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¡Si, Po! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States -Chile Free Trade Agreement

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¡Sí, PO! FOREIGN INVESTMENT DISPUTE RESOLUTION DOES HAVE A PLACE IN TRADE AGREEMENTS IN THE AMERICAS: A COMPARATIVE LOOK AT CHAPTER 10 OF THE UNITED STATES-CHILE FREE TRADE AGREEMENT

INTRODUCTION

On June 6, 2003, the United States and Chile signed a Free Trade Agreement (U.S.-Chile FTA), after three years of formal negotiations.[1] The U.S.-Chile FTA comes some nine years after

1. Free Trade Agreement, U.S.-Chile, June 6, 2003, *at* the official website for the United States Trade Representative, http://www.ustr.gov/new/fta/Chile/text/ (last visited October 31, 2003) [hereinafter U.S.-Chile FTA]; *see also* the official website of the Ministerio de Relaciones Exteriores de Chile, *at* http://www.direcon.cl (last visited June 6, 2003) [hereinafter Direcon]. There were fourteen rounds of negotiations, beginning in December 1999 and concluding in December 2002.

The U.S.-Chile FTA was signed in Miami, Florida after several months of tension between President George W. Bush and President Ricardo Lagos, resulting from Chile's refusal to back a second U.S.-proposed resolution in the United Nations Security Council supporting military action against Iraq. *See* CNNenEspañol.com, "Estados Unidos y Chile firman tratado de libre comercio," *at* http://edition.cnn.com (last visited June 6, 2003) [hereinafter CNN Chile]; La Nación, Carolina Miranda, "Alvear firma el pacto commercial más "soñado" del gobierno de Lagos," *at* http://www.lanacion.cl (last visited June 6, 2003) [hereinafter La Nación TLC]; El Diario, "Definitivo: TLC con Estados Unidos se firma el 6 de juñio," *at* http://www.eldiario.cl (last visited May 28, 2003); La Tercera, M. Alam & M. Chapochnick, "Chile y EE.UU. ponen fin a incertidumbre y anuncian firma de TLC, May 28, 2003, No. 19.342 [hereinafter La Tercera TLC] (explaining that President Lagos stood firm on Chile's historic pacifist stance to international military conflict).

The leaders of both countries were not present for the signing; rather, U.S. Trade Representative Robert Zoellick and Chilean Minister of Foreign Relations Soledad Alvear completed the formalities. *See* CNN Chile; El Mercurio, Nelly Yáñez, "Sin los Presidentes se firmará el TLC con EE.UU," *at* http://elmercurio.cl (last visited May 28, 2003) (signaling that Chile's support of the United States in the United Nations to lift sanctions on Iraq after the coalition victory was politically conducive to finalizing the U.S.-Chile FTA).

Despite the tension resulting from disagreement over the recent war with Iraq, both countries expressed a positive outlook and a commitment to the U.S.-Chile FTA. *See* CNN Chile. Chile expects its GDP to increase by one percent each year just from new commerce resulting from the U.S.-Chile FTA, and expects its exports to the United States to increase by forty percent in a very short time. Chile also expects its economy to double in size by 2014 as a result of the treaty. *See* La Tercera TLC; La Nacion TLC (discussing in more detail the various economic prospects for Chile as a result of the U.S.-Chile FTA).

In July of 2003 both the U.S. House of Representatives and the U.S. Senate approved the U.S.-Chile FTA, and on September 3, 2003, President George W. Bush

discussion of Chile's entry into the North American Free Trade Agreement (NAFTA) was suspended.[2] This latest development in the rubric of international trade in the Americas represents a historic step for both the United States and Chile. It is the first trade agreement signed between the United States and a South American country. It is also the second agreement of its kind signed between the United States and a developing country in the Americas, and as such it represents a progressive step for both economies, especially so for Chile.[3] Moreover, it represents a forward stride toward the realization of a Free Trade Area of the Americas (FTAA).[4]

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signed the agreement. *See* FAS Online, *at* http://www.fas.usda.gov/itp/Chile/us-Chile.html (last visited Sept. 29, 2003). On October 22, 2003, the Chilean Congress officially approved the U.S.-Chile FTA. *See* Gobierno de Chile, Ministerio de Relaciones Exteriores, Direccion General de Relaciones Economicas Internacionales, "Comision Especial de la Camara de Diputados Aprobo Tratado de Libre Comercio con EE.UU," at http://www.minrel.cl/prensa/Comunicados2003/10-09-03(2).htm (last visited Oct. 27, 2003). The agreement entered into force on January 1, 2004.

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057, *reprinted in* 32 I.L.M. 289 (1993) [hereinafter NAFTA]. There was much discussion initially that Chile would become a founding member of NAFTA. *See* NAFTA: A PROBLEM-ORIENTED COURSEBOOK 28 (Ralph H. Folsom, Michael Wallace Gordon, & David Lopez eds., 2000) [hereinafter NAFTA Coursebook]. However, after five meetings, Chile suspended talks regarding its accession, waiting for the U.S. Congress to approve fast-track negotiating authority for U.S. President Bill Clinton, which never happened. In subsequent years, Chile entered into separate free trade agreements with Canada and Mexico. *See infra* Part II.

3. The first trade agreement was between the United States and Mexico with NAFTA. *See* NAFTA, *supra* note 2. Most recently, the United States signed the Central America Free Trade Agreement (CAFTA) with Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. *See* the official website for the United States Trade Representative, [hereinafter USTR Website] *at* http://www.ustr.gov/new/fta/Cafta/text/preamble.pdf (last visited Feb. 1, 2004). Although outside the scope of this article, that agreement contains provisions for investor-state foreign investment dispute resolution very similar to those found in the U.S.-Chile FTA.

4. In December of 1994, thirty-four democratic countries met in Miami, Florida at the Summit of the Americas, with the goal of fashioning the FTAA. *See* official website of the FTAA, *at* http://www.ftaa-alca.org/View_e.asp (last visited Aug. 15, 2003) [hereinafter FTAA Website] *and* Summit of the Americas, *at* http://www.summit-americas.org (last visited Feb. 23, 2003) [hereinafter Summit of Americas Website]. *See also* PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 241 (1999). "The idea behind the FTAA . . . is the consolidation of the nearly twenty-five free trade pacts already operating in a region of nearly 800 million inhabitants.". Notably,

> The Summit of the Americas process . . . is an institutionalized set of meetings at the highest level of government decision-making in the Western Hemisphere. The purpose of the meetings . . . is to discuss common issues and seek solutions to problems shared by all the countries in the Americas, be they economic, social, military or political in nature.

Since the Miami Summit, major summits have taken place in San Jose (1996),

Like NAFTA, the U.S.-Chile FTA takes into account the importance of foreign investment along side free trade in realizing goals of economic harmonization and progress. The ability to attract foreign investment is critical to economic growth, just as trade is, especially for developing countries. Similarly as with trade, foreign investment demands the establishment of a unique set of rules. In order to promote investment, there must be clear guidelines regarding foreign investors' rights and the protection of such rights. A structured, predictable legal framework for foreign investment dispute resolution is an integral part of the promotion of foreign investment. Modeled after NAFTA Chapter 11, Chapter 10 of the U.S.-Chile FTA seeks to accomplish this goal by allowing for the direct participation of private investors in international dispute resolution. Chapter 10 grants investors from both countries direct access to international arbitration to resolve a dispute arising out of a Party's alleged breach of the provisions in Section A of the chapter.

NAFTA Chapter 11 dispute resolution has been a source of debate in recent years, attracting criticism from academics and public interest groups.[5] The arguments against investor-state dis-

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Santiago (1998) and Quebec City (2001). *See also* Richard L. Bernal, *Free Trade Areas: The Challenge and Promise of Fair vs. Free Trade*, 27 LAW AND POLICY IN INT'L BUS. 945 (1996), stating that the FTAA would serve as an enormous regional trade agreement, creating "a market of . . . [over] 719 million people and could expand trade within the hemisphere to unprecedented levels." On November 20, 2003, FTAA negotiating countries met in Miami, Florida and reiterated their commitment to conclude negotiations by early January 2005. *See* FTAA Website, *supra* note 1. The Third Draft of the Consolidated Text of the FTAA is available on the FTAA Website.

Through the Declaration of Principles and Plan of Action, negotiating states have agreed to make decisions on a consensus basis, to ensure that the decision-making process is transparent, to follow WTO-based guidelines, to take into account the needs of less-developed countries, and to complete negotiations for the FTAA by 2005. *See* Declaration of Principles and Plan of Action, 34 I.L.M. 808 (1995) [hereinafter FTAA Declaration]. *See also* FTAA Website, *supra* note 1. The Declaration also expresses the negotiating states' commitment to "build on existing subregional and bilateral agreements in order to broaden and deepen hemispheric integration and to bring agreements together." *See* FTAA Declaration, at 811. For detailed discussions on the FTAA and economic integration, see Frank J. Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1997) [hereinafter Garcia, Americas Agreement]; Frank J. Garcia, *New Frontiers in International Trade: Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357 (1997) [hereinafter Garcia, New Frontiers]; David Lopez, *Dispute Resolution under a Free Trade Area of the Americas*, 28 U. MIAMI INTER-AM. L. REV. 597 (1997).

5. *See* Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 44 (2001) (noting that Chapter 11 "has become a lightning rod for opponents of globalization and the intrusion of international law into domestic affairs.").

pute resolution vary, but in general critics have claimed that it is a threat to national sovereignty and an affront to democratic governance.[6] The text of Chapter 10 attempts to address some of the major concerns voiced about NAFTA Chapter 11 dispute resolution by incorporating provisions aimed at establishing a more transparent dispute resolution process. Notably, over the last few years, clarifications of NAFTA Chapter 11 dispute resolution issued by the Parties and the conduct of Chapter 11 arbitrations have demonstrated a commitment on behalf of the Parties to a more transparent dispute resolution process. However, Chapter 10 goes a step further by explicitly incorporating new provisions in the text.

Whether Chapter 10 dispute resolution will generate the same criticisms as NAFTA Chapter 11, of course, remains to be

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6. For discussion of the NAFTA Chapter 11 debate, see Brower II, *supra* note 5; Scott R. Jablonski, Comment, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Politics*, 32 DENV. J. INT'L L. & POL'Y (forthcoming 2004) (copy on file with the author); Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 B.Y.U.L. REV. 527, 545-46 (2002); Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 308 (2002); Daniel M. Price, *NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 1, 8 (2001); Ian Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 226 (2001); Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 217 (2001); Maximo Romero Jimenez, *Considerations of NAFTA Chapter 11*, 2 CHI. J. INT'L L. 243, 250 (2001); Justin Byrne, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, TEX. INT'L L.J. 415, 434 (2000); Donald S. Macdonald, *Chapter 11 of NAFTA: What are the Implications for Sovereignty*, 24 Can.-U.S. L.J. 281 (1998); Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303 (1996); Public Citizen, "NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy," *available at* http://www.citizen.org/publications/release.cfm?ID=7076 (last visited Aug. 15, 2003); "Bill Moyers Reports: Trading Democracy," February 5, 2002, 10:00pm (ET), PBS, *transcript available at* http://www.citizen.org/trade/NAFTA/CH_11/articles.cfm?ID=6687 (last visited Aug. 15, 2003); "Viendo El Futuro: Un documento preparado por la Comisión de Asuntos Sociales (CCCB-CECC) en vistas a la conferenica *Humanizando la Economía Global*, Presentada en La Universidad de Católica de América, Washington, D.C., Enero 28 al 30, 2002, *available at* http://www.citizen.org (last visited Aug. 15, 2003).

In general, critics have argued that NAFTA Chapter 11 dispute resolution is flawed in that it creates a potential for frivolous litigation and disproportionate compensation for investors, it lacks an appellate review process, it promotes resolution of disputes through "secret" tribunals, it prevents legitimate regulation by governments for the public health and the environment, and it neglects notions of equality and sustainable development. *See* Jablonski (summarizing and analyzing the arguments for and against NAFTA Chapter 11 dispute resolution). *See also infra* Part III.B.2.

seen. At this stage, however, the important issues are how and to what extent the Chapter 10 text differs from or expands upon dispute resolution under NAFTA Chapter 11, as it represents an important development in the evolution of international dispute resolution in the Americas. The purpose of this article is thus to analyze the Chapter 10 dispute resolution process, using the NAFTA Chapter 11 dispute resolution process as a basis for comparison.

Part II of this article first provides some background on foreign investment and the laws pertaining thereto in Chile, providing a brief summary of the investment climate in Chile. Chile's economic status and progressive investment laws relative to other Latin American countries has enabled it to enter into such a trade/investment agreement with the United States. It is an example to the rest of Latin America of how open economic policy and predictable legal rules can enhance growth and the opportunity for a better future. Further, it is another example of how international law regarding investment has a place in Latin America.

Part III analyzes the text of Chapter 10 of the U.S.-Chile FTA. It first addresses its major substantive provisions, commenting on the rationale behind the open investment provisions as well as the reasons for some exceptions to the open regime. Part III then discusses the investor-state dispute resolution process in detail, article by article, using NAFTA Chapter 11 dispute resolution as a basis for comparison. Inferences are made throughout with respect to potential praise and criticism of the Chapter 10 dispute resolution framework given the present debate on NAFTA Chapter 11, and a summary of the new developments found in Chapter 10 dispute resolution is provided. At base, investor-state dispute resolution in the U.S.-Chile FTA is an important development in the evolution of international dispute resolution in the Americas.

CHILE AND FOREIGN INVESTMENT: AN EXAMPLE FOR LATIN AMERICA

Chile has emerged as a symbol for growth in Latin America. Its commitment to open economic policy and strong legal structures over the last twenty years, and its commitment to democracy over the last ten years, has enabled it to experience relatively

consistent macroeconomic success.[7] In the last ten years, Chile has also entered into numerous bilateral and multilateral economic agreements to secure its path toward economic advancement.[8] Chile continues to enjoy an increasing inflow of foreign

7. Chile follows a policy of economic liberalization, with a commitment to free markets. *See* Foreign Investment Committee of the State of Chile, *at* http://www.foreigninvestment.cl (last visited June 3, 2003) [hereinafter Foreign Investment Committee]. It maintains a flexible exchange rate policy, and the Central Bank is committed to a policy of low inflation. *See* Banco Central de Chile, *at* http://www.bcentral.cl. (last visited June 3, 2003) [hereinafter Banco Central]. According to the Foreign Investment Committee, since 1990, inflation in Chile has declined over 25% down to roughly 3% per year. It has enjoyed successive balanced fiscal budgets and strong reserves, and it has kept its public debt minimal.

The results of these policies have been positive. The economy has experienced steady growth, and per capita income continues to increase. In the last twelve years, the Chilean economy has grown at an average annual rate of 5.9%. Since 1990, its Gross Domestic Product ("GDP") has increased by roughly 85%. Per capita GDP has increased by some 65% since 1990. The unemployment rate has not seen large swings either way over the last several years, although real wages have increased substantially. Since the early 1990s, real wages in Chile have increased by roughly 46%. The percentage of the population living in poverty continues to decrease. *See also* Chile-U.S. Free Trade Agreement Website, *available at* http://www.chileusafta.com/ (last visited June 3, 2003) [hereinafter Agreement Website]. From 1987 to 2000, for example, the percentage of Chileans living in poverty was reduced from 45% to 21%, while the percentage of Chileans living in absolute poverty was also reduced from 17.4% to 5.7%.

Since 1990, Chile has demonstrated a commitment to democratic institutions and popular elections. The Chilean legal system is transparent and non-discriminatory, with an independent and accountable judiciary. There is also minimal corruption in Chilean institutions compared to other countries in Latin America, and it ranks along side the United States in the Transparency International Corruption Index. *See* Foreign Investment Committee. *See also* Transparency International, *at* http://www.transparency.org/ (last visited June 3, 2003). The Transparency International Corruption Perceptions Index ranks countries according to perceived corruption in government institutions, with a ranking of number one representing no corruption. In 2002, Chile ranked 17th out of 102 countries, just one place behind the United States. It ranked number one among Latin American countries, and number three among emerging economies.

8. Most recently, in addition to the U.S.-Chile FTA, Chile has just signed economic agreements with the European Union and South Korea, adding to an impressive list of trade cooperatives, with more expected in the near future. *See* Direcon, *supra* note 1. Chile is also currently negotiating some ten other trade agreements, with eight others already signed and awaiting legislative approval. Over the last thirty years, both the number of different products Chile exports as well as the number of different countries to which it exports has increased tremendously. *See* Foreign Investment Committee, *supra* note 7. Since 1975, the number of different products Chile exports has increased from 200 to 3,749, and the number of different exporters has increased from 200 to 600 in that same time period. From 1975-79, trade represented 38.6% of Chile's GDP, but from 1991-2001 that number was 42.9% and continues to grow. By region, Chile exports the most to Europe and imports the most from Latin America, but its number one individual trading partner is the United States.

investment and its policies and laws pertaining to that investment have been among the most progressive in Latin America.[9]

For the last thirty years, Chile has maintained an open investment policy with minimal capital controls.[10] It enjoys a low investment risk rating and is considered the most competitive market in Latin America.[11] Since the mid-1970s, Chile has received roughly $85 billion in foreign investment.[12] Investment in Chile, in nominal terms, has been growing at an average annual rate of almost twenty percent.[13] Traditionally, foreign investment has been concentrated in the mining sector, although today such investment continues to diversify, finding its way into other sectors such as fishing, farming, forestry, electricity, natural gas and water.[14] This diversity of investment has been critical to Chile's development. The United States has long had the largest share of foreign investment in Chile.[15]

Chile's acknowledgment of the importance of foreign investment to its growth and development is evidenced in its foreign investment laws and treaties. These laws are in line with the laws pertaining to foreign investment in developed countries in that the laws encourage the free flow of investment across borders. Since 1974, the main law regarding foreign investment in Chile has been Decree Law 600 (D.L. 600).[16] D.L. 600 sets up a standardized system for application and approval of foreign investment proposals and establishes rights and responsibilities

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9. *See* Foreign Investment Committee, *supra* note 7.

10. *Id.*

11. *Id. See also* Institutional Investor Magazine, *available at* http://www.institutionalinvestor.com (last visited June 4, 2003) (ranking Chile as the least risky Latin American country in which to invest, and the sixth least risky emerging country in which to invest in 2002); International Institute for Management & Development, *at* http://www02.imd.ch/ (last visited June 4, 2003) (ranking Chile as the most competitive country in Latin America and the third most competitive emerging economy in 2002).

12. *See* Foreign Investment Committee, *supra* note 7. Nearly 90% of the total foreign investment entering Chile has entered since 1990.

13. *Id.*

14. *Id.*

15. *Id.* Over the last thirty years the United States has accounted for over 30% of total foreign investment in Chile, followed by Spain, which has accounted for slightly less than 20%.

16. Foreign Investment Statute of 1974, Decree Law 600, Ministerio de Justicia, Diario Oficial de la República de Chile [D.O.] Dec. 16, 1993 [hereinafter D.L. 600]. For good overviews of D.L. 600, see Foreign Investment Committee, *supra* note 7; The U.S. Commercial Service, *available at* http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-CHILE2002-CH-7:-00683BEF (last visited May 1, 2003) [hereinafter Commercial Service].

of foreign investors in Chile, with emphasis on principles of non-discrimination.[17] The law clearly reflects an attitude of openness to foreign investors, and there are few restrictions on foreign investment.[18] Another important law regarding foreign investment in Chile is Chapter XIV of the Central Bank's Foreign Exchange Regulations, which coincides with the principles set forth in D.L. 600.[19] This law is applicable upon election by a foreign investor in lieu of D.L. 600, and it is usually used for short-term portfolio investments.[20]

With regard to investment dispute resolution, D.L. 600 provides for initial review of a dispute by the Foreign Investment Committee of Chile.[21] Investors also have access to Chilean courts for further adjudication of an investment dispute.[22] However, Chile has negotiated several Bilateral Investment Treaties (BITs), which, in addition to providing substantive rules regarding foreign investment in Chile, also provide investors with the option of international arbitration for the resolution of investment disputes.[23] BITs are important to the evolution of dispute resolution in the Americas, as they firmly establish the applicability of international law to investment dispute resolution.[24]

The openness of Chile in negotiating BITs separates it from the traditional Latin American approach regarding the applicability of international law to foreign investment. The more tradi-

17. D.L. 600, arts. 9, 10; *see also* Foreign Investment Committee, *supra* note 7; U.S. Commercial Service, *supra* note 16.

18. One notable restriction is the one-year residency requirement for foreign capital under Article 4 of D.L. 600, although under that same article profits may be repatriated at any time. *See* D.L. 600, at art. 4. Another traditional exception to Chile's open investment scheme was the *encaje*, "which required foreign investors to deposit a variable percentage of foreign-sourced loan funds and portfolio investment with the Central Bank in a non-interest-bearing account for up to two years." *See* Commercial Service, *supra* note 16. In April 2001, however, this restriction on investment was eliminated.

19. For a copy of Chapter XIV, see Banco Central, *supra* note 7.

20. Almost all foreign investment comes into Chile under D.L. 600. *See* Foreign Investment Committee, *supra* note 7. It is important to note that in May 2000, Chile eliminated the one-year residency requirement for capital entering under Chapter XIV. *See* Commercial Service, *supra* note 16.

21. D.L. 600, art. 10.

22. *Id. See also* Commercial Service, *supra* note 16 (noting that investment disputes in Chile are normally settled through negotiations because of the time it usually takes to litigate in local courts).

23. As of March of 2003, Chile had negotiated fifty-one BITs, thirty-seven of which were in force. *See* Foreign Investment Committee, *supra* note 7. Chile's most recent free trade agreements, including those with Canada, Mexico, Korea, the European Union and the United States, contain investment dispute resolution provisions.

24. *See infra* note 35.

tional approach is based on the Calvo Doctrine.[25] In the mid-nineteenth century, Argentinean diplomat and publicist, Carlos Calvo, set forth a series of "assertions" that formed the basis of the doctrine.[26] Calvo argued that international law and principles of state sovereignty should prohibit diplomatic and military intervention by foreign countries to resolve commercial disputes on behalf of their investors.[27] According to Calvo, such intervention exacerbated the inequality between developed and developing countries by obliging developing countries to accord greater protection to foreign nationals in commercial dealings than they accorded to their own citizens.[28]

The Calvo Doctrine, therefore, is based on two key principles: absolute "nonintervention"[29] by foreign states and "absolute equality of foreigners with nationals"[30] with regard to foreigners' commercial dealings in another country. Thus, under the Calvo Doctrine, local law only applies to foreign investment disputes, and there is little place for international law. The Calvo Doctrine immediately became popular throughout Latin America.[31] For years, Latin American countries attempted to implement the Calvo Doctrine through international treaties, in addition to implementing the Calvo Doctrine in national constitutions, municipal legislation and contractual stipulation.[32] Calvo's principles are still pervasive in many Latin American countries today and stand as a point of contention between developed and developing countries.[33] For example, throughout much of the twentieth century, Mexico maintained Calvo's principles in its national laws.[34] The negotiation of NAFTA Chapter 11 resulted in the

25. *See generally* DONALD R. SHEA, THE CALVO CLAUSE 17 (1955).
26. *See id.*
27. *Id.* at 18.
28. *Id.* at 19.
29. *Id.*
30. *Id.* at 19-20.
31. *Id.* at 21.
32. *Id.* at 21-32.
33. *See* Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT'L L.J. 161, 168-69 (1996).
34. *See* NAFTA Coursebook, *supra* note 2, at 324 (noting that the Calvo Clause "stipulate[d] that foreign persons operating in Mexico should be considered in all respects as Mexicans, thus limiting the resolution of disputes to local courts adjudicating under domestic law provisions and prohibiting any intervention by the home government."); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193-95 (2001) (discussing the history of Mexico's unfriendly foreign investor provisions and explaining that "the United States lobbied hard to include Chapter

applicability of international law to foreign investment in Mexico.

Chapter 10 of the U.S.-Chile FTA represents another milestone in Chile's commitment to open investment policy. In its substance, this chapter establishes rights and responsibilities of foreign investors in line with Chile's traditional open policy. More importantly, with regard to dispute resolution, Chapter 10 reflects both countries' commitment to predictable rules and international law. It solidifies the applicability of international law to foreign investment disputes, and it does so in a manner that attempts to bring greater transparency to the international arbitration process between private individuals and sovereign entities. An examination of dispute resolution under Chapter 10 compared to under NAFTA Chapter 11 sheds light on this development.

CHAPTER 10 OF THE U.S.-CHILE FTA

The structure of Chapter 10 of the U.S.-Chile FTA is similar to NAFTA Chapter 11. The structure of NAFTA Chapter 11 comes from U.S. BITs that have been in place for years.[35] Of

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11's investment protections precisely because it wanted 'to liberalize Mexican restrictions on investment'.") (internal footnotes omitted). *See* Gloria L. Sandrino, The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective, 27 VAND. J. TRANSNAT'L L. 259, 283-87 (1994) for a good discussion of how the traditional anti-foreign investment sentiment in Mexico is embedded in the Mexican Constitution and in Mexican law.

Since the NAFTA negotiating process began, however, Mexico has undergone significant changes in its policy and laws on foreign investment—namely, the Calvo Clause no longer applies to investors from NAFTA Parties. See Isidro Morales, *NAFTA: The Governance of Economic Openness*, 565 ANNALS 35, 50 (1999) (internal citations omitted), explaining that the traditional Mexican approach:

> was completely opposed to the international minimum standard that the U.S. government has traditionally required all states to comply with when dealing with foreign investments. According to the U.S. view, even if a state does not provide its own nationals with minimum international rights, it may not escape international responsibility to guarantee minimum standards to nationals of other countries. Though Latin American countries, including Mexico, have moved progressively from the national-centered paradigm to that of the "minimum international standard" approach, chapter 11 of NAFTA is a turning point in this regard.

35. Notably, U.S. BITs "commonly dealt with the key issue[] of . . . mechanisms for settling disputes between foreign investors and host governments," which included provisions for binding international arbitration. NAFTA Coursebook, *supra* note 2, at 324. Currently, there is no multilateral framework for the regulation of foreign investment, unlike the WTO framework for international trade. *See* WTO, *Trade and Investment*, *at* http://www.wto.org/english/tratop_e/invest_e/invest_e.htm (last visited Aug. 15, 2003) [hereinafter WTO Investment] ("Despite several efforts since the end of WWII, to date there does not exist a set of coherent, substantive, and

course, as discussed, the structure is not something new to Chile either, as Chile also has in place numerous BITs similar in structure.[36] Section A of Chapter 10 sets forth substantive provisions for foreign investment. These provisions stand to promote an open investment policy between Chile and the United States. Section B of Chapter 10 details the investment dispute resolution process. It is supplemented by several annexes that further clarify that process. Although there are many similarities between the Chapter 10 dispute resolution and the NAFTA Chapter 11 dispute resolution and although recent developments in NAFTA Chapter 11 dispute resolution render the two dispute resolution frameworks even more similar, the codification in Chapter 10 of a few provisions represent what may be labeled as a new step in the evolution of investor-state dispute resolution.

Substantive Provisions

A main goal of the U.S.-Chile FTA is to "ensure a predictable commercial framework for business planning and investment,"[37] and to "substantially increase investment opportunities in the territories of the Parties."[38] Foreign investment, of course, has tradi-

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binding multilateral rules governing foreign investment."). Absent such a framework, the United States has signed BITs with more than forty countries, and these agreements contain standard provisions for dispute resolution in accordance with established principles of international law. *See* RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 1053-58 (2000) [hereinafter BRAND IBT]; Todd Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541 (1994). BITs have thus become a key component of economic integration in addition to free trade agreements:

> The U.S. Model BIT covers five main subjects:
> 1) general principles for treatment of foreign investors;
> 2) conditions of expropriation and the measure of compensation payable;
> 3) the right to free transfer without delay of profits and other funds associated with investments;
> 4) the prohibition of inefficient and trade distorting practices; and
> 5) access to international arbitration for settlement of investment disputes.

Notably, the Model BIT provides for binding international arbitration against signatory states. To view the prototype U.S. Model BIT, *see* THE U.S. PROTOTYPE BILATERAL INVESTMENT TREATY *at* http://www.ita.doc.gov/legal/modelbit.html (last visited Nov. 22, 2003) (the prototype is from 1994). The U.S. Model BIT, nonetheless, has served to influence the form and much of the substance of BITs throughout the world as well as investment provisions in free trade agreements.

36. *See* Foreign Investment Committee, *supra* note 7.

37. U.S.-Chile FTA, *supra* note 1, Preamble.

38. *Id.* art. 1.2(1)(d).

tionally been one of the most widely debated topics in North/South relations.[39] The overall effects of foreign investment on an economy, however, especially for developing countries, are generally positive.[40] Both the United States and Chile confirmed the impor-

39. *See* JOAN E. SPERO & JEFFREY A. HART, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 267-92 (6th ed. 1997) (discussing foreign direct investment ("FDI") in detail and the arguments for and against such investment in developing countries). In tune with economic liberalism, proponents argue that FDI is a mechanism for overall economic efficiency, growth and public welfare in developing countries. Through FDI, foreign companies transfer experience, knowledge, technology, capital, and create much-needed jobs. Foreign investors stimulate domestic firms to improve performance by increasing competition in a given market, and domestic firms further become more competitive in the world economy, thus enhancing developing countries' external economies. In addition, advocates of FDI consistently point to the general correlation between increased FDI inflows and increased trade.

Opponents argue that FDI does not stimulate domestic economic activity; rather, they say, foreign investors merely repatriate profits instead of reinvesting in host countries. Moreover, any growth achieved is offset by the high prices developing countries pay in licensing fees for technology as well as for debt service. *Id.* Another argument is that foreign companies absorb and replace domestic capital at best, rather than provide for new jobs and the spread of technology—that is, FDI is often a change in ownership, not a change for improvement. *Id.* Opponents also argue that intrafirm trading falsely presents positive trade gains for developing countries. *Id.* Further, through intrafirm trading, multinational corporations ("MNCs") are able to manipulate the prices of imports and exports, enabling them to disguise profits in order to avoid paying taxes in developing countries. *Id.* Also, MNCs often dominate markets in developing countries, and these countries in turn rely on technology and products from MNCs, which discourages local development and allows MNCs to exact monopoly rents and manipulate research and development (R&D) preferences. Many are also critical of MNCs' propensity to influence local and national politics in developing countries when MNCs' profit motives may run inimical to public policy.

40. *See* SPERO & HART, *supra* note 39, at 276. The authors offer several facts about the impact of FDI in light of the various arguments for and against it in developing countries. FDI generally has more positive effects on developing countries that invest in human capital development such as education and training. MNCs tend to raise wages and thus improve the quality of living of employees in developing countries. Increased FDI inflows are associated with increased trade benefits overall. However, while technology transfer to developing countries does take place, in some instances it may be rather limited. Further, some MNCs have demonstrated their power to influence politics in developing countries, both legally and in some instances illegally.

Empirical evidence further demonstrates that foreign investment overall and in particular FDI is beneficial for developing countries, although those countries should be aware of certain countervailing risks. *See* Prakash Loungani & Assaf Razin, *How Beneficial is Foreign Direct Investment for Developing Countries?*, Finance & Development 38:2 (2001), *available at* http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm (last visited July 3, 2003). The authors point to recent, comprehensive studies verifying arguments of economic liberals that FDI has a positive correlation with economic growth in developing countries. Loungani and Razin also corroborate Spero and Hart's finding that the more a developing country invests in education and training, the better results it has from FDI and MNC operations. Further, the authors acknowledge the common criticisms of FDI, but call

tance of foreign investment to their economies by adopting broad investor-friendly provisions in Chapter 10. These provisions seek to stimulate cross-border investment under an open but regulated framework that is based on international law.

Chapter 10 applies to investors of the Parties and to covered investments.[41] Covered investments include most types of investments, such as investment in a business, equity securities, debt securities, options, contract rights, intellectual property rights, licenses and rights under domestic law, and other types of tangible or intangible property and rights relating thereto.[42] One limitation to the broad definition of investment deals with posting bonds. The requirement "that a service provider of the other Party post a bond or other form of financial security as a condition to providing service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service."[43] Another important exception is that investment does not include a judicial or administrative order.[44]

In line with the hallmarks of investment agreements, Chapter 10 sets forth national treatment[45] and most-favored nation treatment[46] standards for treatment of investors. Article 10.4 mandates that the Parties accord investors a minimum standard of treatment in line "with customary international law, including fair and equitable treatment and full protection and security."[47]

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to attention the lack of empirical evidence to confirm that these effects are widespread.

41. U.S.-Chile FTA, *supra* note 1, art. 10.27. An investor is "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 the other Party.".

42. *Id.*

43. *Id.* art. 10.1(3). However, Chapter 10 "applies to that Party's treatment of the posted bond or financial security."

44. *Id.* art. 10.27. Interestingly, NAFTA Chapter 11 does not specifically mention this. *But see* The Lowen Group, Inc. v. United States, 2003 CASE NO./ARB/AF/98/3 (June 26, 2003), *available at* U.S. Department of State, http://www.state.gov/s/l (last visited Sept. 29, 2003) [hereinafter State Department Website] (dismissing claimants' Chapter 11 claims based on judicial proceedings in Mississippi courts).

45. U.S.-Chile FTA, *supra* note 1, art. 10.2. The Parties are thus obligated to treat investors and investments from the other Party no less favorable than the Parties treat investors from their own countries. Also, with respect to individual states in the United States, the national treatment standard is assessed and applied according to the treatment that an individual state gives its investors. *See* arts. 10.2, 10.27.

46. *Id.* art. 10.3. The Parties are thus obligated to treat investors and investments from the other Party no less favorable than the Parties treat investors of a non-Party.

47. *Id.* art. 10.4(1). Annex 10-A of Chapter 10 defines customary international law as that which "results from a general and consistent practice of States that they follow from a sense of legal obligation." It is important to note that there is no automatic cause of action under Chapter 10 if a Party breaches another chapter of the

More specifically, "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . ."[48] And, "'full protection and security' requires each Party to provide the level of police protection required under customary international law."[49] Protection is further extended to investors in the event of losses resulting from armed conflict or civil strife.[50] These provisions clearly reflect the important role of international law in defining investors' rights under the FTA.

Another important way in which to increase the flow of investment between countries is to eliminate or significantly reduce performance requirements. With regard to an investment from the other Party, Article 10.5 eliminates export quotas, domestic content requirements, purchase requirements, weighting the volume of exports to foreign exchange inflows, sale restrictions, technology transfer requirements and supply requirements.[51] Further, Parties may not "condition the receipt or continued receipt of an advantage" related to an investment on domestic content requirements, preferential purchase requirements, weighting the volume of exports to foreign exchange inflows, or sale restrictions.[52]

There are, however, some notable exceptions to the liberal performance requirement regime. A Party still may condition the receipt of an advantage by designating where production facilities may be located, where services may be provided, where employees may be trained, where construction may be undertaken and where research and development may be conducted.[53] The restriction on technology transfer requirements is curtailed "when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement."[54] This is also the case "when

U.S.-Chile FTA or a separate international treaty. *See* art. 10.4(3). Interestingly, NAFTA Parties issued an interpretation of Chapter 11 in 2001 officially confirming this principle with regard to NAFTA Chapter 11 dispute resolution. *See* United States Trade Representatives, *Free Trade Clarifications Related to Chapter 11, at* http://www.ustr.gov/regions/whemisphere/NAFTA-chapter11.PDF (last visited October 28, 2003).

48. U.S.-Chile FTA, *supra* note 1, art. 10.4(2)(a).

49. *Id.* art. 10.4(2)(b).

50. *Id.* art. 10.4(4)-(5).

51. *Id.* art. 10.5(1).

52. *Id.* art. 10.5(2).

53. *Id.* art. 10.5(3)(a).

54. *Id.* art. 10.5(3)(b)(i). The TRIPS Agreement is the World Trade Organization's

the requirement is imposed . . . to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws."[55]

Furthermore, the restrictions on export quotas, domestic content requirements, technology transfers, and conditioning advantages on domestic content requirements and purchase requirements "shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources."[56] The performance requirement regime thus not only creates an environment for the free flow of investment capital and ideas, but also provides important exceptions regarding, for example, technology transfers and the protection of the environment, which are important for both countries.

Other important provisions geared toward open investment deal with management positions and transfers. A Party may not require an investor's enterprise to appoint individuals of a particular nationality to senior management positions.[57] Further, transfers from covered investments are "to be made freely and without delay into and out of" the territory of the Parties.[58] However, there are exceptions to this open transfer policy, and Chapter 10

(WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights. *See* WTO, "Intellectual Property: Protection and Enforcement," *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Sept. 29, 2003). The purpose of the TRIPS Agreement is to provide an international framework of minimum standards of protection for intellectual property. Article 31 of the TRIPS details the rules governing a situation where a WTO Member permits the use of a patent in the Member's country without specific authorization from the patent holder in accordance with the limited exceptions for doing so set forth in Article 30 of the TRIPS. *See* TRIPS Agreement, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm#Footref7 (last visited Sept. 29, 2003). The United States presumably pushed hard to incorporate the TRIPS in the U.S.-Chile FTA because Chile has not yet assimilated the TRIPS into its domestic law and the United States wanted to ensure that no matter what happened in Chile the TRIPS would be applicable to investment under the U.S.-Chile FTA.

55. U.S.-Chile FTA, *supra* note 1, art. 10.5(3)(b)(ii.).

56. *Id.* art. 10.5(c)(i)-(iii). For more minor exceptions to the liberal performance requirement regime, *see* Articles 10.5(d)-(f).

57. *Id.* art. 10.6(1). However, a Party "may require that a majority of the board of directors . . . be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment." *Id.* art. 10.6(2).

58. *Id.* art. 10.8(1). Transfers include all types of profits, fees, payments and proceeds.

establishes a somewhat complex network of rules and exceptions. A Party may still, in a non-discriminatory manner, prevent a transfer in accordance with its laws regarding the protection of creditors, securities trade, criminal offenses, financial reporting and compliance with judicial or administrative orders.[59] Annex 10-C sets forth special rules for investment disputes involving payments or transfers to accommodate Chile's requirement that investment remain in Chile for at least one year.[60]

Article 10.9 sets out rules regarding expropriation and compensation in accordance with international norms:

> 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization . . . except:
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate, and effective compensation . . . .[61]

Further, in the event of an expropriation, compensation should not be delayed and must be "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place."[62] Article 10.9 does not apply, however, when a Party grants a compulsory license regarding intellectual property rights in accordance with the TRIPS Agreement.[63] In the same manner, it also does not apply to the creation, limitation or revocation of such rights as long as such acts are consistent with Chapter 17 of the U.S.-Chile FTA.[64]

Annex 10-D emphasizes that the applicable expropriation standard is that of customary international law, and clarifies the definition of both direct and indirect expropriation.[65] Direct expropriation is defined as when "an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[66] The case of indirect expropriation is not as straight forward, so the annex establishes a fact-based inquiry

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59. *Id.* art. 10.8(5)(a)-(e).

60. *Id.* Annex 10-C. *See generally supra* note 18.

61. U.S.-Chile FTA, *supra* note 1, art. 10.9(1).

62. *Id.* art. 10.9(2). A Party must also pay an investor interest from the date of expropriation. *Id.* art. 10.9(3).

63. *Id.* art. 10.9(5).

64. *Id.* Chapter 17 of the U.S.-Chile FTA deals with intellectual property rights. *See* U.S.-Chile FTA, *supra* note 1.

65. *Id.* Annex 10-D.

66. *Id.* Annex 10-D(3).

test to guide a Chapter 10 tribunal in determining whether such expropriation has occurred.[67] Lastly, the annex clarifies that "[e]xcept 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 expropriation."[68]

Another important and interesting substantive provision of Chapter 10 permits a Party to deny Chapter 10 benefits to an investor if the investor is owned or controlled by an investor of a non-Party, and the Party receiving the investment "does not maintain diplomatic relations with the non-Party."[69] Article 10.11 also establishes other special conditions under which a Party may deny an investor the benefits of Chapter 10.[70] Finally, Article 10.12 indicates that nothing in Chapter 10 shall be interpreted to contravene measures taken by the Parties to protect the environment.[71]

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67. *Id.* Annex 10-D(4)(a):

> (a) The determination of whether an action . . . constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
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> (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;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.

68. *Id.* Annex 10-D(4)(b).

69. *Id.* art. 10.11(1)(a). Both countries believed that this is an important safeguard in order to protect diplomatic interests. For example, the United States presumably does not want investors in Cuba to benefit from the U.S.-Chile FTA with Chile. Also, for example, while Chile does not have a "Cuba," diplomatically speaking (although Chile only maintains consular relations with Bolivia, it is not like the U.S.-Cuba situation), it has reason to be concerned about investment inflows related to illegal drug activity in high drug-producing regions in South America.

70. A Party may deny benefits to an investor if the Party has enacted laws regarding the non-Party and such laws would be violated if the Party granted the benefits of Chapter 10 to an investor. *Id.* at art. 10.11(1)(b). A Party may also deny benefits to an investor if such investor is owned or controlled by an investor of a non-Party and that non-Party investor does not do substantial business in the territory of the Party. *Id.* at art. 10.11(2)(a). Lastly, a Party may deny benefits to an investor from a Party if such investor is owned or controlled by an investor of the denying Party and that investor does not do substantial business in the denying Party. *Id.* at art. 10.11(2)(b).

71. *Id.* art. 10.12.

Dispute Resolution: A Comparative Look

Predictable rules for the adjudication and enforcement of foreign investors' rights is critical to achieving an open investment regime. Alternative Dispute Resolution ("ADR") has become the preferred structure in trade and investment agreements for the resolution of commercial disputes.[72] The preference for and importance of international arbitration in modern trade agreements,

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72. *See* BRAND IBT, *supra* note 35, at 584-85 (detailing the arguments for and against international arbitration); Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP. L. REV. 1, 3, 11-12 (1998); Hope H. Camp, Jr., *Dispute Resolution and United States-Mexico Business Transactions*, 5 U.S.-MEX. L.J. 85 (1997).

ADR includes methods of resolving disputes without litigation in a particular court system. For an introductory discussion on ADR, see International Trade Administration, "A Primer on International Alternative Dispute Resolution," *at* http://www.ita.doc.gov/legal/adr.html (last visited Feb. 23, 2003). These methods include consultation, mediation and arbitration. Mediation, also known as conciliation, is simply "a process in which parties to a dispute appoint a neutral third party to assist them in resolving their disputes," and the goal is "a voluntary negotiated settlement." Arbitration also involves resolution of disputes by a neutral third party, but it is a more formal step for parties to take. Generally, depending upon the rules to which the disputing parties have agreed, decisions of arbitration panels can be either binding or non-binding.

Several organizations offer guidelines and services for international arbitration. The United Nations Commission on International Trade Law (UNCITRAL) is one. *See* United Nations Commission on International Trade Law (UNCITRAL), "General Information," *at* http://www.uncitral.org/english/commiss/geninfo.htm (last visited Feb. 23, 2003) [hereinafter UNCITRAL Website]. UNCITRAL is the main legal body of the United Nations for international trade law. *Id.* It has set forth several rules and guidelines regarding international commercial arbitration and conciliation, and, in particular, the UNCITRAL Arbitration Rules adopted in 1976 are often selected by parties to disputes in international arbitration.

The International Centre for the Settlement of Investment Disputes (ICSID) was created by the World Bank in 1966 "to facilitate the settlement of investment disputes between governments and foreign investors so that investors could help promote increased flows of international investment." International Centre for Settlement of Investment Disputes, "About ICSID," *at* http://www.worldbank.org/icsid/about/main.htm (last visited Feb. 23, 2003) [hereinafter ICSID Website]. Notably,

> ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards.
>
> . . .
>
> Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has . . . a set of Additional Facility Rules authorizing the ICSID Secretariat to administer

and in particular investment agreements, has been summarized as follows:

> Arbitration has become a fixture in international trade and investment because it compares favorably to the alternatives. It provides a neutral mechanism characterized by private proceedings, flexible procedures, expert decision-makers, relative finality, and enforceability of the result. For a host state, private adjudication before a learned tribunal within a relaxed procedural framework will often be preferable to defending against litigation in an investor's home state.[73]

Both Chile and the United States have adopted this preference in Section B of Chapter 10, just as the Parties to NAFTA did in NAFTA Chapter 11. Chapter 10 explicitly incorporates provisions for greater transparency in dispute resolution. Although in practice NAFTA Chapter 11 dispute resolution is more transparent than what critics argue, by codifying such provisions Chapter 10 represents an important development in investor-state dispute resolution in the Americas.

Article 10.14: Consultation and Negotiation

Article 10.14 encourages resolution of investment disputes through less formal means of ADR before an investor chooses recourse to an international tribunal.[74] Consultation, negotiation, and other "non-binding, third-party procedures" are provided as first options for investors.[75] In this respect, Chapter 10 is exactly like NAFTA Chapter 11.[76] As discussed, the negotiation method is currently the most common method used by foreign investors in

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> certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention.
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> . . . .
>
> Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties.

73. Clyde C. Pearce & Jack Coe, Jr., *Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311, 318 (2000). *See also* Gal-Or, *supra* note 5, at 19 (discussing the obvious advantages of such international arbitration).

74. U.S.-Chile FTA, *supra* note 1, art. 10.14.

75. *Id.*

76. *See* NAFTA, *supra* note 2, art. 1118.

Chile to resolve a dispute with the government.[77] Nonetheless, encouraging less formal means of dispute resolution serves the interests of both investors and the Parties. Both time and money may be saved by avoiding recourse to litigation, and more importantly, there is more flexibility in resolving a dispute in order to preserve the investment relationship.[78]

Article 10.15: Submission of a Claim to Arbitration

Article 10.15 grants private investors direct access to an international arbitration panel for the resolution of an investment dispute.[79] An investor may submit a claim on its own behalf or on behalf of an enterprise owned or controlled by the investor.[80] This is the structure that is found in NAFTA Chapter 11.[81] The claim may be based on an alleged breach of "an obligation under Section A or Annex 10-F," "an investment authorization," or "an investment agreement," if the investor has suffered some loss or damage as a result of the alleged breach.[82] Annex 10-F details that Chile must accord an investor from the United States the better treatment of either Chapter 10 or D.L. 600 if the investment entered Chile under the former.[83]

As mentioned above, D.L. 600 has been the main law regarding foreign investment in Chile since the 1970s.[84] Its liberal investment framework has contributed to Chile's success in attracting foreign investment, but its dispute resolution framework is different from Chapter 10.[85] Annex 10-F, therefore, provides more specifics regarding the interplay of Chapter 10 and D.L. 600. If an investment from the United States entered Chile under a contract based on D.L. 600, the investor may only submit a claim under Chapter 10 dispute resolution against Chile regard-

77. *See generally supra* note 22.

78. At the time of this writing, under NAFTA Chapter 11, after almost nine years since its inception, foreign investors have invoked the Chapter 11 dispute resolution mechanism against the Parties only eighteen times, eight of which have been against Mexico. For a listing of the pending arbitrations and accessible documents related thereto, *see* the official website for the U.S. Department of State, [hereinafter State Department Website], at http://www.state.gov/s/l/c3439.htm.

79. U.S.-Chile FTA, *supra* note 1, art. 10.15.

80. *Id.* art. 10.15(1).

81. *See* NAFTA, *supra* note 2, arts. 1116, 1117.

82. U.S.-Chile FTA, *supra* note 1, art. 10.15(1).

83. *Id.* Annex 10-F(1). Chile is also required Chile to allow an investor who's investment entered Chile under D.L. 600 to amend the investment contract to incorporate the provisions of Chapter 10. *Id.* at Annex 10-F(2).

84. *See generally supra* note 16.

85. *Id.*

ing the contract if the investor alleges a breach of "Section A in connection with the investment contract" or Annex 10-F.[86] Also, an investor may not submit a claim under Chapter 10 if an investment entered Chile under D.L. 600 and the investor alleges that Chile has breached the tax provisions of the investment contract.[87] In such a case, the investor only has recourse to the dispute resolution provisions in the investment contract or under the dispute resolution procedures for tax measures in the U.S.-Chile FTA.[88] Furthermore, as long as it does so in accordance with its obligations under Section A of Chapter 10, Chile may continue to screen and limit foreign investment entering Chile from the United States under D.L. 600.[89]

Other provisions in Article 10.15 serve to detail and limit the arbitration submission process, and are identical to those found in NAFTA Chapter 11. Except as permitted for alleged breaches of Article 12.18 regarding financial services, an investor may only utilize the Chapter 10 dispute resolution process for alleged breaches of Section A or Annex 10-F.[90] An investor must provide a Party with written notice of a claim, including the legal and factual bases and relief sought, at least ninety days before the investor submits the claim to arbitration.[91] Moreover, an investor must wait at least six months after the events giving rise to a claim under Chapter 10 occurred before a claim is submitted to arbitration.[92] Further, Annex 10-E grants an investor the opportunity to choose between the Chapter 10 dispute resolution process and litigating in Chilean courts.[93] The purpose of Annex 10-E is to avoid excess costs and inefficiency associated with parallel litigation

86. U.S.-Chile FTA, *supra* note 1, Annex 10-F(3). The annex further narrows an investor's claim when D.L. 600 is involved, as an investor "may not submit any claim under Section B on the basis of the equity/debt ratio requirement of an investment contract under D.L. 600," unless it is alleged that Chile treated the investor or investment in a manner less favorable than it treated a similar investor or investment of a non-Party.

87. *Id.* Annex 10-F(4).

88. *Id.*

89. *Id.* Annex 10-F(6). *See generally supra* note 16. Just as under the U.S.-Chile FTA, Chile maintains the right under D.L. 600 to screen investment entering the country, although the approval rate has traditionally been high.

90. U.S.-Chile FTA, *supra* note 1, art. 10.15(3). NAFTA Chapter 11 allows certain claims involving financial services under NAFTA Chapter 14 to be heard by a Chapter 11 tribunal. *See* NAFTA, *supra* note 2, at arts. 1116-1117.

91. U.S.-Chile FTA., *supra* note 1, art. 10.15(4). This is identical to NAFTA Chapter 11. *See* NAFTA, *supra* note 2, art. 1119.

92. U.S.-Chile FTA, *supra* note 1, art. 10.15(5). This is also identical to NAFTA Chapter 11. *See* NAFTA, *supra* note 2, art. 1120.

93. U.S.-Chile FTA, *supra* note 1, Annex 10-E.

and to eliminate the possibility that Chile will be twice subject to liability for the same claim. It is identical to NAFTA Article 1121.[94] Like under NAFTA Chapter 11, Chapter 10 identifies the arbitral regimes under which a claim in arbitration may be submitted.[95] As both Parties are members of the ICSID Convention, an investor may submit a claim under either ICSID or ICSID Additional Facility Rules.[96] Alternatively, an investor may elect to have a Chapter 10 claim decided under the UNCITRAL rules.[97] Unlike in NAFTA Chapter 11, however, Article 10.15 allows the parties to elect "any other arbitration rules" to govern the arbitration.[98]

The direct access dispute resolution framework is the hallmark of modern international investment dispute resolution. It provides a link between private actors and sovereign entities in the realm of international law reflecting the commercial relationship between the two in an era of globalization. Here, however, it is important to mention one aspect of the current debate about such dispute resolution. A similar framework found in NAFTA Chapter 11 has been the source of increased debate regarding its implications for democratic governance and sovereignty.[99] Some critics of NAFTA Chapter 11 argue that, in general, granting private investors the right to sue NAFTA Parties directly opens the Parties up to countless frivolous litigation and thus exacts burdensome costs on the governments, and ultimately on the citizenry.[100] Critics also suggest that subjecting NAFTA Parties to rulings of a supranational body, such as an international arbitration tribunal, circumvents domestic legal and political systems and thus is a threat to sovereignty.[101]

It is likely that the Chapter 10 framework will attract the

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94. NAFTA, *supra* note 2, art. 1121.

95. U.S.-Chile FTA, *supra* note 1, art. 10.15(5); *See also* NAFTA, *supra* note 2, art. 1120.

96. U.S.-Chile FTA, *supra* note 1, art. 10.15(a)-(b); *see generally supra* note 67; *see also* NAFTA, *supra* note 2, art. 1120.

97. U.S.-Chile FTA, *supra* note 1, art. 10.15(c).

98. U.S.-Chile FTA, *supra* note 1, art. 10.15(d). This apparently gives investors more choices in the dispute resolution process. Other provisions in that article pertain to the interplay between the selected arbitration rules and Chapter 10. *Id.* arts. 10.15(6)-(8). Importantly, as with NAFTA Chapter 11, those arbitration rules apply unless they are modified by the Chapter 10 text. *See* NAFTA, *supra* note 2, art. 1131.

99. *See generally supra* note 6.

100. *See* Jones, *supra* note 6; Byrne, *supra* note 6; Public Citizen, *supra* note 6.

101. See Price, *supra* note 6, at 7; Robert K. Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors under the North American Free Trade*

same general criticisms. It may be said, just as is the case with NAFTA Chapter 11, that these general criticisms are unfounded.[102] However, the various procedural safeguards found in the text establish a very controlled dispute resolution regime that is both efficient and fair to both investors and the Parties. Moreover, if the expertise and prudence exercised by NAFTA Chapter 11 arbitration tribunals in analyzing the procedural and substantive requirements of that chapter is an indication of what may come under Chapter 10 dispute resolution, there is little basis to fear frivolous litigation.[103] Additionally, it is a hard sell to proclaim that direct access dispute resolution is detrimental to both state sovereignty and principles of democratic governance when it is indeed an act of sovereignty by appropriate branches of the governments to create such a regime in the first place.[104]

Article 10.16: Consent of Each Party to Arbitration & Service of Documents

Article 10.16 officially represents the Parties' consent to the jurisdiction of an international arbitration panel contemplated in Chapter 10.[105] The consent therein is meant to satisfy the consent requirements of the ICSID Convention,[106] the New York Convention,[107] and the Inter-American Convention.[108]

Agreement, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77, 89 (2000) (discussing the sovereignty arguments).

102. For a broad discussion of why the major criticisms of NAFTA Chapter 11 are unfounded, based on the Chapter 11 text as well as a sampling of final Chapter 11 awards, see Jablonski, *supra* note 6.

103. *Id.*

104. For a good discussion on the changing notions of sovereignty today, see Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 279 (2002)[hereinafter Brand, *Sovereignty*]. Professor Brand notes the growing trends in international economic law, wherein private parties are increasingly receiving more rights in the international system. *Id.* at 290. Moreover, in discussing the historical origins of sovereignty and the relationship between nation-states and individuals, he concludes, most correctly, that "[r]ecognition that international law now limits the conduct of states in their relationships with individuals is not a bad thing, nor does it necessarily represent a dimunition of the 'sovereignty' of states." *Id.* at 294.

105. U.S.-Chile FTA, *supra* note 1, art. 10.16.

106. *Id.* art. 10.16(2)(a); ICSID Website, *supra* note 67.

107. *Id.* art. 10.16(2)(b). The United Nations Convention on the Enforcement and Recognition of Foreign Arbitral Awards, or the New York Convention, "provides for the recognition and enforcement of arbitral awards rendered in foreign countries." There are currently 134 countries who are party to the New York Convention. *See* UNCITRAL Website, *supra* note 67.

108. *Id.* art. 10.16(2)(c). The Inter-American Convention on International Commercial Arbitration is like the New York Convention in providing for enforcement

Article 10.17: Conditions and Limitations on Consent of Each Party

Article 10.17 establishes a three-year time bar on claims, beginning the date on which an investor discovered or should have discovered a breach of Chapter 10 and the resulting loss or damage.[109] The time bar provision encourages investors to resolve investment disputes as they arise, which promotes efficiency in investments and also prevents both Parties from being subject to stale claims. Also, in order to use the Chapter 10 dispute resolution procedure, an investor must waive in writing any right to initiate suit against the Party in any other court or under any other dispute resolution procedure.[110] This provision, however, does not prevent an investor from seeking some form of injunctive relief from a domestic court, but only if the purpose of such relief is to preserve the investor's investment while the arbitration is pending.[111] The waiver provisions thus provide further guarantee that the Parties will not be subject to duplicate liability, and also encourage efficiency in the investment dispute resolution process.

The same time bar provisions,[112] waiver provisions[113] and injunctive relief provisions[114] exist under NAFTA Chapter 11. Under both agreements, a tribunal may issue a protective order to preserve an investor's right pending the arbitration, but it may not enjoin the governmental measure under dispute.[115] In both treaties, these provisions protect parties from excess liability and encourage efficiency of investments.

Article 10.18: Selection of Arbitrators

Article 10.18 provides that an arbitral tribunal will consist of three arbitrators: each disputing party selects one arbitrator and both disputing parties together select the third.[116] If the parties cannot agree on whom to appoint as the third arbitrator within

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of foreign arbitral awards. For a copy of the text of the Inter-American Convention, see the website of the Organization of American States, *at* http://www.oas.org/juridico/english/treaties/b-35.htm (last visited Oct. 31, 2003). There are nineteen signatories to the Inter-American Convention.

109. U.S.-Chile FTA, *supra* note 1, art. 10.17(1).
110. *Id.* art. 10.17(2).
111. *Id.* art. 10.17(3).
112. NAFTA, *supra* note 2, arts. 1116(2), 1117(2).
113. *Id.* art. 1121(1)-(3).
114. *Id.* art. 1121(1)(b), (2)(b).
115. *See id.* art. 1134; U.S.-Chile FTA, *supra* note 1, art. 10.19(8).
116. U.S.-Chile FTA, *supra* note 1, art. 10.18(1).

seventy-five days from the date the claim was submitted, the Secretary-General has the authority to appoint the arbitrator in order to commence the arbitration.[117] Here, there is no difference from NAFTA Chapter 11.[118]

Article 10.19: Conduct of Arbitration

Article 10.19 does reflect some of the provisions in NAFTA Chapter 11 regarding the conduct of Chapter 10 arbitrations. Disputing parties may choose where a Chapter 10 arbitration will take place, with the condition that the arbitration must take place in a country that is a party to the New York Convention for enforcement purposes.[119] A non-disputing Party can make submissions regarding its interpretation of Chapter 10, both written and oral, during the course of an arbitration.[120] Moreover, a tribunal has the power to order an interim order of protection to preserve an investor's rights and/or the competence of the tribunal until a final award is issued, but it may not enjoin the challenged governmental measure.[121]

Article 10.19 establishes a dispute resolution framework that is explicitly inclusive and open. The tribunal in a Chapter 10 arbitration may "accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party . . . ."[122] The NAFTA Free Trade Commission recently issued a clarification statement of NAFTA Chapter 11 dispute resolution, explaining that nothing in NAFTA precludes a Chapter 11 tribunal from accepting *amicus curiae* submissions.[123] In this respect, the two dispute resolution frameworks are similar. The Chapter 10 text, moreover, signifies an explicit movement away from the traditionally more closed process of international investment dispute reso-

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117. *Id.* art. 10.18(2)-(3).

118. *See* NAFTA, *supra* note 2, arts. 1123-1125.

119. U.S.-Chile FTA, *supra* note 1, art. 10.19(1); *see* NAFTA, *supra* note 2, at art. 1130.

120. U.S.-Chile FTA, *supra* note 1, art. 10.19(2); *see* NAFTA, *supra* note 2, at art. 1128-29.

121. U.S.-Chile FTA, *supra* note 1, art. 10.19(8); *see* NAFTA, *supra* note 2, at art. 1134.

122. U.S.-Chile FTA, *supra* note 1, art. 10.19(3).

123. *See Unofficial Statement of the Free Trade Commission on non-disputing party participation*, Oct. 7, 2003, *available at* http//:www.ustr.gov/regions/whemisphere/nafta2003/statement-nondisputingparties.pdf (last visited Nov. 22, 2003). In *United Parcel Service of America v. Canada*, (U.S. v. Can.), *available at* http://www.state.gov/s/l/c3749.htm, for example, the Chapter 11 tribunal accepted written briefs by non-disputing parties.

lution and toward public participation in the disputes.[124]

Article 10.19 also provides ample opportunity for a disputing Party to raise an objection to the tribunal's competence with respect to an investor's claim.[125] The tribunal must suspend proceedings on the merits and address the objection.[126] This practice is common under NAFTA Chapter 11, however, there are no provisions explicitly providing for such in the NAFTA text.[127] Moreover, as per the request of a disputing Party, the tribunal must send a copy of its proposed final award to the disputing parties and the non-disputing Party for comments, which the tribunal may consider for purposes of modifying its award.[128]

Most interestingly, Article 10.19 keeps open the possibility for "a separate multilateral agreement . . . that establishes an appellate body for purposes of reviewing awards rendered by tribunals . . . ."[129] The idea of establishing an appellate body for NAFTA Chapter 11 arbitrations has been offered more than once in the literature on NAFTA.[130] Pending trade promotion authority legis-

124. The idea of confidentiality in NAFTA Chapter 11 disputes has given rise to ample criticism of Chapter 11 dispute resolution. One commentator contests the principle of confidentiality in international arbitrations entirely, and vehemently opposed the confidentiality of NAFTA dispute settlement on grounds that investors must assume that documents will be made public for purposes of accountability to democratic governments. *See* Fracassi, *supra* note 6. Others remark that principles of confidentiality serve legitimate purposes in international investment arbitration. *See* Daniel R. Loritz, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, 22 Loy. L.A. Int'l & Comp. L. Rev. 533, 539 (2000) (commenting that the confidential nature of the arbitrations serves as an incentive for both parties to submit important documents regarding the investment dispute that would not come out in open court).

125. U.S.-Chile FTA, *supra* note 1, art. 10.19(4).

126. *Id.* However, a disputing Party may not object to the jurisdiction of a Chapter 10 tribunal on grounds that the investor in the dispute may be entitled to indemnification or reimbursement for the alleged loss under an insurance contract. *Id.* art. 10.19(7).

127. In many NAFTA Chapter 11 arbitrations, a disputing NAFTA Party has objected to the jurisdiction of the tribunal and the tribunal holds proceedings to decide whether it should hear a claim on its merits. *See* State Department Website, *supra* note 43.

128. U.S.-Chile FTA, *supra* note 1, art. 10.19(9).

129. *See id.* art. 10.19(10).

130. *See, e.g.*, Frederick M. Abbot, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 Hastings Int'l & Comp. L. Rev. 303, 308 (2002). Abbot questions whether democratic NAFTA Parties and their citizens should be "comfortable" with arbitral decisions given that there is no appellate review process, and he suggests that NAFTA Parties establish an appellate body or provide national courts with more of a role in Chapter 11 arbitrations. However, one argument for not including an appellate mechanism is that in striking the balance between the need for economic efficiency and legal certainty, NAFTA Parties chose to side with finality over

lation in the U.S. Congress calls for the establishment of an appellate review mechanism to review decisions rendered by international arbitration panels in investor-state disputes arising out of trade/investment agreements.[131]

The main purpose of the appeal mechanism is to establish another safeguard against subjecting Parties to the liability of an international arbitration tribunal, in addition to that which is already provided in Article 10.25(6) which allows a Party to petition a domestic court for review of questions of law in a final award.[132] Annex 10-H establishes a three-year time frame for the Parties to consider and possibly establish an appellate review mechanism.[133] Overall, the establishment of an appellate mechanism would create an even more open arbitration process with more checks on international arbitration panels. This would seemingly appease those critics who view direct access dispute resolution without a review process as an affront to principles of democracy.

Article 10.20: Transparency of Arbitral Proceedings

Article 10.20 goes a step further than Article 10.19 in order to establish a more open investor-state dispute resolution process. First, a disputing Party must promptly make available to the non-disputing Party all documents pertaining to a Chapter 10 arbitration as they are received.[134] Even more, a Chapter 10 tribunal

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appellate litigation. One economic rationale behind this is to deal with an investment dispute in a neutral forum when it arises and move on, which lessens the likelihood of pending litigation inhibiting decisions to invest. Also, in the context of appellate review and NAFTA, commentators have opined that:

> heightened judicial review . . . constitutes an independent violation of Chapter 11. Although heightened review might not, for technical and political reasons, subject the NAFTA Parties to additional claims for liability, it undermines the principle of voluntary compliance with authoritative decisions rendered at the international level by impartial bodies charged with the supervision of treaty compliance. Thus, heightened judicial review impairs the development of the rule of law in international economic relations.

See Brower II, *supra* note 5, at 47.

131. *See* CRS Report to Congress, *Trade Promotion (Fast-Track) Authority: Summary and Analysis of Selected Major Provisions of H.R. 3005*, April 15, 2002, *available at* http://fpc.state.gov/documents/organization/10090.pdf (last visited Nov. 22, 2003) [hereinafter TPA].

132. NAFTA Chapter 11 allows for the same process of review with regard to questions of law. *See* NAFTA, *supra* note 2, art. 1136.

133. U.S.-Chile FTA, *supra* note 1, Annex 10-H.

134. U.S.-Chile FTA, *supra* note 1, art. 10.20(1).

"shall conduct hearings open to the public . . . ."[135] This is a significant development in investor-state dispute resolution and represents a major departure from procedures in such dispute resolution that leaned toward confidentiality. Article 10.20 does, however, provide several provisions for protecting confidential business information and national security information during the course of such "public" proceedings.[136]

One of the major criticisms of NAFTA Chapter 11 has been that the investor-state dispute resolution process is "secret" and evades public scrutiny.[137] Some have suggested that NAFTA Chapter 11 arbitrations be made more open to public participation.[138] The United States recently issued a statement concerning the openness of NAFTA Chapter 11 arbitrations, confirming its support for open hearings through mediums such as "closed-circuit television systems, Internet webcasting, or other forms of access."[139] In negotiating the Chapter 10 dispute resolution framework, the Parties took careful consideration of these criticisms and have without a doubt established an explicitly more transparent framework of investor-state dispute resolution. Given this development, the Chapter 10 process may avoid some of the intense criticism that NAFTA Chapter 11 has endured regarding its compatibility with principles of openness and democracy.

Article 10.21: Governing Law

Article 10.21 provides that disputes under Chapter 10 arbitrations shall be governed by international law.[140] When the rules governing an investment contract are not specified in the contract, the arbitration tribunal in a Chapter 10 dispute must apply the law of the disputing Party, the terms of the contract, applicable international law and the provisions of the U.S.-Chile FTA.[141]

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135. *Id.* art. 10.20(2).

136. *Id.* art. 10.20(3)-(4).

137. *See, e.g.*, Fracassi, *supra* note 6.

138. *See* Jones, *supra* note 6.

139. *Statement (U.S.) on Open Hearings in NAFTA Chapter Eleven Arbitrations*, Oct. 7, 2003, *available at* http//:www.ustr.gov/regions/whemisphere/nafta2003/statement-nondisputingparties.pdf (last visited Nov. 22, 2003). For example, the parties decided to hold the arbitration open to the public via closed circuit television in *United Parcel Service of America v. Canada*, (U.S. v. Can.), *available at* http://www.state.gov/s/l/c3749.htm. *See* ICSID Website, *supra* note 72, *at* http://www.worldbank.org/icsid/ups.htm.

Current trade promotion authority legislation also calls for public access to investor-state arbitrations. *See* TPA, *supra* note 131.

140. U.S.-Chile FTA, *supra* note 1, art. 10.21(1).

141. *Id.* art. 10.21(2).

Further, the Parties have the authority to issue interpretations of the provisions of Chapter 10, which are binding on Chapter 10 tribunals.[142] The same regime is established under NAFTA Chapter 11, although with less detail.[143] This structure gives proper place to international law as well as respects the authority of the Parties in interpreting and implementing the U.S.-Chile FTA.

Article 10.22: Interpretation of Annexes

Article 10.22 provides another avenue through which the Parties' interpretation of the U.S.-Chile FTA has binding effect on a Chapter 10 tribunal. If a disputing Party claims as a defense that the challenged governmental measure or action is within the exceptions listed in Annex I or Annex II, that Party may request an official, binding interpretation of the issue by the Commission.[144] The same setup exists in NAFTA Chapter 11 for similarly reserved defenses.[145]

Article 10.23: Expert Reports

Article 10.23 allows for participation of experts.[146] Experts may be called upon by a disputing party, or by the tribunal if the disputing parties agree to submit written reports during the arbitration process on complex scientific issues pertaining to environmental, health or safety matters.[147] These provisions are identical to those found in NAFTA Chapter 11.[148]

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142. *Id.* art. 10.21(3). Interpretations are issued by the Free Trade Commission, which is established under Article 21.1 of the U.S.-Chile FTA.

143. *See* NAFTA, *supra* note 2, art. 1131. Under Chapter 11, international law is the applicable law, and the interpretations of the Parties through the Free Trade Commission regarding the text are binding on a Chapter 11 tribunal. For example, in 2001 the Trade Commission issued a statement on Chapter 11 dispute resolution clarifying certain rules regarding confidentiality and the applicability of international law, which is binding on all Chapter 11 tribunals. *See generally supra* note 46.

The U.S.-Chile FTA goes further than NAFTA in stating the applicable rules that apply when an investment contract lacks such terms, for further clarification.

144. U.S.-Chile FTA, *supra* note 1, art. 10.22. Annexes I and II set out a series of country-specific reservations for non-conforming measures pertaining to certain areas of services and investment. The U.S. and Chilean reservations and exceptions to non-discriminatory treatment of foreign services and investment cover a wide range of areas including atomic energy, radio communications, air transportation, trademark services, customs services and mining, to name a few sectors.

145. NAFTA, *supra* note 2, art. 1132.

146. U.S.-Chile FTA, *supra* note 1, art. 10.23.

147. *Id.*

148. *Id.*

Article 10.24: Consolidation

Article 10.24 provides a detailed process through which a disputing party may request a consolidation of more than one pending arbitrations where those arbitrations "have a question of law or fact in common and arise out of the same events or circumstances."[149] This process is very similar to that which is found in NAFTA Chapter 11.[150]

Article 10.25: Awards

The rules regarding awards and the enforceability thereof in Article 10.25 are identical to those found in NAFTA Chapter 11.[151] In the event of a breach of Chapter 10, a Chapter 10 tribunal may award an investor monetary damages plus interest to make the investor whole.[152] A tribunal may also award costs and attorneys fees to the winning party.[153] Further, Chapter 10 does not allow for punitive damages.[154]

With regard to enforcement, a Chapter 10 award is only enforceable between the disputing parties in the particular case.[155] Disputing parties are charged with complying with a Chapter 10 award "without delay."[156] In the case of an award issued under ICSID rules, a disputing party may not request final enforcement until 120 days have passed and there has been no request for review or such a review has been completed.[157] In the case of an award issued under the ICSID Additional Facility Rules or under UNCITRAL Rules, a disputing party must wait 90 days under the same conditions or until "a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal."[158]

Parties must enforce Chapter 10 awards in their own territories.[159] If a Party fails to do so, the Party of the investor who

149. *Id.* art. 10.24.
150. *See* NAFTA, *supra* note 2, art. 1126.
151. *Id.* arts. 1135-1136.
152. U.S.-Chile FTA, *supra* note 1, art. 10.25 (1).
153. *Id.* If a claim is brought on behalf of an enterprise, the tribunal must make the award in the name of the enterprise, but must also state that such award is made "without prejudice to any right that any person may have in the relief under applicable domestic law." *Id.* art. 10.25(2).
154. *Id.* art. 10.25(3).
155. *Id.* art. 10.25(4).
156. *Id.* art. 10.25(5).
157. *Id.* art. 10.25(6)(a).
158. *Id.* art. 10.25(6)(b).
159. *Id.* art. 10.25(7).

obtained judgment may request that an arbitration panel be established to determine if the disputing Party is in contravention of its obligations under the U.S.-Chile FTA along with a recommendation that the Party comply with the Chapter 10 award.[160] Even if such a panel has been convened, however, an investor may request enforcement of the final award under the ICSID Rules, the New York Convention or the Inter-American Convention.[161]

Article 10.26: Service of Documents

Article 10.26 establishes the basic rule for serving a Party with documents relating to the arbitral process, which is customary in such agreements for effecting proper notice to a Party regarding a dispute.[162] Here, therefore, just as with NAFTA Chapter 11, the Parties are bound to accept documents in the international arbitration process for investment disputes under Chapter 10.[163]

Summary of Developments: A Progressive Step

As discussed, the U.S.-Chile FTA Chapter 10 framework is modeled after and reflects the principles and purposes of NAFTA Chapter 11. As also discussed, however, Chapter 10 dispute resolution differs from NAFTA Chapter 11 in a few important ways. In summary, the important developments in investor-state dispute resolution are found in Articles 10.19 and 10.20.[164] Indeed, the NAFTA Chapter 11 dispute resolution in practice already makes available some of these developments. However, although practice and recent clarifications by the NAFTA Free Trade Commission NAFTA evidence that Chapter 11 dispute resolution is more transparent than critics have argued, Chapter 10 of the U.S.-Chile goes a step further by codifying a more participatory dispute resolution framework.

Article 10.19 sets forth explicit guidelines for handling jurisdictional objections before a tribunal reaches the merits of a dispute. Moreover, a Chapter 10 tribunal has the discretion to

160. *Id.* art. 10.25(8). Under 10.25(8), if a Party does not comply with an award, a non-disputing Party may seek the establishment of a arbitral panel under Article 22.6 to decide whether "failure to abide by or comply with the final award is inconsistent with the obligations" of the U.S.-Chile FTA and potentially receive a recommendation for compliance.

161. *Id.* art. 10.25(9). *See generally supra* notes 67, 102, 103.

162. U.S.-Chile FTA, *supra* note 1, art. 10.26.

163. *See* NAFTA, *supra* note 2, art. 1122.

164. *See generally supra* notes 114-30.

"accept and consider" briefs from non-disputing parties under Article 10.20, and if requested must send copies of a proposed award to disputing parties and the investor's home country for comments before rendering the final award under Article 10.25. While Chapter 10 does not establish an official mechanism for appellate review of Chapter 10 awards, the text does allow for the inclusion of such a mechanism in the dispute resolution process if created in the future.

Article 10.20 provides explicit guidelines for document sharing in the course of investor-state dispute resolution, and most significantly requires Chapter 10 arbitration proceedings to be open to the public. In addition, and as a general but important note, Chile and the United States have included more definitions in the Annexes of Chapter 10 in an attempt to clarify several concepts as used in the text, including international law.[165] This clearly is an effort to provide Chapter 10 tribunals with more guidance in deciding both jurisdictional objections as well as merit-based arguments and to limit ambiguities arising from the text, and to further limit tribunals' discretion. It may be stated, therefore, that given the debate on NAFTA Chapter 11 over the last several years, in negotiating Chapter 10 both Chile and the United States included provisions therein that attempt to establish a more inclusive, transparent investor-state dispute resolution process. Although these changes will probably not appease the staunchest opponents of NAFTA Chapter 11, they will serve to incorporate opinions and checks on the Chapter 10 dispute resolution process.

CONCLUSION: FOREIGN INVESTMENT DISPUTE RESOLUTION HAS A PLACE

The promotion of foreign investment alongside trade is critical to a country's economic viability, especially with respect to developing countries. Creating predictable rules and dispute resolution procedures in accordance with principles of international law is critical to promoting the free flow of such investment. Chapter 10 of the U.S.-Chile FTA incorporates these concepts into its text by establishing a well-defined investor-state dispute resolution framework that reflects the realities of the global political economy—that reflects the interaction between private actors and nation-states in an era of globalization. The Chapter 10 dispute

165. *See* U.S.-Chile FTA, *supra* note 1, Annexes 10-A and 10-D.

resolution framework represents an important step for both Chile and the United States in officially linking the applicability of international law to foreign investment in the Americas.

The degree of criticism that Chapter 10 dispute resolution will receive, of course, remains to be seen, but it will probably be less than that which NAFTA Chapter 11 has endured. Regardless, given the numerous similarities to NAFTA Chapter 11 and the clarifications regarding openness and inclusiveness in Chapter 10, Chapter 10 dispute resolution represents an important milestone for investor-state dispute resolution in the Americas. It is evidence that direct access investment dispute resolution based on principles of international law does have a place in free trade agreements in the Americas.

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