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Settlement of Disputes Under the Central America – United States – Dominican Republic Free Trade Agreement

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I. Introduction

> This is an historic day for the United States and our six partners in CAFTA-DR. This free trade agreement makes stronger the bond between us and our neighbors. CAFTA-DR creates an alliance for fair trade and will promote security and stability in our region. This is a win-win agreement that benefits American workers with greater access to important markets, and our trading partners with new economic opportunities . . . America's support for CAFTA-DR sends a strong signal to the world that the United States is committed to market liberalization. We look forward to continuing to work with Congress and our trading partners around the world to provide global opportunities for free and fair trade through the Doha Development Agenda.[1]

[1] USTR Press Release, Statement of Ambassador Portman on Signing of U.S.-Central American-Dominican Republic Free Trade Agreement, Aug. 2, 2005, *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/August/Statement_of_USTR_Rob_Portman_

A. CAFTA-DR in Context

In recent years, many nations, including the United States and to a somewhat lesser extent the nations in Central America and the Caribbean, have participated in the proliferation of "regional trade agreements" world-wide. The WTO secretariat estimates that as of the end of 2005, based on notifications to the WTO, some 300 such agreements would be in force by the end of 2005.[2]

The Central American – United States – Dominican Republic Free Trade Agreement ("CAFTA-DR)[3] is one in what is now an extensive list of post-NAFTA FTAs concluded by the United States. Since 1999, the United States has concluded FTAs with Jordan,[4] Singapore,[5] Chile,[6] Morocco,[7] Peru,[8] Australia,[9] Colombia,[10] Oman[11] and

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on_Signing_of_US-Central_American-Dominican_Republic_Free_Trade_Agreement_printer.html (visited Aug. 23, 2006).

[2] WTO, Regional Trade Agreements, *available at* http://www.wto.org/english/tratop_e/region_e/region_e.htm (visited Aug. 21, 2006).

[3] Central American-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, United States, Guatemala, El Salvador, Honduras, Nicaragua, Dominican Republic, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (visited Jul. 31, 2006) [hereinafter "CAFTA-DR]. (As of early 2007, in force for all but Costa Rica. It is expected to enter into force for Costa Rica during the first quarter of 2007.) The United States, pursuant to the implementing legislation, has implemented the Agreement on a country specific basis, "At such time as the President determines that countries [party to the Agreement] have taken measures necessary to comply with the provisions of the Agreement that are to take effect on the date on which the Agreement enters into force . . . ." Dominican Republic-Central America- United States Free Trade Agreement Implementation Act, sec. 101(b), P.L. 109-53, 119 Stat. 462, 19 U.S.C. § 4001 note (2005).

[4] Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000 [hereinafter "Jordan FTA"], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf (visited Jul. 31, 2006). This was a "bare-bones" agreement by current standards, with less than 20 pages of text compared to hundreds with all of the other FTAS, and the only one concluded after NAFTA by the Clinton Administration.

[5] United States - Singapore Free Trade Agreement, May 6, 2003, U.S.-Sing., *available at* http://www.ustr.gov/new/fta/Singapore/final/2004-01-15-final.pdf (last visited Feb. 11, 2004) [hereinafter Singapore FTA].

[6] United States - Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, http://www.ustr.gov/new/fta/Chile/ text/index.htm (last visited Feb. 11, 2004) [hereinafter Chile FTA]

[7] United States – Morocco Free Trade Agreement, Jun. 15, 2004 [hereinafter "Morocco FTA"], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html (visited Jul. 31, 2006).

[8] United States – Peru Trade Promotion Agreement, Apr. 12, 2006 [hereinafter "Peru FTA"], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (visited Jul. 31, 2006). (Not in force.)

[9] U.S. – Australia Free Trade Agreement, May 18, 2004 [hereinafter "Australia FTA"], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html (visited Jul. 31, 2006).

[10] Proposed United States – Colombia Trade Promotion Agreement [not in force], [hereinafter "Colombia FTA"], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html (visited Jul. 31, 2006).

Bahrain.[12] All of these except those with Peru and Colombia have received U.S. and foreign congressional approval, and are or will soon be in force. Negotiations continue at various levels of intensity with others.[13] With the recent suspension of the WTO's "Doha Development Round" of global trade negotiations,[14] it seems reasonable to assume that the United States and other major trading nations will maintain or even step up their efforts to conclude more regional trade agreements,[15] even though opposition in the U.S. Congress and the likely expiration of the President's "Trade Promotion Authority" on June 30, 2007[16] will likely make it difficult for the Bush Administration to undertake major new FTAs, except perhaps for the one under negotiation with South Korea.

The Central American nations have experience with regional trade agreements that pre-dates that of the United States. The initial instrument designed to create a common market in Central America was signed in 1960,[17] even though its full implementation has been delayed by more than forty years of civil war and the lack of political will to deal with well-entrenched business and labor interest groups. The fact that most duties for trade within the five nation region (the Dominican Republic is not a party) have finally been eliminated, and the common external tariff has been substantially implemented, can likely be traced in significant part to the anticipation of CAFTA-DR, and the need to increase Central American industrial competitiveness vis a vis Asia.[18]

There are also a number of bilateral FTAs between CAFTA-DR members and other nations. Among the outside nations that have negotiated FTAs with Central American nations are Mexico (Guatemala, El Salvador, Honduras); Chile (all); the Dominican Republic (all); Panama (all); Colombia (Guatemala); and Venezuela

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[11] U.S. – Oman Free Trade Agreement, Jan. 18, 2006, [hereinafter "Oman FTA"], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html (visited Jul, 31, 2006).

[12] Agreement between the Government of the United States and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Agreement, Sep. 14, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html (visited Jul. 31, 2006).

[13] Panama, Thailand, Malaysia, Ecuador (currently suspended pending resolution of U.S. investor disputes), the United Arab Emirates and South Korea . Some information on each of these negotiations is available from USTR; *see* http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (visited Jul. 31, 2006).

[14] Daniel Pruzin & Christopher S. Rugaber, *WTO's Doha Round Talks Collapse, as G-6 Meeting Ends in Acrimony*, 23 INT'L TRADE REP. (BNA) 1120 (Jul. 27, 2006).

[15] *See* Steven Chase, *WTO Talks Collapse after 5 Years*, Jul. 24, 2005, *available at* http://www.theglobeandmail.com (visited Jul. 25, 2006) (commenting that "trade watchers" expect more bilateral free trade deals, with the "spaghetti bowl" effect of different agreements that hamper global commerce).

[16] 19 U.S.C. §§ 3801 – 3814, 3803(b)(C)(ii) (2002). Renewal in 2007 is problematic.

[17] General Treaty on Central American Economic Integration, Dec. 13, 1960, *available at* http://www.sice.oas.org/trade/camertoc.asp (visited Jul. 31, 2006). (As usual, Costa Rica didn't get around to signing until a couple of years later.)

[18] Carol Osmond et al., *Final Report, Implementation of Customs-Related Business Facilitations Measures as Part of the Free Trade Area of the Americas (FTAA) Process*, Oct. 31, 2004, Annex A (copy on file with author).

(Guatemala).[19] The Dominican Republic's only (other) regional trade agreement other than CAFTA-DR and the one with the Central American states is a more limited, older (1985) agreement with Panama.[20] Costa Rica has concluded an FTA with Canada,[21] and has concluded FTAs or similar agreements with the Caribbean group CARICOM, Panama, Mexico, Colombia and Venezuela.[22] The Central American nations (except Costa Rica) have been negotiating an FTA with Canada for at least four years, but to date agreement has not been reached.[23] It was expected that negotiations of a long-discussed FTA between Central American and the European Union would be initiated before the end of 2006.[24] However, many of the non-U.S. agreements do not have full coverage of such areas as investment and intellectual property.[25]

As indicated above, all of the NAFTA Parties have attempted FTAs with Central America, but only the United States has managed to conclude one with all five of the Central American nations. The United States, of course, has the most to offer with regard to market access for both agricultural and manufactured goods, even if, as one observer has rather critically put it, that "access involves idiosyncratic rules, self-defeating trade-offs, uneven playing fields, and political benefits overshadowing economic costs. The US sets the standards. . . ."[26] For Canada, it may be that concluding negotiations is more difficult where development preconditions, human rights, democratic governance and the like are preconditions for negotiations,[27] all of which have been met only for Costa Rica. For Mexico it has been possible to conclude agreements with the northern Central American nations despite somewhat differing historical relationships and earlier frictions.[28] However, given the large number of Mexican FTAs with various countries

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[19] SICE [OAS], Free Trade Agreements with Guatemala, *available at* http://www.sice.oas.org/Trade/gua_e.ASP (visited Jul. 31, 2006).

[20] SICE, Free Trade Agreements with the Dominican Republic, *available at* http://www.sice.oas.org/Trade/domrep_e.ASP (visited Jul. 31, 2006).

[21] Canada – Costa Rica Free Trade Agreement, Apr. 2001, *available at* http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica_toc-en.asp (visited Jul. 31, 2006).

[22] SICE [OAS], Free Trade Agreements with Costa Rica, *available at* http://www.sice.oas.org/Trade/cos_e.ASP (visited Jul. 31, 2006).

[23] The negotiations were initiated in the fall of 2001, with the most recent negotiations held in February 2004. Foreign Affairs and Int'l Trade Canada, *Canada and Central America Four Free Trade Negotiations, available at* http://www.dfait-maeci.gc.ca/tna-nac/ca4-en.asp (visited Jul. 31, 2006).

[24] *See* EU – Central American Summit Joint Communiqué, May 13, 2006, para. 2, *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=PRES/06/139&format=HTML&aged=0&language=EN&guiLanguage=en (visited Aug. 21, 2006).

[25] As discussed *infra*, the United States has for decades sought bilateral agreements (either as part of FTAs or free-standing), protecting U.S. investors abroad against adverse actions by host countries. Also, since well before NAFTA and after the entry into force of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights(TRIPS) (available at http://www.wto.org/english/docs_e/legal_e/27-trips.doc), protection of U.S. intellectual property—ranging from copyrights, patents and trademarks to chip masks and certain Internet content—has also been a hallmark of U.S. international economic policy.

[26] A. IMTIAZ HUSSAIN, RUNNING ON EMPTY IN CENTRAL AMERICA? CANADIAN, MEXICAN, AND US INTEGRATIVE EFFORTS 15 (Univ. Press of America, 2006).

[27] *Id.* at 57.

[28] *Id.* at 54-55.

both within and outside Latin America[29] it isn't surprising that most of the Central American nations (except Nicaragua) are included.

The U.S. FTAs, including CAFTA-DR, while varying considerably in their content and coverage, share far more similarities than differences. All are extensively patterned after the North American Free Trade Agreement of 1994 (NAFTA),[30] in that they are comprehensive agreements that deal with tariff and non-tariff barrier elimination for trade in goods (including extensive but not full coverage of agriculture), rules of origin, and also include chapters on standards, sanitary and phytosanitary measures, government procurement, intellectual property (with some rules going beyond the requirements of the WTO's Agreement on Trade Related Intellectual Property ("TRIPS")),[31] services, investment[32], rudimentary competition law, labor rights and the environment.[33] As with all post-NAFTA U.S. FTAs, CAFTA-DR treat labor rights and environmental protection in the body of the Agreement rather than in separate "side" agreements.

CAFTA-DR consists of 22 chapters, most with self-contained annexes; a "market access" annex (rules of interpretation); product specific rules of origin (143 pages); Annex I (specific exceptions on a country-specific basis); Annex II (additional non-conforming measures); Annex III (financial services non-conforming measures); Tariff schedules for each of the seven Parties; and an extensive series of "side letters", again on a country by country basis.[34] This means, of course, that there are few CAFTA-DR legal questions that can be safely answered by simply reviewing one or two provisions, or even one annex. With investment, in particular, not only Chapter 10 but Annexes I and II are likely critical to any analysis.

With a few exceptions—Australia, Singapore and South Korea (if successfully negotiated)—all post-NAFTA U.S. FTAs are with developing (or near-developing) countries, particularly small developing countries such as those in Central America and the northern half of South America. Since trade with none of these FTA partners—with

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[29] More than a dozen, according to the OAS website, http://www.sice.oas.org/tradee.asp (visited Nov. 14, 2006).

[30] North American Free Trade Agreement, Dec. 17, 1992, U.S. – Mexico – Canada, [hereinafter "NAFTA"], 32 I.L.M. 289 (1993), *also available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42 (full text and annexes) (visited Jul. 31, 2006).

[31] Annex 1c of the Marrakech Agreement Establishing the World Trade Organization, Apr. 14, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.doc (visited Jul. 31, 2006).

[32] The Australia FTA lacks mandatory investor-state arbitration, although standards for treatment of foreign investors are included; there are no investment provisions in the Jordan FTA, but the U.S. and Jordan concluded a bilateral investment treaty in 1997 that entered into force in 2003. U.S. Dept. of State, *U.S. Bilateral Investment Treaty Program* (Nov. 7, 2005), at 2, *available at* http://www.state.gov/e/eb/rls/fs/22422.htm (visited Aug. 2, 2006) [hereinafter "USBIT Program"].

[33] All of the post-NAFTA agreements contain some form of labor and environmental provisions in the body of the agreement, rather than in the two NAFTA "side agreements," the North American Agreement on Environmental Cooperation ("NAAEC"), Sep. 13, 1993, 32 I.L.M. 1482 (1993), *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english (visited Jul. 31, 2006); and the North American Agreement on Labor Cooperation ("NAALC"), Sep. 13, 1993, 32 I.L.M. 1502 (1993) *available at* http://www.naalc.org/english/agreement.shtml (visited Jul. 31, 2006).

[34] CAFTA-DR, *supra* note 3, *passim.*

the possible exception of Singapore and South Korea—is in itself significant for the United States (particularly compared to NAFTA),[35] one needs to be aware of other important U.S. interests that may be advanced by the accords. These include security issues with regard to Jordan, Oman, Morocco, Bahrain and Singapore, and the advancement of economic development/democratic institutions/rule of law with CAFTA-DR, Peru, Colombia and Ecuador (discussed in more detail below).

B. The Importance of Dispute Settlement Provisions in FTAs

While there are many areas of these agreements that could benefit from close analysis by those who will be directly affected by them—including but not limited to rules of origin, transparency, trade facilitation, environmental protection and labor protection—this article focuses on the area of settlement of disputes, those involving foreign investment, and those relating to disagreements among the state-Parties over the application and interpretation of the FTA. NAFTA's investment dispute Chapter 11 has been one of the most widely used—and controversial-- of all NAFTA mechanisms, with the Chapter 20 government to government mechanism less used. In the aggregate, the three major areas of NAFTA dispute settlement, Chapter 11 (investment), Chapter 19 (review of antidumping and countervailing duty administrative actions) and Chapter 20 (general dispute settlement), have involved literally hundreds of proceedings over a 12 year period.[36] (The separate NAFTA side agreements on labor and on environment have also generated numerous citizen complaints, but no arbitrations.[37])

The task of analyzing CAFTA-DR dispute settlement is considerably easier than with NAFTA, since there are only two major mechanisms, for investment and for government to government disputes. Labor and environmental obligations have been merged into the text of the Agreement; they are no longer separate, and are thus discussed in the context of government to government dispute settlement. Also, the NAFTA

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[35] Two - way trade with South Korea in 2005 was approximately $72 billion, while that among the NAFTA partners was in excess of $772 billion in 2005, with Australia, $ 30.1 billion, with Malaysia, about $38 billion, (both 2004) and that between the CAFTA-DR nations and the United States (2003) was about $32 billion. Ministro de Economia [Mexico], *available at* http://www.economia.gob.mx/index.jsp?P=2113&NLang=en (visited Aug. 21, 2006); USTR Press Release, *United States, South Korea Announce Intention to Negotiate Free Trade Agreement,* Feb. 2, 2006, at 1, *available at* http://www.ustr.gov (visited Aug. 21, 2006); USTR Press Statement, *USTR Zoellick Statement at Signing of U.S.-D.R.-Central America FTA*, Aug. 5, 2004, at 2, *available at* http://www.ustr.gov (visited Aug. 21, 2006). Other two-way trade data (Australia, Malaysia) can also be found in the State Department's "background notes," *available at* http://www.state.gov/r/pa/ei/bgn/ (visited Nov. 14, 2006).

[36] *See* David A. Gantz, *The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=918542 (visited Dec. 15, 2006) [hereinafter "NAFTA Dispute Settlement"]

[37] Fifty-five submissions have been made under the NAFTA Environmental side agreement through mid-July 2006; *see* Commission for Environmental Cooperation, Citizen Submissions on Enforcement Matters, *available at* http://cec.org/citizen/status/index.cfm?varlan=english visited Jul. 31, 2006); 28 public submissions had been filed under the NAALC (through March 2004); *see* Commission for Labor Cooperation, Summary of Public Communications, *available at* http://www.naalc.org/english/pdf/pcommtable_en.pdf (visited Jul. 31, 2006).

Chapter 19 mechanism for review of unfair trade actions has not been replicated in CAFTA-DR, or in any other U.S. free trade agreement.[38]

Investment is, of course, a key element of U.S. FTAs, beginning with the U.S.-Canada FTA in 1988. Nor, apparently, is the U.S. alone. According to a recent UNCTAD study, "International investment rules are increasingly being adopted as part of agreements that address inter alia trade and investment."[39] The region is not a major destination for U.S. direct foreign investment; as of 2005, aggregate DFI for the six CAFTA-DR countries was only about $4 billion, roughly 5% of U.S. FDI in Mexico, and flows were erratic.[40] While there appears to be little empirical data demonstrating that investment protection agreements directly stimulate DFI, it seems intuitively correct to believe that to attract investment to small markets with few natural resources, a more favorable investment climate could be an important factor in encouraging foreign investment, and investment agreements, along with political stability, a well-functioning legal system, educated workers, reasonable labor and tax laws and good infrastructure, are relevant to investment decisions.[41] In any event, U.S. FTAs almost invariably include investment protection provisions,[42] and well prior to the CAFTA-DR, three of the six developing country Parties had negotiated bilateral investment treaties with the United States.[43]

Also, with seven Parties instead of three, six of which have a significantly lower stage of economic development and experience with international economic agreements than any of the NAFTA parties, disputes regarding the application and interpretation of the Agreement are almost inevitable. While the Parties are all members of the WTO, and thus have available the WTO's Dispute Settlement Body ("DSB")[44], the various

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[38] The reasons for this are somewhat complex; *see* discussion in NAFTA Dispute Settlement, *supra* note 36, Part II.

[39] UNCTAD, *Investment Provisions in Economic Integration Agreements* (UN, 2006), at 1, *available at* http://www.unctad.org/templates/webflyer.asp?docid=6935&intItemID=2310&lang=1 (visited Dec. 22, 2006).

[40] U.S. Dept. of Commerce, Bureau of Economic Analysis, *available at* http://www.bea.gov/bea/di/usdctry/longctry.htm (visited Aug. 2, 2006). FDI for the six CAFTA-DR countries was $3.989 billion, compared to $71.423 billion for Mexico.

[41] A recent study concludes that bilateral investment treaties [and, presumably, similar provisions of FTAs] "do indeed have a positive impact on FDI flows to developing countries," as a signal of welcome to foreign investors, but that conclusion of a BIT alone does not permit developing countries to "avoid the hard work of improving their own domestic environment as it affects the political risks of investment." Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: the Political-Economic Environment for Bilateral Investment Treaties*, Nov. 14, 2006, at 30-31, *available at* http://www.law.yale.edu/documents/pdf/When_BITs_Have_Some_Bite.doc (visited Dec. 15, 2006).

[42] The Australia FTA lacks mandatory investor-state arbitration; there are no investment provisions in the Jordan FTA, but the U.S. and Jordan concluded a bilateral investment treaty in 1997 that entered into force in 2003. U.S. Dept. of State, *U.S. Bilateral Investment Treaty Program* (Nov. 7, 2005), at 2, *available at* http://www.state.gov/e/eb/rls/fs/22422.htm (visited Aug. 2, 2006) [hereinafter "USBIT Program"

[43] El Salvador (1999), Honduras (1995) and Nicaragua (1995). Only the Honduras agreement actually entered into force. U.S. BIT Program, *supra* note 32, at 2.

[44] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakech Agreement Establishing the World Trade Organization, Apr. 14, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.doc (visited Aug. 14, 2006) [hereinafter "DSU"].

provisions of CAFTA-DR that are not covered by the WTO agreements, including but not limited to provisions on labor and environment, and some of those in the intellectual property area, make at least some Chapter 20 disputes likely.

This article is intended both to explain the dispute settlement provisions, and to highlight the differences in CAFTA-DR compared to NAFTA. It is not, however, a comprehensive analysis of the NAFTA jurisprudence, particularly the many tribunal decisions under the NAFTA Chapter 11 investment provisions.[45] In the analysis, the author has tried to steer a middle ground between readers with sophisticated expertise in investment agreements and investor-state arbitration, and those who are newer to the area, realizing that some of the commentary will be overly-simplistic for some, and perhaps too complex for others, for which he apologizes in advance.

Part II constitutes a brief summary of CAFTA-DR and its objectives, primarily but not exclusively from the point of view of the United States. It attempts to answer, at least in part, what is perhaps the most obvious question: why did the United States government devote an enormous volume of negotiating resources, and considerable political capital, to secure the conclusion and congressional approval of an FTA than when fully in force will produce only about as much trade annually as NAFTA does in three weeks?

Part III focuses on CAFTA-DR Chapter 10, Section A, the protections for foreign investors afforded under the Agreement. Part IV discusses the actual process of investor-state international arbitration, as structured in Section B of Chapter 10. Both draw as appropriate on other sections of CAFTA-DR, including the Chapter 11 definitions and annexes, and general annexes I and II. All of these provisions are patterned closely but by no means slavishly on NAFTA's Chapter 11, with subtle and not so subtle changes reflecting the NAFTA experience.[46] Even more recent FTAs, such as those with Colombia and Peru, contain further innovations, including the treatment under the investment chapter of restructuring of foreign debt.[47]

Part V discusses the government to government dispute settlement mechanism created under CAFTA-DR Chapter 20, with particular attention to a series of procedural additions, and a potential increase in jurisdiction resulting from including the labor and environment provisions in the body of CAFTA-DR rather than in "side" agreements

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[45] *See, e.g.,* NAFTA: INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler, ed., Transnational Publ. 2004) (discussing various aspects of Chapter 11 dispute settlement, including the case law).

[46] The author has undertaken a somewhat similar analysis with regard to the Chile FTA; *see* David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement,* 19 AM. U. INT'L L. REV. 680 (2004) [hereinafter, "Gantz – Evolution"].

[47] *See, e.g.,* United States – Peru Trade Promotion Agreement, Annex 10-F, Apr. 12, 2006, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file483_9547.pdf (visited Nov. 14, 2006) (providing that no award may be made for default or non-payment of public debt unless there is a tribunal finding of expropriation or breach of another Section A obligation; commercial risks involved in the purchase of public debt are excluded).

under NAFTA. Part VI attempts to draw some conclusions as to how the dispute settlement mechanisms will function under CAFTA-DR.

At the risk of stating the obvious, since CAFTA-DR is not yet fully in force,[48] any commentary about the likely usage rate of its dispute settlement provisions is largely speculative, although some predictions can be made based on the NAFTA experience. The author's best guess is that the overall the numbers will be lower, since CAFTA-DR does not incorporate a mechanism for review of administrative determinations in unfair trade, actions along the lines of NAFTA's Chapter 19.[49] These usage rates may, however, be affected by the manner in which the Free Trade Commission under the Agreement goes about implementing various procedural steps, such as appointing the roster of potential arbitrators for government-to-government disputes[50] and those questions likely will not be addressed by the Commission until the Agreement has gone into force for all of the Parties.[51] In the end, as with NAFTA, the viability of the dispute settlement mechanisms, particularly Chapter 20, will depend on whether the governments implement them in good faith.

II. The Broader Significance of CAFTA-DR

CAFTA-DR is of course concerned first of all with increasing trade among the Parties, particularly the volume of two - way trade between the United States and each of the others. However, the agreement is probably as much a vehicle for economic development as it is for trade expansion *per se*, more so than NAFTA or any other earlier FTA, in such areas as rule of law, "trade capacity building," customs procedures, regulatory transparency, private property rights, competition, "civil society" participation, environmental protection, and labor law. Forty-five years after the General Treaty on Central American Economic Integration was concluded, in 1960, the CAFTA, along with promised negotiations of an FTA with the European Union, may provide the necessary impetus for the Central American nations to complete the customs union and harmonization of commercial law that was agreed to so long ago.[52]

USTR's statement at the signing of the CAFTA-DR, quoted at the beginning of this article, sums up the multiple U.S. motives for the FTA. These considerations included strengthening economic and other ties with six small nations, none of them major U.S. trading partners, but most—Guatemala, El Salvador, the Dominican Republic, Nicaragua-- nations in which the United States has politically intervened in the past, sometimes with disastrous results.[53]

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[48] As of early 2007, it had entered into force for the United States vis a vis all signatories except Costa Rica.

[49] Neither CAFTA-DR, nor any of the other post- NAFTA U.S. FTAs, nor any post – NAFTA FTAs concluded by Canada or Mexico, replicate the NAFTA Chapter 19 provisions.

[50] CAFTA-DR, art. 20.7.

[51] Telephone conversation with USTR Lawyer, Aug. 17, 2006.

[52] *See* discussion in David A. Gantz, *The Free Trade Area of the Americas: An Idea Whose Time Has Come – and Gone?*, [hereinafter "Gantz, FTAA"] 1 LOYOLA INT'L L. REV. 179, 194-195 (2004).

[53] *See* STEPHEN KINZER, OVERTHROW: AMERICA'S REGIME CHANGE FROM HAWAII TO IRAQ 56-77 [Nicaragua], 129-147 [Guatemala] (Times Books, 2006); *See* U.S. Library of Congress, *Civil War and*

Security and stability in the region, perhaps with a great concern for democracy than in the past, remains a U.S. objective in the post 9/11 world, as does illegal immigration from the region. As another USTR document noted, "In the 1980s, Central America was characterized by civil war, chaos, dictators, and Communist insurgencies. Today, Central America is a region of fragile democracies that need U.S. support . . . CAFTA-DR is a way for America to support freedom, democracy and economic reform in our own neighborhood."[54]

Second, probably for U.S. domestic audiences, "fair" trade is there, through market forces and the creation of "economic opportunities" designed to stimulate economic development, job growth and exports. This is more than lip service, given the extensive CAFTA-DR provisions on trade facilitation[55] and trade capacity building,[56] but it doesn't extend to market opening in sugar; USTR boasted that increased sugar imports from the region—a major producer—amounted to only a bit more than one day's U.S. production.[57] Even though trade volumes are small compared to NAFTA, the roughly $15 billion in exports to the six CAFTA-DR nations in 2004 made the group the 14th largest U.S. export market worldwide, and second after Mexico in Latin America.[58] For the Central

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United States Intervention, (undated) *available at* http://countrystudies.us/dominican-republic/13.htm (visited Dec. 15, 2006).

[54] USTR, *The Case for CAFTA*, Feb. 2005, at 1 [hereinafter "CAFTA Facts"], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file235_7178.pdf (visited Jul. 31, 2006).

[55] CAFTA-DR, ch. 5.

[56] *Id.*,, ch. 19B.

[57] CAFTA Facts, *supra* note 54, at 2.

[58] USTR, *Small Countries, Big Markets*, Feb. 2005, at 1, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file118_7180.pdf (visited Aug. 25, 2006).

[59] *See* State Department Background Notes, Costa Rica (Jun. 2006, at 2), Dominican Republic (Jun. 2006, at 2), El Salvador (Dec. 2005, at 1), Guatemala (Nov. 2005, at 2), Honduras (Jan. 2006, at 2)and Nicaragua (Nov. 2005, at 2), *available at* http://www.state.gov/r/pa/ei/bgn/1850.htm (visited Aug. 23, 2006).

[60] Despite the sensitivity of textiles and apparel, some significant additional market opportunities were afforded in that sector, but with duty-free, quota free entry permitted in most instances only if U.S. or regional fabric and yarns were used. This was rightfully justified on a global competitiveness basis: "[W]ith the expiration of global quotas on textiles/apparel at the end of 2004, regional producers face a new competitive challenge from Asian imports. CAFTA would provide regional garment-makers – and their U.S. or regional suppliers of fabric and yarn—a critical advantage in competing with Asia." CAFTA Facts, *supra* note 54, at 1.

[61] The signing of CAFTA-DR came at a time when it was becoming more and more obvious that the United States' initiative for a "Free Trade Area of the Americas" was foundering and would likely be abandoned. *See, e.g.,* Gantz, FTAA*, supra* note 52, at 183-192 (exploring the reasons why the FTAA seemed doomed to failure).

[62] USTR termed these as "Strong Protections for Labor and the Environment," noting that the agreement provisions were designed to focus on assisting the CAFTA-DR nations in enforcing core ILO principles

[63] CAFTA-DR, Chs. 16 (labor) and 17 (environment). CAFTA Facts, *supra* note 54, at 2.

[64] *See Pelosi Statement in Opposition to CAFTA*, May 28, 2004, *available at* http://democraticleader.house.gov/press/releases.cfm?pressReleaseID=589 (visited Aug. 23, 2006) (statement of then House Democratic leader explaining opposition to CAFTA-DR, largely on grounds of insufficient protection of labor rights and the environment).

American nations, the United States is the most important market, representing from about 35% to over 80% of total trade,[59] and for some sectors, such as apparel, U.S. market access is significantly expanded;[60] trade with the United States is thus far more important to those countries than to the United States.

Third, CAFTA-DR (and other FTAs like it) were intended to have a demonstration effect of the United States commitment to freer trade (and perhaps a not so veiled threat) at the global as well as the regional level, including the likelihood that if everyone won't seek these goals, the United States will negotiate with those who will.[61]

Unmentioned in Ambassador Portman's statement, but showcased elsewhere[62], was the fact that CAFTA-DR contains language designed to protect to at least some degree internationally recognized labor rights and the environment.[63] These controversial (and to some, overly weak) provisions, which almost led to the defeat of CAFTA-DR in the U.S. Congress because of Democratic opposition,[64] are largely beyond the scope of a discussion of CAFTA-DR dispute settlement, except to a limited degree in Part V. The post-NAFTA U.S. FTAs make the labor and environmental provisions—whether or not considered otherwise sufficient—subject to the general dispute settlement mechanism (Chapter 20 in CAFTA-DR) rather than to separate agreements as in the case of NAFTA.

III. Investment Protection Under CAFTA-DR Chapter 10

Despite the differences among U.S. FTAs, it is the author's view that an understanding of NAFTA is essential to an understanding of these newer FTAs, and with such understanding a person with reasonable expertise in NAFTA can relatively quickly attain similar expertise in dealing with the provisions of CAFTA-DR and similar agreements. This seems particularly true with regard to protection of investment provisions. As with NAFTA, CAFTA-DR's investment chapter is divided into three major sections, investment, investor-state dispute settlement and definitions. Also as with NAFTA, CAFTA-DR contains a series of annexes reserving the right to temporarily or permanently reject or limit foreign investment in certain sectors. However, CAFTA-DR, unlike NAFTA, also contains a series of investment specific reservations and clarifications and procedural requirements, many of which are discussed in this section or in Part IV.

A. The NAFTA Background and Influence

NAFTA's investment provisions, as many readers will likely recall, were anything but radical when incorporated into the agreement. The obligations to investors language (Section A), were taken in significant part from the U.S. – Canada Free Trade

Agreement,[65] and both the obligations to investors and the dispute settlement provisions (Section B) reflected what at the time was more than a decade of U.S. experience concluding bilateral investment treaties ("BITs") with various developing nations.[66] By the time CAFTA-DR was negotiated, the negotiators (presumably for all parties) were aware of extensive investor-state litigation under NAFTA, some of which was relevant and some not to the situation of the six developing country CAFTA-DR parties. That history—and Congressional perception of it—caused a significant reshaping of the CAFTA-DR investment provisions compared to NAFTA's.

As far as the author has been able to determine over time, none of the NAFTA negotiators thought much about NAFTA's major departure from the BITs negotiated earlier; all of the earlier agreements with mandatory investor-state arbitration were with developing, capital importing nations, rather than a developed, capital exporting (as well as importing) nation such as Canada. The conventional wisdom seems to have been an assumption that the Chapter 11 provisions would be used almost exclusively by United States and Canadian investors in Mexico, and hardly ever by Mexican investors against Canada and the United States, simply because both the United States and Canada maintained highly developed legal systems with independent, non-corrupt, well-educated judiciaries. Why, under those circumstances, would anyone prefer international arbitration to domestic courts?

In retrospect, this view may seem naïve, but at the time it seemed logical enough to this author, and the likelihood of multiple disputes between United States investors and Canada, or vice-versa, did not appear to be a matter for concern.[67] Even if the concerns had been raised, they probably would not have significantly changed the agreement. Protection for foreign investors was a key objective of NAFTA (since job creation in Mexico was thought to depend on it), and there was no precedent for including such provisions in an FTA or BIT unless they were equally applicable to all parties.

The volume of U.S. – Canada investment is sufficiently enormous-- $175 billion from the U.S. to Canada and $134 billion from Canada to the United States, [68] to assure that there are at least a few actual or potential disputes with each host government. Also, there is a sufficient cadre of well-trained, aggressive and creative attorneys in each country, even given the well-respected national court systems, so that testing of the limits of investment treaty protections might have been anticipated. Finally, there is probably

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[65] United States – Canada Free Trade Agreement, Dec. 1997-Jan. 1998 [U.S. –Can.], 27 I.L.M. 281 (1998) [hereinafter "CFTA"], Ch. 16.

[66] *See* Daniel M. Price & P. Bryan Christy, III, *Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement* in THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 167 (Judith H. Bello et al., eds. (ABA, 1993) (discussing the negotiation and conclusion of the investment chapter by the principal negotiator, Dan Price); K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin Purposes and General Treatment Standards,* 4 Int'l Tax & Bus. Law 105 (1986) (discussion of the origin and early experience of the U.S. bilateral investment treaty program by one of the State Department negotiators).

[67] These issues are discussed at greater length in Gantz – Evolution, *supra* note 46, at 693-695.

[68] U.S. Dept. of State, "Background Note: Canada" (Jul. 2006), at 5, *available at* http://www.state.gov/r/pa/ei/bgn/2089.htm (visited Jul. 31, 2006).

no government on earth in which regulatory actions couched in terms of protecting the environment or worker rights or other worthwhile purposes are not in fact occasionally taken for protectionist purposes, or are simply arbitrary, discriminatory or unreasonable. In any event, in actual experience, of the roughly forty-two matters notified to the NAFTA Parties under Chapter 11, almost two thirds have been by American investors against Canada, or Canadian investors against the United States.[69]

NAFTA's experience has thus been a particularly educational, if occasionally painful, one for the NAFTA governments, including the United States, whose government lawyers are no more fond of losing court or arbitral decisions than other attorneys, and whose Members of Congress or Parliament don't particularly want to spend taxpayer money on foreign investor claims (whatever else they may be willing to spend it on). This concern persists despite the fact that the United States has never lost a NAFTA tribunal decision that found it in violation of NAFTA or required it to compensate a foreign investor. To the extent possible, the perceived errors in opening too wide the doors in NAFTA Chapter 11 would not be made in subsequent FTA investment chapters or BITs.

Some of the specific government and congressional concerns are discussed below, in the analysis of certain CAFTA-DR Chapter 10 provisions. The most notable relate to a) the types of conflicts between legitimate government regulatory actions (particularly those designed to protect the environment) and "takings" that would be compensable under the Fifth Amendment to the U.S. Constitution;[70] b) NAFTA tribunal review of decisions of national courts; and c) the possibility that foreign citizens bringing NAFTA investment claims may end up with greater rights than American citizens facing the same governmental action would have under what may be their only available remedy, the 5th Amendment to the United States Constitution.

In particular, criticism has focused on two actions against the United States, *Methanex v. United States*[71] and *Loewen Group v. United States*.[72] The first involved an

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[69] This is based on the best information available regarding the number of "notices of intent to submit a claim to arbitration" under NAFTA, Art. 1119. It can be reasonably argued that this is an imperfect measure, since not all such notices of intent resulted in actual claim submissions under NAFTA, Art. 1120, and even fewer were pursued through arbitration. On the other hand, it is at least possible that other notices of intent were filed which have never become public. Regardless of what criterion is used, there have been a very significant number of proceedings in which American investors brought claims against Canada, and vice versa. In the author's view, the best source of information on NAFTA claims—and by far the easiest to navigate—is a proprietary but free website managed by attorney Todd Weiler, http://www.naftaclaims.com, which has fewer gaps that the three government website.

[70] *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (holding, *inter alia*, that a temporary moratorium on building in the Lake Tahoe basis did not constitute a compensable taking). The relevant clause in the 5th Amendment states only that "[N]or shall private property be taken for public use, without just compensation."

[71] *Methanex v. United States* (Preliminary Award on Jurisdiction) (Aug. 7, 2002), 42 I.L.M. 514 (2003) [hereinafter *Methanex I*]; *Methanex v. United States* (Final Award on Jurisdiction and Merits] Aug. 3, 2005 [hereinafter *Methanex II*], *available at* http://www.naftaclaims.com.

[72] *Loewen Group Inc. v. United States* (Award) (Jun. 26, 2003),42 I.L.M. 811 (2003) [hereinafter "Loewen I"]; *Loewen Group, Inc. v. United States* (Decision on Request for Consideration) (Sep. 13, 2004), 44 I.L.M. 836 (2005) [hereinafter "*Loewen II"*].

alleged "regulatory" taking, based on a California decision to ban a gasoline additive, MTBE, allegedly on health grounds, to the detriment of Methanex' methanol production operations. The original tribunal dismissed the claim on the grounds that Methanex lacked a sufficient nexus under the "relating to" language under NAFTA, Art. 1101, since Methanex produced not the MTBE but only its prime ingredient, methanol.[73] Ultimately, all claims against the U.S. were dismissed either on jurisdictional grounds or on the merits,[74] but not before the lengthy proceedings raised serious concerns among NGOs and some Members of Congress over the prospect of such environmental action costing the United States or California hundreds of millions of dollars, and have a chilling effect on necessary government regulation in the future.

Loewen raised the specter of NAFTA review, ultimately on denial of justice grounds, of a decision of a Mississippi state court. That case too was ultimately dismissed on procedural grounds and for failure of one of the claimants to exhaust his local remedies as required under international law, but only after the tribunal characterized the Mississippi proceedings as a "disgrace."[75] In fact, it established a very high standard—denial of justice under international law—for effective second-guessing of a national court decision.

These cases led to various public objections, and ultimately to negotiating objectives and guidelines (not mandatory but to be ignored only at the president's peril) for future investment provisions in international trade agreements and BITs. These guidelines were embodied in the 2002 U.S. "Trade Promotion Authority" allowing the President to negotiate future trade agreements and BITs:

> [T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, *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*, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by -
>
> (A) reducing or eliminating exceptions to the principle of national treatment:
>
> * * *
>
> *(D) seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice;*
> *(E) seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process* . . . .[76]

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[73] *Methanex I*, supra note 71, para. 172(2).
[74] *Methanex II*, supra note 71, Tribunal's Operative Order, at 300.
[75] *Loewen I, supra* note 72, paras. 119, 137, 217, 240; *Loewen II*.
[76] 19 U.S.C. § 3802(b)(3) (emphasis added).

Thus, as one U.S. government attorney has put it,

> Each of the United States' post-NAFTA agreements embodies changes that reflect the negotiating objectives . . . Many of these objectives, as well as the resulting changes made to the agreements, have their origin in the United States' experience with NAFTA Chapter Eleven arbitration. In broad terms, the significant changes include the clarification of standards of certain substantive provisions, as well as modifications made to promote the transparency of investor-State arbitration, improve the efficiency of arbitrations, deter the filing of frivolous claims, and ensure the consistency of interpretations of similar obligations across agreements.[77]

It was in this context, therefore, that the U.S. negotiators proceeded with the negotiations of the Singapore and Chile FTAs (the first two to use modified investment language), and with CAFTA-DR.

B. CAFTA-DR's Investor Protections

At the outset, several important distinctions between NAFTA and CAFTA-DR affecting investment should be noted, even at the risk of stating the obvious. First, except for the United States, the other CAFTA-DR parties are developing nations, with relatively little investment in the United States, as is the case with most U.S. bilateral investment treaties, despite their being fully reciprocal in the included rights and obligations. There is thus likely to be relatively little investor-related litigation directed at the United States. Secondly, all seven parties to the CAFTA-DR are also parties to the ICSID Convention, while neither Canada nor Mexico have adhered.[78] In practical terms, this means that the normal ICSID Arbitration Rules[79] and secretariat services are available for investor-state disputes (in addition to other rules) while under NAFTA only the ICSID Additional Facility Rules are available at ICSID.[80]

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[77] Andrea J. Menaker, *Benefiting from Experience in the United States Most Recent Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 121, 122 (2005) [hereinafter "Menaker"].

[78] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159; *see* ICSID, List of Contracting States and Other Signatories (Jan. 2006), *available at* http://www.worldbank.org/icsid/constate/c-states-en.htm (visited Aug. 1, 2006) (showing all the CAFTA-DR nations as members, but not Mexico or Canada) [hereinafter "ICSID Convention"]. Canadian authorities signed the Convention on Dec. 19, 2006, but its entry into force for Canada awaits enactment of implementing legislation in several Canadian Provinces. Foreign Affairs and International Trade Canada News Release, *Canada Signs International Convention on Investment Dispute Resolution*, Dec. 19, 2006, *available at* http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=384696&Language=E&docnumber=160 (visited Dec. 22, 2006).

[79] ICSID, Rules of Procedure for Arbitration (updated Apr. 10, 2006), *available at* http://www.worldbank.org/icsid/basicdoc/partF.htm (visited Aug. 1, 2006).

[80] The Additional Facility Rules are available to disputes where either the investor or the host state is an ICSID party, but not both. They would be available for any disputes under NAFTA as between the U.S. and Mexico or the U.S. and Canada, but not between Mexico and Canada. ICSID Additional Facility Rules

Third, while U.S. firms (and Canadian firms) have in the past made significant use of investor-state arbitration in the NAFTA context and otherwise, there is little history of investor-state dispute settlement among the member countries of CAFTA-DR other than the United States.[81] Whether this is due to more significant efforts to resolve disputes through negotiation, the high cost of international arbitration, relatively low volumes of intra-Central American investment, cultural differences or some other factor or factors is beyond the scope of this discussion.

Fourth, the text of Chapter 10, which is highly similar to the investment provisions of earlier U.S. agreements, strongly suggests that Chapter 10 is essentially a U.S. origin (rather than a jointly negotiated) document. The other six Parties' input appears limited primarily to the reservations and certain limitations in the party-specific annexes, particularly with respect to sectors in which national treatment is not required for foreign investors. As the USTR, "Summary of the Agreement" states, "Its [Chapter 10] provisions reflect traditional standards incorporated in early *U.S.* investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties) and in customary international law, and contain certain innovations incorporated in the [U.S.] free trade agreements with Chile and Singapore as well as others."[82] The basic text appears to have been imposed (with or without objection) on the other negotiating parties.

Fifth, the NAFTA case law (and other investor-state case law) is relevant to possible investor-state arbitrations under CAFTA-DR, despite that fact that "An award made by a [CAFTA-DR] tribunal shall have no binding force except between the disputing parties and in respect of the particular cases."[83] The issue is not "binding force" or precedent, but whether tribunal members, likely experienced arbitrators from one or more of the CAFTA-DR parties and/or from outside the region, will pay attention to prior tribunal decisions on the same or similar issues, particularly when rendered under legal provisions that are identical or closely similar. Experience under NAFTA has demonstrated that tribunal members consider and discuss earlier arbitral decisions, even if tribunal members don't necessarily treat them as binding precedent. Even if the tribunal members did not wish to do so, they usually have little choice, because both the investor and the host state will cite prior decisions that tend to support their arguments before the tribunal. In future investor-state arbitrations under CAFTA-DR, the parties

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(updated Apr. 10, 2006), *available at* http://www.worldbank.org/icsid/facility/facility.htm (visited Aug. 1, 2006).

[81] Of 106 completed and 104 pending ICSID and ICSID Additional Facility cases, only two have involved a Central American country (Costa Rica, El Salvador), and none were between Central American-DR nations and investors; *see* ICSID, List of Completed Cases, *available at* http://www.worldbank.org/icsid/basicdoc/partF.htm ; ICSID, List of Completed Cases, *available at* http://www.worldbank.org/icsid/cases/pending.htm (both visited Aug. 1, 2006).

[82] USTR, Summary of the [Dominican Republic-Central America-United States Free Trade] Agreement, at 12 (undated), *available at* http://www.worldbank.org/icsid/cases/pending.htm (visited Aug. 1, 2004) (hereinafter "USTR Summary") (emphasis added).

[83] CAFTA-DR, art. 10.26.4.

will likely refer the tribunals to prior NAFTA and to any other arbitral decisions that involve the interpretation of similar treaty provisions.

1. Coverage of Investments and Investors

As with NAFTA[84], CAFTA-DR investment coverage is broad, applying to "measures adopted or maintained by a Party relating to . . . investors of another party" and to "covered investments,"[85] the latter including "investments" defined broadly to include an enterprise; shares of stock or other forms of equity participation; loan instruments; futures, options and other derivatives; turnkey, construction, concession and other contracts; intellectual property rights; licenses, authorizations and permits issued under domestic law; and various tangible, intangible, movable or immovable property, and related property rights.[86] However, not all transactions taking one of these forms will be covered "investments." Among other things, the investment must have "the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[87]

Claims with regard to sovereign debt instruments are covered, but if the claim relates to a short term instrument (less than one year) the claim cannot be filed until more than one year from the date of events (e.g., default) on which the claim is based.[88] An order or judgment from a court or administrative tribunal is not an investment.[89] Not only direct governmental actions but actions by state enterprises and others exercising regulatory or administrative authority are covered.[90] Except with regard to performance requirements and investment and environment,[91] Chapter 10 is not applicable to an "act or fact . . . or any situation that ceased to exist before the date of entry into force of this Agreement."[92] This language presumably establishes a basic rule of non-retroactivity, but would not bar a claim based on a course of conduct by a party violating the Section A obligations that began before entry into force but continued afterward.

The definition of "investor of a Party" is also broad. It includes "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party."[93] (The state enterprise is apparently covered only when it exercises regulatory, administrative or other

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[84] Many BITs also define investment broadly, and ICSID tribunals, despite the requirement in Article 25(1) of the ICSID Convention that a dispute must involve an investment, have tended to take an expansive view of the concept. *See* Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience,* 8 FALL L. & Bus. Rev. Am. 501, 513-516 (2002) (discussing the treatment of a dispute involving purchase of certain debt instruments as a dispute over an investment).

[85] CAFTA-DR, art. 10.1.1.

[86] *Id.,* art. 10.28.

[87] *Ibid.*

[88] *Id.,* annex 10-E, para. 3.

[89] *Id.,* art. 10.28, n. 11.

[90] *Id.,* art. 10.1.2.

[91] *Id.,* arts. 10.9, 10.11.

[92] *Id.,* art. 10.1.3.

[93] *Id.,* art. 10.28.

governmental authority that has been delegated to it by the government.[94]) However, unlike many bilateral investment treaties, CAFTA-DR deals explicitly with the dual national problem, since the benefits of Chapter 10 are available to "investors of *another* party . . ." [95] that is, the benefits are not available to Party's own national for an investment in its own territory. Consequently, Chapter 10 provides that a natural person claiming jurisdiction under the Agreement "shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[96] This effectively codifies the general principle of international law applicable to dual nationals.[97]

Consistent with this approach, the Agreement also permits a Party to deny Chapter 10 benefits to companies nominally operating in another Party, if the owners have no substantial business activities within CAFTA-DR other than in the Party denying the benefits, and persons of a non-Party, or of the denying Party, are the owners of the enterprise.[98] This language deals with two different situations. First, it has presumably been intended at least in part to preclude nationals of one CAFTA-DR Party (e.g., Guatemala) from using a corporation formed in the United States (without substantial business activities there) from seeking the benefits of protection under Chapter 10 for their investments in Guatemala. Secondly, if, for example, a Korean firm sets up a corporate subsidiary in Nicaragua, but has no substantial business activities in Nicaragua, the Nicaraguan subsidiary lacks standing to bring a Chapter 10 action against the United States based on the Korean firm's investment in the United States.

CAFTA-DR, like NAFTA, also prevents the Parties from having to offer Section A benefits to nationals of nations with which the offering Party does not have diplomatic relations or where rules and regulations on prohibited transactions would be violated.[99] This is presumably designed to prevent a Cuban-owned enterprise in one of the CAFTA-DR from enforcing Chapter 10 rights against the United States.

The provisions of Chapter 10 prevail against inconsistent provisions in other chapters generally, but do not apply with regard to government measures that may also be covered by the financial services chapter (12).[100]

2. National Treatment and MFN Treatment

The key protections in most investment protection agreements are those relating to national treatment, most favored nation treatment, fair and equitable treatment and expropriation, and these provisions of NAFTA are those that have been subject to the

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[94] *Id.,* art. 10.1.2.
[95] *Id.,* art. 10.1.1(a).
[96] *Id.*, referring to annex 2.1.
[97] *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 34 (Martinus Nijhoff, 1995)
[98] *Id.,* art. 10.12.2.
[99] *Id.,* art. 10.12.1.
[100] *Id.,* art. 10.2.

greatest volume of litigation.[101] The concept of national treatment, as reflected in CAFTA-DR Article 10.3, is simple in theory:

> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Applying such a non-discrimination principle is not always easy in practice. Among the issues that have arisen under NAFTA are what constitutes "in like circumstances" and whether there must be evidence of intent to discriminate, with the key decisions being *Pope & Talbot v. Canada*[102] and *S.D. Myers.*[103] The former related to a dispute over treatment of export quotas under a U.S. – Canada agreement, and resulted in a determination that the national treatment provisions of NAFTA were not violated, on the ground that different classes of lumber producers and exporters that were actually in like circumstances were not treated differently. The latter turned on Canadian government regulations which effectively precluded the export of hazardous wastes for processing in the United States so as to assure that Canadian wastes would be processed by a Canadian firm in Alberta; a violation of Article 1102 (national treatment) was found. In another case, *Feldman v. Mexico,*[104] a tribunal decided that foreign and domestic cigarette resellers were in like circumstances, but not foreign resellers and domestic cigarette manufacturers.

Most favored nation treatment, in NAFTA and in CAFTA-DR, is designed to assure that investors of one party are not treated in a discriminatory manner with regard to investors of another treaty party, or investors with rights under a separate investment treaty with the host government. The CAFTA-DR language, virtually identical to that in NAFTA, provides:

> Each Party shall accord to investors [covered investments] of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management,

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[101] NAFTA, arts. 1102, 1103, 1105, 1110.

[102] *Pope & Talbot v. Canada*, Award on the Merits of Phase Two (Apr. 10, 2001), *available at* http://www.naftaclaims.com (visited Aug. 1, 2006) [the third major Pope & Talbot decision, addressing national treatment and fair and equitable treatment, hereinafter "Pope & Talbot III"].

[103] *S.D. Myers, Inc. v. Government of Canada* (Nov. 13, 2000) (Partial Award) [hereinafter *S.D. Myers*], 40 I.L.M. 1408 (2001); *see also Cross-Border Trucking Services*, Feb. 6, 2001, paras. 248, 249, *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf (visited Aug. 1, 2006) (a Chapter 20 dispute interpreting identical language in art. 1202 regarding services). The author served as one of the panelists.

[104] *Marvin Feldman v. United Mexican States*, Case no. ARB(AF)/99/1 (Dec. 16, 2002), 42 I.L.M. 625 (2003) [hereinafter *Feldman*], *available at* http://www.naftaclaims.com (visited Aug. 1, 2006). The author served as one of the members of the tribunal.

> conduct, operation, and sale or other disposition of investments in its territory.[105]

This language has not been tested extensively under the NAFTA investment provisions, but was applied by a Chapter 20 NAFTA tribunal in the *Cross Border Trucking Services* case, in which Mexico had claimed that the United States was violating NAFTA's most favored nation investment (and services) clauses by permitting Canadian investment in U.S. trucking firms while denying Mexican investors the same opportunities.[106] It may well be that under an agreement with seven states-Party instead of only three that most-favored-nation issues will arise more frequently than they have under NAFTA, particularly for any CAFTA-DR Parties that have an extensive network of bilateral investment treaties, so that an investor can seek the applications of more favorable provisions (if any) in alternative treaties through the MFN clause in Chapter 10.[107]

3. Minimum Standard of Treatment

Among the most complex obligations under Section A of the investment chapter is the obligation to provide a minimum standard of treatment, particularly fair and equitable treatment, to foreign investors. The concept here is again relatively simple. What if the host state treats both foreign investors and its own citizens in an arbitrary and unreasonable manner? This would not violate a national treatment standard, but it would fall afoul of a fair and equitable treatment requirement. Full protection and security, in recent U.S. treaty practice at least, refers largely to police protection in the event of mob violence and the like. CAFTA-DR provides:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[108]

This language is substantively identical to NAFTA, except that NAFTA does not include the term "customary" before "international law."[109] However, the NAFTA Parties attempted to eliminate the confusion as to the extent to which "customary international law" meant something different (and more narrow) from "international law" alone, by issuing a binding "Interpretation" of NAFTA Chapter 11,[110] along with the

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[105] CAFTA-DR, art. 10.4.1.

[106] *Cross Border Trucking Services, supra* note 103, para. 297.

[107] There is an ongoing discussion regarding whether jurisprudence regarding MFN principles governing trade (e.g., GATT, Article I) should be applicable when MFN issues are raised under investment treaty provisions, as with CAFTA-DR, art. 10.5.

[108] CAFTA-DR, art. 10.5.1.

[109] NAFTA, art. 1105(1).

[110] NAFTA, art. 1131(2) provides that "An interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." CAFTA-DR, art. 10.23.2 incorporates similar language.

language that stated, *inter alia*, that "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[111] A full discussion of the proper scope of fair and equitable treatment and what constitutes the minimum standard of treatment under customary international law is well beyond the scope of this article.[112] However, it is noted here that the Interpretation was designed in part to counteract one of the early *Pope & Talbot* decisions, in which the tribunal unwisely decided that the NAFTA fair and equitable treatment was *in addition to* what was required under international law.[113]

Thus, for subsequent FTAs, including CAFTA-DR, the United States negotiators apparently decided to make it more difficult for tribunals to make mischief with fair and equitable treatment. Accordingly, CAFTA-DR "for greater certainty" contains more specific definitions and limitations. First,

> The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that [customary international law minimum] standard, and do not create additional substantive rights.[114]

Secondly,

> "fair and equitable treatment" includes the obligation not to deny justice[115] in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . .[116]

This language also reflects NAFTA experience, and a perceived need to instruct future tribunals on how to deal with situations in which the tribunal is effectively reviewing a national court or administrative decision for consistency with CAFTA-DR Chapter 10. Denial of justice has been addressed in at least two

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[111] *See Notes of Interpretation of Certain Chapter 11 Provisions*, (Jul. 31, 2001), *available at* <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp?format=print> (visited Mar. 31, 2003).

[112] *See, e.g.,* Ian A. Laird, *Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105*, *in* NAFTA—INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 49-76 (Todd Weiler, ed., Transnational Publ. 2004); Gantz – Evolution, *supra* note 46, at 708-730.

[113] *Pope & Talbot III, supra* note 102, paras. 114-115. A fuller discussion of fair and equitable treatment in *Pope & Talbot* can be found in David A. Gantz, *International Decisions: Pope & Talbot, Inc. v. Canada*, 97 Am. J. Int'l L. 937, 942-947 (2003).

[114] CAFTA-DR, art. 10.5.2.

[115] "Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice." Harvard Research draft, art. 9, *quoted in* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 506-507 (6th ed., Oxford, 2003).

[116] CAFTA-DR, art. 10.5.2(a).

NAFTA decisions, *Loewen, Mondev Int'l Ltd. v. United States*[117] and *Waste Management v. Mexico,*[118]although no clear standard has yet been articulated in the NAFTA jurisprudence. [119]

Thirdly, the CAFTA-DR parties decided to define customary international law:

> The Parties confirm their shared understanding that "customary international law" generally . . . results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5 [minimum standard of treatment] , the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.[120]

These particular clarifications reflect U.S. Trade Promotion Authority language, quoted at length above, which effectively requires that standards "for fair and equitable treatment [be] consistent with United States legal principles and practice, including the principle of due process."[121] As one U.S. government attorney has asserted, "These clarifications do not change the nature of the substantive obligations . . . instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties' intent in agreeing to those obligations."[122] However, they also seem designed to narrow the choices for members of future tribunals, despite the fact that a tribunal such as the one in *Loewen* would still have to decide the requirements of a denial of justice under customary international law, or a tribunal such as that in *Pope & Talbot* what constituted the minimum standard required under international law for fair and equitable treatment, and how to determine what standard is actually revealed from state practice. Whether it will discourage arbitrators from looking at other sources of international law[123] in determining that standard, such as earlier arbitral decisions and any of the several thousand bilateral

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[117] (Award) (Oct. 11, 2002), 42 I.L.M. 85 (2003) [hereinafter "Mondev"]

[118] (Award) (Apr. 30, 2004), 33 I.L.M. 967 (2004) [hereinafter "Waste Management II"]

[119] *See* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 849-860 (2005) (discussing the tribunals' treatment of denial of justice and concluding that "The Tribunals have not, however entirely agreed on the progress made in the intervening seventy-five years [since the Mexican General Claims Commission cases], and they have not announced appreciably clearer or more useful standards.").

[120] CAFTA-DR, annex 10-B.

[121] 19 U.S.C. § 3802(b)(3)(E) (2002); *see* Part III(A), *supra*.

[122] Menaker, *supra* note 77, at 122.

[123] Art. 38 of the Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1055, T.S. no. 993, 3 Bevans 1179, established a hierarchy of sources of international law: international conventions; international custom; general principles of law recognized by civilized nations; judicial decisions and the teachings of publicists ("as subsidiary means for the determination of rules of law." Some, such as expert NAFTA Chapter 11 attorney Todd Weiler, argue that this additional language (whether in the NAFTA Interpretation or in CAFTA-DR) simply defines the standard as customary international law, leaving the question of the substance of the obligation as applied by tribunals in particular cases, subject to being informed by treaty, custom and/or general principles of international law. (Email correspondence with Todd Weiler, Sep. 18, 2006, on file with author).

investment treaties in force (or even U.S. Supreme Court jurisprudence), remains to be seen.

4. Direct and Indirect Expropriation

Expropriation is probably the single most complex and politically-sensitive area in investment treaties, as suggested in the earlier discussion of regulatory takings and the 5th Amendment to the U.S. Constitution. For all the discussion and commotion, there has been only one tribunal decision under NAFTA that resulted in a finding of expropriation, *Metalclad v. United Mexican States*,[124] and despite the rather weak reasoning of the tribunal, Metalclad was arguably a "garden variety" expropriation, where Metalclad was deprived of the use and enjoyment of its hazardous waste disposal facility by state authorities, purportedly to create an "ecological preserve."[125] Indirect or "creeping" expropriations are covered by NAFTA as well as by CAFTA-DR, yet to date none has been found; *Methanex*, noted earlier, is the only decision to date where conceivably that result might have occurred.

However, notwithstanding that case history, the broad expropriation language of both agreements, by itself, would suggest that the critics are not paranoid. The basic language of CAFTA-DR is instructive:

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate and effective compensation in accordance with paras. 2 through 4[126]; and
> (d) in accordance with due process of law and Article 10.5.[127]

This language differs somewhat from NAFTA, but primarily in non-substantive respects. NAFTA also covered both direct and indirect expropriation, but contained a confusing term "tantamount to expropriation" which now reads "equivalent to expropriation," generally following the interpretation of the term endorsed by the tribunal in *S.D. Myers*.[128] The language does not really deal with the key problem, which is deciding what constitutes an indirect expropriation. Most actual or alleged expropriations in recent years, and certainly those in the NAFTA and Central American countries, are not situations in which the army marches into a foreign owned facility and seizes it.[129]

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[124] *Metalclad Corporation v. United Mexican States,* Case no. ARB(AF)/97/1 (Aug. 26, 2000), 40 I.L.M. 36 (2001) [hereinafter *Metalclad*].

[125] *Id.,* 40 I.L.M. at 44.

[126] Paras. 2-4 require payment without delay based on the fair market value of the investment, fully realizable and fully transferable in convertible currency or at a fair rate of conversion, plus interest.

[127] CAFTA-DR, art. 10.7.1.

[128] *S.D. Myers, supra* note 103, 40 I.L.M. at 1440.

[129] This has happened most recently in Bolivia, when soldiers were ordered to occupy the natural gas fields in May 2006. Notisur South American Political and Economic Affairs, *Bolivia: President Evo*

Rather, they are indirect takings, sometimes called "creeping" expropriations, where one or more government actions accidentally or intentionally make it impossible for a foreign investor to continue to operate.

Nor are the four conditions a great deal of assistance, since they kick in only after the existence of an expropriation has been found under the "chapeau." Moreover, as long as fair compensation is required in any event, it doesn't really much difference in the final analysis whether the expropriation meets the other three standards. A sovereign government traditionally can nationalize pretty much without second-guessing as long as it pays fair compensation, and tribunals seem loath to decide whether a particular action is for a public purpose. However, under both NAFTA and CAFTA-DR, tribunals might be more likely to order restitution of the property seized by the expropriating government in an "illegal" expropriation, although even there the expropriating government has the option of paying monetary damages.[130]

CAFTA-DR does, however, expand on the NAFTA expropriation language in several important respects, which may well make it somewhat more difficult for claimants to convince tribunals to find indirect expropriations or actions equivalent to expropriations which that would otherwise require compensation:

> The Parties confirm their shared understanding that:
> 1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
> 2. An action or a series of actions by a Party cannot constitute an expropriation unless it *interferes with a tangible or intangible property right or property interest in an investment*.
> 3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
> 4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors:
> (i) the *economic impact of the government action*, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

Morales Nationalizes Natural Gas Resources, May 12, 2006, 2006 WLNR 8238298. *See also* David A. Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 Am. J. Int. L. 474 (1977) (discussing the takeover, in 1975, by the Peruvian army of an American company's iron ore mine and smelter, and the compensation negotiations that followed).

[130] NAFTA, art. 1135.1(b); CAFTA-DR, art. 10.26:1(b).

(ii) the extent to which the government action *interferes with distinct, reasonable investment-backed expectations*; and

(iii) the *character* of the government action.

(b) *Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*.[131]

Some of these are significant changes, some not, but all affect the ticklish determination of what actions may constitute an indirect expropriation.[132] Paragraph 1, relating to customary international law, reflects concepts already discussed. Paragraph 2 seeks to limit expropriations to property rights. What is *not* a property right that the United States wishes to exclude from coverage? Perhaps this is intended to clarify that market access alone is not a property, right, or partially reflects *Methanex*, noted earlier, where the company was allegedly deprived of its opportunity to sell methane because its customers in California could no longer produce MTBE? Perhaps also the objective is distinguishing the rights "related to" to investments from cases based primarily on trading activities rather than on investment per *se,* as with *Ethyl*[133]*, Pope & Talbot, S.D. Myers* and *Feldman.*

Paragraph 3 provides a specific, but non-controversial, definition of direct expropriation. Paragraph 4 is the thorny issue of defining what constitutes an indirect expropriation or taking, and reflects U.S. Supreme Court jurisprudence, specifically the *Penn Central* approach.[134] Paragraph 4(a) directs a case-by-case approach, focusing on a non-exclusive series of considerations, including the economic impact of the government on the investor, the investor's reasonable expectations, and the character of the government action. (Presumably, this goes to some extent to motive, and to whether the government was seeking to force an investor out of business or has other, less suspect objectives.)

The most significant part is likely para. 4(b), which establishes a presumption that a group of regulatory actions designed to protect legitimate public welfare objectives (including but not limited to those enumerated) will be excluded from treatment as a compensable indirect expropriation. However, the language, again reflecting *Penn Central*, does not require the "appropriation" of the property, only that the *effect* of the government action constitute an expropriation. What impact this will have is difficult to

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[131] CAFTA-DR, annex 10-C; emphasis added.

[132] *See* Menaker, *supra* note 77, at 123 (explaining that "the annex [to post NAFTA investment provisions] sets forth a number of factors that tribunals should take into consideration when determining whether an indirect expropriation has occurred").

[133] *Ethyl Corp. v. Canada* (Award on Jurisdiction), Jun. 24, 1998, 38 ILM 708 (1999). Once the tribunal found jurisdiction, and the federal government lost an international Canadian arbitration, the Canadian government effectively terminated the administrative action that had resulted in a ban on Ethyl's sale in Canada of a gasoline additive manufactured in the United States. *See* Alan C. Swan, *International Decision: Ethyl Corp. v. Canada, Award on Jurisdiction*, 94 Am. J. Int'l L. 159 (2000) (discussing the case and its nature as a trade rather than an investment dispute).

[134] *Penn Cent. Transp. Co. v. City of New York***,** 438 U.S. 104, 130-138) (1978).

assess unless and until there are tribunal actions under CAFTA-DR, the Chile and Singapore FTAs or others with this language. Some, including this author, have expressed the concern that excluding a broad class of regulatory actions from treatment as an expropriation would be an invitation to clever, if unscrupulous, government officials to craft a regulation non-discriminatory on its face but nevertheless designed or applied in such a manner to put a certain foreign company or group of companies out of business, and at minimum would raise the burden of proof for foreign claimants arguing that regulatory actions were in fact expropriatory.[135] Perhaps the "except in rare circumstances" language with give the tribunals a reasonable opportunity to treat government actions otherwise fitting the exception as expropriatory nevertheless, as the U.S. Supreme Court did in *Lucas.*[136]

5. Performance Requirements

The performance requirements section of CAFTA-DR gives foreign investors somewhat greater specificity than the WTO's TRIMS Agreement,[137] by providing a more expansive list of what constitutes banned performance requirements, but it also includes a series of exceptions, for example, for TRIPS compliance and where GATT Article XX exceptions for "compliance with laws and regulations that are not inconsistent with this Agreement" and for measures (including environmental measures) "necessary to protect human, animal or plant life or health" or "related to the conservation of living or non-living exhaustible natural resources."[138] Also, unlike TRIMS Chapter 10 effectively provides a private right of (investor) action, unlike the WTO system. Performance requirements have not been a major issue in NAFTA litigation; although a claim was made in both *Pope & Talbot* and in *S.D.* Myers, the tribunal rejected it in both instances.[139] Article 10.9 bars the usual tie-ins—exporting a given level of goods or services produced, maintaining a given level of domestic content, relating import volume or value to exports or to the availability of foreign exchange, limiting sales based on export volume, technology transfer requirements and exclusive supply arrangements. None of these requirements may be imposed, "in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory . . . ."[140]

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[135] Gantz, Evolution, *supra* note 46, at 764-765.

[136] *See Lucas v. South Carolina Coastal Council***,** 505 U.S. 1003, 1027-1032 (1992) (where a majority of the court determined that a state regulation of beachfront property, depriving the claimant of essentially all productive use of his property, constituted a compensable taking).

[137] Agreement on Trade Related Investment Measures, Annex 1a to the Marrakech Agreement Establishing the World Trade Organization, Apr. 14, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/18-trims.doc (visited Aug. 1, 2006).

[138] CAFTA-DR, art. 10.9; *See* GATT, art. XX(b), (d), (g), TRIMS, art. 3 (the latter incorporating all GATT exceptions into TRIMS).

[139] *Pope & Talbot v. Canada* (Interim Award) (Jun. 26, 2000), 40 ILM 258 (2001) [expropriation issues, merits], hereinafter *Pope & Talbot II*, paras. 73, 75, 76, *available at* http://www.naftaclaims.com (visited Aug. 1, 2006); *S.D. Myers v. Canada, supra* note 103, 40 I.L.M. at 1439-1440.

[140] CAFTA-DR, art. 10.9.1.

Similarly, the receipt of government benefits or advantages may not be conditioned on achieving domestic content, local purchase or export requirements.[141] There are exceptions for intellectual property rights when the Party is in compliance with the WTO TRIPs Agreement; or enforcing its anti-competition laws; or, if non-discriminatory measures are imposed which are necessary to secure compliance with laws and regulations otherwise consistent with the Agreement, or to protect human, animal or plant life and health or related to conservation of living or non-living exhaustible natural resources.[142] These later two provisions, including the "necessary" terminology, closely track GATT 1994, Article XX, and may well be implemented in a similarly narrow manner, including the limitation of "necessary" to permitting certain measures where no less trade restrictive measure is available.[143] Of course, one should not assume that NAFTA arbitrators will necessarily follow the GATT jurisprudence in interpreting these CAFTA-DR provisions.

6. Investment, Labor and the Environment

CAFTA-DR contains an environmentally friendly sounding exception, investment and the environment:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[144]

In the NAFTA context identical language[145] has had essentially no significance; it was mentioned, but dismissed in *S.D. Myers*.[146] The provision was circular: the environment could be protected, but enforcement had to be "otherwise consistent with this agreement." However, as noted earlier, in NAFTA there is no presumption against treating environmental regulatory actions as indirect expropriation. Arguably, the same language in CAFTA-DR could have a more substantive impact, as it may be cited to reinforce the presumption in Annex 10-C(4)(b) that environmental regulation is not normally to be considered to be a compensable taking.

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[141] *Id.,* art. 10.9.2.
[142] *Id.,* art. 10.9.3(b)-(c).
[143] GATT art. XX(b) and XX(g); *see Korea – Various Measures on Beef*, WT/DS161/AB/R, adopted Jan. 10, 2001, paras. 161-162, *available at* http://www.wto.org (visited Aug. 15, 2006) ("necessary" means something close to "indispensable", not simply "making a contribution to").
[144] CAFTA-DR, art. 10.11.
[145] NAFTA, art. 1114(a).
[146] *See S.D. Myers, supra* note 103, separate opinion of Dr. Brian Schwartz, 40 I.L.M. at 1461-1462 (characterizing Article 1114 of NAFTA "as acknowledging and reminding interpreters of chapter 11 (investment_ that the parties take both the environment and open trade various seriously ad that means should be found to reconcile these two objectives….").

NAFTA reflected concerns on the part of some in the United States that lax labor or environmental regulation would be used as means of attracting investment to Mexico, and attempted to discourage this by stating that

> The Parties recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment acquisition, expansion or retention in its territory of an investment of an investor. [147]

NAFTA also provided for consultations in the event of possible violations. Even if this language were somehow relating to the later-drafted North American Agreement on Labor Cooperation,[148]

CAFTA-DR contains the identical first sentence in both the labor and the environmental chapters, but is somewhat weaker on the follow-up, whereby the Party is to "*strive to ensure* that it does not waive or otherwise derogate from . . . ."[149] CAFTA-DR also lacks the explicit right of consultation.

7. Miscellaneous Provisions

Other provisions in section A cover such matters as investor interests in the case of armed conflict and civil strife,[150] a provision that does not appear in NAFTA although perhaps it could be incorporated on the basis of NAFTA's MFN clause applicable to state obligations to foreign investors, Article 1103. IN CAFTA-DR, the Parties are to "accord to investors of another Party, and to covered investments, non-discriminatory treatment with regard to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife"; if the investor's property is requisitioned or destroyed by government forces to an extent not required by the "necessity of the situation," compensation is required.[151] Guatemala has taken a reservation to the latter.[152]

Funds transfers; performance requirements; and choice of senior management, among others, are also covered. All of these last three are adapted with minor modifications from the parallel NAFTA provisions. The transfer provisions of CAFTA-DR cover the range of possible income sources, including capital contributions, profits, dividends, capital gains, interest, royalty payments and those arising out of a dispute.[153] The transfers must be available freely and without delay, in a freely usable currency, and

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147 NAFTA, art. 1114(b).
148 North American Agreement on Labor Cooperation, NAALC, Sep. 12, 1992, *available at* http://www.naalc.org/english/agreement.shtml (visited Nov. 20, 2006).
149 CAFTA-DR, arts. 16.2.2, 17.2.2; Italics added.
150 *Id.,*, art. 10.6.
151 *Id.,* art. 10.6.1-2.
152 *Id.,* annex 10-D.
153 *Id.,* art. 10.8.1.

include returns in kind when covered by an agreement.[154] Exceptions are preserved for bankruptcy, insolvency, securities dealings, criminal offenses, financial reporting or records needed for law enforcement, and compliance with judgments.[155]

CAFTA-DR, like NAFTA, investors, retain the discretion to chose senior management and boards of directors without regard to nationality, but also without precluding normal national requirements that a majority of the board of directors be of the host country's nationality, unless that rule unless that requirement were to "materially impair the ability of the investor to exercise control over its investment."[156]

8. Exceptions and Reservations for Non-Conforming Measures

Finally, there is an exception in Chapter 10 for non-conforming measures. These provisions preserve the Parties' rights to protect existing non-conforming measures at the central government, regional or local government level when those measures are set out in a Party's Annex I (existing non-conforming measures that are preserved).[157] However, they apply only to certain Section A benefits, national treatment, most favored nation treatment, performance requirements and senior management. They do not free annex or non-conforming measures from the obligations relating to minimum standard of treatment or expropriation, among others. The section also bars new laws covered by the Party's Annex II (permitting existing and new non-conforming restrictions), from forcing an investor to dispose of his investment based on the investor's nationality.[158]

These reservations in Annexes I and II of CAFTA-DR are extensive in many instances, and are set out on a country by country basis. For example, in Costa Rica's Annex I, under "Cross Border Services and Investment" the following reservation appears:

> A concession is required to perform any type of development or activity in the maritime-terrestrial zone [200 meter strip along the entire coastline]. Such a concession shall not be granted to or held by: (a) foreign nationals that have not resided in the country for at least five years; (b) enterprises with bearer shares; (c) enterprises domiciled abroad; (d) enterprises incorporated in the country solely by foreign nationals; or (e) enterprises where more than 50 percent of the capital shares or stocks are owned by foreigners.
>
> Within the maritime-terrestrial zone, no concession may be granted within the first 50 meters counted from the high tide line nor in the area comprised between the high tide line and the low tide line.[159]

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[154] *Id.,* art. 10.8.1-3.
[155] *Id.,* art. 10.8.4.
[156] *Id.,* art. 10.10.
[157] *Id.,* art. 10.13.1.
[158] *Id.,* art. 10.13.2.
[159] *Id.,* annex I (Costa Rica), I-CR-9.

As is obvious, this proviso discriminates against foreigners with respect to Article 10.3 national treatment and might be subject to challenge as well under Article 10.5 (minimum standard of treatment), in the absence of its status as a reserved non-conforming measure. (Even so, Annex I does not override the "fair and equitable treatment" rights of investors.) Costa Rica is not of course alone. In Annex I, U.S. reservations cover, *inter alia*, atomic energy; mining; air transportation; and radio communications. These restrictions are not necessarily outright bans on foreign investment, but they typically restrict foreign investment in the enumerated sectors.[160]

IV. Investor-State Dispute Settlement

In addition to a series of investor rights, CAFTA-DR, like all U.S. BITs and most U.S. FTAs,[161] contains provisions for mandatory international arbitration of investor-state disputes. Substantively, there are relatively few major differences between the mechanisms set forth in CAFTA-DR and those in NAFTA. Certain procedural modifications have been made, and provisions relating to transparency of the arbitral proceedings based on several NAFTA Commission decisions, have been incorporated into the text of CAFTA-DR. Both agreements follow now-traditional procedures first developed in international commercial arbitration with regard to such matters as consultations, choice of arbitrators, procedural due process and the like. However, despite certain CAFTA-DR specific requirements, most of the procedural aspects of investor-state arbitration are governed by the arbitration rules chosen by the disputing parties, either those of ICSID[162] or of the United Nations Commission on International Trade Law.[163]

If non-binding consultations and negotiations[164] are unsuccessful in resolving the dispute the claimant, either on her own behalf or on behalf of an enterprise (a legal entity) controlled by the claimant, may lodge a claim that the responding Party has breached one of its obligations under Section A.[165] However, in a significant addition to the coverage provided in NAFTA, Chapter 11, claims may also be brought for breach of an "investment authorization" or "investment agreement."[166] An "investment authorization" is defined as "an authorization that the foreign investment authority of a Party grants to a covered investment of an investor of another party . . . ."[167] (The United States of course

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160 *Id.,* annex I (United States), *passim.*
161 Except, as noted earlier, the Australia and Jordan FTAs.
162 *See* ICSID Arbitration Rules, *supra* note 79.
163 UNCITRAL Arbitration Rules (1976), UNGA Res. 31/98, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (visited Aug. 2, 2006). CAFTA-DR, art. 10.16.5, states that "The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to extent modified by this Agreement."
164 *Id.,* art. 10.15.
165 *Id.,* art. 10.16(1).
166 *Ibid.*
167 *Id.,* art. 10.28.

has no such authority as the term is used here, so that this protection is meaningless for foreign investment into the United States.)

> "Investment agreement" means a
>
> written agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself . . . .[168]

The right of an investor to challenge not only a violation of international law as embodied in the protections of Section A, but also a breach of an investment authorization or agreement, could significantly increase the potential scope of jurisdiction of investor-state dispute settlement, particularly in countries where the requirement of formal government approval of certain investments is a common practice. Reliance on government approvals also becomes an explicit factor in determining jurisdiction over a state. Without this language, a breach of an investment authorization or agreement could not be challenged unless it also constituted a breach of a Section A obligation.

The Advisory Committee for Trade Policy and Negotiations, reviewing CAFTA-DR, was particularly impressed by these additions: "The Committee stresses the importance of covering both investment authorizations and agreements, and cannot urge strongly enough that these provisions must be part of all future agreements."[169]

A. Notice, Choice of Forum and Consent

CAFTA-DR contains several notice requirements. First, at least 90 days before a claim can be submitted to arbitration, a "notice of intention to submit a claim to arbitration" must be filed with the respondent state. The claimant is required to specify, in addition to names and addresses, the particular provisions of Section A or of the investment authorization or investment agreement for which a breach is claimed; the "legal and factual basis for each claim"; as well as the relief sought and the approximate damages claimed.[170] This requires something more than simple "notice" pleading, given the language about the legal and factual basis for each claim. With the similarity of this language to NAFTA,[171] claimants under CAFTA-DR can draw on the NAFTA practice,

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[168] *Ibid.* "National authority" means the authority of the central government only, not that of any state or local entity, per art. 10.28, fn. 13.

[169] U.S. Central American Free Trade Agreement (CAFTA): Report of the Advisory Committee for Trade Policy and Negotiations (ACTPN), Mar. 12, 2004, at 5, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA_Reports/asset_upload_file367_5932.pdf (visited Aug. 2, 2006).

[170] CAFTA-DR, art. 10.16.2.

[171] NAFTA, art. 1119.

in which the notice of intent is typically 10 - 15 pages,[172] and it is probably reasonable to assume that the CAFTA-DR Free Trade Commission[173] will eventually issue guidelines for such notices, as has occurred in NAFTA.[174] While this NAFTA document is effectively a recommendation and thus not binding on claimants, it does state that if the form is properly completed it "will satisfy the requirement of Article 1119."[175]

The more important notice is, of course, the notice of arbitration, which cannot be filed until "six months have elapsed since the events giving rise to the claim . . . ."[176] This six month period is presumably designed to allow the claimant and the government an opportunity for settlement negotiations. If the claimant meets the six months requirement, and 90 days has elapsed since the communication of the notice of intent, as noted above, she may submit her claim, designating one of the three rule/forum options provided under the Agreement, the ICSID Convention and the ICSID Arbitration Rules, the ICSID Additional Facility Rules,[177] or the UNCITRAL Arbitration Rules.[178] (UNCITRAL, unlike ICSID, provides no secretariat, so parties seeking arbitration under the UNCITRAL Rules must arrange for secretariat services either at ICSID, another existing arbitration secretariat, or make ad hoc arrangements.)

For most disputes under CAFTA-DR, there will not really be three alternatives, but only two, the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules.[179] The ICSID Secretariat is authorized to administer conciliation and arbitration proceedings under the ICSID Additional Facility rules "for the settlement of legal disputes arising directly out of an investment which are *not* within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State" or proceedings "which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State . . . ."[180] Since all seven CAFTA-DR parties are also parties to the ICSID Convention,[181] the ICSID Secretary General would not be authorized to administer a dispute involving a CAFTA-DR investor and a state under the Additional Facility,

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[172] *See, e.g.,* Kenex Ltd. v. United States, Notice of Intent to Submit a Claim to Arbitration (12 pages); Glamis Gold, Ltd. v. United States, Notice of Intent to Submit a Claim to Arbitration (14 pages); *but see* Methanex v. United State, Notice of Intent to Submit a Claim to Arbitration (4 pages), *all available at* http://www.naftaclaims.com (visited Aug. 2, 2006). In a number of cases, the notice of intent is not publicly available.

[173] Cabinet level representatives of the Parties, as established under art. 19.1.

[174] Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration, Oct. 7, 2004, *available at* http://www.naftaclaims.com/Papers/NoticeIntent-en.pdf (visited Aug. 2, 2006).

[175] *Id.,* at 1.

[176] CAFTA-DR, art. 10.16.3.

[177] For arbitration under ICSID, the arbitration is governed by relevant provisions of both the ICSID Convention and the ICSID Arbitration Rules. Where the ICSID Additional Facility Rules are used, as either the host state or the investor's home state is not a party to ICSID, only the Additional Facility Rules themselves govern the arbitration.

[178] CAFTA-DR, art. 10.16.3.

[179] Of course, the investor and state can always agree on a different mechanism.

[180] ICSID Additional Facility Rules, Art. 2, *available at* http://www.worldbank.org/icsid/facility/partA-article.htm (visited Aug. 2, 2006).

[181] *See* ICSID Convention, *supra* note 78.

unless the Secretary General were to determine that it did not arise directly out of an investment. The "Investment" requirement is embodied in the ICSID Convention itself, but is not defined there.[182] It is in theory conceivable—although very unlikely-- that a claim based on provisions of an investment authorization or investment agreement under CAFTA-DR, or a claim considered an investment under NAFTA, might not be considered a dispute arising "directly out of an investment" and thus shifted from the ICSID Arbitration Rules to the ICSID Additional Facility Rules.

Notice is considered delivered when received by the ICSID Secretary General (for arbitrations under either of the ICSID rules) or by the respondent (for arbitration under UNCITRAL). Under the ICSID Convention, the Secretary General acts as registrar, and at least in theory may refuse to register a claim if, for example, in his view it does not "arise directly out of an investment" or does not otherwise meet the rules of the Convention.[183] In contrast, if a claim is filed under the UNCITRAL Rules with the respondent, any jurisdictional issues will presumably be decided by the arbitral tribunal, although there is of course a risk that the respondent state will refuse to cooperate. At the time the notice is submitted, the claimant is to provide the name or the arbitrator she wishes to appoint or consent in writing to appointment by the ICSID Secretary General[184] as appointing authority.

To avoid confusion, particularly when the notices are to be filed under UNCITRAL with the respondent state rather than the ICSID Secretary General, CAFTA-DR provides specific addresses for claimant delivery of notices and other documents.[185] This should make it more difficult for respondents to argue that they have not received timely notices and other served documents.

CAFTA-DR,[186] like virtually all U.S. FTA investment chapters and BITs, constitutes the necessary written consent by the governments to the jurisdiction of ICSID, "an agreement in writing" under the New York Convention"[187] and an "agreement" the Inter-American Convention.[188] Thus, a CAFTA-DR Party cannot refuse to arbitrate on the grounds that it did not consent to the arbitration.

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[182] *Id.,* Article 25, provides in pertinent part that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State. . . ."

[183] *Id.,* arts. 11, 25. According to one authority (Todd Weiler), the ICSID Secretariat refused to register the "Baha Beach" claim against Mexico because the investors could not provide proof of authorization by each named claimant to proceed. *See* Notice of Intent to Supply a Claim, Billy Joe Adams et al., Nov. 10, 2000, *available at* http://naftaclaims.com/Disputes/Mexico/Adams/AdamsNoticeOfIntent.pdf (visited Nov. 21, 2006) (listing more than 100 potential claimants a taking of their property in Baha, California).

[184] CAFTA-DR, art. 10.16.6.

[185] *Id.,* art. 10.27, annex 10-G.

[186] *Id.,* art. 10.17.

[187] the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (visited Dec. 15, 2006).

[188] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, *available at* http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp (visited Dec. 15, 2006).

For the claimant, of course, there has been no prior consent to arbitration (unless it was contained in an investment agreement), and in CAFTA-DR, as in NAFTA, a prospective claimant must meet a number of procedural requirements in order for arbitration under Chapter 10 to proceed. First, there is a statute of limitations: "No claim may be submitted to arbitration under this Section of more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged" and that either the claimant or enterprise "has incurred loss or damage."[189] For a case that is based on an ongoing series of actions or measures that allegedly conflict with state obligations under Section A, this may mean that any recovery will be limited to damages for no more than the most recent three years after the claim is filed (unless of course the claimant only recently discovered a course of action by the government that was ongoing for many years). This three year window for seeking arbitration may be significantly narrowed if the claimant, once becoming aware of the potential breach, fails to pursue any advisable consultations on negotiations, and submission of the notice of intent, promptly.[190]

Secondly, the claimant must formally consent to the arbitration.[191] Third, CAFTA-DR contains what amounts to a "no u-turn" provision for investors of most Parties but a "fork in the road" provision for U.S. investors in the other Parties.[192] The claimant or enterprise is required, as a condition of arbitration, to waive the right to initiate or continue administrative tribunal or court proceedings under the law of any party (presumably local law in virtually all cases), except for interim injunctive relief not seeking monetary damages.[193] (For U.S. investors, once an action challenging a Party action as a violation of Section A is lodged in a local court or tribunal, arbitration under Section B is precluded.[194]) Provisions of this type are related to the fact that under CAFTA-DR, as with most such investment protection agreements, the traditional customary requirement that a claimant exhaust local and administrative remedies before bringing an international claim[195] does not exist.[196] Similar language is found in NAFTA.[197]

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[189] CAFTA-DR, art. 10.18.1.

[190] In *Feldman, supra* note 103, the claimant had alleged a continuing course of conduct going back not only more than three years, but for several years before NAFTA entered into force, and had not filed his NAFTA claim at the earliest possible. Under these circumstances, although a majority of the tribunal found a violation of NAFTA's national treatment provisions, damages were limited to the three year period. 42 I.L.M. at 634-35.

[191] CAFTA-DR, arts. 10.18.2(a)

[192] *See* Mark Kantor, *Investor-State Arbitration Over Investments in Financial Services: Disputes Under New U.S. Investment Treaties,* 121 Banking L. J. 579, 593-594 (2004) (discussing the fork-in-the-road and exhaustion rules in the 2004 U.S. Model BIT).

[193] CAFTA-DR, arts. 10.18.2(b)-3.

[194] *Id.,* annex 10-E.

[195] *See* Brownlie, *supra* note 115, 472-474. Under the ICSID Convention, *supra* note 78, art. 26, a Contracting State may require the exhaustion of local remedies as a condition to its acceptance of ICSID jurisdiction.

[196] Under NAFTA jurisprudence, *Loewen, supra* note 75, if the claimant is effectively challenging the validity of a national court decision the bar is higher; she must essentially demonstrate a denial of justice under international law, not simply that the result might otherwise have been a denial of fair and equitable treatment under art. 1105. *See also Robert Azinian, Kenneth Davitian & Ellen Baca. v. United Mexican*

The CAFTA-DR provisions do not on their face appear to require at the outset a choice between international arbitration or local court action. Rather once arbitration is initiated, the local option is no longer available, so that existing actions must be terminated and new ones cannot be initiated.[198] However, this choice may be more apparent than real for U.S. investors, as an annex essentially provides that when the claimant is a U.S. investor against one of the Central American Parties or the Dominican Republic the election is definitive: should a breach of Section A be lodged first in a local court or administrative tribunal, "the investor may not thereafter submit the claim to arbitration under Section B."[199] (The investor may protect herself if in the local court action she alleges only violations of local law.)

The rule for challenges based on investment authorizations or investment agreements (rather than Section A) even more explicitly requires a choice that once made is irrevocable. If a potential CAFTA-DR Chapter 10 claimant "has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution" the claimant is barred from the Chapter 10 remedy.[200] Whether tribunals will actually refuse to hear such claims remains to be seen. Jurisprudence under various BITs suggests that claims may be allowed to proceed if there is no identity of parties and issues, or if the local claim was premised on local law alone, with the international claim being premised on international law as reflected in the BIT or FTA investment provisions[201] (or, by analogy, on the Section A language of CAFTA-DR).

B. The Arbitral Process

Under CAFA-DR, as under NAFTA and most other such investment agreements, there are normally three arbitrators, two appointed by the parties and the third appointed by agreement of the parties. If the parties do not agree within 75 days after submission of the claim—a frequent occurrence—the third arbitrator is appointed by the ICSID Secretary General (even if the arbitration is taking place under the UNCITRAL rules).[202] The respondent state is deemed to have agreed (with prejudice to objection on grounds other than nationality), and the claimant must agree in writing, to appointment of the

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States, Case no. ARB(AF)/97/2 (Nov. 1, 1999), 39 I.L.M. 537, 555 (2000) [hereinafter *Azinian*]; *Mondev, supra* note 117, 42 I.L.M. at 109-110.

[197] NAFTA, art. 1121.2(b).

[198] CAFTA-DR, art. 18.2(b).

[199] CAFTA-DR, Annex 10-E.

[200] *Id.,* arts. 10.18.4.

[201] *See Ronald S. Lauder and The Czech Republic* (Final Award) (Sep. 3, 2001), *available at* http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf (visited Aug. 27, 2006) (lack of identity of parties and issues); OEPC v. Ecuador, Case no. 3467, Jul. 1, 2004, *available at* http://www.investmentclaims.com/decisions/Occidental-Ecuador-FinalAward-1Jul2004.pdf (visited Aug. 27, 2006) (different legal questions addressed before the tribunal compared to those raised in national courts).

[202] CAFTA-DR, art. 10.19.1-3.

three arbitrators, for purposes of the ICSID Convention and the ISCID Additional Facility rules.[203]

In general, the conduct of the arbitration is consistent with the rules applicable under the relevant arbitral rules and NAFTA, with one significant exception. As is usual, the tribunal determines the "place" of arbitration after consultation with the parties.[204] (This is important, because in the case of ICSID Additional Facility or UNCITRAL arbitration, it determines what national courts would have any jurisdiction over any challenges to the award. For ICSID arbitrations, the only challenge is in theory to an ICSID Annulment Committee,[205] but when a judgment is entered in a national court some additional challenges may nevertheless be possible.) "Interim measures of protection" may be ordered by the tribunal, essentially to preserve the status quo pending adjudication of the claim.[206] Respondents are also barred from asserting as a defense that all or part of a claim is covered by insurance,[207] presumably in order to protect the interests of the Overseas Private Investment Corporation, or any similar agency that issues political risk and other forms of insurance in any of the CAFTA-DR countries.[208]

However, there are some innovations. As in NAFTA, a "non-disputing Party" may present its views either orally or in writing to the tribunal "regarding the interpretation of this Agreement."[209] This has happened occasionally in NAFTA[210], and may be more frequent in CAFTA-DR, because in each dispute there are likely to be six rather than only two non-disputing Parties (which include the investor's government). Most significantly, and unlike NAFTA, CAFTA-DR states:

> Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 [awards] . . . .[211]

When a jurisdictional objection is submitted by the respondent state in accordance with the requirements of this section (within 45 days after the constitution of the tribunal), the tribunal "shall decide on an expedited basis," suspending proceedings on

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[203] *Id.,* art. 10.19.4.
[204] *Id.,* art. 10.20.1.
[205] ICSID Convention, *supra* note 78, art. 52; see discussion of review of awards, *infra.*
[206] CAFTA-DR, art. 10.20.8.
[207] *Id.,* art. 10.20.7.
[208] (*See* OPIC, Doing Business with Us, *available at* http://www.opic.gov/doingbusiness/ourwork/latinamerica/index.asp (visited Aug. 3, 2006).
[209] CAFTA-DR, art. 10.20.2.
[210] *See, e.g., Feldman v. Mexico, supra* note 104, Submission of the United States on Preliminary Issues, Oct. 6, 2000, *available at* http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanUS1128Jurisdiction.pdf (visited Aug. 3, 2006); Second Submission of Canada Pursuant to Article 1128, Oct. 6, 2000, *available at* http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanCanada1128Jurisdiction.pdf (visited Aug. 3, 2006).
[211] CAFTA-DR, art. 10.20.4.

the merits, and "issue a decision or award on the objection(s) within 150 days" subject to extension under certain circumstances.[212] Costs and attorneys' fees may be awarded in such proceedings in circumstances in which the claim or the respondent's objection is considered "frivolous," and by implication in others as well.[213] This provision is presumably designed to discourage "frivolous" actions by private claimants, and to assure (or at least to strongly encourage) tribunals to decide what are effectively motions to dismiss or motions for summary judgment in U.S. parlance as preliminary matters, rather than to combine them with decisions on the merits. Separately, a tribunal under CAFTA-DR is explicitly authorized to "award costs and attorney's fees in accordance with this Section and the applicable arbitration rules."[214] Recent NAFTA tribunals have not been reluctant to award costs and attorneys' fees largely or entirely to the prevailing party when the tribunal felt it was appropriate[215], and the inclusion of the "frivolous" language may encourage CAFTA-DR tribunals to do the same.

This language likely results from U.S. frustration with several NAFTA Chapter 11 proceedings in which dismissal on jurisdictional grounds required several years of proceedings[216], or was combined with a decision on the merits.[217] While the problem if any seems mostly a question of tribunals finding it difficult to decide jurisdictional issues promptly, rather than refusing to sever jurisdictional issues from the merits, there will likely be times when the two are sufficiently entwined as to make it impractical to consider them separately. This is probably most likely to occur, where, for example, evidence to be developed in the course of the proceeding will be relevant to jurisdictional

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[212] *Id.,* art. 10.20.5.

[213] *Id.,* art. 10.20.6. See Menaker, *supra* note 77, at 127-128 (explaining the award of costs provision).

[214] *Id.,* art. 10.26.1.

[215] In *Methanex II* and *Int'l Thunderbird Gaming Corp.*, the arbitral tribunals broke with what had been standard procedure of dividing the arbitral costs evenly between the parties, with each bearing its own legal fees, and taxed the losing party—the private claimant in both instances—with all or most of the arbitral costs *and* the other (government) party's legal fees. *Methanex II, supra* note ___, at 300-301; *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Jan. 26, 2006, para. 222, *available at* http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Award.pdf (visited Aug. 15, 2006) (requiring Thunderbird to pay ¾ of the arbitration costs and most of Mexico's outside legal fees). This "loser pays" practice, although common in international arbitration generally, and specifically contemplated in Article 40 of the UNCITRAL Rules (which governed both proceedings), obviously could have a chilling effect on the willingness of claimants without deep pockets, and their attorneys, to lodge new claims under NAFTA and similar investment provisions.

[216] *See, e.g., Methanex I supra* note 71, the Notice of Arbitration was submitted Dec. 2, 1999, and the Preliminary Award on Jurisdiction was issued on Aug. 7, 2002, about two and a half years later. (The chronology of the case is available at http://www.naftaclaims.com/disputes_us_6.htm (visited Aug. 3, 2006); *Waste Management v. Mexico,* 40 I.L.M. at 57, 57 (2001) [hereinafter Waste Management I"] in which the elapsed time between the Notice of Arbitration (Sep. 29, 1998) and dismissal on jurisdiction (Jun. 2, 2000) was 21 months. (The chronology is available at http://www.naftaclaims.com/disputes_mexico_waste.htm (visited Aug. 3, 2006).)

[217] In *Loewen Group v. United States*, *supra* note 72, the tribunal did issue an Award on Jurisdiction on Jan. 5, 2001, some 27 months after the Notice of Arbitration (Oct. 3, 1998). However, in that award, the tribunal effectively dismissed the United States' jurisdiction objections on a preliminary basis and joined them to the merits. (Award at 23.), and did not decide the case finally until Jun. 26, 2003 (and then on a different jurisdictional basis). In *Feldman, supra* note 104, some of the jurisdictional issues were decided in a preliminary decision, while others were joined to the merits. 42 I.L.M. at 633-637.

questions as well as substantive ones. In any event, CAFTA-DR claimants are on notice to be prepared for jurisdictional objections at the outset.

Several other provisions relating to the conduct of the arbitration are worth noting. As in NAFTA,[218] a CAFTA-DR tribunal may, at the request of a disputing party or, in the absence of their objection, on its own initiative, appoint "one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party . . . ."[219] This is without prejudice to the possibility of appointing other kinds of experts if permitted by the applicable arbitration rules[220] (which normally is not the case without the permission of the parties). Given that the arbitrators are in most cases likely to be experts in investment law, the possible need for bringing in expertise in these other areas is obvious.

There is also provision for consolidating two or more claims that have "a question of law or fact in common and arise out of the same events or circumstances," at the request of a disputing party and with the agreement of the disputing party, subject to certain procedural requirements concerning the request and the appointment of arbitrators in consolidated cases.[221] Consolidation has been accepted only once to date under NAFTA, at the initiative of the respondent United States, with regard to three claims alleging violations of Section A arising out of the antidumping and countervailing duty orders imposed by United States authorities on softwood lumber imports from Canada.[222]

C. Transparency

An area addressed for NAFTA only after the fact, but directly in the text with CAFTA-DR, is a provision which requires transparency of the proceedings. All of the major documents (notice of intent, notice of arbitration, pleadings, memorials and briefs, submissions relating to protected information, minutes or transcripts of the hearings, orders, awards and decisions) must be made public "promptly."[223] Hearings are to be open to the public.[224] In all instances there is an exception for protected information and procedures for protecting such information against unauthorized disclosure,[225] with the further exception to the exception that a respondent may nevertheless disclose otherwise protected information when required by law.[226] CAFTA-DR also authorizes the tribunal to "accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."[227]

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[218] NAFTA, art. 1133.
[219] CAFTA-DR, art. 10.24.
[220] *Ibid.*
[221] *Id.,* art. 10.25.
[222] *Canfor Corp. v. United States, Tembec v. United States, Terminal Forest Products Ltd. v. United States*, Order of the Consolidation Tribunal, para. 226, Dec. 17, 2005, *available at* http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf (visited Aug. 4, 2006).
[223] CAFTA-DR, art. 10.21.1.
[224] *Id.,* art. 10.21.2.
[225] *Id.,* art. 10.21.2-4.
[226] *Id.,* art. 10.21.5.
[227] *Id.,* art. 10.20.3.

This explicit language reflects concerns raised by NGOs and some U.S. government officials regarding the lack of transparency and of NGO access to the NAFTA Chapter 11 process, which is thought by some to have contributed to skepticism of the process within the United States. For example, under the ICSID Additional Facility Rules, a popular mechanism under Chapter 11, the process was not transparent, as neither the written nor the oral proceedings were open to the public. [228] However, the degree of transparency of the process was increased significantly beginning in July 2001, when the governments stated that "nothing in NAFTA imposes a general duty of confidentiality" and agreed that they would "make available to the public in a timely manner all documents submitted to, or issued by, Chapter 11 tribunals" subject to certain exceptions for confidential or privileged information.[229] In October 2003, Canada and the United States, but not Mexico, issued statements indicating that they would consent - and request disputing investors and tribunals to consent - to holding hearings that are open to the public, subject to measures to protect confidential business information.[230] At the same time, a statement was issued setting forth procedures for non-disputing party (*amicus curiae*) participation in Chapter 11 proceedings.[231] The language in these NAFTA Commission statements was the model for the CAFTA-DR provisions on transparency.

D. Applicable Law

As noted in the discussions of Section A, the scope of "international law" and "customary international law" have been an issue under the NAFTA case law, NAFTA Commission interpretations and, ultimately, in the drafting of CAFTA-DR. As in NAFTA, in CAFTA-DR tribunals are directed to decide cases under Section A "in accordance with this Agreement and applicable rules of international law."[232] In a number of NAFTA cases, among others, the references to "international law" relate not only to substantive international law provisions on investment, when not specified in NAFTA, but also to procedural law, particularly to the rules of interpretation set out in the Vienna Convention on the Law of Treaties.[233]

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[228] *See* ICSID Arbitration (Additional Facility) Rules, *supra* note 180, Art. 39 (giving the tribunal authority to decide, with the Parties' consent, what persons may be admitted to the hearing; publication of the minutes of the hearing requires the Parties' consent under Art. 44).

[229] NAFTA Free Trade Commission, *Notes of Interpretation,* parts A(1), A(2) (Jul. 30, 2001), *available at* http://www.ustr.gov (visited Aug. 3, 2006).

[230] *Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations,* Oct. 7, 2003, *available at* <http://www.ustr.gov; Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 2003), *available at* http://www.dfait-maeci.gc.ca (visited Aug. 3, 2006).

[231] *See Statement of the Free Trade Commission on non-disputing party participation* (Oct. 2003), *available at* <http://www.ustr.gov>; *NAFTA Commission Meet, Announces New Transparency Measures*, USTR Press Release, Oct. 7, 2003, at 1. The United States is not a party to the Vienna Convention, but generally accepts its provisions as customary international law.

[232] CAFTA-DR, art. 10.22.1.

[233] The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (visited Dec. 15, 2006), particularly arts. 31-32, have been cited by many NAFTA and other tribunals as the basis for interpreting "the Agreement and applicable rules of international law. *See, e.g.,* the first NAFTA decision on the merits, *Metalclad, supra* note 124, 40 I.L.M. 36, 46.

With regard to cases arising under investment authorizations or investment agreements, the tribunal is to apply the rules of law specified in the relevant agreements or agreed upon by the parties or, in the event of no such specification or agreement, the law of the respondent state (including its conflicts of laws rules) and "such rules of international law as may be applicable."[234]

As in NAFTA, the Commission[235] has the power to issue an interpretation of the provisions of the investment chapter, which "shall be binding on the tribunal . . . ."[236] However, unlike NAFTA, CAFTA-DR adds "and any decision or award issued by the tribunal must be consistent with that decision."[237] This addition is presumably designed to deal with tribunals such as the one in *Pope & Talbot*, which having received a Commission Interpretation, nevertheless considered carefully whether it would follow the Interpretation or ignore it, ultimately rather huffily agreeing that it was binding.[238] CAFTA-DR (like NAFTA) provides a mechanism whereby a respondent state, when arguing that an alleged breach is within one of the exceptions in Annexes I or II, may request the Commission to interpret the annex at issue. The Commission is to issue a decision on the request within 60 days of the request. If it fails to issue the decision within that period, the tribunal may proceed to decide the issue without the Commission's input.[239]

Whether the issuance of formal Commission "interpretations" (or decisions under Annexes I or II) will turn out to be more common under CAFTA-DR than the issuance of interpretations under NAFTA—once in thirteen years—remains to be seen. One might speculate that the difficulties of getting three sovereign governments to agree a) that the issuance of an interpretation was warranted; and b) how that interpretation should be worded, would be even more complicated under an agreement with seven members of the Free Trade Commission. Annex I and II decisions, at least, are subject to a specific deadline, although it is problematic whether agreement can be reached when dealing with complex and controversial issues.[240] (Needless to say, Commission interpretations will be easier to bring about that any formal amending of the Agreement.)

E. **Awards and Challenges**

The basic awards language in CAFTA-DR is little changed from NAFTA,[241] except that in the former awards, finality and enforcement are addressed in a single

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[234] CAFTA-DR, art. 10.22.2.
[235] Established under CAFTA-DR, Chapter 19, Section A, as the trade ministers of the seven Parties or their designates.
[236] CAFTA-DR, art. 10.22.3; NAFTA, art. 1131.2.
[237] *Id.,* art. 10.22.3.
[238] *Pope & Talbot v. Canada,* Award in Respect of Damages (May 31, 2002), 41 ILM 1347 (2002), [hereinafter *Pope & Talbot IV*], paras. 23-79, 80.
[239] CAFTA-DR, art. 10.23; NAFTA, art. 1132.1.
[240] *Id.,* art. 19.1.5 permits the Commission to "establish its own rules and procedures." However, Commission decisions are to be "taken by consensus unless the Commission otherwise decides."
[241] NAFTA, arts. 1125-1126.

article instead of several. Awards are limited to monetary damages, or to giving the respondent state the option of providing restitution of property or monetary damages plus interest.[242] If the claim has been brought by an enterprise, the award of monetary damages and interest or restitution shall be provided to the enterprise. Issues regarding who may have a right to right to the "relief" are decided under domestic law.[243] No punitive damages may be awarded.[244]

> However, there is one major innovation, an interim review procedure:
>
> In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.[245]

This procedure is apparently designed to permit the parties (most likely the respondent state) to comment on the award before it becomes final, in a manner similar to the review process afforded WTO Members involved in panel proceedings before the Dispute Settlement Body of the World Trade Organization.[246]

The awards language and other provisions of CAFTA-DR Chapter 10, as in NAFTA, provide little useful guidance to tribunals in determining the amount of the award, or the rate and period of interest, except when an expropriation is found. There, under Article 10.7, there are detailed guidelines for determining the amount of compensation and the calculation of interest for takings coming within the scope of Article 10.7.[247] For other violations of Section A, or for violations of investment

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[242] CAFTA-DR, art. 10.26.1.
[243] *Id.,* art. 10.26.2.
[244] *Id.,* art. 10.26.3.
[245] *Id.,* art. 10.20.6.
[246] *See* DSU, *supra* note 44, art. 15 (applicable only to panel decisions, not to decisions of the WTO Appellate Body; Menaker, *supra* note 77, at 128 (noting the similarity of this investment decision review procedure to that used in the WTO).
[247] CAFTA-DR, art. 10.7.2-4. Arguably, a tribunal that found a taking that failed to comport with the expropriation requirements of Article 10.7 might take the position that the measure of compensation specified in that provision was in applicable. *See* ADC Affiliate Ltd. et al. v. Republic of Hungary, Oct. 2, 2006, ICSID Case no. ARB/03/16, paras. 480-482, *available at* http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf (visited Nov. 27, 2006) (holding that where there had been an unlawful expropriation under a bilateral investment treaty specifying only "just compensation," it was appropriate for the tribunal to use a higher, customary international law standard of compensation, in that instance the market value of the investments as of the date of the award). However, under CAFTA-DR, a very explicit compensation standard is provided in Article 10, specifying fair market value at the time of the taking. Art. 10.7.2(b), and it seems unlikely that a tribunal would apply a different standard.

authorizations or investment agreements (unless the latter specify calculation of damages), having found "that the claimant has incurred loss or damage by reason of, or arising out of, that breach,"[248] the tribunals are left to their own to develop a proper measure of damages. Nevertheless, in the four cases under NAFTA in which damages have been awarded, calculation of the amounts did not prove a major problem for the tribunal. As the arbitrators deemed appropriate, they used adjusted book value,[249] the amount of the uncontested losses sustained by the claimant,[250] a type of going concern value,[251] and the approximate costs of the claimant as a result of the respondent's denial of fair and equitable treatment.[252]

Enforcement of an award is deferred for 120 days in the case of an ICSID Convention arbitration, and 90 days in the event the arbitration was conducted under the ICSID Additional Facility or UNCITRAL Rules; then it may be enforced if no party has requested annulment under ICSID or revision under the other two mechanisms.[253] An award by a tribunal operating under the ICSID Convention Arbitration Rules is subject to limited review, to annulment "on one or more of the following grounds":

> (a) that the Tribunal was not properly constituted;
>
> (b) that the *Tribunal has manifestly exceeded its powers;*
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.[254]

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

The ICSID Annulment Committee procedures are not available for arbitral awards under either the UNCITRAL Rules or the ICSID Additional Facility Rules. In either

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[248] CAFTA-DR, arts. 10.16.1(a)(ii) and 1(b)(ii).

[249] *Metalclad v. Canada, supra* note 124, 40 I.L.M. at 51-54 (book value was essentially used because the enterprise had never actually begun its operations; the tribunal equated fair and equitable treatment damages and expropriation damages because Metalclad had been deprived entirely of the use of its investment).

[250] *Feldman v. Mexico, supra* note 104, 42 I.L.M. 665-667 (allowing only amount of cigarette tax refunds the majority believed were denied to claimant in a violation of the national treatment provisions, plus interest, but denying other damage claims, including that based on expropriation).

[251] *S.D. Myers v. Canada,* Second Partial Award [Damages], Oct. 21, 2002, para. 300, *available at* http://www.appletonlaw.com/cases/Myers%20-%20Damages%20Award%20-%20Oct21-02.pdf (visited Aug. 4, 2006) (loss of profits and opportunity costs).

[252] *Pope & Talbot IV, supra* note 238, paras. 84-85 (losses relating to management time and the need to shut down the facility for a week to comply with Canada's unreasonable audit requests).

[253] CAFTA-DR, art. 10.26.6.

[254] ICSID Convention, *supra* note 78, Art. 52; emphasis added.

instance, a court proceeding may be brought to set aside or annul the award, in the state that has been designated as the situs (place) of the arbitration.[255] This has occurred several times in the NAFTA context, all by Canadian federal or provincial courts.[256] The criteria for review by the ICSID annulment committee are also relatively narrow: the tribunal was not properly constituted; the tribunal "manifestly exceeded its powers"; there was corruption on the part of a member of the tribunal; there was a "serious departure from a fundamental rule of procedure; or the award failed to state the reasons upon which it was based.[257]

Neither ICSID Annulment Committee nor national court review have been considered a fully satisfactory means of dealing with arbitral awards. Under such circumstances, the idea of a single appellate mechanism,[258] perhaps modeled after the WTO's Appellate Body, has received support from diverse sources. NGOs and some government agencies have been concerned about the lack of appeals, a situation that means *ad hoc* arbitrators cannot be controlled and any legal errors that are made cannot be effectively corrected for the current or for future cases. The use of the NAFTA Commission's power to issue binding Interpretations (noted above), suffers from the uncertainties noted earlier which may carry over to the CAFTA-DR Commission. Also, arbitral decisions, even though not serving as precedent, are likely to be considered by subsequent tribunals. As a result, the President's Trade Promotion Authority states : "[T]he principal negotiating objectives of the United States regarding foreign investment are . . . to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by . . . providing for an appellate body or similar mechanism to provide coherence to the interpretations of trade agreements . . . ."[259] (U.S. concerns are not shared by ICSID. In 2004, the secretariat proposed the creation of an appellate mechanism, but the proposal was later withdrawn.[260])

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[255] *See* NAFTA, art. 1136:3.

[256] *Metalclad v. Mexico, S.D. Myers v. Canada* and *Feldman v. Mexico.* In all three instances the reviewing court in Canada effectively upheld the arbitral decision, although in *Metalclad* the result was sustained on different grounds from those relied upon by the tribunal. (All court decisions are available at http://naftaclaims.com.) For a discussion of the review of these cases, *see* David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, Vanderbilt J. Transnat'l L. 39, 51-54 (2006).

[257] ICSID Convention, *supra* note 257 art. 52(1). This contrasts wit the UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 34(2)(b), which also includes public policy and arbitrability grounds for negating an award. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (visited Aug. 8, 2005); emphasis added.

[258] *See* Gantz, Appellate Mechanism, *supra* note 256, at 54-57.

[259] 19 U.S.C. § 3802(b)(3)(G)(iv) (2002).

[260] *See* ISCID Discussion Paper, *Possible Improvements of the Framework for ICSID Arbitration,* Annex, *Possible Features of an ICSID Appellate Facility*, Oct. 22, 2004, *available at* http://www.worldbank.org/icsid/highlights/improve-arb.pdf ; the proposals were effectively withdrawn as "premature." ICSID Secretariat Working Paper, *Suggested Changes to the ICSID Rules and Regulations,* May 12, 2005, para. 4*, available at* http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf (both visited Nov. 28, 2006).

Relatively weak language in the Singapore and Chile FTAs, and in later FTAs with Peru and Colombia[261] on this subject was replaced in CAFTA-DR alone with a much more explicit (and likely less realistic) directive, requiring the Parties within three months of the entry into force of CAFTA-DR to set up a negotiating group "to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter."[262] The negotiating group is to provide the Commission with a draft within one year of its establishment.[263] The issues to be considered are enumerated, and include its composition; scope and standard of review; transparency; effect of decisions; relationship to applicable arbitral rules; and relationship to existing domestic and international laws on enforcement of arbitral awards.[264]

Whether the negotiating group once appointed will be able to agree upon a proposal is at this writing an open question, as the legal and procedural challenges to creating a satisfactory appellate mechanism are not to be dismissed lightly.[265] However, if successful, and if the mechanism is approved by the CAFTA-DR Parties, it might provide a greater level of certainty and predictability to arbitral awards under Chapter 10.

V. Government to Government Disputes Under Chapter 20

A. NAFTA Antecedents of CAFTA-DR Dispute Settlement

The CAFTA-DR dispute settlement mechanism follows NAFTA Chapter 20 with some modifications; NAFTA in turn closely follows Chapter 18 of the U.S. – Canada Free Trade Agreement ("CFTA"). Given the inclusion of a provision in the 1947 GATT recognizing the need for a means to resolve disputes over the interpretation and application of trade agreements,[266] and nearly forty years of third party dispute resolution under the GATT and the WTO at the time of the CFTA negotiations, the issue in the NAFTA negotiations, and in later FTAs, was less whether there should be such a mechanism as to how it should be structured.

In most such situations, panels of trade experts appointed on an *ad hoc* basis opine on the legal aspects of disputes between member governments, based on the "law" of the relevant international agreements (NAFTA or the GATT and other WTO agreements), in a typical international arbitral procedure consisting of consultations, briefings, a hearing, and the issuance of an opinion or report. A draft of what is now the

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[261] "Within three years after the date of entry into force of the Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism" Chile - United States Free Trade Agreement, *supra* note 6, Annex 10-H; *see also*, *e.g.,* Peru Trade Promotion Agreement, *supra* note 8, annex 10-D.

[262] CAFTA-CR, annex 10-F, para. 1.

[263] *Id.,* annex 10-F, para. 2.

[264] *Id.,* annex 10-F, para. 1.

[265] Gantz, Appellate Mechanism, *supra* note 258, at 57-73.

[266] General Agreement on Tariffs and Trade (1947), art. XXIII, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc (visited Dec. 15, 2006).

WTO's Dispute Settlement Understanding[267] existed at the time of the NAFTA negotiations.[268] While the NAFTA negotiators were aware of the DSU draft, there appears to have been relatively little "borrowing" from the DSU in NAFTA, Chapter 20, perhaps in part because of the desire of both Canada and the United States to avoid wholesale renegotiation of CFTA, Chapter 18.[269] CAFTA-DR, in contrast, appears to reflect somewhat more significantly some of the provisions and practices under the WTO's Dispute Settlement Understanding (as well as under NAFTA), since at the time of the CAFTA-DR negotiations the governments had eight years of experience under the DSU.

The CFTA general dispute settlement system was considered to offer "a significant improvement to the traditional, pre-WTO GATT proceedings" by making the formation of a panel mandatory on the request of either Party and for providing deadlines for each stage of the process, but the rulings there, as in GATT, were only recommendations, while leaving the prevailing Party the option of retaliation.[270] The scope of Chapter 20 is broader that CFTA largely because NAFTA is broader than the CFTA, covering, *inter alia*, such areas as intellectual property, standards, sanitary and phytosanitary measures and to a limited degree, the environment.[271] CAFTA-DR jurisdiction is broader still, because disputes over compliance with labor and environmental obligations are subject to Chapter 20, rather than to dispute resolution in separate "side" agreements.

The most recent NAFTA Chapter 20 panel decision was rendered in February 2001[272], six years ago and several years before the CAFTA-DR negotiations. There have been only three regular Chapter 20 panel decisions and one non-NAFTA proceeding using Chapter 20 rules.[273] The jurisprudence is thus quite limited compared to the wealth

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[267] DSU, *supra* note 44.

[268] GATT Trade Negotiations Committee, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, "GATT Document MTN.TNC/W/FA, Dec. 20, 1991, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92130093.pdf (visited Dec. 15, 2006) [hereinafter "Dunkel draft"].

[269] NAFTA, Chapter 20 did take a similar approach to that of the DSU in seeking to put a limit on the level of retaliation by the prevailing Party in a dispute, through providing for additional panel review– never used to date– if the retaliation levels were "manifestly excessive." (Art. 2019.)

[270] Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under NAFTA: The New and Improved Model*, in The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas 315, 323 (Judith H. Bello et al., eds. 1994); CFTA, *supra* note 65, Art. 1807.

[271] *See, e.g.,* NAFTA, *supra* note 30, Art.104 (environmental agreements), Chapter 7B (sanitary and phytosanitary measures), Chapter 9 (standards), Chapter 14 (financial services), Chapter 17 (intellectual property).

[272] In the Matter of Cross-Border Trucking Services and Investment, Case no. USA-MEX-98-2008-01 (Feb. 6, 2003), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf (visited Aug. 16, 2006) [hereinafter "Cross-Border Trucking Services"].

[273] The Softwood Lumber Agreement, May 29, 1996, 35 I.L.M. 1195, sought (unsuccessfully in retrospect) to resolve a long-running dispute between Canada and the United States over Canada lumber exports to the United States, contained an *ad hoc* dispute settlement mechanism that is based in part on NAFTA Chapter 20 (Art. V). An arbitral panel was convened in November 1998 to address an alleged

of NAFTA investment dispute tribunal decisions[274], but is worth mentioning to provide a flavor of the types of disputes for which the mechanism has been utilized.[275]

In the first, the United States charged that NAFTA required Canada to eliminate duties on certain dairy products (*Dairy Products*). Under the WTO Agreement on Agriculture, Canada had agreed to "tarification" of dairy products (conversion of quantitative restraints to tariffs), but there is no obligation under the WTO to eliminate tariffs. Under NAFTA, in contrast, all tariffs must be eliminated within no more than 15 years. Canada took the position that these items are exempt from the NAFTA tariff reductions; the United States disagreed. Although NAFTA does not specify the use of a neutral country fifth arbitrator, a panel consisting of two Canadian and two U.S. law professors was chosen, with a British law professor as chairperson. The panel ultimately determined unanimously that Canada's actions were consistent with NAFTA.[276]

In another action, Mexico challenged the United States' application of safeguards to corn brooms from Mexico (*Brooms).* Mexico argued that the application of the safeguards was inconsistent with NAFTA, Chapter 8 and with the WTO Agreement on Safeguards. The panel, chaired by an Australian government official, found unanimously in favor of Mexico, holding that the U.S. International Trade Commission had failed to explain adequately its "domestic industry" determination in violation of NAFTA.[277]

Cross Border Trucking Services involved the refusal of the United States to implement a NAFTA provision requiring the United States and Mexico, as of December 1995, to permit each other's trucking firms to carry international cargoes between the ten Mexican and four U.S. border states. Investment by Mexican firms in U.S. trucking companies had also been blocked. Mexico had charged that the United States had violated the national treatment and most-favored nation treatment provisions of Chapter

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violation of the agreement. as a result of British Columbia's reduction of certain charges for harvesting timber from government-owned lands, "In the Matter of British Columbia's June 1, 1998 Stumpage Reduction." The panel, operating generally under the NAFTA Chapter 20 Rules of Procedure, reviewed briefs submitted by the Parties, held a hearing and drafted a decision, but the case was settled by the Parties one day before the decision was due. *See* Exchange of Diplomatic Notes dated Aug. 26, 1999 (on file with author).

[274] Also, there have been more than 100 actions filed under the procedures set out in NAFTA, Chapter 19 (not replicated in CAFTA-DR or any subsequent United States, Mexican or Canadian FTA); *see* NAFTA Secretariat, *Status Report: NAFTA & FTA Dispute Settlement Proceedings*, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=9 (visited Dec. 13, 2006).

[275] More detailed discussions of the Chapter 20 process from the point of view of a panelist are available in Sidney J. Picker, *NAFTA Chapter 20 – Reflections on Party-to-Party Dispute Resolution*, 14 Ariz. J. Int'l & Comp. L. 465 (1997) and David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process,* 11 AM. REV. INT'L ARB 481 (2000).

[276] Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, Case no. CDA-95-2008-01 (Dec. 2, 1996), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/Canada/cb95010e.pdf (visited Aug. 16, 2006) [hereinafter "Dairy"]

[277] U.S. Safeguard Action Taken on Broomcorn Brooms from Mexico, Case no. USA-97-2008-01 (Jan. 30, 1998), citing NAFTA Annex 803.3(12), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub97010e.pdf (visited Aug. 16, 2006) [hereinafter "Brooms"].

11 (investment) and Chapter 12 (cross-border services), as well as the specific provisions of Annex I imposing such obligations. The Panel ultimately agreed unanimously with Mexico, although in recognition of legitimate safety concerns in the United States, it held that "to the extent that the inspection and licensing requirements for Mexican truckers and drivers wishing to operate in the United States may not be 'like' those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable."[278]

Insofar as the author has been able to determine,[279] at least ten other matters have reached at least the consultation stage under Chapter 20.[280] Some of these were resolved through consultations, although most of the details are unknown, suggesting that with NAFTA, Chapter 20, as with most formal dispute settlement mechanisms, success cannot be measured solely by the number of cases that went to term.

The NAFTA impact on CAFTA-DR Chapter 20 necessarily reflects some apparent unhappiness on the part of the United States with NAFTA's Chapter 20.[281] The United States government had not been fully satisfied with the results under CFTA, Chapter 18; several of the five cases decided under those proceedings were thought to be poorly reasoned decisions, and there was no reason to believe that Chapter 20 would work better. Thus, even from the outset, there was healthy skepticism of the process on

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[278] *Cross Border Trucking Services, supra* 103, para. 301; *see also* paras. 295-300, 302.

[279] There remains a possibility that other formal requests for consultations were lodged at one time or another, without ever becoming public.

[280] These are a) Uranium Exports (U.S. v. Canada, 1994); b) Import Restrictions on Sugar (Canada v. U.S., 1995); c) Restrictions on Small Package Delivery (U.S. v. Mexico, 1995); d) Restrictions on Tomato Imports (Mexico v. United States, 1996); e) Helms-Burton Act (Mexico and Canada v. United States, 1996), f) Restrictions on Sugar (Mexico v. U.S., 1998); g) Farm Products Blockade (Canada v. United States, 1998); h) Bus Service (Mexico v. United States, 1998); i) Sport fishing Laws (United States v. Mexico, 1999); and j) Restrictions on Potatoes (Canada v. United States, 2001). For a discussion of these cases, *see* David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 Am. Rev. Int'l Arb. 481, 456-549 (2002) [hereinafter "Gantz, Chapter 20"].

[281] The U.S. reluctance to use Chapter 20 is well illustrated by the Mexican Sugar case - concerning U.S. market access to Mexican sugar under a NAFTA Side Letter- which Mexico considers directly related to a dispute over Mexican taxes imposed on beverages using high fructose corn syrup instead of sugar that are sold in Mexico. The Chapter 20 case technically remains pending, but the U.S. authorities have refused for more than four years to appoint panelists, a refusal that was effectively supported by a WTO panel. In *Mexico - Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report, WT/DS308/AB/R, adopted Mar. 24, 2006, *available at* http://www.wto.org , the Appellate Body upheld a panel decision rejecting Mexico's request that the panel and appellate body decline to exercise WTO jurisdiction because the matter was "inextricably linked to a broader dispute" which only a NAFTA [Chapter 20] panel could properly decide. The Appellate Body concluded that once it was established that a WTO panel had jurisdiction, it could not refuse to exercise it. *See* paras. 10, 40, 57. That case has apparently been resolved by the United States and Mexico, but not through the Chapter 20 mechanisms. *See* Daniel Pruzin, *U.S., Mexico Reach Agreement on WTO Soft Drink Dispute Compliance Deadline*, 23 INT'L TRADE REP. (BNA) 1069 (Jul. 13, 2006) (discussing a settlement in which Mexico will implement a WTO decision holding that an excise tax on corn syrup violates WTO rules); *USTR Announces Sugar Quota Allocations; Producers Cite 'Disorder' in Import Increase*, 23 INT'L TRADE REP. (BNA) 1191 (Aug. 10, 2006) (indicating that Mexico's sugar quotas for 2006 and 2007 have been increased).

the part of U.S. officials.[282] Perhaps more significantly, some issues, such as those involving dumping and illegal subsidies, effectively require resolution by the WTO's Dispute Settlement Body because they are excluded from NAFTA jurisdiction,[283] or because the NAFTA Parties preferred to take their frequent disputes over "unfair" trade actions to Geneva. Those who expect adjudicatory systems to follow set time limits and strict procedural rules are likely to find the NAFTA Chapter 20 system wanting, in part because of the inherent difficulty in forming panels where there is no independent secretariat—in either NAFTA or CAFTA-DR—to assure that deadlines are met.[284] Presumably, there is hope on the part of the U.S. negotiators that adaptation of some of the WTO's post-decision procedures, discussed below, will improve the operation of the CAFTA-DR mechanism compared to that of NAFTA.

The CAFTA-DR mechanism thus begins its existence under something of a cloud reflecting U.S. dissatisfaction with the operation of NAFTA, Chapter 20. Nevertheless, it can be hoped that all of the CAFTA-DR governments realize that such a mechanism in CAFTA-DR is necessary, even if they don't necessarily have full confidence in its viability.

B. The Chapter 20 Mechanism

1. Functions of the Free Trade Commission

Although it has no practical significance, structurally, the content of NAFTA Chapter 20 is divided between CAFTA-DR Chapters 19 and 20, as the Free Trade Commission is treated in a separate chapter in CAFTA-DR. As in NAFTA, the Free Trade Commission is comprised of cabinet level representatives or their delegates, but unlike NAFTA, CAFTA-DR specifies the officials for each country, in all cases other than the United States, the ministries of economy (El Salvador, Guatemala), industry and commerce (Dominican Republic, Honduras), development, industry and commerce (Nicaragua) and foreign commerce (Costa Rica).[285] For the United States the commissioner is the U.S. Trade Representative.[286] The same agencies, but at the director general (or Assistant USTR) level, are also designated the "free trade coordinators."[287] The Commission's responsibilities go well beyond dispute settlement, including as well supervision of implementation of the Agreement; overseeing the "further elaboration" of the Agreement (e.g., establishing a negotiating group under Annex 10-F to consider a mechanism for review of arbitral decisions in investor-state disputes); resolution of

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[282] Discussion with a former U.S. government official involved in both CAFTA Chapter 18 and NAFTA Chapter 20 negotiations. (Memorandum of Conversation, May 31, 2005 on file with author.)

[283] NAFTA, art. 1901(3) provides that, "...[N]o provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law."

[284] This is in contrast to the WTO's DSB, where the secretariat in most cases has been able to keep the panel selection process moving forward promptly.

[285] CAFTA-DR, art. 19.1.1, annex 19.1.

[286] *Id.,* annex 19.1(g).

[287] *Id.,* art. 19.2, annex 19.2.

disputes over the interpretations of the Agreement; supervision of committees and working groups; and other matters that may affect the operation of the Agreement.[288]

The Commission is also authorized to "establish and delegate responsibilities to committees and working groups"; modify tariff schedules, rules of origin, interpretative guidelines for the customs and rules of origin chapters; and annexes for the government procurement chapter; issue interpretations of Agreement provisions; seek advice of non-governmental persons or groups; and take other actions agreed upon.[289] Most significantly for this discussion the Commission is empowered with administrative coordination of the Chapter 20 dispute settlement mechanism, and each Party is required to designate an office to provide administrative assistance, and to be responsible for the operation and costs of the office, and provision of fees and expenses for panelists and experts in the Chapter 20 process.[290] These latter functions have been exercised by national sections of the NAFTA Secretariat[291], and one may reasonably assume that the CAFTA-DR process will operate in the same manner, albeit without the actual creation of a CAFTA-DR secretariat.

2. The Dispute Settlement Process

As in NAFTA, the CAFTA-DR parties are encouraged to "endeavor to agree on the interpretation and application of this Agreement," and to cooperate and consult on matters affecting its operation.[292] The basic applicability of the dispute settlement provisions is the same as in NAFTA,[293] but in CAFTA it is outlined in greater detail:

> (a) with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;
> (b) wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement; and
> (c) wherever a Party considers that an actual or proposed measure of another Party causes or would cause nullification or impairment in the sense of Annex 20.2.[294]

"Nullification or impairment" is defined along the lines of the GATT, in terms of actions by a Party which are not violations of the Agreement but nevertheless "nullify or impair" "any benefit it [the other Party] could reasonably have expected to accrue to it" under the provisions of chapters relating to national treatment, market access, rules of origin and

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[288] *Id.,* art. 19.1.2.
[289] *Id.,* art. 19.1.3.
[290] *Id.,* art. 19.3.
[291] NAFTA, art. 20002.
[292] CAFTA-DR, art. 20.1; NAFTA, art.2003.
[293] NAFTA, art. 2004.
[294] CAFTA-DR, art. 20.2.

customs administration/trade facilitation; technical barriers to trade; government procurement; cross-border services trade; or intellectual property rights.[295]

A Party seeking dispute settlement must normally make an election among Chapter 20, another free trade agreement to which the disputing Parties are Party (for example, a Free Trade Area of the Americas agreement if one is ever negotiated), and the WTO's Dispute Settlement Body. Once a forum has been chosen, "the forum selected shall be used to the exclusion of the others."[296] NAFTA contains substantively similar language, while requiring that certain matters relating to environmental, standards or sanitary and phytosanitary issues be exclusively resolved under NAFTA, Chapter 20.[297] Conflicts over choice of forum have arisen at least once under NAFTA, when Mexico requested a WTO panel to refrain from exercising jurisdiction over a dispute with the United States involving a tax on soft drinks made with high fructose corn syrup, on the grounds that the issues should be resolved in a NAFTA Chapter 20 proceeding initiated by Mexico (the latter focusing on Mexico's access to the U.S. sugar market). However, the WTO panel and appellate body decided the case, holding that they had no authority to decline to exercise jurisdiction.[298]

As in many international arbitration regimes, and in the NAFTA and WTO Dispute Settlement Body ("DSB"),[299] the process in CAFTA-DR begins with a written request for consultations, in this instance with copies to the other Parties to the Agreement.[300] The reasons, the legal basis for the complaint, and the "actual or proposed measure or other matter at issue" must all be identified. Another Party may participate in the consultations upon request within seven days of notice (five days for perishable goods).[301] Should consultations be unsuccessful in resolving the dispute within 60 days of the request (15 days for perishable goods), any consulting party may request the Commission to exercise good offices, consultation and mediation.[302] A similar request may be lodged when consultations have been held under the labor, environment or standards provisions of the Agreement.[303] The Commission is directed to meet within 10 days of the request and "shall endeavor to resolve the dispute promptly"; it may at its discretion call technical advisors, have recourse to other good offices, conciliation or mediation procedures, or make recommendations, all with the objective of assisting "the consulting Parties to reach a mutually satisfactory resolution of the dispute."[304] Multiple proceedings regarding the same measure are to be consolidated.[305]

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295 *Id.,* annex 20.2
296 *Id.,* art. 20.3.
297 NAFTA, art. 2005.
298 *Mexico – Tax Measures on Soft Drinks and Other Beverages*, *supra* note 281, paras. 44-57.
299 NAFTA, art. 2006; DSU, *supra* note 44, art. 4.
300 CAFTA-DR, art. 20.4.2.
301 *Id.,* art. 20.4.3.
302 *Id.,* art. 20.5.1.
303 *Id.,* art. 20.5.2.
304 *Id.,* art. 20.5.4.
305 *Id.,* art. 20.5.5.

Should the matter be unresolved within 30 to 75 days after the request to the Commission (depending on whether the matter has been consolidated or involved perishable goods, or whether the Commission has actually convened), any of the consulting Parties that requested the Commission to meet "may request in writing the establishment of an arbitral panel to consider the matter."[306] Here, as in NAFTA,[307] the requests for consultations and a meeting of the Commission are conditions precedent for the request for convening of an arbitral panel. This means that other than for perishable goods, it will be at least 90 days between the request for consultations and the request for establishment of a panel (60 days at the consultation stage and at least 30 days at the conciliation stage). In the WTO's DSB, consultations are mandatory, but conciliation is not; a complaining Member may request the formation of a panel 60 days after the request for consultations if the matter has not been resolved by consultations, although the panel request may be blocked (until the next DSB meeting) by any Member at the first monthly DSB meeting at which the request is lodged, meaning that in the WTO system it normally takes 90 days from request for consultation to the DSB's order to form an arbitral panel.[308]

As in NAFTA and in the WTO, CAFTA-DR provides for the establishment of a standing roster of persons to serve as panelists here, within six months after the Agreement enters into force.[309] NAFTA required the establishment, by January 1, 1994, of a roster of up to 30 persons,[310] but the NAFTA Parties have unable to agree on such a formal roster up to now, thirteen years after NAFTA entered into force. Rather, under NAFTA Chapter 20, panelists have been selected on an *ad hoc* basis (with a complaining Party selecting two nationals of the other Party, and vice versa-- a practice abandoned in CAFTA-DR) and the chairperson of the five person panel being selected by the disputing Parties from non-NAFTA citizen experts. This has occurred despite language which indicates that in the absence of agreement between the disputing Parties on a chair, the chairperson should be selected by a disputing Party chosen by lot, with the only restriction that the chair not be a national of that disputing Party.[311] With CAFTA-DR, as in NAFTA, panelists must have "expertise or experience in law, international trade or other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements . . ." They are to be chosen on the basis of objectivity, reliability and sound judgment" and be independent of the government; they must comply with a code of conduct established by the Commission.[312]

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306 *Id.,*, art. 20.6.1.
307 NAFTA, arts. 2006-2008.
308 DSU, *supra* note 44, arts. 4.7, 6.1.
309 This likely means six months after the Agreement enters into force for the last of the seven Parties.
310 NAFTA, art. 2009.
311 *Id.,* art. 2011. For example, in the *Cross-Border Trucking Services and Investment Case, supra* note 103, the two American panelists were selected by Mexico, the two Mexican Panelists by the United States, and the chair—a British barrister—by the two governments, in a process that required 15 months. *See* paras. 21-24 (relating the proceedings from the request for a panel on Sep. 22, 1998 to its ultimate formation Feb. 2, 2000).
312 CAFTA-DR, art. 20.7.2.

In a significant departure from the NAFTA text, where at least four of the five panelists in a given case are citizens of the disputing Parties,[313] CAFTA-DR provides that unless otherwise agreed, of the 70 individuals selected to be roster members, up to eight will be from each Party, and up to 14 of the 70 will be persons who are not nationals of any Party. All are to be appointed by consensus, for a minimum of three years.[314] This change likely reflects in part the actual practice under NAFTA, where in each of the three cases the chairperson was a national of a country other than the disputing Parties.

If the roster is compiled as specified, there will likely be eight nationals each of the disputing parties, plus the 40 nationals of the other Parties, plus 14 non-CAFTA-DR country nationals. The process for selecting panelists in CAFTA-DR is similar to that in NAFTA, with the important explicit proviso that if there is not agreement on a chair within 15 days of the request for establishment of the panel, the chair is to be chosen by lot among the (14) roster members that are non-nationals of a disputing Party.[315] Each party is to select its own panelist, "normally" from the roster, with any person selected other than from the roster subject (as in NAFTA[316]) to a peremptory challenge by the other Party, [317] again putting a premium on selection from the roster. If either Party has failed to designate a panelist within 15 days after selection of the chair, that panelist is selected by lot from the (eight) nationals of that Party on the roster.[318]

Whether this panel selection process will work better than that under Chapter 20 remains to be seen. Consensus among seven governments on 70 panelists may be difficult to achieve; consensus among the three governments on 30 NAFTA panelists has remained elusive. Without a permanent roster, the rest of the panel selection process will likely break down, causing significant delays as the disputing Parties argue about panel selection, and delays along the lines of those found under NAFTA—six to sixteen months or longer—are likely to occur.[319]

The Commission is to establish rules of procedure for the operation of the panels, which will presumably be quite similar to the NAFTA Chapter 20 Rules of Procedure.[320] Under NAFTA, as under CAFTA-DR, there must be at least one hearing (as in NAFTA).[321] However, the remaining rules depart significantly from NAFTA provisions. There is no provision for transparency in NAFTA, and under NAFTA, all submissions were thus confidential; in the first case, *Dairy Products*, between the United States and Canada, there was even a short-lived effort to keep the names of the panelists (other than

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[313] *See* NAFTA, art. 2011.1 (where each disputing Party chooses two nationals of the other disputing Party to serve).
[314] CAFTA-DR, art. 20.7.1.
[315] *Id.,* art. 20.9.1 (b).
[316] NAFTA, art. 2011:3.
[317] CAFTA-DR, arts. 20.9.1(c), 20.9.2.
[318] *Id.,* arts. 20.9.1(c), 20.9.1(d).
[319] *See* Gantz, *supra* note 280, at 502-504 (discussing the reasons for the delay in panel selection under NAFTA Chapter 20).
[320] Model Rules of Procedure for Chapter 20 (1994), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=74 (visited Aug. 17, 2006).
[321] NAFTA, art. 2012.

the chairperson) confidential![322] Also, the hearings in the most recent NAFTA, Chapter 20 case, *Cross Border Trucking Services*, held in May 2000, were not public.[323]

Nor were the transparency measures dictated by the NAFTA Commission with regard to Chapter 11 investor-state disputes (discussed in Part IV, above) extended to proceedings under NAFTA, Chapter 20, although discussions among the NAFTA Parties to this end have apparently been taking place for some time.[324] This may well reflect the lack of any general rule of transparency for government-to-government disputes in the World Trade Organization, and it is highly unlikely in the author's view that most of the WTO Members would support open hearings and prompt disclosure of briefs. Notwithstanding that general view, several key WTO Members, the United States, Canada and the European Union, have authorized the panel to make *ad hoc* arrangements to open hearings to the public via closed circuit television for hearings affecting those parties (but not for other WTO Members who appeared in the matter as third parties).[325]

In CAFTA-DR, in contrast, the rule is transparency, and this is a significant innovation for government-to-government dispute resolution, which has tended to keep disputes under wraps at least until they are resolved. Although confidential information may be protected, the hearings must generally be open to the public; the Parties' initial and rebuttal briefs are public except for confidential information; the panel is to consider requests from NGOs to provide their views (*amicus curiae* briefs) that "may assist the panel in evaluating the submissions and arguments of the disputing parties."[326] Also, unlike NAFTA, where specific panelists are not to be associated with any minority or majority opinions,[327] under CAFTA-DR, "panelists may furnish separate opinions on matters not unanimously agreed."[328]

Other Parties to CAFTA-DR not parties to the particular dispute may upon written request fully participate in the proceedings through attendance at hearings and making and receiving written and oral submissions, with those submissions "reflected in the final report of the panel."[329] Substantially identical language appears in NAFTA and the NAFTA Party that is not a disputing Party has routinely participated in Chapter 20

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[322] *See NAFTA Chapter 20 Panel Selected in Farm Tariff Flap with Canada,* 13 Int'l Trade Rep. (BNA), vol. 13, no. 4 (Jan. 24, 1996) (reporting the name of the chairperson by stating "A USTR spokeswoman confirmed that panelists have been selected but said that their names were not yet available).

[323] The author, as one of the panelists, was present.

[324] Email communication from Meg Kinnear, of International Trade Canada, to the author (Sept. 5, 2006) (on file with author).

[325] *See* Communication from the Chairman of the Panels, WT/DS380/8, WT/DS321/8 (Aug. 2, 2005) in *United States – Continued Suspension of Obligations in the EC-Hormones Dispute,* WT/DS320; *Canada -- Continued Suspension of Obligations in the EC-Hormone Dispute*, WT/DS32, *available at* http://www.wto.org/english/tratop_e/dispu_e/ds320-21-8_e.pdf (visited Aug. 18, 2006) (advising the Chairman of the DSB of the procedures to be followed).

[326] CAFTA-DR, art. 20.10.1.

[327] NAFTA, art. 2017.2.

[328] CAFTA-DR, art. 20.13.5.

[329] *Id.,* art. 20.11.

proceedings.[330] Similarly, the NAFTA language permitting either a disputing Party or the panel on its own initiative, "to seek information and technical advice from any person or body that it deems appropriate" subject to agreement on terms and conditions by the Parties.[331] However, NAFTA language providing for the use of a scientific review board for environmental or other scientific issues[332], does not appear in CAFTA-DR. Separate opinions are permitted when the panel is not unanimous.[333]

CAFTA-DR, like NAFTA, contains time limits for the proceedings; in CAFTA-DR, the initial report of the panel is to be circulated to the Parties "within 120 days after the last panelist is selected or such other period as the Model Rules of Procedure . . . may provide." This initial report is to contain findings of facts, the panel's "determination as to whether a disputing Party has not conformed to its obligations under this Agreement" or of nullification or impairment, along with recommendations if the Parties have so requested.[334] The 120 day rule is not hard and fast; the panel may request more time, advising the Parties of the reasons for the delay and an estimate of the additional time required, with the caveat that "in no case should the period to provide the report exceed 180 days."[335]

While the initial period is 120 days, instead of the 90 days provided in NAFTA,[336] it is still unlikely in the author's view that the panels will be able to complete this step of their work in four months. The major delays will likely relate to the briefing schedule and scheduling of a hearing at a time that is convenient for several governments and three panelists. In *Cross-Border Trucking Services*, for example, the final panelist was selected on February 2, 2000; the briefs were very promptly submitted by Mexico, the United States and Canada on February 14, February 23, April 3 and April 24; and the hearing was held on May 17, 2000.[337] Post-hearing submissions were solicited by the panel for submission June 1, later extended to June 9 by request of the Parties.[338]

Thus, the hearing in *Cross-Border Trucking Services* took place 106 days after the last panelist was selected, and the case was not under submission until 128 days after panel selection. There were no unusual delays in the briefings or the hearing; the Parties and the panelists all acted promptly in light of the complexities of the legal and factual issues. Yet the period of time for the case to be ripe for panel decision was 38 days *in excess* of the NAFTA time limit, and 8 days in excess of the CAFTA-DR limit, suggesting that both may be impractical unless the Parties are willing to accept very short filing and response periods for their submissions. However, in most cases it should be

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[330] NAFTA, art. 2013. For example, in *Cross-Border Trucking Services, supra* note 103, para. 27, it is noted that "Canada filed its third party submission. On February 22, 2000." A representative also attended the hearing, para. 29.
[331] CAFTA-DR, art. 20.12; NAFTA, art. 2014.
[332] NAFTA, art. 2015.
[333] CAFTA-DR, art. 20.13.5.
[334] CAFTA-DR, art. 20.13.3.
[335] *Id.,* art. 20.13.4.
[336] NAFTA, art. 2016.2.
[337] *Cross-Border Trucking Services*, *supra* note 103, paras. 23-29.
[338] *Id.,* para. 30.

possible for the panelists to complete the interim report within 180 days; this will be easier under CAFTA-DR than under NAFTA, because there are only three panelists rather than five.[339] Strong administrative assistance by the national offices designated to provide administrative assistance to panels[340] will facilitate panel compliance with the deadlines; weak administrative assistance will make such compliance much less likely.

It is anticipated that the Parties will provide comments on the interim report to the panel within 14 days of the presentation of the report, unless another period is agreed by the Parties,[341] with the panel expected to render a final report 16 days later.[342] The 30 day time limit here is the same as in NAFTA.[343] It seems unlikely that this time limit will be strictly met, although the Parties and panelists should be able to come reasonably close. Again based on the author's personal experience, such comments are normally quite valuable to panels and are studied carefully by the panelists; even if the result itself does not change, the governments' superior knowledge of details may help the panel avoid both factual and legal errors.

3. Implementation of Decisions

Once the final report is provided to the Parties, "the disputing Parties *shall* agree on the resolution of the dispute, which *normally* shall conform with the determinations and recommendations, if any, of the panel."[344] Where the panel finds that a "disputing Party has not conformed with its obligation under this Agreement, or that a disputing Party's measure is causing nullification or impairment . . . the resolution, *whenever possible*, shall be to eliminate the non-conformity or the nullification or impairment."[345] In other words, if a panel finds a violation, the violating Party is expected to correct it, but they have some flexibility to work things out if both can agree on a solution.

If, however, compliance satisfactory to the prevailing Party does not occur within 45 days, the Parties are expected to enter into negotiations "with a view to developing mutually acceptable compensation."[346] If the negotiations aren't successful in an additional 30 days, or if compensation agreements are not complied with, the complaining Party may retaliate through the usual (under the WTO and other trade

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[339] However, it is worth keeping in mind that the three panelists will be located in three different countries, likely in different time zones (particularly if the chairperson is not from the Western Hemisphere), and are likely to have day jobs. These factors significantly complicate conference calls and post-hearing meetings of the panelists. (The panelists are *ad hoc*; NAFTA panelists are paid at the rate of CDN$800 per day, currently about US$720 per day. One can reasonably assume that the CAFTA-DR Commission will set a similar rate, although presumably not in Canadian dollars.) Also, in most cases, it will probably be necessary for the panel to render its opinion in both English and Spanish, requiring additional time for translation.

[340] CAFTA-DR, art. 19.3.1(a).

[341] *Id.,* art. 20.13.6.

[342] CAFTA-DR, art. 20.14.1.

[343] NAFTA, art. 2017.1.

[344] CAFTA-DR, art. 20.15.1 (emphasis added).

[345] *Id.,* art. 20.15.2 (emphasis added).

[346] *Id.,* art. 20.16.1.

agreements[347]) suspension of benefits, subject to notification as to what the complaining Party believes are "benefits of equivalent effect" to the protested measure.[348] Where there is a belief by the losing Party that the suspension of benefits proposed is "manifestly excessive," it may request that the panel be reconvened to consider the level of compensation.[349]

The opportunity to review the level of compensation demanded by the complaining Party at the outset is something of a departure from NAFTA, where the alleged excessiveness of the benefits could only be challenged after the fact.[350] Under CAFTA-DR, it is contemplated that a challenge that the suspension is manifestly excessive is to be resolved by the panel *before* any suspension takes place, with the suspension of trade benefits then being in the amount determined by the panel, unless the panel fails to determine the proper level of suspension.[351] This more closely resembles the parallel requirements in the DSU.[352] However, unlike the DSU, where there have been several proceedings in which the losing Party objected to the magnitude of benefits to be suspended,[353] there is little relevant experience in NAFTA. In the first decision, *Dairy*, the panel found no violation of NAFTA by Canada, so no question of compliance arose.[354] In *Broom Corn Brooms*, Mexico had already suspended certain concessions as was their right in a safeguards matter, and continued the suspension until the U.S. lifted the safeguards measures nine months later. In *Cross-Border Trucking Services*, there has been long-standing disagreement between the United States and Mexico regarding implementation of the panel ruling, but no request for suspension of benefits, perhaps because of continued Mexican trucking industry opposition to opening the border.[355]

A similar type of challenge is available under Article 20.16.3(b) to the Party complained against if the complaining Party considers that "it has eliminated the non-conformity or the nullification or impairment that the panel has found."[356] A "compliance review" is available under Article 20.18 after sanctions have actually been

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[347] WTO DSU, *supra* note 44, art. 22.
[348] CAFTA-DR, art. 20.16.2.
[349] *Id.,* art. 20.16.3.
[350] *See* NAFTA, art. 2019.1-4. (providing for the complaining Part to suspend benefits after 30 days, and also for the establishment of a new panel to determine whether the suspension is manifestly excessive, with that panel to render a decision within 60 days after the last panelist is chosen, or as otherwise agreed).
[351] CAFTA-DR, art. 20.16.3-4.
[352] *See* DSU, *supra* note 44, arts. 22.2, 22.6 (where the Member seeking to suspend benefits "may request authorization from the DSB to suspend the application to the Member concerned of concessions under the covered agreements" and the losing Party may contest the requested suspension levels).
[353] *See, e.g.*, *European Communities – Regime for the Importation, Sale and distribution of Bananas*, WT/DS26/ARB (Apr. 19, 1999), *available at* http://www.worldtradelaw.net/reports/226awards/ec-bananas(226)(us).pdf (visited Aug. 18, 2006); *United States - Anti-Dumping Act of 1916*, WT/DS136/ARB (Feb. 24, 2004), *available at* http://www.worldtradelaw.net/reports/226awards/us-1916act(226).pdf (visited Aug. 18, 2006).
[354] *Dairy, supra* note 276, para. 209.
[355] *See* Inside US Trade, Jan. 6, 2006, at 1, *available at* http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2002.ask&dh=38257944&q=Mexico (visited Aug. 18. 2006) (noting that the trucking issue was to be discussed at a high level visit to Washington in January 2006, despite Mexican industry resistance).
[356] CAFTA-DR, art. 20.16.3(b).

applied, providing that "[I]f the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the complaining Party or Parties."[357] If the panel agrees, the complaining Party or Parties are required to "promptly reinstate any benefits that Party has or those Parties have suspended . . . ."[358]

This review of compliance or non-compliance with the panel's finding of a violation resembles the WTO "Article 21.5" procedure,[359] although in most instances at the WTO it is the complaining Member, not the Member complained against, that asks the panel to determine that the alleged compliance was not in fact sufficient. The United States has been on both sides of this process in the WTO,[360] experience which may have led at least in part to inclusion of this language in CAFTA-DR.

As in NAFTA and the DSU,[361] in CAFTA-DR suspension of benefits is to be in the same sector as affected by the measure, unless this is "not practicable or effective." In that instance benefits may be suspended in other sectors.[362]

A major innovation in CAFTA-DR compared to NAFTA is to provide the Parties with an alternative to suspension of benefits; the Party committing the violation may by written notice to the complaining Party agree to pay annual monetary damages, in U.S. dollars to the complaining Party, in lieu of suspension of trade benefits. If there is no agreement on the amount, it is set at 50% of the level of trade sanctions, as determined by the panel, or if there is no panel determination of amounts, by the complaining Party.[363] However, the Commission may determine "when circumstances warrant," that the assessment "be paid into a fund established by the Commission and expended at the direction of the Commission for appropriate initiatives to facilitate trade between the disputing Parties . . . ."[364] It isn't entirely clear how the sequencing would work in terms of proposed suspension of benefits, a panel determination of the amount of benefits, a request for the alternative of a monetary assessment and a possible Commission decision (by consensus of course) to use the funds for trade facilitation instead, but it certainly is an interesting departure from the traditional suspension of benefits approach.

4. Special Rules for Labor and Environmental Disputes

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[357] *Id.,* art. 20.18.1.
[358] *Id.,* art. 20.18.2.
[359] See DSU, *supra* note 44, art. 21.5 (permitting either disputant to challenge alleged compliance with a DSB ruling).
[360] *See, e.g., Canada – Measures Affecting the Importation of Milk*, WT/DS103, 113/AB/RW2 [New Zealand, United States], adopted Jan. 17, 2003, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/RW [India, U.S. as third participant], adopted Apr. 24, 2003); *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/RW [EC], adopted Jan. 29, 2002, *all available at* http://www.wto.org (visited Aug. 18, 2006) (where alleged compliance was challenged by complaining Member and others as insufficient).
[361] NAFTA, art. 2019.2; DSU, *supra* note 44, art. 22.3.
[362] CAFTA-DR, art. 20.16.5.
[363] *Id.,*, art. 20.16.6.
[364] *Id.,* art. 20.16.7.

Another major change (from NAFTA) results from Chapter 20 jurisdiction over possible violations of CAFTA-DR's requirements for enforcement of national labor and environmental laws. Separate rosters of up to 28 persons each are to be designated for resolution of disputes arising under the labor and environmental chapters of CAFTA-DR, all persons with experience in the respective areas, possessing "objectivity, reliability and sound judgment," and acting independently of the governments.[365]

Chapter 20 jurisdiction over labor and environmental issues is also arguably narrower than with regard to other actions inconsistent with the Agreement. For example, not every failure to enforce labor laws is grounds for initiating dispute settlement. Rather, the obligation is as follows: "A Party shall not fail to effectively enforce its labor laws, *through a sustained or recurring course of action or inaction*, after the date of entry into force of this Agreement."[366] Similar language circumscribes actions under the environmental Chapter 17.[367]

Moreover, if a panel finds non-compliance with these labor or environmental obligations, there is no option of suspension of trade benefits. Rather, CAFTA-DR provides for an "annual monetary assessment" to be determined by the panel, taking into account such factors as the trade effects of the non-enforcement; its pervasiveness and duration; the reasons for non-enforcement; the level of enforcement "that could be reasonably expected of the Party given its resource constraints"; efforts of the party to remedy non-enforcement; and any other relevant factors.[368] The monetary assessment is to be paid in U.S. dollars, but not to the complaining Party. Rather, the assessment amounts, which are limited to $15 million annually,[369] are to be

> paid into a fund established by the Commission and shall be expended at the direction of the Commission for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law.[370]

Insulating labor and environmental violations from trade sanctions is one of the more controversial aspects of CAFTA-DR, but one may reasonably assume that as under the North American Agreement on Environmental Cooperation (NAFTA), where there have been no arbitrations, cases involving these issues that reach Chapter 20 will be few, due to the relatively high threshold. Given the innovative nature of the use of monetary assessments as an alternative to trade sanctions generally, and as the only remedy for non-compliance in labor and environmental disputes, it is not surprising that there is a mechanism which provides for a review of the effectiveness of these provisions (Articles 20.17 and 20.18) after five years, or after monetary assessments have been assessed in

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365 *Id.,* arts. 16.7 (labor) and 17.11(environment).
366 *Id.,* art. 16.2.1(a); Italics added.
367 *Id.,* art. 17.2.1(a).
368 *Id.,*, art. 20.17.1-2.
369 Adjusted for inflation beginning January 2006. CAFTA-DR, art. 20.17.2.
370 CAFTA-DR, art. 20.17.4.

five proceedings, whichever comes first.[371] This suggests, in contrast, that the Parties during the negotiations believed that the innovative dispute settlement mechanism under Chapter 20, and the monetary penalty route, would in fact be used on a regular basis.

C. Domestic Proceedings and Private Commercial Disputes

The three articles in this final section of Chapter 20 reflect several carry-over provisions from NAFTA. CAFTA-DR, like NAFTA, incorporates mechanism, perhaps patterned loosely on the "preliminary rulings" jurisdiction of the European Court of Justice:[372]

> If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.[373]

If the commission issues an "agreed interpretation," that interpretation must be submitted by the Party in whose territory the court is tribunal is located to that court or tribunal, "in accordance with the rules of that forum."[374] However, if the Commission cannot agree, "any Party may submit its own views to the court or administrative body in accordance with the rules of that forum."[375]

This mechanism, although never used under NAFTA, could potentially be very useful in providing guidance on complex issues arising out of the CAFTA-DR. Whether it can actually function effectively depends in large part on the efficiency of the Commission. The Commission is not a court with independent judges such as the European Court of Justice, but rather is comprised of political appointees. It is thus difficult to predict whether it will be able to deal with legal issues on a timely basis, if at all. Hopefully, the Commission will issue regulations that detail procedures for considering requests for advice under this Article 20.20, including time limits for doing so. Should, as is not unlikely, the Commission be unable or unwilling to serve this function, the provision also gives the Party that is concerned about a particular issue (most likely the United States) before another Party's court an opportunity to make its own views known.

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[371] *Id.,* art. 20.19.

[372] Under Article 234 of the Treaty Establishing the European Community, as amended by the Single European Act, the Treaty of Maastricht and the Treat of Amsterdam (consolidated), Dec. 24, 2002, *available* at http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf (visited Dec. 15, 2006), the ECJ has jurisdiction to given preliminary rulings, *inter alia*, concerning "the interpretation of this treaty . . ." "When such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."

[373] CAFTA-DR, art. 20.20.1; *see* NAFTA, art. 2020.1 (with virtually identical language).

[374] *Id.,* art. 20.20.2.

[375] *Id.,* art. 20.20.3.

In CAFTA-DR, as in NAFTA, private actions against another Party on the grounds that a measure of another Party is inconsistent with the Agreement (NAFTA), or that the other Party has failed to conform to its obligations under the Agreement (CAFTA-DR) are barred.[376] This reflects long-standing U.S. policy, and language found in the legislation that approves trade agreements.[377] It is probably significant for the other CAFTA-DR nations as well. Most nations in Latin America use a pure "monist" system, in which treaties are fully self-executing, that is, in which once approved and in force they automatically have direct applicability by government agencies, courts and private parties, even where they create conflicts with existing statutes.[378] In theory, since trade agreements are automatically the law of the land, they could be the basis of private citizen actions charging the government with failing to properly implement the agreements, unless there is some provision in the Agreement barring such legal actions.[379]

Finally, CAFTA-DR, like NAFTA, makes some modest effort to encourage alternative dispute settlement, including arbitration, among private citizens and entities. CAFTA-DR, in language similar to that in NAFTA, states:

> 1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

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[376] NAFTA, art. 2021; CAFTA-DR, art. 2021.

[377] *See* CAFTA Implementation Act, 19 U.S.C. § 4012(c): "Effect of Agreement with respect to private remedies: No person other than the United States-- **(1)** shall have any cause of action or defense under the Agreement or by virtue of congressional approval thereof; or **(2)** may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with the Agreement."

[378] For example, in Chile, international agreements are negotiated, signed and ratified by the President. They must be approved by the Parliament, in the same manner as a new law. Once ratified and published in the official journal, an international trade agreement is the law of the land. Since it has the same status as a domestic law, and is subsequent, the promulgation of the international agreement automatically repeals any prior inconsistent law. This was the approach used with regard both to the Marrakesh Agreements and the U.S.-Chile Free Trade Agreement. Thus, the WTO agreements were promulgated in Chile**,** in a simple decree which listed the Marrakesh Agreement and the subsidiary international trade agreements, noted that the agreements had been approved by the Chilean Parliament on November 24, 1994, confirmed that Chile had deposited its instrument of ratification with the WTO on December 28, 1994, and stated that those agreement were promulgated in Chile. Decree No. 16, promulgated May 1, 1995, published May 17, 1995 (signed by the President, Eduardo Frei, and issued by the Ministry of Foreign Relations).

[379] This "monist" approach also explains the United States practice of implementing the CAFTA-DR on a sequential basis, allowing it to enter into force for the United States and the other Parties only once the other Parties have enacted the necessary implementing legislation, notwithstanding the fact that under the law of the Parties the provisions of the Agreement are automatically applicable within their territories to private citizens, government agencies and the courts. *See* note 3, *supra.*

> 2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes. [380]

Compliance with paragraph 2 requires only that each of the Parties be a party to the United Nations Convention on Enforcement of Foreign Arbitral Awards, and the Inter-American Convention on International Commercial Arbitration. All CAFTA-DR Parties are in fact parties to these two conventions. [381]

Also in both agreements, there is provision for establishing an "Advisory Committee on Private Disputes," to "report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area" and as considered appropriate, provide technical cooperation."[382] However, there is an important difference in the wording between NAFTA and CAFTA-DR. In NAFTA, the Commission "shall establish" the Advisory Commission, while CAFTA-DR states that the Commission "may establish" it. Thus, the likelihood that there will be such a committee under CAFTA-DR is by no means certain.

The "2022 Committee" under NAFTA has been something of a disappointment, as its funding is very limited. (Private sector members pay their own travel costs and per diem, and there appears to be only funding for the drafting of reports.) The Committee meets on an annual basis, and in recent years efforts have been made to provide information on ADR through a section of the NAFTA Secretariat's website.[383] It is difficult to believe that a similar committee under CAFTA-DR, even if one is established, will be very active in the absence of significant funding, but it may be unreasonable to expect governments to support private sector arbitration beyond ensuring that the necessary agreements for enforcement are in place. In retrospect, it is unfortunate that CAFTA-DR does not require member governments to enact legislation that would facilitate the use of ADR within their jurisdictions, particularly with regard to adopting or improving national legislation recognizing arbitrations held within their territories, and limiting the extent that local courts may review such arbitral determinations.

VI. Summary and Conclusions

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[380] NAFTA, art. 2022; CAFTA-DR, art. 20.22.

[381] *See* UNCITRAL, *Status, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (visited Aug. 19, 2006); Organization of America States, *Inter-American Convention on International Commercial Arbitration*, Jan. 30, 1975, Signatory Countries, *available at* http://www.oas.org/juridico/english/sigs/b-35.html (visited Aug. 19, 2006).

[382] CAFTA-DR, art. 20.22.4-5; see *also* NAFTA, art. 2022.4 (with nearly identical language).

[383] The website, "Business Sector – Private Dispute Resolution in the NAFTA Region," provides such information as a guide to private dispute resolution and model ADR clauses. *See* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=856 (visited Aug. 29, 2006).

The provisions of CAFTA-DR relating to investment disputes and those among the CAFTA-DR Parties closely follow those applicable for fourteen years under NAFTA, but with some significant departures. Among the most important innovations in Chapter 10 are changes in the investment protection provisions which appear designed to limit the scope of "fair and equitable treatment," customary international law and indirect expropriation when applied to regulatory takings, along with transparency mechanisms that were added to NAFTA only gradually and after the fact. With regard to government-to-government disputes, in addition to greater transparency of the process and the possibility of monetary penalties for non-compliance instead of trade sanctions, the major innovation relates to coverage, albeit circumscribed, of actions in which it is charged that a Party is failing to enforce its own labor or environmental laws.

Frequency of usage is always difficult to predict. If CAFTA-DR is successful in stimulating U.S. investment in the territories of the other six Parties, it is almost inevitable that there will be some investment disputes eventually. Whether the Chapter 10 provisions will be used in investor disputes among the other six Parties is more problematic, although there is some indication that the use of investor-state dispute settlement is increasing among developing nations.[384] Chapter 20—government-to-government disputes—likely will be used only sparingly, at least at first. Many of the trade disputes arising among the CAFTA-DR Parties are likely to be subject to WTO jurisdiction, as in the conflict between Honduras and the Dominican Republic over cigarettes,[385] even if the Parties would now have the option of choosing CAFTA-DR Chapter 20.[386] If NAFTA provides any basis for predictions, CAFTA-DR Parties will prefer WTO dispute settlement unless the CAFTA-DR Parties move expeditiously to create the standing roster that will enable prompt formation of panels. One can also hope and expect that the U.S. government will use diplomacy and gentle pressures in situations where the other Parties are failing to comply immediately and strictly with their obligations under the Agreement.[387] As with courts and other types of dispute settlement mechanisms, the measure of their success is not only the number of cases submitted to court or arbitration, but those which were settled amicably because the formal mechanism existed.

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[384] For example, as of 1996 El Salvador has BITs with Argentina, Ecuador and Peru, and Guatemala with Chile; all of the developing country CAFTA-DR Parties also have various BITs with developed countries. *See* ICSID Bilateral Investment Treaties, 1959-1996, *available at* http://www.worldbank.org/icsid/treaties/treaties.htm (visited Dec. 13, 2006). Others have undoubtedly been concluded in the past decade.

[385] *See Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted May 19, 2005, *available at* http://www.wto.org (visited Aug. 27, 2006) (focusing on discrimination issues under GATT arts. III and XX).

[386] CAFTA-DR, art. 3.2 effectively incorporates GATT art. III by reference, and CAFTA-DR art. 21.1 incorporates GATT art. XX.

[387] With regard to China, which became a WTO Member in December 2001, the U.S. has refrained generally from resorting to formal WTO dispute resolution until very recently. The first request for consultations was in *China – Measures Affecting Imports of Auto Parts*, WT/DS340, Mar. 30, 2006. *See* WTO, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/27, Jun. 9, 2006, *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/OV27-00.doc (visited Aug. 27, 2006).