Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership

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I. INTRODUCTION

Within the vast literature associated with investor-state arbitration, "transparency" tends to refer to the extent to which the public may be alerted to, gain information about, and perhaps participate in, proceedings organized to adjudicate an investor's claim.[1] The topic has assumed considerable importance in this once obscure corner of the international dispute resolution field.[2] The majority of the nearly 2400 investor protection treaties[3] contain investor-state arbitration provisions and the last decade has witnessed investor claims invoking those provisions in unprecedented numbers. With states called to account as never before, issues of process transparency have arisen. For reasons more fully developed below, the arbitration regime established under the North American Free Trade Agreement (NAFTA) Chapter Eleven[4] has

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1. The literature addressing process transparency is mounting. Among recent treatments are Jeffrey Atik, *Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 135 (Todd Weiler ed., 2004); Martin Hunter and Alexei Barbuk, *Non-Disputing Party Interventions in Chapter 11 Arbitrations*, in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 151 (Todd Weiler ed., 2004); V.V. Veeder, *The Transparency of International Arbitration: Process and Substance*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 88 (Loukas Mistelis and Julian Lew eds. 2006); Paul Freidland, *The Amicus Role in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 321 (Loukas Mistelis and Julian Lew eds. 2006).

2. For a non-exhaustive bibliography comprising fourteen pages (limited to NAFTA Chapter Eleven subjects alone), see CHARLES H. BROWER, II ET AL., NAFTA CHAPTER ELEVEN REPORTS, Vol. I, 683–99 (2005).

3. The United Nations Conference on Trade and Development (UNCTAD) recently estimated the total number of bilateral investment treaties (BITs) to be 2392. *Recent Developments in International Investment Agreements*, UNCTAD RESEARCH NOTE, Aug. 30, 2005, at 1, http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf.

4. North American Free Trade Agreement ch. 11, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA]. For a more detailed discussion on NAFTA, Chapter Eleven and arbitration see Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16

given rise to transparency policies of relative refinement and influence. This Article examines the formation of those policies. It first attempts to establish context by surveying selective aspects of state responsibility law, of investor-state arbitration regimes, and of the architectural and policy rudiments at work in the formation of the current trends. It concludes by anticipating what might be called "next-generation issues"—those transparency questions that will likely occupy policy makers in coming years.

II. DISTINCTIVE FEATURES OF INVESTMENT TREATY CLAIMS AND ARBITRATION

Despite possessing many important similarities, investor-state and international commercial arbitration exhibit in relation to each other important differences that explain why the two systems have become distinguishable on the questions of who can become informed about, observe, and participate in an arbitration.

A. Private International Commercial Arbitration—Some Benchmarks

International arbitration is the principal alternative to commercial litigation before national courts. Aided by institutions of long-standing repute, such as the International Chamber of Commerce (ICC),[5] the system offers both relative neutrality and considerable potential for the parties to anticipate disputes through contractual provisions[6] and to

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ARB. INT'L 393 (2000); Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA*, 43 HARV. INT'L L. J. 531 (2002); Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1415–18 (2003); Robert K. Paterson, *A New Pandora's Box?: Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77 (2000); Clyde C. Pearce & Jack J. Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections on the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311 (2000). Helpful collections of essays also include: ARBITRATING FOREIGN INVESTMENT DISPUTES (Norbert Horn ed., 2004); INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005) [hereinafter LEADING CASES]; NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004).

5. See generally W. LAURENCE CRAIG, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 2000); YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION (1998).

6. This theme was central to the United States Supreme Court's *Mitsubishi* decision, now approaching its twentieth anniversary. *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (refusal to enforce an arbitration clause condemned as "parochial"); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 20 (1972) (finding a forum selection clause in an international maritime contract to be enforceable). See WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION (1995) and

configure the associated process to suit the circumstances and personal tastes.[7] Thus, the same autonomy that allows parties to agree on the terms of contractual performance and upon governing law,[8] also permits them to replace publicly appointed judges and open court with private adjudicators selected for their expertise, impartiality, and other attributes—private adjudicators who are empowered and expected to advance the proceedings apace subject to the parties' joint preferences and minimum standards of procedural fairness.[9] The prerogative to choose arbitration is reinforced by important treaties[10] and corresponds to self-restraint on the part of domestic courts and legislatures; the latter still exercise powers of supervision through bargain-policing doctrines found in the governing law,[11] limits on subject-matter arbitrability,[12] and insistence upon minimal levels of procedural fairness,[13] but these modes of intervention have receded as states have vied for international arbitration business[14] and endeavored to avoid idiosyncrasy.[15] Additional self-restraint on the parts of courts is manifest in the

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GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS (1999) for detailed discussions on international forum selection clauses and the proper methods to create them.

7. *See, e.g.*, DERAINS & SCHWARTZ, *supra* note 5, at 210–12 (stating that the broad deference shown to parties' procedural wishes is consistent with the consensual nature of arbitration, and that international arbitrators "solicit the parties' views and very often seek to obtain their agreement").

8. *See, e.g.*, 1980 EEC Convention on the Law Applicable to Contractual Obligations, art. 3, Oct. 9, 1980, 19 I.L.M. 1492 (1980).

9. In general, arbitrators are given broad procedural discretion subject to the fundamental requirements that they provide a reasonable opportunity for each party to present its case while practicing equality of treatment. See UNCITRAL Arbitration Rules, U.N. GAOR, 31st Sess., art. 15(1) Supp. No. 17, U.N. Doc. A/31/17 (Apr. 28, 1976), [hereinafter UNCITRAL Arbitration Rules]. Discretion is important also to ensure that an arbitration is not undermined by a recalcitrant party's tactics. *See* ABA/AAA, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I (f) (2004) ("An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.").

10. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II (3), June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention] (requiring a court to refer parties to arbitration when an agreement to arbitrate is invoked).

11. *See, e.g.*, U.C.C. § 2-302 (amended 2003) (permitting a court to limit the effect of unconscionable terms).

12. *See, e.g.*, New York Convention, *supra* note 10, art. V(2)(d) (non-arbitrability under local law is a basis for non-enforcement).

13. *See, e.g.*, Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992) (refusing to enforce an award where a debtor was not given a meaningful opportunity to present its case). *See generally* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1989).

14. *See* generally Christopher Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, 24 INT'L REV. L. & ECON. 371 (2004); Department of Trade and Industry, Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law, reprinted in* 3 Arb. Int'l 278 (1987) [hereinafter Mustill Report].

15. *See, e.g.*, Mustill Report, *supra* note 14, ¶ 109 (recommending possible use of the Model Law structure and language to enhance accessibility of statutory revisions).

preclusive effect accorded foreign arbitral awards,[16] which are largely shielded from merits review in the enforcement process.[17]

In general, transparency is not given priority in international commercial arbitration, a by-product of certain assumptions about the process and about the wishes of would-be participants. Indeed, arbitration is often promoted as offering a less public venue than litigation.[18] The standard commercial arbitration model supports the claim by ensuring that the proceedings will be private,[19] that the tribunal will be bound to curtail its public disclosures concerning the process and the merits, [20]and that the parties can prohibit many dispute-related disclosures through mutual undertakings.[21] An ICC arbitration thus

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16. *See* New York Convention, *supra* note 10, art. III (requiring signatories to treat awards as binding and to enforce them according to the procedural rules of the arbitral situs and under the conditions of the New York Convention). *See generally* David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION"AND UNIFORMITY? 163 (Richard B. Lillich & Charles N. Brower eds., 1993) (observing that national courts are increasingly recognizing and enforcing covered arbitral awards through a uniformly restrictive approach to Article V of the New York Convention).

17. *See* New York Convention, *supra* note 10, art. IV (grounds for refusal to enforce do not include errors of law or fact).

18. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES—A PRACTICAL GUIDE 5 (2004), http://www.adr.org/sp.asp?id=22020 (noting that arbitration is, inter alia, a private process).

19. *See* UNCITRAL Arbitration Rules, supra note 9, art. 25 (unless parties otherwise agree, hearings will be held in camera); Rules of Arbitration of the International Chamber of Commerce, art. 27 (3), http://www.iccwbo.org/index_court.asp (Jan. 1, 1998) ("Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted"); Loukas A. Mistelis, *Confidentiality and Third Party Participation:* UPS v. Canada *and* Methanex Corporation v. United States, 21 ARB. INT'L 211, 213 (2005) (noting that many consider confidentiality "to be one of the main advantages of international commercial arbitration" over litigation).

In contemporary usage by specialists, "privacy" is often distinguished from "confidentiality." "Privacy" generally refers to the lack of public access to hearings and deliberations; "confidentiality" refers to disclosures of information related to the arbitration by the participants. Though there is an obvious connection between the two concepts, privacy is widely regarded as an attribute of arbitration while confidentiality is more controversial. *See generally* Richard Hill, *Does Confidentiality in Arbitration Extend to Court Proceedings?*, 5 INT'L ARB. Q. L. REV. 163 (2004); Mistelis, *supra;* Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 Arb. Int'l 303 (1995); Symposium, *Confidentiality in Arbitration*, 11 ARB. INT'L 297 (1995); Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. Int'l 1 (2002). The law of arbitral confidentiality varies among systems and is only occasionally treated in arbitration statutes, as opposed to rule formulae. *See* Mistelis, *supra*, at 215–16 (citing, as an exception, the Spanish Arbitration Act of 2003 and noting the failure of UNCITRAL Model Law to address the question). *See generally* Andrew Tweeddale, *Confidentiality in Arbitration and the* Public Interest Exception, 21 ARB. INT'L 59 (2005) (discussing whether arbitral proceedings should be confidential).

20. *See, e.g.,* UNCITRAL Arbitration Rules, *supra* note 9, art. 32(5) (awards made public only with the parties' permission); AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL ARBITRATION RULES, Art. 27(4) (2001), ("An award may be made public only with the consent of all parties or as required by law."), *available at* http://www.adr.org/sp.asp?i=22188#Article_27.

21. Tribunals are sometimes willing to incorporate the parties' confidentiality agreement in a

might run its course with not even the fact of the dispute being publicly disclosed.[22] Under this paradigm, if published at all, the award may be redacted to obscure the identity of the parties.[23]

That states and investor-state tribunals would respond to those urging transparency-minded accommodations in investor-state arbitration reflects the recognition that (unlike ordinary commercial arbitration) such "mixed" arbitrations involve sovereign parties, controversial governmental acts, responsibility assessed by a-national tribunals applying non-domestic law, and material implications for the public fisc. These themes recur in most discussions of investor-state arbitral transparency, and are surveyed below.

B. Investors and Host States—Protections and Private Standing

1. Protection of Aliens—Traditional Espousal

Many of the attributes of investor-state arbitration that implicate transparency relate to its function as a mechanism for determining state responsibility. In classical understanding, international law exists primarily to regulate relations among states, and only indirectly confers protections and obligations upon private actors.[24] Among the norms that have come to bind states were several concerning the treatment of aliens and their property. Aliens, for example, were not to be denied justice before host state courts,[25] were to not be the object of injurious state

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tribunal order. *See, e.g.*, Ethyl Corp. v. Canada, 38 I.L.M. 736 (NAFTA Arbitral Trib. 1998) (incorporating the parties' agreement on handling confidential materials). *See also infra* note 194 and accompanying text. Such agreements will take account of, by suitable exemption, disclosures made pursuant to law, such as those required of publicly traded companies whose regular filings may have to disclose the fact of the dispute; *see also* CRAIG, ET AL., *supra note* 5, at 295–96 (stating that rules governing the procedures, which would include confidentiality, are decided almost completely by the parties); DERAINS & SCHWARTZ, *supra note* 5, at 210–11 (1998) (same).

22. This is most likely to be the case where the parties are not public companies.

23. *Cf.* KLAUS PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS 317 (2006) (referring to "sanitized" awards).

24. The classically organized reference works tend to refer to states as the principal "subjects" of international law. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57–58 (6th ed. 2003) ("It is States and organizations . . . which represent the normal types of legal person on the international plane."); ANTONIO CASSESE, INTERNATIONAL LAW 3–5 (2001) ("States are the principal actors on the international scene."). Notable exceptions to the normal ambit of international law include the laws of war and of piracy that govern to some extent the conduct of individuals. *See generally* I.A. SHEARER, STARKE'S INTERNATIONAL LAW 53–54 (11th ed. 1994).

25. ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938). Under NAFTA, denial of justice claims are a subset of those that legitimately can be brought under Article 1105's international minimum standard. *See* Jack J. Coe, Jr., *Denial of Justice and NAFTA Chapter Eleven—The Mondev Award,* 3(1) ABA INT'L ARB. NEWS 2 (Winter 2002/2003). By its nature, a denial of justice claim compares the treatment actually received by the claimant in the host state's courts to an international standard. The analysis is fact-intensive and free

arbitrariness or discrimination,[26] were to receive suitably diligent protection of their person and property,[27] and in the event that property was taken by the state, were to receive compensation at a level set by international law.[28] That bundle of obligations, which subsists today, applies irrespective of the host state's internal law.[29]

That these obligations are owed among states inter se traditionally was reflected in the manner in which alleged breaches of norms were pursued. While, in theory, the injured alien might bring claims against the offending state in that state's courts (or perhaps in the investor's home courts),[30] standing to assert breaches of international law in the international arena resided ordinarily with the aggrieved alien's state of

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of any bright line tests. Though each arbitrator can be expected to use her own system and experience as a partial basis of comparison, justice is denied only when the alleged deficiency is grave enough to fall below what states hold as a minimum level of procedural and substantive fairness. J.L. BRIERLY, THE LAW OF NATIONS 286–91 (H. Waldock ed., 1963); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 57–84 (2005). With investors availing of the arbitral remedy under NAFTA, the proscription against denial of justice came to be examined in a modern civil litigation context. The United States has twice confronted denial of justice claims. These were the *Mondev* and the *Loewen* cases, under NAFTA Chapter Eleven. With the help of skillfully deployed, largely jurisdictional, arguments, the United States prevailed in each case. *See generally* Loewen Group, Inc. v. United States, Final Award, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (2003); Mondev v. United States, ICSID Case No. ARB(AF)/99/2, Final Award, (Oct. 11, 2002), *available at* http://www.naftaclaims.com/disputes_us_7.htm. The *Loewen* award was particularly controversial. William S. Dodge, Loewen v. United States: *Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 571 (2002) (discussing claim that a denial of justice had occurred in an American court); Noah Rubins, Loewen v.United States: *The Burial of an Investor State Arbitration Claim*, 21 ARB. INT'L 1, 19–20 (2005) (discussing whether Loewen –a denial of justice claim—was correctly decided); Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice:* Chattin v. Mexico *and* Loewen v. USA, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 669 (Todd Weiler ed., 2005).

26. *See* BIN CHENG, PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 36–37, 42 (1953); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 315 (1991).

27. *See* GEORGE A. FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW 93 (1937) (noting that state responsibility to aliens and their property is governed by international law, notwithstanding contrary national law); *cf.* RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 60–61 (1995) (noting that the full protection and security clauses found in modern BITs originated in older Friendship treaties); *see also* AMT v. Republic of Zaire, ICSID Case No. ARB/93/1, 36 I.L.M. 1531, 1548 (1997) (requiring Zaire to show it had taken "all measure[s]" of precaution to protect the investments of claimant).

28. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 478–84 (2002); Jack J. Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the* Tecmed *Case: Context and Contributions*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 597 (Todd Weiler ed., 2005); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS (HAGUE ACAD. OF INT'L L.) 259 (1982).

29. *See* FINCH, *supra* note 27, at 93–94 (noting that state responsibility with respect to aliens and their property is governed by international law, notwithstanding contrary national law).

30. *See, e.g*, Alfred Dunhill of London, Inc. v Republic of Cuba, 425 U.S. 683 (1976) (ruling on applicability of certain judicial self-restraint doctrines when acts of a state are involved).

nationality.[31] Consequently, that state enjoyed discretion in pursuing the respondent state on the international plane and was entitled to determine the sufficiency of any reparations proffered. Given the lack of predictability and control given the aggrieved enterprise, the system did not offer much comfort to prospective investors as they considered the risks of venturing abroad.[32]

2. Edifying Custom—Treaties and Private Arbitral Standing

Sluggish and fragmentary, customary international law in its natural state was, and remains, ill-equipped to provide detailed, comprehensive guidance to host states and prospective investors.[33] Treaties thus understandably came to represent an essential feature of home-state/host-state interaction.[34] For the United States, the more general Friendship Commerce and Navigation (FCN) treaties that originally addressed investor protections[35] were succeeded by BITs inspired by emerging

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31. *E.g.*, Mavrommatis Palestine Concession Case, 1924 P.C.I.J. (ser. A) No. 2 (Greece asserting the rights of a private company); Barcelona Traction Light and Power Co. (Belg. v. Spain) 1970 I.C.J. 3 (Feb. 5) (Canada, as place of incorporation of alien, not Belgium, had standing). *See generally* ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 204–10 (1989).

32. *See generally* NOAH RUBINS & N. STEPHEN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 405–42 (2005). "Espousal" of a claim by the investor's state of nationality is discretionary on the part of the home state and is thus unpredictable. It tends also to produce low levels of compensation. Coe, *supra* note 4, at 1414–17. *Cf.* ANDREAS LOWENFELD, INTERNATIONAL PRIVATE INVESTMENT 151 (1982) (noting that western nations have accepted settlements with expropriating host states representing amounts far less than full value of the property taken). Additionally, diplomatic protection (espousal) came to be associated in some quarters with abuses by more powerful states in their dealing with weaker respondent states. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1, n.1 (1986).

33. For a general discussion regarding the formation of custom, see generally Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTEEN YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 67–79 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). One of custom's principal defects is that it must be evidenced by a persistent, widely observed state practice sustained for a duration sufficient to pass inchoate principle to binding norms. Problems of proof abound since the practice pattern identified must ordinarily be shown to coincide with a sense of legal obligation (opinio juris), rather than being merely a usage. FINCH, *supra* note 27, at 47–50; JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 23–26 (2005); *cf.* ROSALYN HIGGINS, PROBLEM AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 17 (1994) (noting that uncertainty occurs as to the content of particular norms).

34. *See generally* Gerald Aksen, *The Case for Bilateral Investment Treaties*, *in* PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1981 357–90 (1981); DOLZER & STEVENS, *supra* note 27, at 1–18.

35. *See generally* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE 7–43 (1992). The diverse range of topics covered in a FCN treaty might include tax issues, the rights of business travelers, standing in local courts, and enforcement of arbitral awards. *Id.* at 14–19; DOLZER & STEVENS, *supra* note 27, at 10. Because the Iran-United States Friendship Treaty was held to have remained in effect during the Islamic Revolution of the late 1970s, and hence to be a source of law at the Iran-United States Claims Tribunal, it is perhaps the instrument of

European practice.[36] Such instruments are now standard centerpieces in many states' efforts to promote and attract foreign investment.[37] They guarantee in relative detail a range of protections to qualifying investments and investors, but remain dependent on custom in many respects to supply essential parts of the analysis.[38]

Despite the suggestion that the NAFTA investor arbitration provisions introduced something novel, years before NAFTA was finalized, private investor standing had become a dominant feature of BITs, entitling an injured investor to assert breach-of-treaty claims before arbitral tribunals.[39] This trend has been fueled by weaknesses in the espousal system referred to above and by widespread ratification of the ICSID Convention,[40] which makes available an autonomous arbitration system accepted by over 140 state parties.[41]

In contrast to the private setting in which arbitral jurisdiction generally is founded upon a clause embedded in the main contract,

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this type to have received the highest number of authoritative constructions. For a discussion on the tribunal generally, see GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1996); CHARLES N. BROWER & JASON BRUESCHKE, THE IRAN-U.S. CLAIMS TRIBUNAL (1998).

36. *See generally* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. L. 105 (1986).

37. WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 175–97 (2005), *available at* http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf.; DOLZER & STEVENS, *supra* note 27, at 11–13.

38. As an example, custom is used to determine when a taking has occurred so as to trigger the treaty's obligation to make compensation. *See generally* Coe & Rubins, *supra* note 28.

39. Legum, *supra* note 4, at 531–32.

40. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S 159 (1965) [hereinafter ICSID Convention]. The Convention establishes the International Centre for the Settlement of Investment Disputes (ICSID). It also sets forth a detailed arbitral regime designed, in conjunction with the ICSID's arbitration rule formulae, to operate independently of national legal systems. P. F. Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 INT'L & COMP. L.Q. 367, 378 (1979). A leading commentary on the ICSID Convention is CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001). The Convention applies to legal disputes arising out of an investment if the host state and the investor's home state (national links delineated with greater technicality in the convention) have both ratified it and consent governing the dispute in question has been given by the parties. ICSID Convention, *supra*, art. 25. It follows that no ICSID format exists to accommodate investment disputes where neither state implicated is an ICSID Convention party—an impact that affects NAFTA's investor arbitral regime because, at present, neither Canada nor Mexico is a party to the ICSID Convention. The restriction dictates that Canadian and Mexican investors are limited to UNCITRAL arbitration when, respectively, Mexico or Canada is the respondent state. Where the United States (a ratifying state) is involved, ICSID's alternative format, the Additional Facility, is available. ICSID ADDITIONAL FACILITY RULES, Schedule C, art. 2 (2003), [hereinafter Additional Facility Rules], *available at* http://www.worldbank.org/icsid/facility/ICSID_Addl_English.pdf. In addition, there are indications that ICSID remains prepared to help administer NAFTA arbitrations under the UNCITRAL rules, which mitigates the effects of limited treaty membership.

41. A list of contracting states is available at http://www.worldbank.org/icsid/constate/c-states-en.htm.

investor-state arbitration typically depends on post-dispute mutual assent formed after the investor becomes aggrieved. By processing its claim in the prescribed manner, the investor accepts what is functionally a treaty-based standing offer[42] by the host state to arbitrate a particular class of claims with a defined class of persons.[43] The "offer," with all its qualifications, is construed according to international law. The detailed claims procedure of the treaty[44] in turn is augmented by whichever procedural format the investor chose when launching the claim,[45] making for an arbitral procedure governed both by treaty and rule formulae.

To place in the investor's hands the benefit and burden of pressing the claim reduces the home state's role while transferring control and accountability to actors with concrete interests in the dispute. While relieving the home state of the delicate business of distinguishing worthy grievances from others, direct arbitral standing also removes any screening function the home state might have otherwise performed.

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42. The private investor's pressing of guarantees conferred at the interstate level is analogous to a third-party beneficiary asserting rights under a private contract or an injured person bringing a warranty claim under the Uniform Commercial Code against a seller with which that plaintiff has no privity of contract. *See* U.C.C. § 2-318 (2003) (delineating the beneficiaries of warranties).

43. *See* Andrea Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183, 183 (2001) (discussing NAFTA arbitration procedures for parties to an investment dispute that lack privity); Jack J. Coe, Jr., *The Mandate of Chapter 11 Tribunals—Jurisdiction and Related Questions*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 215, 219 (Todd Weiler ed., 2004) (discussing the contrast between investor-state arbitration and that in the private setting); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 233 (1995) (discussing a new approach to the resolution of international disputes that "offers the hope of sanctioning legal rights in individual cases brought directly by the aggrieved party").

44. *See, e.g.*, NAFTA, *supra* note 4, ch. 11, § B ("Settlement of Disputes between a Party and an Investor of another Party").

45. The UNCITRAL Arbitration Rules are often one of two procedural choices. DOLZER & STEVENS *supra* note 27, at 129–30 (discussing BITS referencing ICSID, ICC arbitration, or UNCITRAL rules); Horacio Grigera Naon, *The Settlement of Investment Disputes Between States and Private Parties*, 1 J. WORLD INVESTMENT 83–85 (2000)(considering ICC, UNCITRAL and other format choices); Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV. 1, 7–9 (2004) (discussing proceedings governed by UNCITRAL rules rather than ICSID). Despite offering the principal alternative to institutional arbitration in arbitrations not involving a state, the UNCITRAL rules were adopted by the Iran-United States Claims Tribunal, where both interstate and mixed (alien-to-state) arbitration has been pursued for 25 years. DAVID CARON AND MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED 7–8 (1995); JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 5 (1991).

III. SYSTEM ATTRIBUTES THAT IMPLICATE TRANSPARENCY

A. In General

The literature critiquing investor-state arbitration in general, and NAFTA Chapter Eleven in particular, reveals misgivings that are, to a large extent, reactions to established systemic attributes either of international arbitration or of international law. As a matter of logic, that these attributes are often mistaken for revolutionary mechanisms and methods does not fully discredit the cries for greater transparency they induce. To merely describe these features—many of which have long been taken for granted among specialists—does much to place in context the negative appraisals the system has inspired within a broader audience. For convenience, these can be clustered under three headings: the governing law and associated rules of responsibility; the tribunals; and control and award review mechanisms.

The purpose of the survey that follows is to explain how a diverse and growing audience of observers might become intrigued, concerned, and even alarmed. These are reactions that punctuate the literature on the subject of investor-state arbitration,[46] and that to some extent have driven transparency reforms.[47]

B. Public International Law and State Responsibility

Public international law often governs investor-state arbitration, either exclusively,[48] or as a moderating body of principles that constrains the internal law of the host state.[49] Frames of reference developed by consulting domestic law are not fully helpful in anticipating the dictates of international law. Though some municipal systems incorporate

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46. *See* BROWER, *supra* note 2.

47. Methanex Corp. v. United States, Statement of Respondent, the United States Re Petition for Amicus Status, at 2–3, 5, 14 (Oct. 27, 2005) (to fail to admit amici would reinforce a perception that Chapter 11 was an "exclusionary and secretive process."), *available at* http://www.state.gov/s/l/c5821.htm.

48. *See* NAFTA, *supra* note 4, art. 1131(1) (requiring Chapter 11 tribunals to decide in accordance with NAFTA and "applicable rules of international law").

49. *See* Ibrahim F. I. Shihata & Antonio Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration Under the ICSID Convention*, 9 ICSID REV.: FOREIGN INVEST. L.J. 183, 195, 202–06 (1994).

international law into the domestic regime as a formal matter,[50] international law's methodology remains discrete from its domestic counterparts. It follows from this dualism that the levels of protection accorded under the two regimes may differ. Consequently, the protections for aliens recognized by international law may, in a given circumstance, be greater than those available under domestic law (for aliens or nationals of that state).[51] Under international law, moreover, a host government's compliance with domestic law is not a defense to international responsibility[52]—a precept which holds even though the respondent government has acted with no illicit animus[53] and pursuant to

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50. BROWNLIE, *supra* note 24, at 47–48.

51. There is a distinction between a state's undertaking to accord aliens national treatment and one that accepts international law's protections as a floor, even if that baseline requires better treatment for aliens than for nationals—the so called "international minimum standard." Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, 78 N.Y.U. L. REV. 30 (2003); Coe, *supra* note 4, at 1439. In a given legal system, preferences for foreign enterprises under investment treaties may prompt plausible assertions of unconstitutionality. *See* Mark. A. Luz, *NAFTA, Investment, and the Constitution of Canada: Will the Watertight Compartments Spring a Leak?*, 32 OTTAWA L. REV. 35, 41 (2000) (analyzing Canadian constitutional law and Chapter 11 of NAFTA). The question of "super national" rights for investors also generated criticism during the campaign to formulate the Multilateral Agreement on Investment (MAI). Edward M. Graham, *Regulatory Takings, Supernational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations*, 31 CORNELL INT'L L.J. 599, 611–12 (1998). The issue also has been addressed by United States lawmakers. *See* 19 U.S.C. § 3802(b)(3) (supp. 2005) (codifying this policy under the Bipartisan Trade Promotion Act of 2002):

> Recognizing that United States law as a whole provides a high level of protection for investment . . . the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, *while ensuring that foreign investors, in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States.*

Id. (emphasis added).

52. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 19, May 23, 1969, 1155 U.N.T.S. 331, 25 I.L.M. 543 [hereinafter Vienna Convention] (stating that non-compliance with a treaty is not excused by internal law); *Report of the International Law Commission*, U.N. GAOR, 53rd Sess., Supp. No. 10 at ch. IV.E.1, art. 3, U.N. Doc. A/56/10 (Nov. 2001), *available at* http://www.un.org/documents/ga/docs/56/a5610.pdf [hereinafter ILC Report] (noting that international wrongfulness not dictated by domestic law characterization).

53. Under international law, responsibility may attach to a state though no specific intent, recklessness, or negligence is shown. The content of a particular substantive rule or obligation may contain such a standard, but that is specific to the substantive rule or obligation in question, and is not a result of the rules of international responsibility. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 12–13 (2002). The question has arisen often in expropriation cases. *See, e.g.*, Biloune v. Ghana Invs. Centre, 95 INT'L L. REP. 183 (1993) (determining whether the treatment of the investor was politically motivated not essential to render an award in the investor's favor). *See also* Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36, ¶ 103 (2000) ("[E]xpropriation . . . includes . . . incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."); Phillips Petroleum Co. v. Iran, 21 Iran-U.S. Cl. Trib. Rep. 79, 115 (1989) (noting that "liability does not depend on proof that the

a constitutionally recognized regulatory mandate related to, for example, public health or the environment.[54] Concurrently, many segments of international law doctrine relevant to investor protections are fragmentary, highly fact-dependent,[55] and arguably, indeterminate.[56] Debate rages, for example, concerning the extent to which public safety regulation is exempt from ordinary expropriation analysis,[57] the elements necessary for an actionable denial of justice claim,[58] and the circumstances under which a contract breach might be asserted as a treaty claim.[59] The governing jurisprudence accordingly leaves room for investors affected by government measures to press plausibly and in good faith one or more theories of recovery.[60] The amounts claimed tend to be substantial, and counsel are sometimes willing to proceed on a

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expropriation was intentional"); Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225–26 (1984) (declaring that the government's intent is less important than the effects on the owner). For a contrary view, see Katharina A. Byrne, *Regulatory Expropriation and State Intent*, CAN. Y.B. INT'L L. 89, 91–92 (2000) (citing Sea Land Serv., Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 166 (1984) (noting that under the circumstances recovery would require "deliberate governmental interference" with claimant's operations)). *But see* BROWER & BRUESCHKE, *supra* note 35, at 429, 461 (stating that the language in *Sea Land* relates to attribution in the context of failures to act due to general deterioration in the management of port services).

54. William T. Warren, *Paying to Regulate: A Guide to* Methanex v. United States *and NAFTA Investor Rights*, 31 ENVTL. L. REP. 10,986 (2001). For an illustrative award see, *Compania del Desarollo de Santa Elena, S.A. v. Costa Rica*, Final Award, Feb. 17, 2000, 39 I.L.M. 1317, ¶ 72 ("[E]xpropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are . . . similar to any other expropriatory measures [such that] . . . where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.").

55. For example, whether the host state accorded fair and equitable treatment, a protection found in most BITs, is not capable of bright line analysis; not all state misfeasance rises to the level of a breach. *See generally* J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and Influence of Commentators*, 17 ICSID REV. 21 (2002) (discussing the "Minimum Standard of Treatment" under NAFTA Article 1105); Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35 (2003) (discussing how the minimum standard of treatment under NAFTA Article 1105 may be determined in future cases).

56. Charles H. Brower, II, Mitsubishi, *Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 920–23 (discussing inconsistency in investor-state awards); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1558–82 (2005) (surveying inconsistent decisions in investment treaty arbitration).

57. *See* Coe and Rubins, *supra* note 28.

58. Rubins, *supra* note 25, at 19–20.

59. *See generally* Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims—The SGS Cases Considered*, in LEADING CASES, *supra* note 4, at 325.

60. This is a common theme in critiques addressing investor-state arbitration. *See, e.g.*, *Trading Democracy*, (PBS television broadcast Feb. 1, 2002), *available at* http://www.pbs.org/now/transcript/transcript_tdfull.html (noting that foreign investors are invited to file a claim if they believe they have suffered injury from regulation and also noting that such claims may have a chilling effect on regulation). This concern explains in part why the Model United States BIT contains a summary adjudication procedure designed to allow tribunals to dispatch frivolous claims at an early juncture. *See* Legum, *supra* note 4, at 532–33.

contingent fee basis.[61] Further, no rule requires a tribunal to invariably award the state its costs,[62] even when the claim is fully unsuccessful.[63]

C. *The Tribunals*

Often, a majority of arbitrators appointed for a given investor-state arbitration are not citizens of the respondent state.[64] Two of the three are frequently appointed after private, ex parte, interviews with the respective appointing parties.[65] Investor-state arbitrators need not have ever held a judicial or diplomatic rank in their home states; nor, in theory, must they be recognized experts in public international law.[66] They are entitled to determine their own jurisdiction[67] and to hold the arbitration proceedings away from the respondent state.[68] Moreover, the community of investment arbitration specialists is relatively small. These lawyers sometimes change roles from one arbitration to the next, perhaps being counsel or party-appointed expert in one arbitration, while

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61. This practice is not an invariable feature within the claimants' bar. Anecdotal accounts suggest that firms are aware of the many hurdles to recovery and the disinclination of states—especially NAFTA states—to settle.

62. Coe, *supra* note 4, at 1459–60; Jack J. Coe, Jr., *The State of Investor-State Arbitration—Some Reflections on Professor Brower's Plea for Sensible Principles*, 20 AM. U. INT'L L. REV. 929, 932 (2005).

63. Legum, *supra* note 4, at 532–33.

64. *See, e.g.*, ICSID Convention, *supra* note 40, art. 39 (stating that a majority of arbitrators shall have a nationality other than that of the two states involved).

65. JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL TEXT 110–12 (1997). Such pre-appointment contact is not per se unethical under the prevailing view and, ordinarily, is not a ground for challenge if the interview was confined to subject-matter other than the merits and in other respects does not compromise the appointee. *See* Ben H. Sheppard, Jr., *A New Era of Arbitration Ethics for the United States, The 2004 Revision to the AAA /ABA Code of Ethics for Arbitrators in Commercial Disputes*, 21 ARB. INT'L 91, 95–96 (2005) (distinguishing permitted contact and conversations from prohibited types). The parties may request that an institution select their arbitrators—a practice which solves certain issues raised by the party-appointed arbitrator model. In general, however, parties prefer to have maximum control over who will serve. When they do, their confidence in the system's thoroughness and fairness should be amplified. *See* Lucy Reed, *Arbitration Principles Prove Effective in Resolving Holocaust Bank Claims*, *in* INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS 59, 64–65 (The Int'l Bureau of the Permanent Court of Arbitration ed., 2000) (stating that a tribunal's credibility is enhanced when it is "party-balanced").

66. Those who have served, however, have included a mixture of distinguished academics and practitioners, often with governmental or judicial experience; some have been public international law authorities. *See* Coe, *supra* note 4, at 1457–60 (providing a listing of arbitrators).

67. *See generally* Coe, *supra* note 65, at 57–59, 140–46, 168.

68. Tribunals, in default of the parties' agreement on the question, are entitled to designate the arbitral seat. *See generally* Charles H. Brower, II, The *Place of Arbitration*, *in* LEADING CASES, *supra* note 4, at 151. The seat is less juridically important when the arbitration is governed by the ICSID Convention. Regardless, arbitrators may hold the proceedings away from the seat if convenience dictates. *See, e.g.*, UNCITRAL Arbitration Rules, *supra* note 9, art. 16 (3)(4) (noting that an arbitration may be held in any place the tribunal deems proper given the circumstances).

serving as an arbitrator in another.[69] Rule texts and ethical guides regulate these practices and depend heavily on disclosure,[70] good judgment among professionals, and a party's ability to challenge an arbitrator if there is good reason to question his or her independence.[71] When a challenge is mounted, however, the ensuing judicial or institutional determination of whether the arbitrator must step down is frequently decided against the challenging party.

D. Control Mechanisms[72]

The global award enforcement mechanisms in place,[73] in combination with purposefully limited sovereign immunity,[74] ensure that a state resisting the execution of an investor-state award will often fail.[75] As in the case of commercial arbitration awards, investor-state awards are subject to only limited review—review which, in principle, does not include an examination of the merits.[76] A number of such disputes settle

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69. Coe, *supra* note 4, at 1436.

70. *See generally* INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004), *available at* http://www.ibanet.org/images/downloads/guidelines%20text.pdf. *See, e.g.*, UNCITRAL Arbitration Rules, *supra* note 9, art. 9 (noting that a prospective arbitrator must disclose circumstances likely to raise justifiable doubts about his impartiality and independence).

71. *See, e.g.*, UNCITRAL Arbitration Rules, *supra* note 9, art. 10 (noting that a party may challenge an arbitrator when "circumstances . . . give rise to justifiable doubts" as to his "impartiality or independence"). In some systems of arbitration, it is doubtful that the parties could alter the rule that arbitrators are to be independent and impartial. *See* DERAINS & SCHWARTZ, *supra* note 5, at 108, 121–25 (noting that ICC arbitrators must be and remain independent of the parties and must sign a statement of independence).

72. *See generally* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 740–47. Professor Reisman is perhaps the figure most to be credited with making the phrase "control mechanisms" popular.

73. *See generally* David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION"AND UNIFORMITY? 163, 164–69 (Richard B. Lillich & Charles N. Brower eds., 1994) (discussing enforcement of foreign arbitral awards).

74. *See generally* HAZEL FOX, THE LAW OF STATE IMMUNITY 67–123 (2002) (examining sources of the law of state immunity); *see also* Creighton Ltd. v. Qatar, 181 F.3d 118, 124 (D.C. Cir. 1999) (holding that immunity is not a bar to enforcement when 28 U.S.C. § 1605(a)(6) applied); Nathalie Meyer-Fabre, *Enforcement of Arbitral Awards Against Sovereign States, A New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in* Creighton v. Qatar, 1 INT'L ARB. Q.L. REV. 89, 91–95 (2000) (analyzing sovereign immunity and *Creighton* case).

75. *See generally* Albert Jan van den Berg, *Refusals of Enforcement Under the New York Convention of 1958: The Unfortunate Few*, *in* ARBITRATION IN THE NEXT DECADE 75 (1999) (discussing grounds for refusal of enforcement of award).

76. *See generally* KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 724–25 (1993) (providing tables that indicate, inter alia, the grounds for recourse under the UNCITRAL Model Law and in specific countries); Jack J. Coe, Jr, *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?* , 19(3) J. INT'L.

before an award issues, sometimes upon terms that are not widely publicized.[77]

IV. CALIBRATING RULES AMIDST COMPETING INTERESTS

During the period in which arbitration has entered the lexicon of consumers at large, ironically, the expectation that adjudicative and governmental processes will be relatively transparent has also become relatively engrained within public sensibilities. Particularly where a state is a party, openness thus aligns well widely held expectations,[78] while systems that have private elements attract attention and raise suspicions.[79] Arrayed against the bromide that transparency enhances accountability and promotes legitimacy[80] are certain realities, however. Transparency, like other potentially valuable characteristics, comes at a price: each participant must accept new risks and more complicated tasks in an already complex system of investor-state arbitration. Whether the price is worth paying is inescapably a question of priorities; competing policies, interests, and expectations abound.

ARB. 185, 202–03 (2002) (describing courts' deficient capacity for substantive review); *see also* Andrea Giardina, *ICSID: A Self-Contained, Non-National Review System*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 199, 200–04 (Richard B. Lillich & Charles N. Brower eds., 1994) (noting the limited basis for annulment under the ICSID Convention).

77. Settlement has not often occurred in Chapter Eleven cases. Coe, *supra* note 4, at 1459–60. The settlement rate of ICSID cases in general seems to be in the range of twenty-five to thirty percent. I infer this from ICSID's docket listing of the cases it registers and the outcomes indicated for the concluded cases, including a number that end by settlement. The approximation is offered because an exact percentage varies, and some cases have been resubmitted after an annulment, thus presenting questions of how one should count the total number of cases. See the ICSID list of concluded cases and outcomes, which is available at http://www.worldbank.org/icsid/cases/conclude.htm. *See also* Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 21 n.71, 35 (2005) (suggesting the rate could be improved by more routine use of conciliation).

78. That the public might expect access is easily understood. Entire cable television networks are devoted to dissecting court cases, perhaps aided by publicly available court documents, real-time transmissions of various types from the courthouse (and perhaps from within the courtroom), and post-trial interviews with jurors. Concurrently, freedom of information legislation has become relatively common, so that where a state is an arbitral party, the expectation that access will be granted may be particularly firmly entrenched.

79. *See, e.g.*, Anthony De Palma, *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far Critics Say*, N.Y. TIMES, Mar. 11, 2001, at 1 (describing the investor-state arbitral process as a form of "secret government").

80. Large quantities of ink and paper have been devoted to the question of the "legitimacy" of the investor-state dispute process. *See generally* Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51 (2004); Atik, *supra* note 1; Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003); *Franck, supra* note 56; Naveen Gurudevan, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L. J. 399 (2005).

States responding to calls for transparency have been wise enough to not adopt extreme measures that fully denature the arbitral method known to the mercantile world, with its emphasis on privacy, party autonomy,[81] tribunal discretion, and a paucity of mandatory procedures.[82] Rather, moving incrementally, the approach has been to seek the correct balance between mandatory rules on the one hand, and traditional elements that promote flexibility and attract arbitration users on the other.[83]

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81. In the rule formulae applicable to investor-state arbitration, the parties' ability to "otherwise agree" is the norm, not the exception, and many important elements can be established by the parties, either individually or jointly. In Chapter Eleven arbitration, for instance, the disputants may each choose their own arbitrators, NAFTA, *supra* note 4, art. 1123, and together may designate the place of arbitration, *id.* art. 1130, the languages of the proceeding, Additional Facility Rules, *supra* note 40, art. 30; UNCITRAL Arbitration Rules, *supra* note 9, art. 17(1), and, at least to an extent by agreement, eliminate reasoned awards. *See* COE, *supra* note 65, at 294–95 (discussing the parties' ability to constrain the scope of awards); UNICITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION art. 31(2) (1985), *available at* http://www.jus.uio.no/lm/un.arbitration.model.law.1985. By inaction, they may also give effect to numerous default rules, such as that which prevents the public at large from attending hearings; *see, e.g.*, UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION art. 25(4), *available at* http://www.us.ulo.no/lm/un.arbitration.model.law.1985.

Yet, in practice, maximum exploitation of the foregoing opportunities does not occur. Because mutual assent to arbitrate ordinarily is complete only after the dispute arises, the disputing parties typically will not have had a non-adversarial context in which to fix by agreement even such fundamental details as the place of arbitration or the number of arbitrators. While these matters can be addressed after the claim is initiated, the contentiousness of that setting may prevent accord on such questions, reducing the probability that the parties will agree to deviate from the default transparency rules in place, and conversely that transparency rules requiring the parties to opt in may seldom operate.

82. The twin canons that parties are to be afforded a full opportunity to present a case and equality of treatment have been referred to as the "Magna Carta of Arbitral Procedure." Alan Uzelac, *UNCITRAL Notes on Organizing Arbitral Proceedings A Regional View*, 4 CROATIAN ARBITRAL Y.B. 135, 140 n.17 (1997), *available at* http://aanuzelac.from.hr/pubs/1.1.2.16 UNCITRAL_Notes.pdf. They would, in many jurisdictions, be regarded as impervious to the contrary agreement of the parties. In addition, in some systems of arbitration, the parties could not alter the rule that arbitrators must be independent and impartial. *See* DERAINS & SCHWARTZ, *supra* note 5, at 108, 121–25 (noting that ICC arbitrators must be and remain independent of the parties and must sign a statement of independence).

83. The question to a great extent involves a choice from among rule structures. If less dogmatism can be tolerated, one can employ default prescriptions favoring transparent processes, while enabling the parties or the tribunal to opt-out. To retain such flexibility would comport with the prominent roles traditionally given party autonomy and tribunal discretion to ensure fair proceedings and an enforceable result, and with the correspondingly short list of rules currently framed as imperatives. Yet to accord the parties or the tribunal too much room to maneuver may also reduce greatly the general level of transparency ultimately achieved.

Certainly, arbitrators would not be expected invariably to prefer privacy to heightened supervision. They have a stake in the public's perception of investor–state arbitration and in the legitimacy it enjoys among the disputants whom the system serves. Still, left with discretion, tribunals accustomed to the privacy norm of commercial arbitration, and not enthusiastic about the logistical complications involved in opening the process, may find numerous justifications for overriding the default rule. Naturally, the cases in which the parties (or a tribunal) might prefer to avoid supervision or administrative complications are likely often to be the ones most intimately connected to the public interest.

V. TOWARDS A TRANSPARENT DISPUTES REGIME—THE AWARD AS A CENTERPIECE

A. Contemporary Award Publication Policies

The simplest expedient for adding transparency to an arbitral system is to publish the work of the arbitrators and, in particular, their awards.[84] Indeed, whatever thought might have been given by Chapter Eleven's architects to other transparency issues, only publication of awards was affirmatively addressed, and liberally.[85] The United States and Canada confirmed that when either of them is a disputant, the award could be published by either the respondent state or the private disputant.[86] The two states' pro-publication policies were thus roughly equivalent to those adopted by the International Court of Justice (ICJ)[87] and the Iran U.S. Claims Tribunal.[88] Mexico, by contrast, would let that question be governed by whichever rule set governed the proceedings.[89]

The availability of non-NAFTA investor-state awards, by contrast, is not assured by a blanket, NAFTA-style authorization to publish. Absent the parties' permission, ICSID for instance, may excerpt for publication the rules applied by tribunals, but neither ICSID nor an ICSID tribunal may publish an award.[90] Recently, however, the parties have tended to permit publication of awards,[91] an attitude encouraged by ICSID.[92] Certain non-NAFTA, non-ICSID investment arbitration awards

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84. Franck, *supra* note 56, at 1616.

85. *See* NAFTA, *supra* note 4, Annex 1137.4. A very good website collects NAFTA Chapter Eleven awards and related materials. The website, http://www.naftaclaims.com, enhanced accessibility to an unprecedented degree. Other websites, including ICSID's own, have increased substantially the availability of non-NAFTA investor-state awards.

86. NAFTA, *supra* note 4, Annex 1137.4.

87. Statute of the International Court of Justice, art. 46, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

88. Tribunal Rules of Procedure, art. 32(5), *reprinted in* IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 433 (David Caron & John Crook eds., 2000) [hereinafter Claims Tribunal Rules].

89. NAFTA, *supra* note 4, Annex 1137.4.

90. The parties' permission is required before awards can be published, but without express permission ICSID may include excerpts of legal reasoning in its publications. *See* ICSID Convention, *supra* note 40, art. 47(5).

91. The docket information on the ICSID website contains an increasing number of digitally available awards. *See generally* http://www.worldbank.org/icsid/cases/awards.htm (listing published cases and awards).

92. ICSID Regulation 22, *available at* http://www.worldbank.org/icsid /htm, seems to contemplate that ICSID will seek the parties approval for publication of awards, and if approval is given, will publish them "with a view to furthering the development of international law in relation to investments."

too are finding their way into the public domain.[93] As a public policy question, why might this trend be endorsed? A number of possible by-products associated with award publication may be mentioned.

B. Awards as Educational Tools

As reasoned instruments,[94] awards disclose essential facts, the content of governing law, the extent to which the host state is responsible, and how the costs of the proceedings should be borne—all matters that both educate the public and expose the host state and the claimant to post-event supervision and presumably, heightened accountability. A published award also exposes the tribunal's work to scrutiny by the academic and practice communities, supplying a species of peer review. When separate arbitrator opinions issue with the award, additional insights may be garnered.[95]

C. Award Publication and Jurisprudential Cross-Pollination

Making awards available also serves the important goal of promoting jurisprudential development and unification.[96] Though no formal system of precedent operates, well reasoned awards may inform future tribunals[97] and serve to anchor the parties' arguments and expectations.[98] While careful observers of the system often speak of the disarray within the doctrine that tribunals articulate,[99] the divergence complained of

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93. A number may be viewed at http://www.InvestmentClaims.com.

94. Standard rule formulae require a tribunal to supply its reasons as part of the award. In some legal systems, the parties are entitled to forgo reasons by agreement. When they do so, the informational value and the award's vulnerability to attack are greatly reduced. *See, e.g.*, Federated Dept. Stores, Inc. v. J.V.B. Indus., 894 F.2d 862, 871 (Martin J., concurring) (noting that the absence of reasons makes review of an award a "judicial snipe hunt").

95. *See, e.g.*, Waste Mgmt. v. Mexico, Award (NAFTA Trib. June 2, 2002) (Highet, K., dissenting), *available at* http://naftaclaims.com/Disputes/Mexico/Waste/WasteDissentJurisdiction.pdf. *See generally* Richard Mosk & Thomas Ginsburg, *Dissenting Opinions in International Arbitration*, *in* LIBER AMICORUM BENGT BROMS 259 (1999).

96. COE, *supra* note 65, at 119; Franck, *supra* note 56, at 1616.

97. The three arbitrator model preferred by many arbitrators implies collaborative decision-making; the same culture of openness to peer interaction, and other factors, promotes a willingness to consider the views of other tribunals. *Cf.* Jack J. Coe, Jr., *Reflections on the Global Center's Barcelona Meeting*, 20 J. INT'L ARB. 11, 19–20 (2003) (discussing tribunal decision-making in arbitration); Coe, *supra* note 62, at 940 (discussing mechanisms and influences internal to the tribunal).

98. Coe, *supra* note 62, at 940–41, 947; Coe, *supra* note 4, at 1391.

99. *See* Brower, *supra* note 56, at 921–22 (discussing inconsistency among holdings of tribunals in NAFTA arbitration); Surya P. Subedi, *The Challenge of Reconciling Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term Expropriation*, 40 INT'L LAW. 21 (2006).

would likely be more acute if not for the ready availability of awards.[100] In particular, tribunals are informed and moderated by a form of indirect, horizontal, interaction with other tribunals,[101] often induced by the reliance of disputants on published awards. The unification and cross-fertilization that occurs is not limited to matters of substance. Over time, certain procedural norms emerge through a similar process.[102]

D. Promoting Settlement

To the extent that the decisions of one tribunal become seasonably available to the participants in another concurrent or later-initiated proceeding, the chances of settlement[103] may be affected in subtle, if unpredictable, ways. The modern investor-state docket contains many cases implicating common treaty doctrines and terms of art, and based on analogous events. Notwithstanding the lack of a stare decisis principle, when one tribunal speaks to issues critical to other cases, it will often change for each disputant in those other cases the perceived risks of proceeding and, concomitantly, the attractiveness of settlement. Given that inter-tribunal influence sometimes operates, a ruling from an outside tribunal that casts doubt on a given theory of recovery or defense would be expected to soften the relevant disputant's resolve.[104] At a minimum,

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100. *See* BERGER, *supra* note 23, at 317 (precedential value of award publication); Martin Hunter, *Publication of Awards and Lex Mercatoria*, 54 ARB. 55 (1998) (Iran-U.S. Claims Tribunal awards valuable to scholars and students);

101. See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. LAW REV. 2029, 2049-53 (2004) (describing judicial "dialogue" and "transnational comity").

102. Ready access among tribunals to each other's procedural orders promotes commonality of approach. Additionally, repeated endorsement by tribunals of textual guides, such as the UNCITRAL Notes or the IBA Evidence Rules may elevate their status over time. *See* Jack J. Coe, Jr., *The Serviceable Texts of International Commercial Arbitration: An Embarrassment of Riches*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 143, 152–58 (2002) (discussing procedural rules for NAFTA Chapter Eleven tribunals); Mark Friedman, et al., *Developments in International Commercial Dispute Resolution in 2003*, 38 INT'L LAW. 265, 286–87 (2004) (explicit use in investor-state arbitration of IBA Evidence Rules).

103. For insightful speculation about factors affecting settlement in a specific mixed arbitration setting, see Peter D. Trooboff, *Settlements*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 291–95 (David D. Caron & John R. Cook eds., 2000).

104. Settlement may also be influenced by an award-related procedure that is becoming associated with U.S. BITs. In a departure from established investor-state arbitration practice, the United States-Uruguay BIT provides that the tribunal will circulate a draft award to the disputants for written comment. Treaty between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 13, Nov. 4, 2005, *available at* http://bilaterals.org/IMG/pdf/US-Uruguay_BIT.pdf. The latest United States Model BIT incorporates this procedure, prefiguring its wider use. The provision is unaccompanied by detailed guidance, leaving open interesting questions. *See generally* 2004 United States Model BIT, *infra* note 120. Given one final chance to influence an award that has been foreshadowed to

with enhanced levels of information should come better founded expectations concerning rights, duties, and, recoveries.

E. Equality of Arms

The continuing nature of a sovereign's promise to arbitrate investment claims requires many host states to become repeat players in the investor-state arbitration process. If they alone had access to earlier awards involving them, and perhaps others made available to them through diplomatic channels, the private claimant would often enter the process at a disadvantage. To widely distribute awards therefore helps to neutralize the repeat player advantage.[105]

F. Investor Confidence

The general attractiveness of a particular host state to foreign investors is a function of numerous criteria that include that state's acceptance of the rule of law.[106] The fact that a state has ratified a treaty that promises minimum levels of treatment and an arbitral remedy is noteworthy;[107] as telling, however, is how that state honors its promise to arbitrate,[108] and the official positions it takes with respect to important

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them, will the parties' reactions become merely a form of post-hearing brief (adding a significant new segment to the proceedings), or will limitations be imposed, such as by confining them to the kinds of matters that could be addressed to the tribunal after the award, e.g., requests for interpretation, the identification of orphan claims, and perceived clerical errors? Will the draft's predictive character regularly induce settlement, so as to reduce the total number of awards ultimately issued?

Regardless, requests that the draft award be made public when it is circulated to the disputants will likely be made, though publication is not expressly contemplated in the aforementioned treaties. The added proposition that the tribunal should receive public comment before making the award final, is likely to be declined on the basis of the added burden on the process, though to allow existing amici to comment briefly might be a suitable compromise.

105. *See* Howard Holtzmann, *Drafting the Rules of the Tribunal*, *in* IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 75, 83–84 (David Caron & John Crook eds., 2000).

106. *See* RICHARD C. ALLISON & JACK J. COE, JR., PROTECTING AGAINST THE EXPROPRIATION RISK IN INVESTING ABROAD 1–24 (1993) (discussing host state characteristics and foreign investment); *see also* RUBINS & KINSELLA, *supra* note 32, at 1–29 (discussing the elements affecting political risk); WORLD BANK, *supra* note 37, at 244–52 (discussing the means of measuring the investment climate).

107. *See* WORLD BANK, *supra* note 37, at 177 (discussing prevalence of bilateral investment treaties and arbitration).

108. Arbitration-related practices that may give prospective investors pause include anti-arbitration injunctions by host state courts, vacatur of arbitration awards on idiosyncratic grounds, and interference with the tribunal's—or with a party-appointed arbitrator's—attempt to discharge the arbitral mandate. *See, e.g.*, Marc Goldstein, *International Commercial Arbitration*, 34 INT'L LAW. 519, 528–29 (2000) (discussing "The Case of the Kidnapped Arbitrator"); Jacques Werner, *When Arbitration Becomes War—Some Reflections on the Frailty of the Arbitral Process in Cases*

protections and doctrines. Awards chronicle host state encounters with arbitration, apply learned rigor to the positions states have offered and may alert potential investors to attitudes, sectors, or practices carrying particular risk.[109]

G. Pre-Award Materials—Pleadings and Non-Disputant Statements

Awards, though often hundreds of pages in length, are necessarily synoptic.[110] For constituencies seeking an intimate understanding of the dispute and the ultimate award, contemporaneous access to the work-product of the participants is of material benefit.[111] A full collection of materials would contain consecutive submissions beginning with the claimant's initial moving papers and ending with such pleadings as might occur after the award is issued.[112] These writings usually are expertly drafted, albeit on a partisan basis. Under emerging investor-state practice, non-disputant treaty partners are also entitled to make submissions, adding to the available information.[113]

Opposing whatever negative side effects might be identified in publication of pleadings[114] is the equalizing influence access exerts. An anecdotal survey of investor-state cases decided in recent years confirms

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Involving Authoritarian States, 17 J. INT'L ARB. 97, 97–102 (2000) (recounting an injunction issued in 1980 by a national court against arbitral proceedings involving a sovereign and reprinting a more detailed account of the kidnapping case). At present, Argentina's actions in the face of a flood of BIT-based arbitral claims—and one large award in favor of an investor—are being monitored with great interest. *See, e.g.*, ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 464–66 (2006) (discussing Argentina's actions).

109. *See* Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L LAW & POL'Y 47, 60–62 (2005) (noting that the Czech Republic considering withdrawl from investment treaties).

110. The elaborateness and format of reasoned awards vary somewhat among investor-state tribunals. Common elements of an award are a recitation of procedural history, a summary of factual allegations and framing of legal issues, discussion of the content of applicable law linked to the facts determined, and a dispositive portion in which liability (or lack thereof) is declared and quantified. *See id.* at 339–40 (discussing the nature of awards as reasoned instruments).

111. *See* Franck, *supra* note 56, at 1616, n.455 (stating that without public access, "award analysis would occur in a vacuum"). *Cf.* Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 728, 754–56 (2005) (arguing that pleadings fulfill important public notice functions).

112. These might include requests for interpretation of the award directed to a tribunal or court filings related to attempts to set aside the award.

113. *See infra* note 147 and accompanying text.

114. More so than in domestic civil litigation, arbitral pleadings carry a range of secondary sources—such as newspaper articles, hearsay-laced witness declarations, and factual assertions that the proffering party hopes to, but may not, prove in due course. Unsubstantiated allegations of corruption are common, though they may not play a role in the dispute's ultimate disposition. Having been reduced to writing and publication, however, such unproven assertions may create a cloud that long outlasts the dispute. Though tribunals have long been expected to be disciplined in weighing such proffers, *see generally* DUWARD SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 256–57 (1939), the public at large is encumbered by no such expectation.

that not infrequently one disputant faces significant resource limitations reflected in modest libraries, small teams of lawyers, and difficult choices about the use of counsels' time. Though one might legitimately question whether heavy reliance on the work-product of others is to be encouraged, it remains true that the public availability of well researched, expertly crafted memorials can only improve the ability of poorly funded disputants to participate in the investor-state disputes process on an equal footing. Among other positive effects, enhanced equality in this context should foster better informed tribunals and more thoughtful awards.

VI. THE HEARING

A. Contemporary Practices

Detractors of investor-state arbitration sometimes decry the privacy surrounding hearings.[115] As capstone events at which witnesses are exposed to probing questions[116] and each side is provided a final opportunity to explain and refine its theory of the case, open hearings would offer information of value to informed observers.[117]

In the investor-state arbitration context, the traditional view regarding hearings is found in the UNCITRAL Arbitration Rules, one of the format options typically available to investors.[118] They stipulate that the hearing is to be held in camera unless both parties agree otherwise.[119] Far different approaches might nevertheless be considered in an effort to enhance transparency. Tribunals, for instance, might be instructed to provide an open hearing, and to use their discretion to manage the associated details.[120] To make such a rule mandatory, and thus impervious to party autonomy, would present the most rigid variant of

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115. *See Trading Democracy*, *supra* note 60 (noting that the public has no place at the table and that secret tribunals can make governments pay for regulating).

116. Cross-examination is not native to many legal systems, but it has found a place in international arbitration because it is deemed useful. *See* IBA, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION art. 8(2) (1999), available at http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf.

117. Pearce & Coe, *supra* note 4, at 334–37.

118. *See supra* notes 40 and 45, and accompanying text.

119. UNCITRAL Arbitration Rules, supra note 9, art. 25(4). Parties in certain Chapter Eleven arbitrations have agreed to permit observers. Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV. 344, 350 (2004).

120. U.S. State Dep't, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 29(2)(2004) [hereinafter 2004 United States Model BIT], *available at* http://www.state.gov/documents/organization/38710.pdf; *see also* Canadian Agreement for the Promotion and Protection of Investments, art. 38(2), (2004) (same), *available at* http://www.sice.oas.org/investment/NatLeg/Can/2004-FIPA-model-en.pdf.

this reversal of the UNCITRAL Rule.[121] A middle ground would be to empower the tribunal in its discretion to allow public attendance, subject perhaps to the parties' right to insist on privacy.[122] As will be seen below, each of these positions can be found among potentially applicable texts.[123]

B. Open Hearings—Point and Counter Point

It might be argued that the same information absorbed by those witnessing a hearing can more efficiently be made available by publishing a hearing transcript. It would follow that efforts expended to provide a public gallery would not be worthwhile. Can it nonetheless be said that an open hearing still adds transparency value? A few points may be offered.

First, in the public arena in which symbols can be important, an open hearing signifies that neither the host state nor the tribunal has anything to hide. The host state may in fact welcome the opportunity to showcase the vigor and skill with which it pursues the public interest,[124] and to convey to existing and prospective investors civilized behavior tethered to the rule of law. So too may the investor be able to make use of the publicity.[125] Second, such observation may more effectively than a transcript help counter any impression that investor-state arbitrations are relatively devoid of formality, or decorum, or rituals that might add a tincture of legitimacy in the minds of skeptics.[126] Third, transcripts do not fully convey the demeanor of the participants; visual, real time, observation is thus superior in this regard.

Against open hearings is that the public's appetite for attending them has proven modest,[127] that the kinds of cases that attract real time

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121. *See, e.g.*, 2004 United States Model BIT, *supra* note 120, art. 29(2).

122. *Cf.* ICSID Rules of Procedure for Arbitration Proceedings, Rule 32(2) *available at* http://www. worldbank.org/icsid/highlights/04-10-06.htm.

123. *See infra* notes 234–52 and accompanying text.

124. Given the influence of the Calvo doctrine in Mexico, some observers might have been surprised by the intensity and adeptness with which Mexico has defended itself against NAFTA claims. Indeed, Mexico's commitment to NAFTA's dispute resolution provisions is such that those provisions have strongly influenced the content of Mexican BITs entered into with non-NAFTA states. *See, e.g.*, Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership, Japan-Mex, April 1, 2005, *available at* http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf (utilizing NAFTA-like rules to govern treatment of investments).

125. The investor may enjoy an opportunity to demonstrate to shareholders, potential shareholders, and other stakeholders a robust pursuit of justice on behalf of the corporation, perhaps also signaling strength and resolve to adversaries of all sorts.

126. *See* Brower, *supra* note 80, at 53–58 (discussing rituals as elements bearing on legitimacy).

127. Conversations between the author and ICSID's legal staff confirm that after certain

observation also may attract potentially disruptive observers, requiring costly buffering maneuvers and security. Public attendance would also conceivably heighten the vulnerability of the disputants' legitimate secrets, requiring especial alertness on the parts of the tribunal and counsel.

Assuming, nonetheless, a commitment to hold public hearings, many of the questions that arise—the potential for disruption and the like—may be resolved through planning and technological accouterments.[128] NAFTA practice confirms that many of the related concerns can be overcome, though no doubt time will be required to develop protocols establishing best practices for alerting the public, for anticipating levels of interest in the case at hand, for any credentialing of observes that may be necessary, and for preventing disclosure of information that the disputants are entitled to conceal.

VII. THE PUBLIC'S PROXIES—THE AMICUS QUESTION

Amici play an accepted role in some legal systems, and the practice of receiving amicus submissions has made inroads before certain international tribunals.[129] For those accustomed to private commercial arbitration in particular, however, amici may seem far from indispensable. The question is legitimate. First, investor–state tribunals are already privy to the views of several non-litigants, such as the parties' respective expert witnesses,[130] any experts appointed by the tribunal itself,[131] and increasingly, the non-disputant state (or two non-

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members of the public availed of an initial opportunity to observe investor-state arbitration hearings, attendance dropped considerably.

128. Physical presence in the hearing room is not necessarily the only, or even the preferable, method of granting public access. Live video feeds to remote locations, or cable television type broadcasts are more likely to be the mechanisms employed.

129. *See* Christine Chinkin & Ruth Mackenzie, *Intergovernmental Organizations as "Friends of the Court," in* INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT—TRENDS AND PROSPECTS 135, 136–39 (Laurence Boisson de Chazournes et al., eds., 2002) (discussing the amicis' role in assisting adjudicators, perhaps by adding to the tribunal's knowledge in novel cases but noting that amicus advocacy has come to be the norm in some systems); *see generally* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (analyzing the participation of nongovernmental organizations in permanent international courts).

130. Party-appointed experts, like amici, often perform a subdued advocacy role and opine on the content of governing law. *See, e.g*, Loewen Group, Inc. v. United States, Expert Opinion of Sir Robert Jennings ICSID Case No. ARB(AF)/98/3, *available at*: http://ita.law.uvic.ca/alphabetical_list.htm#jl (opining upon the denial of justice).

131. *See generally* Richard C. Allison & Howard M. Holtzmann, *The Tribunal's Use of Experts, in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 269–71 (David D. Caron & John R. Crook eds., 2000).

disputant states in the case of NAFTA).[132] Each state involved already to a degree functions as a proxy for citizen involvement.

Second, if amici are to have a role, it must be because they add something of significance, without denaturing the process. Nor is their inclusion seamless and self-executing; expert and somewhat time-consuming tribunal management of would-be friends is essential, lest there occur significant duplication in submissions[133] or an artificial broadening or redirecting of the dispute.[134] The more elaborate adjudicative framework that results naturally implies added costs of various types—costs not necessarily borne by the amici.

Given the foregoing, it is not incongruous that, notwithstanding their public-minded policies, the International Court of Justice (ICJ) traditionally has not embraced NGO amici,[135] the Iran-United States Claims Tribunal did so only on an exceptional basis,[136] and the World

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132. *See* NAFTA, *supra* note 4, arts. 1128–29 (allowing the non-disputant party to receive evidence tendered to the tribunal and written arguments of the parties, and to make submissions on matters of interpretation). The most recent generation of investor-state treaty provisions from the United States and Canada grant forms of access in arbitration to the treaty's non-disputant state party. That the "other" state—or in the case of NAFTA, the other two states—have both insight and a stake in the outcome is rightly assumed. Accordingly those states receive the disputants' written submissions, are able to attend the hearing, and are entitled to make submissions to the tribunal on matters of treaty interpretation. Consequently, the tribunal is exposed to highly relevant additional information that may tend to support, or counter, an interpretation sponsored by a disputant. *See also* Pearce & Coe, *supra* note 4, at 337–38. The fact of the additional states' participation, however, does not fully negate a role for amici. Though to some extent the government speaks for its citizens, non-disputant states are careful when considering what to address in the issues they address in their statements and are technically limited to addressing interpretive issues. Further, they are not expected to canvass every interpretive issue redolent of the public interest.

133. Chinkin & Mackenzie, *supra* note 129, at 137.

134. Though legitimacy of the investor-state claims process no doubt is influenced by levels of transparency, equally it must be acknowledged that an indiscriminate amici practice would undermine legitimacy. A process that submits to special interests whose claims to advance the public interest have not been carefully scrutinized would not serve well the goals of establishing "effective procedures for the resolution of disputes" and maintaining "a mechanism that assures both equal treatment among investors . . . and due process before an impartial tribunal." *See* NAFTA, *supra* note 4, arts. 102, 1115 (setting forth the aforementioned goals). Some claims, moreover, attract would-be third party participants in overwhelming numbers, potentially making the tribunal's winnowing task monumental. Reportedly, for example, *Aguas Ddel Tunari S.A. v. Republic Bolivia*, ICSID Case No. ARB/02/3, a dispute arising out of the privatization of water services, generated 300 petitions to intervene and attend the hearing, as well as to receive evidence and pleadings. *See generally* South Centre Analytical Note, *Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries* (Feb. 2005) [hereinafter South Centre *Developments*] at ¶ 37 (discussing the over 300 amici briefs submitted in the Aguas Ddel Tunari case), *available at* http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_feb05.doc. In theory, mishandled amicus participation might imperil the ultimate award.

135. *See* Chinkin & Mackenzie, *supra* note 129, at 140 (noting the ICJ's exclusion of NGO amici).

136. *See* Stewart Baker and Mark Davis, *Arbitral Proceedings under the UNCITRAL Rules—The Experience of the Iran-United States Claims Tribunal*, 23 GEO. WASH. J. INT'L L.& ECON. 267, 296

Trade Organization's (WTO) receptive posture was achieved only after battles made necessary by inconclusive governing texts.[137] Significantly, not all NGOs or states are in favor of adding amicus participation to an already taxing process.[138]

As will be seen below, systems that contemplate amicus participation confer large measures of discretion on tribunals and correspondingly discourage any notion that amicus participation is a right. The luxury to decline petitions is as important as the prerogative to admit them and such accommodations as have been made by experienced tribunals have been tightly circumscribed by them.[139] Nor have tribunals taken the power to admit amici for granted, thus presenting in the seminal cases an essential first level of inquiry.[140]

VIII. EARLY NAFTA CHAPTER ELEVEN CASES—TRIBUNAL LEADERSHIP

A. The Promise of Chapter Eleven

Had Chapter Eleven's designers foreseen the high level of docket activity generated by that chapter, they might have drawn inspiration from the ICJ[141] or the Iran-U.S.Claims Tribunal,[142] and formed an

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n.143 (1989–1990); JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 108 n.42 (1991).

137. Though now seemingly settled in favor of allowing such briefs, when the question arose at the WTO, the European Union (EU) opposed such participation on the ground that neither the Appellate Body's Working Procedures nor the Dispute Settlement Understanding authorizes them. *See* DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 37 (2004). Relying on the governing procedural text's failure to prohibit amicus briefings, the Appellate Body rejected the EU's argument. *Id.*

138. *See generally* South Centre *Developments, supra* note 134. South Centre has argued against routine involvement of amici because it adds to the already heavy burden upon under-financed disputants, it forces an unfamiliar procedure on certain others, and it may give business-oriented groups whose interests align with those of the investor an opportunity to sway the tribunal. *Id.* ¶¶ 37–39. *See also* South Centre Analytical Note, *Proposed Amendments of ICSID Rules: Process Related and Substantive Issues on ICSID Reform for Developing Countries* (Aug. 2005) at ¶¶ 12–17 [hereinafter South Centre *Amendments*], http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_aug05.doc (discussing how problems with investor-to-state arbitration—which is designed to protect investors at the expense of other public interests—will not be repaired by allowing third party submissions and other proposed changes).

139. A mishandled amicus regime could in theory imperil the award. Under the UNCITRAL Model Laws, for example, an award may be set aside if the arbitral procedure deviated from the parties' agreement or if a party was unable to present its case. UNCITRAL Model Law, *supra* note 81, art. 34(2). Under the ICSID Convention, similarly, an award can be annulled if "there has been a serious departure from a fundamental rule of procedure." ICSID Convention, *supra* note 40, art. 52(1)(d).

140. *See infra* notes 190–202 and accompanying text.

141. *See generally* DEREK BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 266–82 (1982) (providing an overview of the International Court of Justice and its relation to parties and jurisdiction); FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE (Vaughn Lowe & Malgosia Fitzmaurice eds., 1996) (providing essays in honor of Sir Robert Jennings and discussing the

institution characterized by a centralized docket of cases and a standing roster of tribunal members. During that effort, a comprehensive approach to transparency questions might have been attempted. Whatever thought might have been given to such an institution, a more decentralized format was inaugurated by Chapter Eleven. Though the three states articulated policies with respect to publication of awards, Chapter Eleven in general followed the BIT pattern and thus relied upon existing UNCITRAL and ICSID procedural formats.[143]

Though the three states had individually explicitly treated the question of award publication, no NAFTA provision expressly addressed whether the disputants must preserve all matters related to the proceedings in confidence, whether the hearings were open or closed, and whether amici might participate. Strong inferences arose as to some of those issues, however, by the failure of the three states to craft treaty variances from the standard UNCITRAL and ICSID formats. To respond to persistent calls for greater transparency would thus require careful thought as to what could be done within the existing regime, with its established deference to the parties' will[144] and to tribunal discretion.[145]

Within those limits, NAFTA's relatively active docket generated a number of opportunities for tribunals and the NAFTA states to grapple with transparency-related questions. A number of thoughtful decisions resulted, forming the beginnings of a durable jurisprudence.[146] Arguably these decisions have been the product of a more dynamic, vibrant process than might characterize decisions rendered under other investment treaties. Among other factors, Chapter Eleven tribunals receive, in addition to the views of the two disputants, the two positions articulated

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International Court as a world court); THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (Lori F. Damrosch ed., 1987) (discussing international adjudication and the jurisdiction of the International Court of Justice); SHABTAI ROSENNE, THE WORLD COURT (1962) (discussing what the world court is and how it works). The ICJ has developed rather liberal transparency practices. Open hearings, non-confidential pleadings, published andloi reasoned opinions, and an active information officer characterized ICJ operations.

142. *E.g.*, ALDRICH, *supra* note 35; BROWER & BRUESCHKE, *supra* note 35. Albeit with some amendments, the Itran-United States Claims Tribunal adopted the UNCITRAL Arbitration Rules, reprinted, as amended for Tribunal use, in Claims Tribunal Rules, *supra* note 88, at 433, and thus pursued an arbitral model in which hearings were closed and pleadings were not publicized. Nevertheless, lengthy, reasoned awards and dissents were (in a departure from common arbitral practice) made public as a matter of course. *See* Lucy Reed, *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The Iran-United States Claims Tribunal*, *in* INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS 9 (2000).

143. *See* Coe, *supra* note 4, at 1452–53. There are indications that in 1992, Mexico might have resisted any system containing bold transparency features. *See infra* notes 173, 229–31 and accompanying text.

144. *See supra* note 7 and accompanying text.

145. *See supra* note 9 and accompanying text.

146. Respective states negotiate using model texts that differ inter se, and the number of disputes processed under a single BIT that produce published procedural decisions is normally quite low.

by the two non-disputant states.[147] Moreover, NAFTA's many chapters and corresponding institutions contemplate ongoing consultation among the NAFTA states, and thus ample opportunity to collaborate on policy development.

As a vehicle for articulating policy, the NAFTA Free Trade Commission (FTC) is of particular importance because it has the formal power to express the joint views of the three states.[148] Those views in turn bind Chapter Eleven tribunals[149] and tend to unify the approach taken by them. In relation to transparency issues, the FTC has used its Interpretive Note prerogative twice—to address confidentiality[150] and, subsequently, to confirm a place in Chapter Eleven for amici.[151] As will be seen below, however, by the time these statements were published, Chapter Eleven tribunals had already confronted such questions.[152]

B. Ethyl

In September of 1996, an American manufacturer of the fuel additive MMT[153] initiated the first NAFTA Chapter Eleven claim.[154] The company, Ethyl Corporation, wholly owned a subsidiary, Ethyl Canada (Ethyl), that operated fuel blending and processing facilities in Ontario, Canada.[155] In 1995, the Canadian Parliament introduced a bill to ban import and inter-provincial distribution of MMT.[156] Before the measure became law, which it eventually did as the Manganese-based Fuel Additives Act (the MMT Act), the investor initiated its claim (i.e., a preemptive filing intended to dissuade lawmakers).[157]

Ethyl sought $251 million in compensation and designated the UNCITRAL Rules.[158] It alleged that the MMT Act violated several

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147. NAFTA, *supra* note 4, art. 1128.

148. Some of the Commission's interpretive statements have been controversial. *See* Brower, *supra* note 56, at 925–26. The prospect that through the FTC the three perennial respondents might slip, in a self-serving manner, from interpretation into amendment of investor protections has been of foremost concern. *Id.*

149. NAFTA, *supra* note 4, art. 1131(2).

150. *See infra* note 181 and accompanying text.

151. *See infra* note 239 and accompanying text.

152. *See infra* notes 153–80 and accompanying text.

153. Methylcyclopentadienyl manganese tricarbonyl.

154. *See generally* Alan C. Swan, Ethyl Corporation v. Canada, *Award on Jurisdiction (under NAFTA/UNCITRAL)*, 94 AM. J. INT'L L. 159 (2000); Todd Weiler, *The* Ethyl *Arbitration: First of Its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187 (2000).

155. Ethyl Corp. v. Canada, Award on Jurisdiction, 38 I.L.M. 708, 709 (1999).

156. *Id.* at 710.

157. *See* Weiler, *supra* note 154, at 195 ("The tribunal posited that Ethyl's conduct could be seen as a fruitless attempt to influence the legislative process.").

158. *See* Ethyl Corp. v. Canada, Award on Jurisdiction, 38 I.L.M. 708, 709, 713. At present, for

NAFTA undertakings, including the guarantee of national treatment[159] and of compensation in the event of expropriation.[160] Canada maintained that the measure was designed primarily to protect the environment, asserting in particular that the additive produced air pollutants and caused automotive emission control devices to fail.[161]

After a critical jurisdictional ruling, Canada settled with the investor.[162]

Though emblematic of much of what NAFTA's detractors protest,[163] for present purposes, *Ethyl* illustrates what was a standard early approach to basic transparency questions, uncomplicated by would-be amici or a chorus of commentators calling for more openness. It also reflects the role of the parties' agreements, or lack thereof, in designing the process. The tribunal, cautious not to exceed authorizations to be found in NAFTA, produced a procedural order[164] providing that interim and final awards and procedural orders could be published by the parties (in accordance with the agreement of Canada and the United States)[165] as could designated disputant filings, including pre-hearing pleadings.[166] Absent an agreement between the parties to the contrary, the hearing would be held in camera (in accordance with the UNCITRAL Rules),[167] but neither the transcript nor accounts of the oral submissions would be published.[168] The tribunal also incorporated into its order the parties' agreed procedure for protecting confidential business information.[169]

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want of the requisite ICSID Convention ratification, ICSID arbitration is not available. ICSID's Additional Facility is another option available to a NAFTA claimant when the United States (an ICSID Convention party) is either the host state or the home state. Coe, *supra* note 76, at 186 n.5.

159. *See* NAFTA, *supra* note 4, art. 1102 (prohibiting less favorable treatment of foreign investors).

160. *See id.*, art. 1110 (discussing expropriation and compensation).

161. Swan, *supra* note 154, at 159.

162. Canada's jurisdictional challenges relied in large measure on the claimant's premature initiation of arbitration. Having not prevailed on jurisdiction, Canada settled before an award on the merits was issued, paying Ethyl $13 million. Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 48 n.32, 59–60 (2001); Swan, *supra* note 154, at 159–60. Compared to the ICSID docket in general, NAFTA Chapter Eleven cases have settled infrequently. *See* Coe, *supra* note 4, at 1459 (listing a table of outcomes).

163. *See, e.g.*, Michelle Sforza & Mark Vallianatos, *NAFTA & Environmental Laws:* Ethyl Corp. v. Government of Canada, Apr. 1997, http://www.globalpolicy.org/socecon/envronmt/ethyl.htm (discussing potential adverse effects of *Ethyl* including threats to national sovereignty and the chilling effect on environmental legislation).

164. Ethyl Corp. v. Canada, Award on Confidentiality, Nov. 28, 1997, *available at* http://naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnConfidentiality.pdf.

165. *Id.* ¶ 3.

166. *Id.* ¶ 2.3.

167. *Id.* ¶ 2.2.

168. *Id.* ¶ 2.1.

169. *Id.* ¶ 1.

C. *Metalclad*

Transparency questions also arose in another early case, *Metalclad v. Mexico*.[170] A publicly traded American investor attempted to operate a hazardous waste landfill in Mexico, but was thwarted by acts attributable to Mexico.[171] Its claim, the first filed against Mexico under NAFTA Chapter 11, alleged several NAFTA breaches.[172] During the proceedings, Mexico (in the form of a request for interim measures) sought to preclude the claimant from disclosing any information related to the proceedings and, in particular, to forestall its management from discussing the details of the case with investors and analysts during conference calls.[173] Metalclad replied that Mexico had not observed the rule it argued for, that Metalclad was subject to disclosure requirements under United States securities law, and that no general rule of confidentiality existed.[174]

The tribunal's order largely endorsed the views of the investor.[175] Given Metalclad's public disclosure obligations under United States law and the apparent lack of contrary prohibitions in the Additional Facility Rules or in general arbitration doctrine,[176] the tribunal declined Mexico's request. Concurrently, however, the tribunal urged the disputants to limit public discussion of the case so as to promote the orderly advancement of the proceedings and enhance working relations between them.[177] As with the *Ethyl* proceedings (though operating under different procedural

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170. Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2000).

171. *Id.* at 37.

172. I was co-counsel to the claimant in *Metalclad* and also assisted in the post-award defense of the tribunal's award which occurred in a British Columbia court. The case has been widely commented upon and appears in several casebooks. A few examples of the many treatments are: Jack J. Coe, Jr., *Metalclad—A Retrospective*, 1 NAFTA ARB. REP. 65 (2002); Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of* Metalclad Corporation v. United Mexican States, 10 MINN. J. GLOBAL TRADE 209 (2001); Lauren E. Godshall, Comment, *In the Cold Shadow of* Metalclad*: The Potential for Change to NAFTA's Chapter Eleven*, 11 N.Y.U. ENVTL. L.J. 264 (2002); Pearce & Coe, *supra* note 4.

173. *See Metalclad Award*, 40 I.L.M. at 39 (noting that parties should "limit public discussion of the case"). Mexico regarded the call that had already occurred as a breach of an implied undertaking and requested that further breaches attract sanctions. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 [hereinafter Procedural Order No.1] (on file with author).

174. *See generally* Mistelis, *Confidentiality*, *supra* note 19; Symposium, *supra* note 19.

175. Procedural Order No.1, *supra* note 173, ¶ 9.

176. *See generally* Pearce & Coe, *supra* note 4, at 330.

177. The tribunal's recommendation concerning discreetness had force. When Mexico later complained that Metalclad's investor relations department had established a website that was reporting on the conduct of the proceedings, Metalclad immediately undertook to cease such communications, which apparently had been intended to efficiently answer arbitration-related questions coming from investors and others.

rules)[178] the *Metalclad* hearings were closed except to necessary persons—the parties, counsel, consultants, experts, witnesses,[179] and permitted government observers from the other NAFTA states.[180]

IX. THE FIRST FTC INTERPRETIVE NOTE

The kinds of issues and solutions illustrated by *Ethyl* and *Metalclad* arose in subsequent cases. In general, tribunals were not receptive to arguments that an obligation of confidentiality governed Chapter Eleven arbitration.[181] In 2001, the NAFTA states helped galvanize this broad tendency by issuing an Interpretive Note, which announced that:

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, [or] precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal. [Accordingly, each] Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: confidential business information; information which is privileged or otherwise protected from disclosure under the Party's domestic law; and information which the Party must withhold pursuant to the relevant arbitral rules, as applied.[182]

The simple formula of "all documents submitted to, or issued by," a tribunal replaces what would otherwise be a prolix, illustrative list accompanied perhaps by a catch-all clause to prevent under-inclusion. The materials caught by this formula would include all manner of written submissions on procedural and substantive matters, including reports of experts, challenges to arbitrators, the tribunal's interim and final awards, orders and decisions, and requests for, and rulings on, interpretation and

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178. *Metalclad* was the first arbitration to proceed under ICSID's Additional Facility Rules. Pearce & Coe, *supra* note 4, at n.6.

179. *Id.*

180. *See* NAFTA, *supra* note 4, art. 1128.

181. *See* Margrete Stevens, *Confidentiality Revisited*, 17(1) NEWS FROM ICSID, 1, 8–10 (Spring 2000).

182. NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS § A(1) (2001), *available at* http://www.dfait-maeci-gc.ca/tna-noc/NAFTA-Interpr-en.asp. *See* Been & Beauvais, supra note 51, at 46 ("In response to growing concerns about the lack of transparency in the arbitral process, Canada, the United States, and Mexico only recently agreed to make available to the public all documents submitted to, or issued by, a [NAFTA] Chapter 11 tribunal.").

correction of the award.[183] The note also covers important related details.[184]

X. METHANEX

A. Background

Though *Metalclad* and *Ethyl* involved claims against different states, and proceeded under different procedural formulae from each other, they shared a basis in regulation ostensibly aimed at the environment and associated health concerns. Yet, no third parties sought to participate as amicus in either proceeding, at least at the arbitral level.[185] In each case, the investor recovered a significant sum for its efforts (in *Ethyl* through settlement, in *Metalclad* as compensation ordered by the tribunal).

These cases were nevertheless followed with great interest. Soon after the *Metalclad* award was issued, an NGO that sought to participate in the *Methanex* case posited that, in light of *Metalclad*, its petition had become all the more worthy and urgent. It noted the lack of amici in the *Metalclad* proceedings, the NAFTA states' perceived failure in that case to stress environmental priorities, and the outcome—an apparent finding that environmental regulation had worked an expropriation.

> [T]he approach of the *Metalclad* tribunal appears to have far reaching implications for environmental protection. It also appears to run the risk of turning the "polluter pays" principle of environmental management, established by the OECD in 1972, into a "pay the polluter" principle. This, among others, is an issue that the Petitioner would wish to address in an *amicus* submission.[186]

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183. Further provisions of the note confirm the NAFTA states' intention to share confidential documents on an intra-state basis, an important question given the confederated structure of the three NAFTA parties and the fact that states and provinces are often the government actors principally involved. However, sharing of documents with local government units—such as municipalities—is not expressly contemplated. *Id.* § A(2)(d).

184. For example, what can be disclosed to a party's expert and on what basis? The note states that: In "connection with the arbitral proceedings" disclosure can be made to "other persons" of "such unredacted documents as [disputants consider] necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents." *Id.*

185. *See generally* Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2002); Sforza & Vallianatos, *supra* note 163. The WTO amicus practice at the time of *Metlaclad* and *Ethyl* was embryonic, producing an initial decision on the subject apparently only in 1998 a case in which the Appellate Body ruled that panels could accept unrequested amicus briefs. PALMETER & MAVROIDIS, *supra* note 137, at 36–39.

186. Methanex Inc. v. United States, Final IISD Submission, ¶ 17, (Oct. 16, 2000), *available at* http://naftaclaims.com/Disputes/USA/Methanex/Methanex/MethanexAmicusStandingIISDFinal.pdf.

The *Methanex* case was one of two contemporaneous proceedings in which the amicus question arose squarely as a matter of first impression. The other was *United Parcel Service v. Canada*.[187] In both cases, the tribunal ruled that neither NAFTA nor the UNCITRAL Rules precluded a limited role for amici.[188] While both cases illustrate how tribunals function in a trilateral setting in which each state and the investor may have a different view, *Methanex* is of particular interest because of its basis in health and safety regulation, the notoriety it achieved,[189] and the extensive range of views offered by the immediate stakeholders. As developed in the following sections, the arguments disclose variegated conceptions of what it is that amicus are and, accordingly what analogies ought to be most helpful to the tribunal in determining their proper role. Are they akin to tribunal-appointed experts, to party-appointed experts, to parties, or to none of these? Despite the unified position later published by the three NAFTA states, moreover, the state positions taken in *Methanex* also disclose misgivings on the part of Mexico not expressed by the other two states.

B. Amicus Petitions

The *Methanex* contribution to transparency in investor-state arbitration was the product of a series of deliberative steps, which spanned several years and coincided in part with the FTC's complementary work on transparency issues.[190] The process began with the August 2000 petition for amicus standing by the Canadian-based International Institute for Sustainable Development (IISD).[191] Contemporaneously, other NGOs, on a joint basis, also sought to participate as amici.[192]

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187. *See* Methanex Corp. v. United States, Decision on Authority to Accept Amicus Submission, (Jan. 15, 2001), [hereinafter Methanex Decision on Petitions] *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionR.AuthorityAmicus.pdf; UPS v. Canada, Decision for Petitions for Intervention and Participation as Amicus Curae, (Oct. 17, 2001), [hereinafter UPS Decision on Petitions] *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionR.ParticipationAmicicuriae.pdf.

188. Methanex Decision on Petitions, *supra* note 187; UPS Decision on Petitions, *supra* note 187.

189. A remarkable number of articles address the question of regulatory taking and the status of environmental measures under NAFTA Chapter 11. *See generally* BROWER, ET AL., *supra* note 2.

190. *See infra* note 239–48 and accompanying text.

191. It described itself as an international, non-governmental organization originally established by an Act of Parliament and charged with fostering "local, regional and international policies and practices in support of the achievement of sustainable development." Methanex Corp. v. United States, Application for Amicus Standing-IISD, (Aug. 25, 2000), *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexAmicusStandingIISD.pdf.

192. Methanex Corp. v. United States, Amicus Submission by Bluewater Network, Communities

IISD sought permission to file a written brief developing its thesis that NAFTA is best construed in light of sustainable development principles, to support that brief by oral submissions, and to be a general observer at the hearing.[193] Stressing its leadership in the field and the quality of talent it would deploy, IISD relied on a series of propositions that would be echoed by the submissions of others. It maintained that the tribunal's procedural discretion under the UNCITRAL Rules was broad, that no relevant prohibition was expressed in those rules or NAFTA, and that faced with analogous texts, WTO adjudicators at both the first instance and appellate levels had admitted amicus briefs.[194]

It later redoubled its request, expressing urgency[195] and emphasizing the opportunity presented:

> [T]he public credibility of the NAFTA Chapter 11 process is at a critical point. By providing for an orderly process for *amicus* participation, the Tribunal will not only enable itself to better address the issues that are both directly and indirectly at stake in this case, but it will also provide a sound basis for other Chapter 11 tribunals to deal with requests for *amicus* status.[196]

C. *The Disputants' Views*

Methanex opposed the petition. It requested that the tribunal declare itself to be without jurisdiction to grant the petition[197] because amici possibly would raise issues not otherwise involved and that admitting them would be equivalent to adding a party, an exercise neither within the tribunal's express powers[198] nor implied in the tribunal's authority to appoint an expert.[199] It argued further that to allow amicus would impinge on the privacy guaranteed under the UNCITRAL Rules and common law, and would further burden the disputants in an already arduous process.[200] Finally, it maintained that amicus would be

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for a Better Environment and the Center for International Environmental Law, (Mar. 9, 2004), *available at* http://www.state.gov/documents/organization/30472.pdf. Environmental NGOs tended to regard *Methanex* as a landmark case, with far-reaching implications for a government's ability to regulate in the public interest in areas such as public health and the environment.

193. Methanex Corp. v. United States, Final Submissions Re the Petition of IISD for Amicus Status, (Aug. 31, 2000), *available at* http://www.state.gov/documents/organization/3934.pdf.

194. *See generally id.*

195. *Id.* ¶ 10.

196. *Id.* ¶ 40.

197. Methanex Corp. v. United States, Methanex Submission Re IISD, ¶ 18, (Aug. 31, 2000), *available at* http://www.state.gov/documents/organization/3948.pdf.

198. *Id.* ¶¶ 10–15.

199. *Id.* ¶ 15.

200. *Id.* ¶¶ 1–4.

unnecessary because the interests of the public were already appropriately represented by Mexico and Canada through their Article 1128 submissions.[201]

By contrast, the United States asked the tribunal to acknowledge a power to receive amicus submissions in appropriate cases where there had been a showing that the submission would be relevant and helpful.[202] In the manner of IISD's own petition, the United States emphasized the lack of an express prohibition in either the NAFTA or the UNCITRAL Rules and the tribunal's authority to manage the proceedings.[203] It suggested that the tribunal was free to depart from practices developed with respect to commercial arbitration because proceedings in which fundamental governmental functions were involved were of substantial public interest,[204] whereas, to fail to admit amici would reinforce a perception that Chapter 11 was an "exclusionary and secretive process."[205]

The United States disputed that the UNCITRAL provision ensuring privacy of hearings had a bearing on the separate question whether amicus could make submissions.[206] Additionally, it argued that the narrowly circumscribed right of other NAFTA parties to offer views on matters of interpretation warranted no particular inferences about whether the tribunal had authority as a matter of discretion to allow amicus submissions.[207] As IISD did, the United States drew support from emerging WTO practice (in which amicus participation appeared not to retard the process)[208] and noted that the three NAFTA parties, in the interest of transparency, had already departed from the paradigmatic private model by agreeing to publish Chapter Eleven awards.[209] Conceding that some measure of additional burden would be created, the United States noted that it would be evenly distributed, that only two amici were involved, and that the tribunal could carefully administer the adjunct procedure—efforts that would be warranted because of the contribution amici could make to the tribunal's work.[210]

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201. *Id.* ¶ 16.

202. Methanex Decision on Petitions, *supra* note 187, at ¶ 22.

203. *Id.* ¶¶ 19–20.

204. Methanex Corp. v. United States, Statement of Respondent, the United States Re Petition for Amicus Status, at 2–3, 5, (Oct. 27, 2005) *available at* http://www.state.gov/s/l/c5821.htm.

205. *Id.* at 14.

206. *Id.* at 4.

207. Methanex Decision on Petitions, *supra* note 187, at ¶ 22.

208. *Id.* ¶ 20.

209. *Id.*

210. *Id.* ¶ 21.

D. The Article 1128 Views of the Two Non-Disputant States

Canada and Mexico took opposing views on the amicus question. Canada, for reasons like those of the United States, supported the petition,[211] and announced that it would therefore propose a consultation among NAFTA partners to craft an appropriate regime, an idea which later bore fruit in the form of an elaborate FTC statement on transparency.[212] Mexico's reasons for doubting tribunal power to admit amici were several.[213] It noted the care and balance with which NAFTA delineated who were to be disputants and which non-disputants were to have a role in the process (expressly including, for example, the other two NAFTA states through their Article 1128 submissions).[214] It followed that had the NAFTA states envisioned a role for amici, they would have done so affirmatively.[215] Equally, the overall regime at present accommodated both common law and civil law conventions without subjugating one or the other. Because amici participation is not known in Mexican law, that procedure should not be injected into the framework, post hoc, while creating a precedent of unknown impact on the system.[216] In the view of Mexico, the tribunal's limited power to entertain experts' reports provided an imperfect analogy in resolving the amicus question because such experts were neutral, whereas amici seek to advance a position.[217]

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211. Methanex Corp. v. United States, Submission of the Government of Canada, ¶ 3, (Nov. 10, 2000), *available at* http://www.state.gov/s/l/c5821.htm.

212. *Id.* ¶ 4.

213. Methanex Corp. v. United States, Submission of Mexico Re Petitions for Amicus Status, ¶ 16, (Nov. 22, 2000), *available at* http://www.state.gov/s/l/c5821.htm.

214. *Id.* ¶¶ 1–3.

215. *Id.* ¶ 7.

216. *Id.* ¶¶ 11–14.

217. *Id.* ¶ 10. In its Article 1128 submissions in *United Parcel Service*, Mexico would later restate these views, with some refinements, maintaining that the *Methanex* tribunal's assessment was incorrect. Though again neither the United States nor Canada disputed the tribunal's power to accept amici briefs, Mexico expressed doubts. *See* UPS Decision on Petitions, *supra* note 187, ¶¶ 10, 56–57. As recounted by the *United Parcel Service* tribunal:

> Mexico disagrees with the *Methanex* Tribunal's conclusion that allowing a third party to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration .... The acceptance of *amicus* briefs under article 15(1) [of the UNCITRAL Rules] is beyond the jurisdiction of a tribunal because it could oblige the disputing parties to respond to such arguments. Thus, the grant of an apparently minor procedural right could create a substantive legal issue in dispute. Mexico considers that nothing in the NAFTA nor in the UNCITRAL Arbitration Rules restrains a disputing party such as Canada in this case from consulting parties such as the petitioners and adopting their views as its own arguments in order to support its case.

Id. ¶ 57.

E. The Tribunal's Amicus Ruling in Methanex

Obviously influenced by the submissions of the United States, Canada, and IISD, the tribunal's twenty-six page decision confirming its power to receive amicus submissions relied on the broad discretion and "procedural flexibility"[218] promoted by the UNCITRAL rules[219] and the silence of the governing texts on the amicus question. The tribunal reasoned that while it could not add parties to the arbitration, or confer substantive rights upon non-disputants,[220] amicus participation did not threaten to do so because amici acquire no rights; the legal character of the proceedings remained unchanged.[221] It envisioned that any written submissions to occur would be restricted in various respects by limitations to be formulated in consultation with Methanex and the United States.[222]

The tribunal also cited the occasional admission of third-party memorials at the Iran-United States Claims Tribunal under the UNCITRAL rules[223] and WTO Appellate decisions holding that while there was no right to participate as amici, the Appellate Body had the power to accept amicus submissions.[224]

The *Methanex* tribunal ultimately would receive briefs from IISD and from Earth Justice on behalf of three other NGOs.[225] Though the briefs are mentioned in the final award—and indeed credited with being "carefully reasoned"[226]—it is not likely that the arguments of amici caused the outcome.[227] Rather, it was prefigured by the tribunal's earlier

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218. Methanex Decision on Petitions, *supra* note 187, at ¶ 27.

219. *Id.* ¶¶ 26, 52–53.

220. *Id.* ¶¶ 27–29.

221. *Id.* ¶ 30.

222. *Id.* ¶¶ 52–53. For instance, supporting witnesses' statements, whose authors might otherwise have to be cross-examined, would not be allowed, and the tribunal would exercise as needed its wide powers concerning admissibility and weight of evidence. *Id.* ¶ 36.

223. *Id.* ¶ 32.

224. *Id.* ¶¶ 32–34. It also attempted to distinguish ICJ practice, where traditionally, NGO's have not been allowed in contentious cases to file amicus briefs. *Id.* ¶ 34.

225. *Methanex v. the United States*, Final Award, Aug. 9, 2005, Part II, Ch. C, at 16, *available at* http://www.naftaclaims.com/disputes_us_6.htm.

226. *Id.* Part IV, Ch. B, at 13 (referring specifically to the IISD Brief).

227. In *Methanex*, IISD argued that non-discriminatory host state regulation in pursuit of public health and environmental objectives should be exempt from normal expropriation analysis under which permanent deprivation of an investment by the host state would ordinarily give rise to a duty to make compensation. *See* Petitioner's Final Submission Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus Curiae Status, Methanex Corp. v. United States, ¶¶ 10–18 (Oct. 16, 2000), *available at* http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexAmicusStandingIISDFinal.pdf. The position was largely consistent with that of the United States and with dictum ultimately included in the final award. *See Methanex*, Final Award, *supra* note 225, Part IV, Ch. D, ¶ 7 (holding there can be no expropriation "unless

jurisdictional ruling, which placed before the claimant a considerable obstacle.[228] Nevertheless, the amicus regime engineered by the tribunal, ultimately in consultation with the parties as inspired by the FTC Note described below, seemed to function well.[229] En route to finding and exercising the requisite power, the tribunal heard arguments and answers through the various submissions that shed considerable light on the nature of the exercise, and by virtue of the legal talent brought to bear, may be presumed to have considered all facets that might plausibly obtain.

One might speculate that the kinship between Mexico and Methanex in opposing amici resulted from somewhat dissimilar motivations. Methanex knew by the nature of the petitioners that any amici submissions would largely support California's authority to regulate water quality without generating in the United States an obligation to compensate affected businesses. It could not know in advance, however, the extent to which those views could be answered simply by replying to the arguments of the United States. Regardless, the involvement of amici could be foreseen to produce additional advocacy unfavorable to its position.

Mexico by contrast was already fully engaged in several arbitrations that might be affected by the procedural precedent being proposed by the petitioners. That many of the organizations most likely to seek amicus participation would support robust regulation in the name of the environment would not invariably translate into advocacy favoring

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specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation"); *see also* Howard Mann, THE FINAL DECISION IN METHANEX V. UNITED STATES: SOME NEW WINE IN SOME NEW BOTTLES 12 (2005), *available at* http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

228. The Final Award was prefigured by a watershed jurisdictional ruling—and limiting construction of NAFTA, article 1101(1) referring to Chapter Eleven's application as being addressed to "measures . . . relating to investors [and] investments." That language suggested a necessary link between the measure complained of and the claimant or its investment. In the case at hand, the measure was aimed at the gasoline additive "MTBE," not the individual products used to make it, such as methanol. The tribunal ruled that merely being affected by a measure was not sufficient. Accordingly, as pleaded, Methanex's claim did not satisfy Article 1101(1)'s predicate. Methanex Corp. v. United States, Preliminary Award on Jurisdiction, 42 I.L.M. 514, ¶ 138 (2003). Methanex was allowed to refashion its pleadings to demonstrate government conduct more specifically targeting it, but as explained in the Final Award, was unable to do so. The lengthy Final Award is noteworthy in many respects, including for its award of nearly $3 million in costs to the United States, in accordance with the default guidance provided in the UNCITRAL Rules. *Methanex*, Final Award, *supra* note 225, Part V. ¶ 13. A substantial number of earlier Chapter Eleven tribunals, by contrast, have been reluctant to award costs. *See* Coe, *supra* note 4, at 1459 (providing outcome tables).

229. The Final Award records the agreement of Methanex to the ultimate decision to permit amicus to file their brief which conformed to the FTC guidance with minor refinements. *Methanex*, Final Award, *supra* note 225, Part II, Ch. C, at 16.

Mexico's position. IISD submitted that Mexico's failure to think of the earlier *Metalclad* case in terms of sustainable development imperatives made its involvement in *Methanex* all the more indispensable. But how might IISD have sought to reorient *Metalclad*, and presumably similar proceedings, if admitted as amici? Would Mexico's acknowledged hazardous waste problem be exposed in an unfavorable light or subjected to ex post facto officious inter-meddling? One can sympathize with a sovereign state's desire to limit the variables in an already elaborate process.

Mexico's Calvo heritage—characterized by a strong preference for local courts and local law[230]—and Mexico's civil law orientation combine to explain further its resistance to innovations not apparent in the bargain it struck when agreeing to Chapter Eleven. Additionally, transparency had not been a cardinal concern in Mexican governmental operations, as evident from its rather belated adoption of Freedom of Information Act-style legislation and numerous other indications. Finally, it is noteworthy that while *Methanex* may be prototypical in that it involved environmental NGOs,[231] that is by no means the only scenario as evident in *United Parcel Service v. Canada*.[232] Thus, the same

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230. Concerning the Calvo Doctrine, see ALLISON & COE, *supra* note 106, at 1.17–1.19; FINCH, *supra* note 27, 38–39; VANDEVELDE, *supra* note 35, at 36, 129; Shihata, *supra* note 32, at 1–4.

231. In United States courts, amicus briefs are often associated with environmental law cases. Shelton, *supra* note 129, at 618–19 (noting the high percentage of Supreme Court environmental law cases involving amicus briefs).

232. In *United Parcel Service*, a publicly traded American company complained of an anti-competitive alliance between Canada's letter mail monopoly and Canadian parcel delivery companies. UPS v. Canada, Notice of Intent to Claim, ¶ 8, (Jan. 19, 2000), *available at*: http://naftaclaims.com/Disputes/Canada/UPS/UPSNoticeOfIntent.pdf. The tribunal was initially petitioned by the Canadian Union of Postal Workers (CUPE) and the Council of Canadians, who sought to participate as parties, or alternatively, as amici. Both claimed to have distinctive expertise and invoked their interest in elucidating constitutional implications of the case, noting also the potential economic impact on their members and the absence of plenary judicial review affecting Chapter Eleven awards. UPS Decision on Petitions, *supra* note 187, ¶¶ 1, 3.

Interestingly, the claimant did not dispute the tribunal's power to receive amicus submissions, but argued that power should be exercised with special care, including by requiring petitioners, inter alia, to demonstrate how the tribunal would be assisted, to ensure that amici not receive greater rights than the treaty parties under NAFTA Article 1128, and to preserve the confidentiality of hearings. *Id.* ¶¶ 48–49.

As in *Methanex*, Canada favored amici and Mexico resisted. *Id.* ¶¶ 56–57. In a two-step approach similar to that of the *Methanex* tribunal, the *United Parcel Service* arbitrators first determined that they possessed the requisite power and identified general restraints to be imposed in the event amicus briefs were accepted. The tribunal deferred whether in fact submissions would be permitted. *Id.* ¶¶ 71–72. It would later (during 2004 and 2005) accepted three such filings, including one from the United States Chamber of Commerce, a belated petitioner. *See, e.g.*, UPS v. Canada, Amicus Curiae Submissions by the Chamber of Commerce of the United States of America, (Oct. 20, 2005), *available at* http://www.naftaclaims.com/Disputes/Canada/Ups/UPSCUPE_CC_Amicus_Submission-20-10-05.pdf; UPS v. Canada, Amicus Curiae Submissions by the Canadian Union of Postal Workers and the Council of Canadians, (Oct. 20, 2005), *available at* http://www.naftaclaims.com/Disputes/Canada/Ups/UPS-CUPE_CC_Amicus_Submission-20-10-

instincts that caused it to seek confidentiality in *Metalclad* may account in part for its reluctance to inaugurate a procedure lacking roots in Mexican legal culture.

XI. A NEW GENERATION OF TEXTS—CONSOLIDATING, CLARIFYING AND PROMOTING TRANSPARENCY PRACTICE

A. The Model U.S. BIT and Transparency

The pro-transparency policies promoted by the United States under NAFTA are reflected in its 2004 revision of the United States Model BIT.[233] It attends to several core transparency issues and prefigures openness exceeding that envisioned under Chapter Eleven. First, it concisely settles the amicus question by providing: "The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."[234] In keeping with the NAFTA learning, the provision impliedly recognizes that it is a matter of tribunal discretion.[235] By contrast, little discretion accompanies the question whether to conduct open hearings: "The tribunal *shall* conduct hearings open to the public . . . ,"[236] though the tribunal is entitled to determine, "in consultation with the disputing parties, the appropriate logistical arrangements."[237] Elsewhere, the Model BIT enumerates the work-product to be made public. The list expressly includes hearing minutes and amicus submissions.[238]

B. The Second FTC Pronouncement—Amicus Participation

Confirmatory of the *Methanex* and *United Parcel Service* amicus rulings,[239] the NAFTA parties, through the FTC, again spoke to transparency-related questions in late 2004.[240] In that statement they

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05.pdf.

233. 2004 United States Model BIT, *supra* note 120.

234. *Id.* art. 28(3).

235. And by failing to qualify the word "submissions," that discretion appears to allow oral submissions as well as written ones.

236. 2004 United States Model BIT, *supra* note 120, 29(2) (emphasis added). The provision appears to leave little room for contrary agreement by the disputants.

237. *Id.*

238. *Id.* art. 29(1).

239. Indeed, the NAFTA states, in a joint statement, would later express pleasure that the guidelines they promulgated had been followed in *Methanex*. *See Methanex*, Final Award, *supra* note 225, Part II, Ch.C, at 16 n.8.

240. FREE TRADE COMMISSION, STATEMENT ON NON-DISPUTING PARTY PARTICIPATION (2004), *available at* http://www.state.gov/documents/organization/38791.pdf.

confirmed that: "No provision of the North American Free Trade Agreement . . . limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party . . . ."[241] The statement also supplied detailed guidance on prosaic but important matters intended to allow tribunals to regulate carefully amicus involvement to promote fair and orderly proceedings.[242]

As a whole, the guidance delimits the role of amici to a substantial degree, recognizing in particular that amici participate not as a matter of right and that the tribunal should consult the disputants in assessing the helpfulness and relevance of the requested filing. Amici are also subject under the guidance to a standing requirement that prevents entities with no, or only a minimal, nexus to a NAFTA state from seeking to participate.[243] Additionally, the application to make a submission and the submission itself are to be of limited length,[244] and are to be filed at the same time.[245] The simultaneity requirement no doubt reflects a desire to expedite the process, and places an obvious burden on the applicant who must marshal its substantive views at an early juncture, without necessarily having had a generous opportunity to acquaint itself with the case. The applicant must also make disclosures about itself and its interest in the arbitration that help place its desire to participate in context.[246] If permitted to participate, the third party should not expect to make additional submissions or to have the tribunal openly engage the views offered.[247]

C. Refinements in ICSID's Modus Operandi

Among the challenges facing ICSID is the need to anticipate shifts in transparency-related preferences of those it serves. Given the improbability of convention amendments, ICSID had to do so without departing from the Convention's dictates and without adopting policies that favor one class of disputant over another. In 2006 the Centre, after a period of study and consultation,[248] published revised Rules and

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241. *Id.* § A.

242. *Id.* § B(1)–(10).

243. The guidance suggests that an amicus be "a person of a Party, or that has a significant presence in the territory of a Party." *Id.* § B(1). The tribunal is also instructed to consider whether "the non-disputing party has a significant interest in the arbitration." *Id.* § B(6)(c).

244. Five pages and twenty pages respectively. *Id.* § B(2)(b), (3)(b).

245. *Id.* § B(1).

246. *Id.* § B(2) (c)–(f).

247. *Id.* § B(9).

248. *Amendments to the ICSID Rules and Regulations*, ICSID News Release, May 12, 2005, *available at* http://www.worldbank.org/icsid/highlights/CRR_English-final; *Possible Improvements*

Regulations corresponding to the seemingly irreversible trend toward openness affecting investor-state arbitration. The specific changes include express authorization for a tribunal to accept amicus briefs[249] and a rule that opens hearings to the public under certain circumstances.[250]

The amicus provision follows naturally from recent ICSID tribunal decisions that found discretionary power in relation to procedural matters.[251] The open hearing provision is informed to some extent by the Centre's experience in providing, albeit with the disputants' permission, a public gallery for real-time observation of certain NAFTA arbitral hearings. For ICSID or other institutions called upon to provide a public gallery, the goal has been to do so in a meaningful way without exposing the proceedings to disruption.[252] ICSID's location within the World Bank's complex enabled it to do so successfully. Observers have been admitted to an adjacent area within the complex where the hearings in question could be observed by closed circuit telecasts.[253] The appropriateness of ICSID's open hearing rule is reinforced by the latest generation of United States and Canadian BITs, which contain particularly robust open-hearing mandates.

XII. THE HORIZON AND BEYOND—NEXT GENERATION TRANSPARENCY ISSUES

From the foregoing it is possible to identify a new dispensation of topics that any sequel to this Article will likely be required to address. What is offered in this penultimate section is an introduction to some of these questions and future developments.

A. Appellate Level Transparency

Many commentators have discussed, and in some cases urged the use of, an appellate body to provide some form of second level review of investor state awards.[254] Cited, among other reasons, are the need for

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of the Framework for ICSID Arbitration, ¶¶ 20–23 *available at* http://www.worldbank.org/icsid.

249. ICSID Arbitration Rules, *supra* note 92, Rule 37(2).

250. *Id.* Rule 32 (2) (discretion in the tribunal to allow non-parties to attend or observe the hearings, but reserve in *either* party the power to insist upon a closed hearing).

251. *See infra* notes 268–70, and accompanying text.

252. Legum, *supra* note 119, at 350.

253. *Id.*

254. *See generally* Barton Legum, *The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002*, *in* ANNULMENT OF ICSID AWARDS 289 (Emannuel Gaillard ed., 2004); 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, 533–34 (2000) (arguing that international commercial arbitration in general would benefit from elective appellate mechanisms). For

substantive coherence[255] and problems inherent in domestic court scrutiny of investor-state awards.[256] The United States is committed to considering how an appellate mechanism can become a routine feature of the investor-state claims regimes to which it submits.[257] With tabula rasa, and the NAFTA experience to inform the architectural process, transparency questions might well be handled cleanly and comprehensively. While certain details of such a policy may depend on the form the appellate body takes,[258] little argues against public distribution of pleadings and appellate awards or against public hearings (subject to the need to protect the proceedings from disruption). The educational and legitimizing byproducts of such an open approach seem obvious and attractive. Additionally, to subject investor-state awards to conspicuous, independent, apolitical review by a permanent institution should do much to promote heightened and concrete awareness of the rule of law as an influence affecting state actors.

That amicus participation should be allowed at the appellate level but tightly regulated would also seem to be uncontroversial, especially given the trend to allow such amicus involvement at the first instance. In keeping with the present learning, an amicus policy built on tribunal discretion, standing limits, and carefully circumscribed levels of involvement will go far to strike the appropriate balance. Thus, amici will not be considered an essential feature, but would be allowed where the benefit-burden calculus supports amicus briefs. Presumably, amicus briefs already supplied to the first instance tribunal will be available for the appellate body to consider, obviating further amicus submissions in certain cases. In others, amicus participation may occur for the first time at the appellate stage.

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discussion of the WTO Appellate Body, see LOWENFELD, *supra* note 28, at 166–71.

255. *See* Brower, *supra* note 80, at 57–58 (arguing that coherence provides necessary predictability); Franck, *supra* note 56, at 1574–81 (discussing inconsistencies in NAFTA arbitration awards).

256. *See* Coe, *supra* note 76, at 187 (summarizing the problems with such awards).

257. *See generally* Legum, *supra* note 254, at 294–96.

258. Specific details will depend upon antecedent questions such as whether the appellate function is to be performed by a permanent body, or merely by ad hoc tribunals akin to those formed under the ICSID Convention. *See generally* Julian D. M. Lew, *ICSID Arbitration: Special Features and Recent Developments*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 267, 275–79 (Norbert Horn ed., 2004) (discussing the annulment of awards by an ad hoc committee). A permanent institution, for instance, might maintain a secretariat whose function could include informing the public of docket activity and related matters.

B. The Mediation Conundrum

Despite its success in relation to private commercial disputes,[259] mediation has not become routine in the resolution of investor-state disputes.[260] Certain commentators and institutions, including ICSID itself, have recognized the need to promote mediation in investor-state disputes[261] on grounds of cost, speed, flexibility, and confidentiality.[262] It is the latter attribute—confidentiality—that comes into tension with the demonstrable trend toward transparency in investor state arbitration.[263] To some extent, the same policies that favor enhanced transparency in investor-state arbitration apply to investor-state mediation. It is thus legitimate to ask whether mediation holds too great a potential to cloak activities that deeply implicate the public interest.

Mediation, however, depends heavily on confidentiality to promote candor. Without candor, the exercise becomes less likely to improve on the settlement rates disputants achieve without the help of a neutral third party.[264] Without successes that invite further use, in turn, mediation is unlikely to become a viable alternative to arbitration. As has been suggested elsewhere, the appropriate *via media* might consist in a format in which the fact of the dispute and the ultimate terms of settlement (at

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259. Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEG. J. 259, 260–67 (1996) (stating that one study of 449 contract- and tort-based disputes revealed a settlement rate of 81%); *see also* EILEEN CARROLL & KARL MACKIE, INTERNATIONAL MEDIATION—THE ART OF BUSINESS DIPLOMACY 91 (2000) (reporting a similar resolution rate from the Center for Dispute Resolution); Robert Coulson, *Arbitration and Other Forms of Alternative Dispute Resolution—General Overview*, 5 AM. REV. INT'L ARB. 6, 7 (1994) (reporting that AAA commercial mediation produced settlement rates in excess of 80%).

260. *See* RUBINS & KINSELLA, *supra* note 32, at 400–03 (discussing why investors and states rarely use mediation to resolve disputes).

261. Ucheora Onwuamaegbu, *Resolution of Oil and Gas Disputes at ICSID*, NEWS FROM ICSID 1, 14 (Summer 2004), *available at* http://www.worldbank.org/icsid/news/news_21-1.pdf; *Possible Improvements for ICSID Arbitration*, ICSID News Release, Oct. 22, 2004, *available at* http://www.worldbank.org/icsid/improvement-arb.htm.

262. *See generally* Coe, *supra* note 77.

263. These competing interests are not unique to investor-state disputes. *See* Carrie Menkel-Meadow, *Whose Dispute Is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2666–67 (1995) (discussing the conflict between the public and private realms in settlement). *See also* Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 303–04 (1999) (examining the debate between confidentiality and public access); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464–74 (1991) (contrasting a right to privacy with property rights).

264. This feature of mediation is fundamental. *See* KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 133, 404, 535, 545 (2004).

least in redacted form) are published, but in which the process is otherwise private and confidential to a large degree.[265]

C. *Unity or Diversity?—Beyond NAFTA*

1. When the United States or Canada is a Party

That the United States and Canadian 2004 revisions address transparency issues in detail is unprecedented among BITs. As these models come to be deployed on an increasing basis, a number of normative ripples may be expected. Certainly as to the amicus question, tribunals functioning under the older model BITs may view the procedural possibilities in light of the new texts, NAFTA cases, and FTC pronouncements. The older texts, in general, designate ICSID and UNCITRAL Rule arbitration and have broad similarities to Chapter Eleven. Therefore, the older texts will be amenable to policies developed under NAFTA as to issues upon which they are silent. Limits to such retrofitting exist, however, because the relevant texts are not silent on all transparency issues. It will, therefore, remain true under the UNCITRAL Rules, for example, that public access to the hearing should not be permitted without the parties' approval.

2. *Vivendi*, ICSID Convention Article 44, and NAFTA's Spill-Over Effects

Where the ICSID Convention applies—a regular occurrence when neither Mexico nor Canada is involved[266]—constructions of that convention's grant of procedural gap-filling power will combine with the concordant rule revisions to promote tribunal initiative in engineering access in the public interest. In relation to amici, for instance, early indications are that ICSID tribunals will not counter the trend evident in NAFTA, as suggested by the *Vivendi* case.[267]

Vivendi is an ICSID arbitration. Relying on Article 44 of the ICSID Convention,[268] (in a ruling that preceded ICSID's liberalizing rule revisions) the *Vivendi* tribunal recently found that its general power to

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265. Coe, *supra* note 77, at 133.

266. *See supra* note 40 and accompanying text.

267. Vivendi Universal, S.A. v. Argentine Republic, Order No. ARB/03/19 ICSID Case No. ARB/03/19, (May 19, 2005), *available at* http://ita.law.uvic.ca/documents/AguasArgentinasVivendiOrderAmicusCuriae.pdf (investment treaty arbitration).

268. *See* ICSID Convention, *supra* note 40, at art. 44 (noting that the tribunal shall decide questions of procedure if not addressed in the Convention or Arbitration Rules).

decide procedural questions entitled it to fashion access for amici. In regulating the petitioning process and articulating the factors to be considered, the tribunal expressly drew inspiration from the NAFTA amicus regime and followed it closely.[269]

3. Impact on Purely Private International Arbitration

Some no doubt fear that as a byproduct of expectations developed in investor-state contexts, private commercial arbitration may come under pressure to lift the metaphorical shades. As to some issues—for instance whether to open hearings—it is likely that party autonomy will prove equal to the task of substantially preserving existing levels of privacy; most rule formulae are clear on the need for party approval to depart from the in camera norm.

As to other questions, such as the role of amicus, less confidence can be expressed. The same UNCITRAL Rules that allowed amici in *Methanex* have inspired many modern rule texts. It is thus quite possible that a tribunal will declare itself to have the authority in a private arbitration to admit amicus, enabling it to advance to the second tier of analysis: whether sufficient public interest is involved to warrant amici. If a tribunal admits amici over the objection of both parties, a plausible basis for set-aside will often exist.[270] Yet, reviewing courts may be expected to differ as to whether party autonomy should be an effective bulwark against, for example, the limited involvement of a regulatory agency when competition and other public laws are unmistakably involved. This question is one of the many that deserve further thought and attention of scholars.

XIII. CONCLUSION

This Article has attempted to trace the march apace toward openness evident within NAFTA Chapter Eleven, and to place those advances in the context of complementary developments outside of that regime. The present mix of openness and control characterizing NAFTA practice and the texts it has inspired can only be taken as concrete progress by those who have urged that Chapter Eleven fortify its legitimacy quotient. One obstacle to transparency—the theory that transnational obligations of confidentiality attach to arbitration—had already been reduced to dubious doctrine, repudiated in cases such as *Metalclad*. The techniques

269. *Vivendi Universal Order*, ICSID Case No. ARB/03/19, at *9–10.

270. *See supra* note 40 and accompanying text.

deployed to engender further openness and access have included progressive use of discretion in the face of silent texts and formal collaboration among treaty partners, in consultation with disputants and other stakeholders.

That a liberal, coherent policy would so rapidly emerge in turn reflects a number of factors including pressure from NGOs, a general desire to bolster public confidence in what has become a remedy central to modern investment treaty programs, the close relationship among the NAFTA states, and the robust docket that brought transparency-related issues to the fore. Tribunal leadership and adeptness too must be credited, as must the various forms of persuasion that no doubt account for the softening in Mexico's earlier reluctance and in the willingness of disputants to open their hearing rooms.

Because the NAFTA transparency formulae are moderate, flexible, and largely reduced to a positive form, they will certainly continue to bear fruit outside of NAFTA, as evident in the newly minted ICSID Rules referred to throughout this essay. Regardless, within United States practice, the commitment to openness now extends well beyond its North American undertakings, as reflected in a number of recent United States trade agreements and the model BIT that will replicate NAFTA learning in coming years.

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