 2005; copy on file with Journal of Appellate Practice and Process).

the basis of consistency. Despite the lack of formal stare decisis, the system of soft precedent has actually resulted in consistency amongst the tribunal decisions. One need only to look at the recent jurisdiction awards rendered by the various tribunals involved in BIT claims against Argentina to see that there has actually been a high degree of consistency.[45]

When addressing the question of correctness, the standard of review of any review mechanism becomes a critical factor. The standard of review can be placed on a continuum with the limited review incorporated into judicial review under the UNCITRAL Model Law or New York Convention on one end of the scale, and full appeal on fact and law, with the right of the court to substitute its decision, on the other end of the spectrum. The further along the scale towards an appeal, the more onerous (and costly) the review process becomes.

This raises the question of deference: When we look at the development of investor-state arbitration, can we confidently say that the awards made up to this point have required correction? One's view frequently depends on whether one is on the losing side of an award. The quality of the arbitrators and the awards in these arbitrations has been extraordinarily high. However, there have been some rumblings, mostly by anti-free trade NGO's and governments on the losing side of certain issues, that these tribunals have been inadequate to the task. A review of these critiques exposes them as being more rhetorical fodder by activists rather than genuine criticisms about the quality of the decisions.

One element of any appeal system is the "unarticulated assumption" that senior practitioners are required to play the role of overseers to provide that sober second thought needed to maintain consistency in decisionmaking.[46] Short of perhaps a review by the International Court of Justice, who could provide a second decision that would be in a better position than the tribunals we have already seen? One of the reasons that the principle of finality appears to have worked in investor-state

45. For a discussion of the Argentina cases with respect to the particular issue of shareholder rights, see Ian Laird, *A Community of Destiny—The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims*, in *Leading Cases* 77, *supra* n. 41.

46. Lauterpacht makes a similar point. *See* Lauterpacht, *supra* n. 6, at 111.

arbitrations is because of the high quality of the arbitrators. We have a situation here in which one must ask whether it is necessary to fix something that is still developing, and that appears not to be broken.

V. CONCLUSION

Is an appellate mechanism required in investor-state arbitration for it to be viable? It would seem that it is too early to make a final determination on this question. After much initial enthusiasm, even the ICSID itself now appears to be taking a "go-slow" approach. Perhaps, as we examine the issue more closely, the objectives of finality and correctness will appear less contradictory. With high-quality arbitrators in the first instance, correctness then becomes less of an issue and finality remains workable. However, in the case of the United States, the movement towards some form of new appeal mechanism seems inexorable. Negotiations are proceeding as to the scope of these mechanisms. Whether correctness and consistency become preferred over finality remains to be determined.