THE ROLE OF CANADIAN COURTS IN THE LEGITIMIZATION OF NAFTA CHAPTER ELEVEN TRIBUNAL DECISIONS

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INTRODUCTION

Over the past several years Canada has actively sought to expand its trade and investment networks in an attempt to provide Canadian industries with increased opportunities to do business abroad and to ensure that Canadian businesses remain competitive in the global marketplace.[1] As a result, Canada has signed seven free trade agreements (FTAs) with ten different countries since 2009.[2] Canada's most recently signed FTA with South Korea on March 11, 2014 is the first to be concluded in the Asia-Pacific region and promises to create thousands of jobs for Canadians by increasing Canadian exports to South Korea by 32 percent and boosting Canada's economy by $1.7 billion.[3] Less than twelve months ago, Canada also concluded negotiations for a comprehensive economic and trade agreement (CETA) with the European Union.[4] Considered by some to be Canada's most ambitious trade initiative yet, CETA is unlikely to come into force anytime soon.[5]

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[1] See "Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians Through Trade" (Her Majesty the Queen in Right of Canada, 2013), online: Foreign Affairs, Trade and Development Canada <http://international.gc.ca/ global-markets-marches-mondiaux/assets/pdfs/plan-eng.pdf>.

[2] Of those seven FTA's recently concluded, five are currently in force, including Canada's FTAs with Colombia, Jordan, Panama, Peru, and the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland). Canada's FTAs with Honduras and South Korea still require consideration by Parliament before the agreements can come into force. The status of Canada's FTAs, including a list of Canada's ongoing FTA negotiations can be found online: Foreign Affairs, Trade and Development Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng>.

[3] "Canada-Korea Free Trade Agreement (Creating Jobs and Opportunities for Canadians): Final Agreement Summary", online: Foreign Affairs, Trade and Development Canada <http://international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ ckfta-fas-saf-eng.pdf>.

[4] On October 18, 2013 the President of the European Commission, José Manuel Barroso, and the Prime Minister of Canada, Stephen Harper, announced the successful conclusion of negotiations for a Comprehensive and Economic Trade Agreement (CETA) (see Declaration by the President of the European Commission and the Prime Minister of Canada, "A new era in EU-Canada relations" (18 October 2013), online: Foreign Affairs, Trade and Development Canada <http://www.international.gc.ca/media/comm/news-communiques/2013/10/18a.aspx?lang=eng>).

[5] Laura Payton, "CETA: Canada-EU free trade deal lauded by Harper, Barosso" (18 October 2013), CBC News, online: CBC News <http://www.cbc.ca/news/politics/ceta-canada-eu-free-trade-deal-lauded-by-harper-barroso-1.2125122>; Bruce Champion-Smith, "Canada-Europe trade deal risks derailment over visa spat" *The Star* (26 April 2012), online: The Star

Some aspects of the deal still need to be clarified and ratification of the agreement will require the approval of the Canadian and European Parliaments as well as each of the 28 EU member states.[6]

In addition to securing more liberal trade partnerships, Canada has deepened its investment ties with some of the largest and most rapidly emerging markets in the world.[7] A relative latecomer to negotiating and ratifying bilateral investment treaties (BITs) (Canada prefers the term foreign investment promotion and protection agreements (FIPAs)),[8] Canada has aggressively pursued such arrangements in the last few years. In 2012 Canada concluded, signed or brought into force FIPAs with 4 countries – Senegal, China, the Slovak Republic and the Czech Republic.[9] That number more than doubled in 2013 with Canada concluding, signing

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<http://www.thestar.com/business/2012/04/26/canadaeurope_trade_deal_risks_derailment_over_visa_spat.html>.

[6] *Ibid*. Ratification of CETA may also be delayed in Canada given opposition to the deal. Almost as soon as CETA was tabled in the House of Commons, concerns emerged about the deal being more favourable for European businesses emerged (see e.g. Mike Blanchfield and Julian Beltrame, "CETA to give European exporters bigger duty savings than Canadians" *The Globe and Mail* (29 October 2013) online: The Globe and Mail <http://www.theglobeandmail.com/news/politics/ceta-to-give-european-exporters-bigger-duty-savings-than-canadians/article15147441/>). Different Canadian industry sector participants have also weighed in on the advantages and disadvantages of CETA. While analysts appear to be divided on how the deal will impact Canada's auto industry, autoworkers unions have expressed concerns that CETA will reduce manufacturing jobs (see "Canada-EU free trade deal could change auto industry" (18 October 2013) online: CBC News <http://www.cbc.ca/news/canada/windsor/canada-eu-free-trade-deal-could-change-auto-industry-1.2125174>). Participants in Canada's agricultural sector have taken a firmer stance on the issue, with many arguing that they won't be able to compete with European goods paying less taxes at the border (see "Quebec cheese makers furious over Euro trade deal" (16 October 2013) online: CBC News <http://www.cbc.ca/news/canada/montreal/quebec-cheese-makers-furious-over-euro-trade-deal-1.2075277>).

[7] A complete list of Canada's FIPAs, including the status of its negotiations with different countries is available online: Foreign Affairs, Trade and Development Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.

[8] On Canada's FIPA practice see Céline Lévesque & Andrew Newcombe, "Canada" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013); RK Paterson, "Canadian Investment Promotion and Protection Treaties" (1991) 29 Can YB Int'l L 373. See also Céline Lévesque, "Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond" (2006) 44 Can YB Int'l L 249.

[9] Canada's FIPAs with Senegal and China (both concluded in September 2012) have yet to come into force as they still need to undergo the appropriate ratification processes in each of the three countries. Between the two FIPAs, the conclusion of Canada's agreement with China has been more controversial with politicians divided over the benefits such a deal will have for Canadians (see e.g. Susan Mas, "Delayed China trade deal reflects Tory dissent, NDP says" (22 April 2013), online: CBC News <http://www.cbc.ca/news/politics/delayed-china-trade-deal-reflects-tory-dissent-ndp-says-1.1307131>). Additionally, six months after the conclusion of the Canada-China FIPA, the Hupacasath First Nation (HFN) sought a declaration at the Federal Court that Canada is required to engage in a process of consultation and accommodation with First Nations, prior to ratifying or taking other specific steps that will bind Canada to the terms of with the Canada-China FIPA. That challenge was unsuccessful, however, with the Federal Court determining that HFN's case was too speculative (see *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900). HFN is appealing the Federal Court's decision with a decision expected sometime in the next few months (see Erin Flegg, "Hupacasath First Nation won't back down on

or bringing into force FIPAs with 9 countries.[10] Six of those agreements were with African countries, including Tanzania, Benin, Côte d'Ivoire, Nigeria, Zambia, and Guinea.[11]

Notwithstanding Canada's determined efforts to conclude FIPAs over the past few years, it was one of the last OECD countries to ratify the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*[12] (ICSID Convention).[13] Consistent with its strategy to create investment opportunities for Canadian businesses abroad and given its recent success in concluding FIPAs and FTAs, Canada's ratification of the ICSID Convention in late 2013 was inevitable. That development has been heralded by some members of the Canadian legal community as providing greater certainty for Canadian investors abroad by providing for an investment law dispute resolution process contained entirely within the ICSID Convention.[14] At the same time others have cautioned against viewing Canada's ratification of the ICSID Convention as a panacea for Canadian investors, noting that the ICSID annulment procedure also has its own risks.[15]

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fight against China-Canada FIPPA treaty" *Vancouver Observer* (7 March 2014), online: Vancouver Observer <http://www.vancouverobserver.com/news/hupacasath-first-nation-wont-back-down-fight-against-china-canada-fippa-treaty>; Council of Canadians, "Hupacasath FIPA challenge moves to appeal, decision by June" (20 January 2014), online: Council of Canadians <http://www.canadians.org/blog/hupacasath-fipa-challenge-moves-appeal-decision-june>).

[10] *Supra* note 7.

[11] *Ibid*.

[12] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, 575 UNTS 160 [ICSID Convention].

[13] "Canada Ratifies the ICSID Convention" (1 November 2013) (News Release), online: ICSID <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement138>. For an explanation of Canada's delay in ratifying ICSID see Barry Leon and Andrew McDougall, "Why Canada has not ratified the ICSID Convention?" (24 August 2010), online: Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/blog/2010/08/24/why-has-canada-not-ratified-the-icsid-convention/>.

[14] See e.g. Rene Cadieux, Clifford Sosnow & Julia Kennedy, "Canadian Investors Abroad Finally Gain Access to ICSID as Canada Ratifies Convention" (6 November 2013), International Arbitration Bulletin, online: Faskin Martineau <http://www.fasken.com/en/canadian-investors-abroad-access-to-icsid/>; Seumas Woods et al, "Arbitration in Canada: Canada Ratifies the ICSID Convention" (4 November 2013), International Dispute Resolution, online: Blakes <http://www.blakes.com/English/Resources/Bulletins/Pages/Details .aspx?BulletinID=1829>.

[15] See e.g. Elizabeth Whitsitt and Nigel Bankes, "Canada Ratifies ICSID and Alberta Introduces the Necessary Implementing Legislation" (13 November 2013) online: ABlawg <http://ablawg.ca/wp-content/uploads/2013/11/Blog_EW_NB_ICSID_November-2013.pdf>; Robert Wisner, "Canada: Understanding the Impact of Canada's Ratification of the ICSID Convention" (November 2013), International Trade Bulletin, online: McMillan <http://www.mcmillan.ca/Files/159234_understanding%20the%20impact%20of%20Canada's%20ratification%20of%20the%20ICSID%20convention.pdf>.

This controversy is particularly meaningful in the context of disputes commenced under Chapter eleven of the *North American Free Trade Agreement*[16] (NAFTA). As discussed in further detail below, Canadian courts have been engaged as actors potentially impacting NAFTA Chapter eleven arbitration in circumstances where the parties to an investment dispute have designated a Canadian locale as the seat for the arbitration. To date, there have been five challenges to NAFTA Chapter eleven panel decisions heard by Canadian courts (collectively the NAFTA Chapter eleven cases).[17] In the wake of Canada's ratification of the ICSID Convention, this paper explores the role Canadian courts have played in those disputes.

There are six parts to this paper. Following this introduction, Part two provides a brief discussion of international investment law and in particular the review process of NAFTA Chapter eleven tribunal decisions. Part three introduces the current debate over the legitimacy in international investment law. Part four reviews the NAFTA Chapter eleven cases. Part five discusses how Canadian courts have been a legitimizing and de-legitimizing force in the context of NAFTA Chapter eleven panel decisions. And part six provides this paper's conclusions.

II. International Investment Law: NAFTA Chapter Eleven Dispute Settlement

As a sub-discipline of public international law (but one with a distinctive private element), international investment law has emerged and evolved over the last fifty years. It is comprised of a large number of BITs or FIPAs, and a much smaller number of regional free trade agreements (FTAs), such as NAFTA, that contain investment chapters.[18] Created by inter-state treaties, the international investment law regime is undoubtedly influenced by those areas of public international law governing the behavior of states.[19] In particular, it is a regime that draws upon the

[16] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

[17] *Mexico v Metalcald Corp.*, 2001 BSCS 664, 89 BCLR (3d) 359, additional reasons 2001 BSCS 1529, 95 BCLR (3d) 169 [*Metalclad*]; *United Mexican States v Marvin Roy Feldman Karpa*, 2003 CanLII 34011 (Ont SC) aff'd on other grounds, [2005] OJ No 16 (Ont CA) [*Karpa*]; *Canada (Attorney General) v S.D. Myers Inc*., [2004] FCJ No 29, 3 FCR 368 [*SDMI*]; *Bayview Irrigation District #11 v Mexico*, [2008] OJ No 1858 (Ont SC) [*Bayview*]; *United Mexican States v Cargill, Inc*., 2010 ONSC 4656 aff'd on other grounds 2011 ONCA 622, leave to appeal to SCC refused, 34559 (11 May 2012).

[18] Estimates of the number of BITs in force vary. According to the United Nation's Conference on Trade and Development there were 3,164 IIAs including 2,833 BITs and 331 "other IIAs", including, principally, free trade agreements (FTAs) with investment provisions, economic partnership agreements and regional agreements by the end of 2011 (see UNCTAD, *World Investment Report 2012: Toward a New Generation of Investment Policies*, UNCTAD/WIR/2012/ (United Nations: New York, Geneva 2012) at 84, online: UNCTAD <http://unctad.org/en/Pages/DIAE/World%20Investment%20 Report /WIR2012_Web Flyer. aspx>.

[19] Elizabeth Whitsitt & Nigel Bankes, "The Evolution of International Investment Law and Its Application to the Energy Sector" (2013) 51(2) Alberta L Rev 207 at 209 [Whitsitt & Bankes].

law of treaties (especially the interpretation of treaties), which has been codified by the Vienna Convention on the Law of Treaties[20] (VCLT), and the law of state responsibility, which has been codified in a set of Draft Articles adopted by the International Law Commission in 2001.[21]

As mentioned above Canada actively negotiates FTAs and FIPAs. However, on January 1, 1994, when NAFTA came into effect, it created the world's largest free trade area (at that time) and was the first comprehensive trade agreement of its type.[22] Consistent with the aim of facilitating investment between Canada, the United States (US) and Mexico, Chapter eleven of NAFTA contains provisions, which protect foreign investment. Such protections include prohibitions against unlawful expropriation and obligations of non-discrimination.[23] NAFTA Chapter eleven also establishes a mechanism for the settlement of investment disputes before an impartial tribunal.[24] Prior to submitting a claim under this mechanism, an investor must consent to arbitration in accordance with the procedure set out in NAFTA, and, with respect to the measure of the disputing party that is alleged to be a breach of the substantive protections delineated in the Chapter, must waive its right to take proceedings (except for injunctive or other relief not involving payment of damages) before any administrative tribunal or domestic court of any NAFTA Party.[25]

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[20] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969). The VCLT is widely but not universally ratified (e.g. neither the United States nor France is a party); nevertheless it is broadly accepted that many provisions of the VCLT represent customary international law, particularly Articles 31 – 33 dealing with the interpretation of treaties. See generally, Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) (and see also preface to the first paperback edition, 2010).

[21] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries in "Report of the International Law Commission on the Work of its Fifty-Third Session" (UN Doc. A/56/10) in Yearbook of the International Law Commission 2001, vol. II, part 2 (New York: UN, 2007) (UNDOC. A/CN.4/SER.A/2001), available online: International Law Commission <http://www.un.org/law/ilc> reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002). The most important aspects of the general law on state responsibility include the rules relating to attribution (i.e. the rules that stipulate the circumstances in which a state will be responsible for the activities of para-state and private entities operating within its jurisdiction or control), the rules relating to remedies, and the rules relating to "circumstances precluding wrongfulness" (e.g. the defense of necessity).

[22] Government of Canada, *NAFTA @ 20 – Fast Facts*, online: Foreign Affairs, Trade and Development Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/facts.aspx?lang=eng>.

[23] See NAFTA, *supra* note 16, articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1104 (Standard of Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation).

[24] *Ibid* at article 1115. The constitutionality of NAFTA Chapter eleven tribunals under the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, App II, No 5 and *Canadian Charter of Rights and Freedoms*, ss 7 & 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 was unsuccessfully challenged in 2006: see *Council of Canadians v Canada (Attorney General)*, [2006] OJ No 4751 (Ont CA).

[25] NAFTA, *ibid* at article 1121.

For disputes arising under NAFTA Chapter eleven, investors may commence arbitral proceedings under the ICSID Convention, the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes (ICSID Additional Facility Rules),[26] or the United National Commission on International Trade Law Arbitration Rules (UNCITRAL Rules)[27].[28] Up until recently neither Canada nor Mexico were ratifying parties to the ICSID Convention with the result that NAFTA Chapter eleven disputes were only conducted under the ICSID Additional Facility Rules or UNCITRAL Rules.[29] In contrast to arbitrations conducted under the ICSID Convention, those taking place under either of these regimes are subject to subsequent review by domestic courts.[30] Which court is cast in this supervisory role and the rules governing review applications depends upon the "seat" of the arbitration. The "seat" is often not a function of where the arbitration actually occurs but rather an express choice of the parties, or, failing agreement, a decision of the arbitral tribunal.[31]

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[26] *International Centre for the Settlement of Investment Disputes Additional Facility Rules*, ICSID/11 (April 2006), online: ICSID <https://icsid.worldbank.org/ICSID /ICSID/AdditionalFacilityRules.jsp> [ICSID Additional Facility Rules].

[27] See *United National Commission on International Trade Law Arbitration Rules* (as revised in 2010), online: UNCITRAL <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf > [UNCITRAL Rules].

[28] See NAFTA, *supra* note 16, art 1120.

[29] See *supra* note 13.

[30] See ICSID Convention, *supra* note 12, article 53(1) which provides:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

[31] See ICSID Additional Facility Rules, *supra* note 26, article 18. See also UNCITRAL Rules, *supra* note 27, Article 16, which provides:

> 1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
>
> 2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
>
> 3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
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> 4. The award shall be made at the place of arbitration.

III. The Debate Over Legitimacy in International Investment Law

The topic of legitimacy in international investment law is one that has generated a breadth of literature with varying opinions.[32] To some, the international investment law regime is one of the great success stories in international law over the past decade.[33] To others, the regime lacks legitimacy for a number of reasons, some of which are elaborated below.[34] The intricacies of that debate, however, are not the focus of this paper. Instead, as alluded to above, this article is concerned with a narrower question. That is, whether Canadian courts have been a legitimizing or de-legitimizing force within the international investment law regime. But what does it mean for a system of law to be legitimate or for a participant within that system to be a legitimizing force?

The pre-eminent work on legitimacy within international law and its organizations is that of Professor Thomas Franck.[35] According to Professor Franck, without clarity and consistency of both the rules of law and their application, those governed by those rules lose their ability and desire to adhere to such rules, which can undermine the legitimacy of any legal order. Conversely, a belief in the law's legitimacy re-enforces the perception of its fairness and encourages compliance.[36] According to Professor Franck each rule is likely to be perceived as more or less legitimate as evidenced by certain indicia, including determinacy and coherence.[37]

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[32] See e.g. José Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2011).

[33] See e.g. Thomas W Wälde, "Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy" (2008-2009) YB Int'l Inv L & Pol 505 at 506 ("I consider the unexpected, rapid, and extensive development of investment arbitration over the past fifteen years as an unmitigated success.").

[34] See e.g. Charles N Brower & Stephan Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?" (2009) 9 Chi J Int'l L 471; M. Sornarajah, "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration", in Karl P. Sauvant, ed, *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008) at 39-45; Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521 [S Franck, "Legitimacy Crisis in Investment Treaty Arbitration"]; Ari Afilalo, "Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11" (2005) 25 NW J Int'l & Bus 279 at 282; Ari Afilalo, "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis" (2004) 17 Geo Int'l Envtl L Rev 51; Charles H Brower, II, "Structure, Legitimacy and NAFTA's Investment Chapter" (2003) 36 Vand J Transnat'l L 37.

[35] Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) [T Franck, *Fairness in International Law*].

[36] *Ibid* at 8.

[37] See *ibid* at 30-46. The indicators of rule legitimacy in international law are determinacy, symbolic validation, coherence and adherence. While all of those indicia are important to legitimacy, the indicia

(A) Legitimacy Through Textual and Interpretive Determinacy

Synonymous with clarity, determinacy involves using rules to convey clear and transparent expectations.[38] In international investment law, determinacy may be evidenced in two different ways. First, there may be 'textual determinacy'.[39] That is, a foreign investor's rights and a host state's obligations may be clearly articulated in the written text of an investment treaty. However, investment treaties often outline vague standards of protection. The typical investment treaty provision setting out the standard of 'fair and equitable' (FET) treatment is just one example of a standard that often lacks clarity. Indeed, governments, tribunals and commentators often bemoan the lack of definition of FET and attempt to define the standard's normative content in an effort to establish coherence regarding this popularly invoked discipline.[40]

While such textual indeterminacy may facilitate agreement between the parties and allow for flexible responses to problems in an ever-changing international legal order, there are corresponding costs to this approach. Textual indeterminacy obscures the boundaries of appropriate conduct and facilitates justifications for non-compliance.[41] However, even if standards in investment treaties have little textual clarity, such standards are not necessarily illegitimate. Having an authority (e.g. an arbitral tribunal or supervising domestic court) provide clarification on the meaning and application of those rules, hence interpretative determinacy, can potentially make up for textual indeterminacy.

Legitimization of NAFTA Chapter eleven panel decisions seated in Canada, through textual and interpretive determinacy, arises in two ways. First, textual determinacy is established in federal[42] and most provincial and territorial

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most relevant to this discussion are determinacy and coherence. As such, only those indicia are addressed in this paper.

[38] *Ibid* at 30-34.

[39] *Ibid*.

[40] An example of one tribunal's attempt to clarify FET can be found in *El Paso Energy International Company v The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) at paras 330-379, online: Investment Treaty Arbitration <http://www.italaw.com/>. For commentators' differing views on how to define FET see e.g. S.W. Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law", IILJ Working Paper 2006/6, Global Administrative Law Series, online: Institute for International Law and Justice <www.iilj. org/publications/2006-6Schill.asp>; Charles Brower, "Investor–State Disputes under NAFTA: The Empire Strikes Back" (2003) 40 Columbia J Transnat'l L 43; Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 Int'l Lawyer 87.

[41] T Franck, *Fairness in International Law*, *supra* note 35 at 31.

[42] See *The United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp.); *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp.), am RSC 1985, c.1 (4th Supp) [Federal CAA].

legislation[43] implementing the UNCITRAL Model Law on International Commercial Arbitration (Model Law),[44] which confers jurisdiction on the courts to review NAFTA Chapter eleven arbitral awards. The grounds for setting aside arbitral awards under the Model Law are clearly set out in Article 34, which includes procedural defects, jurisdictional defects or for public policy reasons.[45] Interpretative determinacy is potentially established by Canadian courts' consideration of Article

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[43] See British Columbia: *International Commercial Arbitration Act*, RSBC 1996, c 233 [BC ICAA]; *Foreign Arbitral Awards Act*, RSBC 1996, c 154; Alberta: *International Commercial Arbitration Act*, RSA. 2000, c I-5; Saskatchewan: *International Commercial Arbitration Act*, SS 1988-89, c. I-10.2; *Enforcement of Foreign Arbitral Awards Act*, 1996, SS 1996, c E-9.12; Manitoba: *International Commercial Arbitration Act*, CCSM c C151; Ontario: *International Commercial Arbitration Act*, RSO 1990, c I-9; Quebec: Code of Civil Procedure, RSQ, c C-25, Articles 940-952 and the Civil Code of Quebec, Articles 2638-2643, 3121; New Brunswick: *International Commercial Arbitration Act*, SNB 1986, c I-12.2; Nova Scotia: *International Commercial Arbitration Act*, RSNS 1989, c 234; Prince Edward Island: *International Commercial Arbitration Act*, RSPEI 1988, c I-5; Newfoundland and Labrador: *International Commercial Arbitration Act*, RSNL 1990, c I-15; Northwest Territories and Nunavut: *International Commercial Arbitration Act*, RSNWT 1988, c I-6; Yukon: *International Commercial Arbitration Act*, RSY 2002, c 123; Foreign Arbitral Awards Act, RSY 2002, c 93.

[44] *UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments adopted in 2006)*, online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

[45] Article 34 of the UNCITRAL Model Law has been adopted unaltered in every Canadian jurisdiction except Quebec, which outlines narrower grounds for "annulment" of such awards under Articles 964.4 and 946.5 of its Code of Civil Procedure. Article 34 of the UNCITRAL Model Law provides that an arbitral award may only be set aside if:

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

34 in the NAFTA Chapter Eleven Cases. Sections four and five below provide a detailed discussion of that issue.

(B) Legitimacy through Coherence

Intimately tied to the concept of determinacy is the notion of coherence. In fact, interpretive determinacy depends in part on the coherence of the decisions reached by arbitral tribunals or domestic courts.[46] Coherence, as another indicia of legitimacy, requires consistency of interpretation and application of rules. As explained by Thomas Franck, "[a] rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every 'similar' or 'applicable' instance."[47] Defined in this way, different applications of the same rule do not necessarily undermine legitimacy as long as the inconsistencies can be explained by a justifiable distinction.[48] As a result, it is possible that different applications of the same rule, while creating superficial inconsistencies, may still leave the rules of international investment law coherent and legitimate.[49]

Establishing coherent jurisprudence within international investment law is, however, a challenging task. Of all the branches of international law, international investment law is perhaps the most likely to generate incoherent jurisprudence. A number of variables contribute to this reality. First, the sources of international investment law are widely dispersed. Since the end of World War II the nations of the world have negotiated and signed approximately 5900 bilateral,[50] regional[51] and sectoral investment treaties,[52] all of which grant substantive protections to foreign investors.[53] Even though many of those agreements were modeled after one another, the sheer volume of investment treaties in force today means that tribunals rarely consider the same investment treaty in subsequent arbitrations, a fact that increases

[46] T Franck, *Fairness in International Law*, *supra* note 35 at 33-34.

[47] *Ibid* at 38.

[48] *Ibid* at 39.

[49] *Ibid* at 40.

[50] See for example the *Agreement between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments* (8 May 1997), online: UNCTAD <http://www.unctad. org/sections/dite/iia/ docs/bits/canada_armenia.pdf>.

[51] See for example NAFTA, *supra* note 16.

[52] See for example the *Energy Charter Treaty*, 17 December 1994, 34 ILM 373 (1998), online: Energy Charter <http://www.encharter.org>.

[53] UNTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy*, UN Doc UNCTAD/WIR/2010 (2010) at xxv, 81-84, online: UNCTAD <http://www.unctad.org/en/docs/wir2010_en.pdf>.

the potential for international investment jurisprudence to be incoherent. Second, while the number of arbitral decisions related to investment treaties and substantive protections granted thereunder is increasing, one could hardly characterize the catalogue of such jurisprudence as 'mature' or 'well developed'. As of the end of 2012, only 514 known investor-state arbitrations have been filed under investment treaties.[54] In fact, arbitral tribunals are still grappling with the balance to be struck between the right of the host state to regulate in the public interest and the rights of the investor.[55] Thus, the developing nature of international investment law generally makes it prone to more incoherent jurisprudence than longer-established areas of international law. Third, international investment disputes are decided by *ad hoc* arbitral tribunals under the auspices of a variety of arbitral institutions with limited opportunity for supervision.[56] Thus, the 'decentralized' nature of dispute settlement inherent in investment law also potentially contributes to incoherent jurisprudence.

It remains to be seen, however, if the challenges to determinacy that plague international investment law generally are also relevant to Canadian courts' consideration of Article 34 in the NAFTA Chapter Eleven Cases. Sections four and five below provide a detailed discussion of that issue.

IV. The NAFTA Chapter Eleven Cases

To date, based on the seat of the arbitration being Canadian locales, there have been five applications to set aside NAFTA Chapter eleven awards heard by the Federal Court of Canada and the courts of British Columbia and Ontario. In all but the earliest case, Canadian courts have refused to overturn the tribunal's decision. The NAFTA Chapter eleven cases are reviewed in the following subsections.

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[54] UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, IIAs Issue Note No. 1 (Revised May 2013) at 3, online: UNCTAD <http://unctad.org>.

[55] One way that arbitral tribunals have attempted to address this issue (rightly or wrongly) is to import considerations of reasonableness and proportionality into their analyses of the FET standard and the duty not to expropriate. Such parameters have yet to influence cases involving the NT obligation, but one would expect such considerations to become more prominent in discussions on the scope of the NT standard as investor-state jurisprudence continues to develop (see Whitsitt & Bankes, *supra* note 19). The importation of proportionality as a mechanism to strike a balance between a host state's right to regulate and the protections afforded investors within the international investment law regime is consistent with the comparative public law approach advocated for by some scholars as a solution to international investment law's legitimacy crisis: See generally Stephan W Schill, "Enhancing International Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2011-2012) 52 Va J Int'l Law 57.

[56] See Part 2 of this paper discussing the different dispute settlement regimes available under NAFTA's investment chapter.

(A) Metalclad Corp. v United Mexican States

In 1997 Metalclad Corporation (Metalclad), a US waste disposal company, commenced arbitral proceedings against Mexico under the ICSID Additional Facility Rules.[57] The dispute arose out of concerns over the construction of a landfill facility in Guadalcazar in the central Mexican state of San Luis Potosí designed for the confinement of hazardous waste.[58] Operating through its Mexican subsidiary, Metalclad received federal and state permits to construct the landfill facility.[59] However, a few months after construction on its landfill commenced, the Municipality of Guadalcazar notified Metalclad that it was unlawfully operating without a municipal construction permit.[60] Metalclad applied for a municipal permit and, in the meantime, completed construction of the landfill.[61] During the course of construction, federal and state authorities continued to take steps evincing their approval of Metalclad's facility.[62] The Municipality eventually turned down Metalclad's construction permit application, effectively barring the operation of the completed facility.[63] After Metalclad commenced NAFTA Chapter eleven proceedings, the Governor of San Luis Potosí issued an Ecological Decree declaring a protected natural area, which encompassed the landfill site and thus permanently closed the landfill.[64]

In assessing the case, the arbitral tribunal determined that Mexico had violated its obligations under NAFTA Articles 1105 ("Minimum Standard of Treatment")[65] and 1110 ("Expropriation")[66]. More specifically, the tribunal took issue with the lack of transparency that permeated the permitting processes necessary for the construction of Metalclad's landfill facility. Referring to transparency as one

[57] *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Notice of Arbitration (2 January 1997), online: NAFTA Claims <http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladNoticeOfArbitration.pdf>.

[58] *Metalclad Corporation v United Mexcian States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) at paras 28-29, online: Investment Treaty Arbitration <http://www.italaw.com> [*Metalclad* Award].

[59] *Ibid* at paras 30-36.

[60] *Ibid* at para 40.

[61] *Ibid* at para 42.

[62] *Ibid* at paras 43-44.

[63] *Ibid* at paras 45-58.

[64] *Ibid* at paras 59-61.

[65] NAFTA, *supra* note 16, Article 1105(1) provides that "each Party shall accord to investments of investors of another Party treatment in accordance with inter- national law, including fair and equitable treatment and full protection and security".

[66] NAFTA, *ibid* at Article 1110 provides that "[n]o party shall directly or indirectly . . . expropriate an investment . . . or take a measure tantamount to . . . expropriation . . . except: (a) for a public purpose; (b) on a non- discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . . ."

of the fundamental principles underpinning NAFTA's investment chapter, the tribunal found that "the absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit…" violated Mexico's obligation to afford Metalclad fair and equitable treatment.[67] In addition, the tribunal found a violation of the fair and equitable treatment standard because the municipal government lacked the authority to deny the construction permit for Metalclad's facility on environmental grounds.[68] The Tribunal also found that the same actions of the local government amounted to an indirect expropriation in violation of NAFTA Article 1110.[69] Finally, the Tribunal held that the Ecological Decree issued after the commencement of arbitral proceedings constituted an act of expropriation.[70] For these breaches the Tribunal awarded Metalclad damages for approximately $16 Million (USD), an amount representative of Metalclad's investment in the landfill facility.[71]

On October 27, 2000, Mexico filed an application with the British Columbia Supreme Court (BCSC) in Vancouver to have the award in this case set aside.[72] Mexico's application invoked the provisions of British Columbia's *Commercial Arbitration Act* (CAA)[73] and *International Commercial Arbitration Act* (BC ICAA)[74]. Mexico invoked British Columbia's CAA in an attempt to appeal the arbitral tribunal's decision on broader grounds (i.e. errors of law) than those permitted under the BC ICAA. In support of this argument, Mexico asserted that its relationship with Metalclad was regulatory – not commercial – in nature and therefore did not fall within the scope of the BC ICAA.[75] The Court disagreed with Mexico's position and found that the relationship between Metalclad and Mexico was chiefly focused on "investing", a conclusion supported by the fact that Metalclad had commenced arbitral proceedings against Mexico under NAFTA's investment chapter.[76]

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[67] *Metalclad* Award, *supra* note 58 at paras 76-88.

[68] *Ibid* at paras 90-93.

[69] *Ibid* at paras 103-107.

[70] *Ibid* at paras 109-112.

[71] *Ibid* at paras 122-128 & 131.

[72] See *Metalclad*, *supra* note 17.

[73] *Commercial Arbitration Act*, RSBC 1996, c 55 [CAA].

[74] BC ICAA, *supra* note 43.

[75] *Metalclad*, *supra* note 17 at para 44.

[76] *Ibid* at paras 44-49.

Focusing on the provisions of the BC ICAA, Mexico challenged the award on three bases: (i) the tribunal decided matters beyond the scope of the submission to arbitration, (ii) public policy, and (iii) the arbitral procedure was not in accordance with the agreement of the parties. More specifically, Mexico argued that the arbitral tribunal wrongly used NAFTA's transparency provisions as a basis for finding a violation of the FET standard in Article 1105[77] and a violation of the prohibition against unlawful expropriation in Article 1110[78]. Additionally, Mexico contended that the Tribunal improperly considered the Ecological Decree in its discussion of Article 1110.[79] Pointing to the alleged corruption of witnesses and excessive damage claims by Metalclad, Mexico also challenged the award on public policy grounds.[80] Finally, on arbitral procedure, Mexico contended that the tribunal failed to address some of the questions submitted to it (e.g. questions about Metalclad's alleged misconduct in bringing the claim and misrepresentations as to the appropriate damage amount) and failed to state the reasons upon which the award was based.[81]

As is customary in applications to set aside or review decisions of tribunals (be they constituted in accordance with domestic laws or international treaties), the Court began its consideration of Mexico's application by first articulating the appropriate standard of review.[82] Counsel for Mexico and the Attorney General of Canada did try to argue that the appropriate standard of review should be determined with reference to Canadian administrative law principles.[83] As a result, they urged the Court to use the "pragmatic and functional approach" delineated by the Supreme Court of Canada in *Puspanathan v Canada*,[84] to determine whether the NAFTA tribunal's decision was "patently unreasonable."[85] The Court rejected those arguments, however, and instead found that the appropriate standard of review was outlined in sections 5 and 34 of the BC ICAA.[86] Section 5 of the BC ICAA indicates that a court must not question an arbitral award except to the extent provided for in the Act.[87] As noted above, section 34 of the BC ICAA replicates the grounds for

[77] *Ibid* at paras 66-67.

[78] *Ibid* at para 78.

[79] *Ibid* at para 81.

[80] *Ibid* at paras 106-108.

[81] *Ibid* at para 119.

[82] *Ibid* at paras 50-56.

[83] *Ibid* at paras 52-53.

[84] [1998] 1 SCR 982.

[85] *Metalcald*, *supra* note 17 at para 53.

[86] *Ibid* at paras 54-55.

[87] Section 5 of the BC ICAA, *supra* note 43 states:

> In matters governed by this Act,
>
> (a) a court must not intervene unless so provided in this Act, and

review articulated in the UNCITRAL Model Law. Consequently, an arbitral award can only be set aside in a narrow set of circumstances including where, for example, an award deals with a dispute outside of the terms of the submission to arbitration. To bolster its decision, the Court also referenced the decision of Gibbs J.A. in *Quintette Coal Limited v Nippon Steel Corporation*,[88] the leading authority interpreting and applying section 34 of the BC ICAA.[89] In so doing, the Court highlighted the importance of international comity and respect for the capacities of dispute settlement bodies in the international commercial system. In the Court's view those principles supported the notion that restraint should be exercised when reviewing arbitral awards under the BC ICAA.[90]

Having reinforced the deferential posture BC courts should take in review applications under the BC ICAA, the Court went on to apply the standard of review with reference to the facts of the dispute. In what has proved to be a fairly controversial decision, the Court partially set aside the award of the NAFTA Chapter eleven tribunal.[91] The Court agreed with arguments raised by Mexico that the tribunal made decisions on matters beyond the scope of NAFTA Chapter eleven.[92] In short, the Court determined that the Tribunal had "…misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency…"[93] As a result the Court found that the Tribunal's interpretation of the fair and equitable treatment principle articulated in Article 1105 was influenced by provisions outside NAFTA's investment chapter (i.e. Articles 102(1) and 1802), an interpretive error that justified intervention.[94] For similar reasons, the Court also set aside the arbitral Tribunal's determination that the denial

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(b) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.

[88] [1991] 1 WWR 219 (BCCA).

[89] *Metalclad*, *supra* note 17 at paras 51-52.

[90] *Ibid* at para 51.

[91] For critical comments on the British Columbia Supreme Court's decision in this case see e.g. David Williams, (2003) "International Commercial Arbitration and Globalization – Review and Recourse Against Awards Rendered Under Investment Treaties", 4 J World Inv 251; Jack J. Coe, Jr., (2002) "Domestic Court Control of Investment Awards – Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?", 19 J Int'l Arb 185; Todd Weiler, "Metalclad v. Mexico – A Play in Three Parts", (2001) 2 J World Inv 685; S Dodge, "Metalclad Corp. v. Mexico" (2001) 95 Am J Int'l L 910 *cf* Henri C Alvarez, "Judicial Review of NAFTA Chapter 11 Arbitral Awards" in Frédéric Bachand & Emmanuel Gaillard eds, *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute, 2011) at 109, fn 12 (indicating that despite certain criticisms of the case, the standard of review articulated in the case is correct) [H Alvarez, "Judicial Review of NAFTA Chapter 11"].

[92] *Metalclad*, supra note 17 at para 67.

[93] *Ibid* at para 70.

[94] *Ibid* at paras 57-76.

of a construction permit by municipal authorities in San Luis Potosí attracted Mexico's liability under NAFTA Article 1110.[95] The Court rejected Mexico's remaining arguments challenging the NAFTA Chapter eleven award on public policy grounds and procedural flaws.[96] In so doing, the Court left in tact the Tribunal's finding that Mexico expropriated Metalclad's investment when the governor of San Luis Potosí issued a decree proclaiming a protected natural area, which incorporated Metalclad's landfill site and permanently closed the facility.[97] As a result of its findings, the Court adjusted the pre-award interest payable by Mexico as part of the compensation owed to Metalclad.[98] The Court also gave Metalclad the right to remit certain questions about whether Mexico had violated its obligations under Article 1105 and 1110 prior to the issuance of the governor's decree for reasons other than a lack of transparency.[99]

That right of remission caused some procedural confusion subsequent to the Court's decision.[100] Metalclad requested that certain issues be addressed by the NAFTA arbitral Tribunal in the case. Mexico objected, claiming that remission was not possible because the Court proceedings had not been adjourned pursuant to Section 34(4) of the ICAA.[101] In supplementary reasons the Court acknowledged that it had inappropriately partially set aside the award without first clarifying whether Metalclad was requesting an adjournment of the proceedings.[102] In so doing, the Court recognized that it had failed to give the Tribunal an opportunity to address the Court's findings that obligations in Article 1105 and 1110 could not be based on claims about a lack of transparency.[103] Finding that it could vary its original order, the Court proceeded to adjourn proceedings for eighteen months in order to give the Tribunal an opportunity to resume arbitral proceedings.[104]

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[95] *Ibid* at paras 77-80.

[96] *Ibid* at paras 106-132.

[97] *Ibid* at paras 81-105.

[98] The Court found that the only basis for finding a violation of NAFTA Chapter eleven was the Governor's decree, which occurred on a later date than those facts, which were the bases of the NAFTA Tribunal original findings. As a result, the Court determined that pre-award interest was owed from the date of the Decree (September 20, 1997) not earlier (see *ibid* at para 135).

[99] *Ibid* at para 136.

[100] See the additional reasons in *Metalclad*, *supra* note 17.

[101] See *ibid* at para 6. Article 34(4) of the Model Law, *supra* note 34 states: The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[102] *Ibid* at para 14.

[103] *Ibid.*

[104] *Ibid* at paras 18-19.

(B) Marvin Roy Feldman Karpa v United States of Mexico

Two years after arbitral proceedings began in the Metalclad dispute Mexico found itself the responding party in another arbitration under NAFTA's investment chapter.[105] This case arose out of concerns regarding Mexico's application of certain tax laws to the export of tobacco products by a company organized under the laws of Mexico and owned and controlled by Mr. Marvin Roy Feldman Karpa, a citizen of the United States.[106] More particularly, Mr. Karpa alleged that Mexico's refusal to rebate excise taxes applied to cigarettes exported by his Mexican company and Mexico's continuing refusal to recognize his company's right to such a rebate on prospective cigarette exports constituted a breach of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Level of Treatment), and 1110 (Expropriation and Compensation). [107]

The arbitral proceedings focused on Mr. Karpa's claims under NAFTA Articles 1102 and 1110. In a split decision the arbitral tribunal found Mexico in violation of Article 1102 (National Treatment) but unanimously rejected claims that Mexico had expropriated Mr. Karpa's cigarette resale/export business.[108] With limited facts about rebates paid to Mexican resellers/exporters of cigarettes, a majority of the Tribunal found that Mr. Karpa's Mexican investment was in fact treated less favorably than comparable Mexican operations.[109] The only confirmed cigarette exporters on the record before the Tribunal were Mr. Karpa's cigarette resale/export company and the Mexican corporate members of the Poblano Group (Mercados I and Mercados II).[110] According to the available evidence, the Tribunal found that Mr. Karpa's company was denied the rebates for October-November 1997 and subsequently in the 1998-2000 period.[111] The Tribunal also determined that Mexico's Ministry of Finance and Public Credit demanded that Mr. Karpa's company repay rebate amounts initially allowed from June 1996 through September 1997, thereby denying Mr. Karpa's company tax rebates during periods when members of the Poblano Group were receiving them.[112] Additionally, the majority of

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[105] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB/(AF)/99/1, Notice of Arbitration (30 April 1999), online: Naftaclaims < http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanNoticeOfArbitration.pdf>.

[106] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB/(AF)/99/1, Award (16 December 2002) at paras 1, 6-23, online: Investment Treaty Arbitration <http://www.italaw.com>.

[107] *Ibid.*

[108] *Ibid* at paras 173 and 110, respectively.

[109] *Ibid* at para 173.

[110] *Ibid* at para 23.

[111] *Ibid* at para 173.

[112] *Ibid* at para 173.

the Tribunal found that Mr. Karpa's company suffered differential treatment with respect to export registration requirements.[113] The Tribunal's findings of violation here were tied to its characterization of the burden of proof in this case. Referring to WTO jurisprudence, the Tribunal observed that Mr. Karpa had established a presumption and a *prima facie* case that his investment was treated in a different and less favorable manner than several Mexican owned cigarette resellers, and that Mexico failed to introduce any credible evidence into the record to rebut that presumption.[114] If Mexico had such evidence, the Tribunal observed that Mexico had never explained why such evidence had not been introduced into the proceedings and went on to make an inference about the existence of discrimination on that basis.[115] As a result, the Tribunal awarded Mr. Karpa almost 17 million pesos.[116]

Following that decision, Mexico sought a rectification of the award, on the grounds that it was obliged under Article 2105 of the NAFTA to withhold certain forms of information in order to protect the "personal privacy or the financial affairs and accounts of individual customers of financial institutions."[117] Accordingly, Mexico was of the view that the Tribunal had erred in finding a violation of NAFTA Article 1102, in part, on the failure of the Mexican authorities to put forward evidence about the taxation of other parties, which might have served to rebut the allegations of discrimination leveled by Mr. Karpa.[118] The tribunal, however, dismissed Mexico's bid for rectification of the award,[119] and Mexico turned to Canadian courts as an alternate means through which to challenge the arbitral award.

Using similar arguments about the applicability of NAFTA Article 2105 and its resultant inability to disclose confidential information about taxpayers in accordance with its privacy laws, Mexico contended that the Tribunal's award should be set aside on three of the grounds enumerated in the Model Law and incorporated into Ontario's *International Commercial Arbitration Act* (Ontario ICAA).[120] Specifically, Mexico argued that (i) it was unable to present its case, (ii)

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[113] *Ibid* at para 175.

[114] *Ibid* at para 177.

[115] *Ibid* at para 178.

[116] *Ibid* at para 211.

[117] NAFTA, *supra* note 16, article 2105 states: "Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions." See also *Marvin Feldman v Mexico*, ICSID Case No ARB/(AF)/99/1, Correction and Interpretation of the Award (13 June 2003), online: Investment Treaty Arbitration <http://www.italaw.com> [*Feldman*, Correction].

[118] *Feldman*, Correction, *ibid* at para 9.

[119] *Ibid* at paras 10-11.

[120] See reasons of the Ont SC in *Karpa*, *supra* note 17.

the arbitral tribunal had departed from the procedure agreed upon by the parties, and (iii) the damages awarded by the Tribunal violated public policy.[121]

In assessing Mexico's application the Ontario Superior Court, like the British Columbia Supreme Court in *Metalclad*, articulated a strict standard of review. Specifically, the Court observed that its jurisdiction to review the arbitral award was "strictly limited to those instances provided for in Article 34 of the Model Law which allows for a very limited opportunity for the courts to provide any recourse against an award."[122] In a deferential stance to the arbitral Tribunal, the Court subsequently rejected all of Mexico's arguments and dismissed its application to set aside the arbitral award.[123]

Of particular relevance are statements made by the court with respect to Mexico's first basis for challenge. Here, the Court found that Mexico was effectively seeking a review of the findings of fact made by the arbitral tribunal.[124] In such a case, the Court was clear that a high level of deference should be accorded to the tribunal's findings given that it is in the best position to assess the evidence.[125] As the BCSC did in *Metalclad*, the Ontario Superior Court emphasized principles of international comity in support of its view that courts should exercise their reviewing powers of transnational tribunals sparingly.[126] Moreover, the Court indicated that any review of the tribunal's decision was limited by Article 34 of the Model Law, which did not provide for a review of a finding of fact.[127] Having so found, the Court proceeded to discuss the degree of deference owed to the NAFTA tribunal, in this case with reference to factors developed by the Supreme Court of Canada in *Pushpanathan* (i.e. the existence of a privative clause, the expertise of the tribunal, the purpose of the jurisdiction-conferring act, and the nature of the problem submitted for review).[128] Specifically, the Court found that, together, the finality of awards of arbitral awards under the ICSID Additional Facility Rules and the strict grounds upon which such awards could be set aside under the Model Law operated

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[121] *Ibid* at paras 13-21.

[122] *Ibid* at paras 52-53.

[123] *Ibid* at paras 77, 81, 87, 92, 95-99.

[124] *Ibid* at para 77.

[125] *Ibid.*

[126] See *ibid* at paras 78-80 (where the Court supports its deferential attitude by citing previous Canadian jurisprudence. One of the cases referenced, the BC Court of Appeal's decision in *Quintette*, was also referenced by the BSCS in Metalclad to support a similar position about the deference owed to international commercial tribunals).

[127] *Ibid* at para 81.

[128] *Ibid* at para 82 citing *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paras 29-38 [*Pushpanathan*].

as a privative clause.[129] In the Court's view the existence of such a clause along with the expertise of the NAFTA Tribunal leant further support to its determination that decisions of the Tribunal should command a high level of deference.[130]

Mexico subsequently appealed this decision, but the Ontario Court of Appeal upheld the decision of the Superior Court.[131] In so doing the Court was clear that courts should use their authority to interfere with international commercial arbitration awards cautiously.[132] According to the Ontario Court of Appeal, principles of international comity and the realities of market globalization supported such a view.[133] Additionally, the Court observed that Ontario's legislature had made a strong commitment to the policy of international commercial arbitration through the adoption of the Ontario ICAA and the Model Law.[134] Thus, Like the Ontario Superior Court, the Court of Appeal elaborated on this finding by discussing the list of factors developed by the Supreme Court of Canada for determinations about the appropriate degree of deference owed to domestically constituted tribunals.[135] While the Court of Appeal disagreed with the lower Court's privative clause analysis, it found that the remaining factors justified a finding that "the applicable standard of review in this case is at the high end of the spectrum of judicial deference."[136]

(C) S.D. Myers, Inc. v Canada

In the midst of the Ontario Courts' consideration of the arbitral tribunal's award in *Karpa*, the Federal Court of Canada was asked to review another award arising out of a NAFTA Chapter eleven dispute.[137] That dispute involved a US corporation (S.D. Myers Inc. or SDMI) involved in the treatment of toxic wastes such as polychlorinated biphenyl (PCB).[138] S.D. Myers Inc. established a subsidiary company in Canada (MYERS Canada) to obtain Canadian PCB waste for treatment in its US facility.[139] For some years the US had prohibited the movement of PCB waste across its border. However, in the fall of 1995 SDMI gained permission to

[129] *Ibid* at paras 84-85.

[130] *Ibid* at paras 85-86.

[131] See judgment of the Ont CA in *Karpa*, *supra* note 17.

[132] *Ibid* at para 34.

[133] *Ibid*.

[134] *Ibid* at para 35 citing *Automatic Systems Inc. v Bracknell Corp.* (1994), 18 OR (3d) 257 (CA) at p 216.

[135] *Ibid* at paras 37-38 citing *Pushpanathan*, *supra* note 128.

[136] *Ibid* at para 43.

[137] *SDMI*, *supra* note 17.

[138] *Ibid* at paras 4-5.

[139] *Ibid* at paras 6-7.

import PCB waste from Canada.[140] Shortly thereafter Canada issued an Order prohibiting the export of PCB waste to the US.[141] As a result, SDMI and its Canadian subsidiary were prevented from operating as they had planned. Canada's prohibition was in effect for approximately 14 months.[142]

SDMI initiated a NAFTA Chapter 11 arbitration alleging that Canada had violated a number of its NAFTA obligations and claiming more than $70 million USD in damages.[143] While the Tribunal dismissed some of SDMI's claims, it found Canada in violation of NAFTA Articles 1102 (national treatment) and 1105 (minimum standard of treatment).[144] Particularly compelling to the Tribunal in its decision was evidence, which showed that Canada's prohibition Order was intended to protect the Canadian PCB disposal industry from US competition. As a result, the Tribunal awarded SDMI more than $6 million USD in damages.[145]

Canada subsequently challenged the Tribunal's award before the Federal Court under the Federal *Commercial Arbitration Act* (CAA)[146]. As with provincial legislation, the Federal CAA incorporates the Model Law.[147] Canada raised two broad bases for challenging the NAFTA arbitral tribunal's award: (i) that the Tribunal exceeded the scope of the arbitration agreement between the NAFTA parties by dealing with a dispute not contemplated by NAFTA Chapter eleven and (ii) that the award contravened the public policy of Canada.[148] On the first ground, Canada was supported by Mexico as an intervener in the case.[149] Together they contended that the Tribunal had erred in finding SDMI an "investor" and its Canadian subsidiary an "investment" within the meaning of NAFTA Chapter eleven.[150] Additionally, they asserted that the Tribunal made a number of errors in its application of NAFTA Article 1102 (National Treatment) to the case. Notably,

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[140] *Ibid* at para 8.

[141] *Ibid* at para 9.

[142] *Ibid*.

[143] *S.D. Myers, Inc. v Canada*, Statement of Claim (30 October 1998), online: naftaclaims <http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersStatementofClaim.pdf>.

[144] *S.D. Myers, Inc. v Government of Canada*, UNCITRAL (1976), First Partial Award (13 November 2000); *S.D. Myers, Inc. v Government of Canada*, UNCITRAL (1976), Second Partial Award (21 October 2002), online: Investment Treaty Arbitration <http://www.italaw.com>.

[145] See Second Partial Award, *ibid* at para 311.

[146] Federal CAA, *supra* note 32.

[147] *Ibid* at ss 2 & 5.

[148] *SDMI*, *supra* note 17 at para 25.

[149] *Ibid* at para 26.

[150] *Ibid*.

Canada and Mexico argued that the Tribunal erred in its determination that SDMI and Myers Canada were "in like circumstances" with Canadian companies and when it decided that a breach of the NT standard also constituted a breach of NAFTA Article 1105.[151] Additionally, Canada and Mexico argued that the Tribunal exceeded its jurisdiction in applying Chapter eleven obligations to a dispute, the subject of which fell more properly under NAFTA Chapter 12 governing cross-border trade in services.[152]

The Federal Court subsequently dismissed Canada's application to set aside the NAFTA award.[153] The Court's findings with respect to the appropriate standard of review to be applied in the case are particularly relevant. Distinguishing between arbitrations involving states and those *vis-à-vis* private parties, Canada and Mexico argued that the appropriate standard of review should be "correctness".[154] The Court disagreed. After reviewing several Canadian cases, including *Metalclad* and *Karpa*, the Court observed, "judicial deference should be accorded to arbitral awards generally and to international commercial arbitrations in particular."[155] Consequently, the Court found that it had limited jurisdiction under Article 34 of the Federal CAA to set aside the NAFTA arbitral award.[156] In so finding, the Court noted that Article 34 does not permit judicial review of decisions based on an error of law or fact if the decision is within the arbitral Tribunal's jurisdiction.[157] Thus, the Court quickly dismissed Canada's and Mexico's arguments about whether the Tribunal properly found breaches of NAFTA Articles 1102 and 1105.[158] Instead, the Court focused on the jurisdictional challenges raised, namely the definition of "investor" and "investment" under NAFTA Chapter eleven and the applicability of NAFTA Chapter 12 to the dispute.[159] In an act that can only be described as reverence for the arbitral procedure that preceded Canada's challenge, the Court determined that Canada was barred from raising such challenges because it had failed to raise them with the NAFTA arbitral Tribunal in accordance with the UNCITRAL Rules governing those proceedings.[160]

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[151] *Ibid*.

[152] *Ibid*.

[153] *Ibid* at para 76.

[154] *Ibid* at paras 33-34.

[155] *Ibid* at para 37.

[156] *Ibid* at para 41.

[157] *Ibid* at para 42.

[158] *Ibid* at para 45.

[159] *Ibid* at para 46.

[160] *Ibid* at paras 47-54. While this finding would have disposed of Canada's application, the Court proceeded to discuss Canada's arguments on public policy, the interpretation of definitions in NAFTA and the Application of NAFTA Chapter 12. Using Canadian administrative law concepts of "correctness" and "reasonableness" to review questions of law and mixed law and fact, respectively, the Court found that

(D) Bayview Irrigation District #11 v United States of Mexico

The fourth case in which a Canadian Court was asked to review a decision reached in an investor-state arbitration under NAFTA Chapter eleven was *Bayview Irrigation District No. 11 v Mexico*.[161] On the international stage this case was commenced in early 2005 with the International Centre for the Settlement of Investment Disputes receiving a request for the commencement of arbitral proceedings under its Additional Facility Rules.[162] Bayview Irrigation District, along with sixteen other US irrigation districts and twenty-eight individuals, claimed that they had acquired rights to use a portion of the waters of the Rio Grande River and its tributaries.[163] Between 1992 and 2002, these parties claimed that Mexico had deprived them of their water rights by wrongfully capturing, seizing, and diverting irrigation water for Mexican farmers. As a result, they claimed that Mexico had violated its obligations under NAFTA Articles 1102, 1105(1) and 1110.[164]

In response, Mexico challenged the jurisdiction of the arbitral Tribunal on a number of bases, including the assertion that Bayview (and its co-claimants) had not made an "investment" in Mexico as required by NAFTA Article 1101.[165] The Texas irrigation districts alleged that they qualified as "investors" under NAFTA because they had invested extensive funds for the storage and conveyance of water to their farms in the Rio Grande Valley of Texas. They also claimed that their dispute concerned an "investment" in "Mexican territory" because their asserted property rights in the river waters were in Mexican territory when the water was seized and diverted.[166] The arbitral tribunal sided with Mexico and found that it lacked jurisdiction to hear the case. Specifically, the tribunal concluded that an "investor" under NAFTA needed to be a *foreign* investor and that their qualifying 'investment' (their farms and irrigation equipment) were located solely within Texas.[167] Further, the tribunal recognized that the claimants' water rights could constitute an "investment" but concluded that the claimants' investment was not 'in the territory

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even if Canada could raise these grounds there was no basis to interfere with the decision of the NAFTA Chapter eleven Tribunal (at paras 57-75).

[161] See *Bayview*, *supra* note 17.

[162] *Bayview Irrigation District et al. v United Mexican States*, Notice of Arbitration (19 January 2005), online: naftaclaims <http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims_NOA-19-01-05.pdf>.

[163] *Ibid* at paras 1-45.

[164] *Ibid* at paras 59-77.

[165] See *Bayview Irrigation District et al. v United Mexican States*, ICSID No ARB/(AF)/05/1, Award (17 June 2007) at pp 7-9, online: Investment Treaty Arbitration <http://italaw.com>.

[166] *Ibid* at paras 41-50, 62-70.

[167] *Ibid* at paras 87-108.

of Mexico' because the claimants could not own the physical waters of a river flowing in Mexican territory.[168]

Bayview, along with its co-claimants, applied to the Ontario Superior Court to set aside the tribunal's decision on the basis that "it did not adhere to fundamental legal principles in arriving at its decision."[169] The crux of the arguments raised by Bayview and its co-claimants in support of this assertion was that the tribunal had erred in addressing the question of whether the alleged water rights belonging to Bayview and its co-claimants constituted an investment at the jurisdictional stage of the proceedings.[170] In the claimants' view, this error meant that they had not had the opportunity to present their case – an assertion which if true meant that the tribunal's decision violated public policy in contravention of Articles 34(2)(a)(ii) and 34(2)(b)(ii) of the Model Law.[171] In rejecting these assertions, the Court confirmed a principle that is found in all of decisions addressing applications to set aside the decisions of NAFTA Chapter eleven tribunals. Specifically the Court acknowledged that "[w]hile decisions of international arbitral tribunals are not immune from challenge, any challenge advanced is confronted with the "powerful presumption" that the tribunal acted within its authority."[172] As a result, the Court confirmed that the grounds for review delineated in the Model Law should be narrowly construed, resulting in applicants needing to overcome a high threshold in order to set aside arbitral awards.[173] Just as the Federal Court found in *S.D. Myers*, the Ontario Superior Court confirmed that an arbitral decision will not be set aside because of errors of law or fact.[174] Finding that Bayview and its co-claimants received a full and fair opportunity to know the case they had to meet and present their case during the arbitral proceedings, the Court refused to set aside the NAFTA tribunal's decision on jurisdiction.[175]

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[168] *Ibid* at paras 109-124.

[169] *Bayview*, *supra* note 17 at para 41.

[170] See *ibid* at paras 42-51 (articulating arguments that the tribunal's determination of the existence of an "investment" was based on disputed facts and an incomplete evidentiary record, resulting in breaches of the principles of fundamental justice and public policy).

[171] *Ibid*.

[172] *Ibid* at para 63. See also para 60 where the Court indicated that the standard of review in this case was narrower in scope than the standard of review to be applied when reviewing the decisions of domestic administrative tribunals.

[173] *Ibid*.

[174] *Ibid*.

[175] *Ibid* at paras 64-78.

(E) United Mexican States v Cargill, Inc.

Most recently, the Ontario Courts were asked to review the decision of a NAFTA Chapter eleven Tribunal in relation to a dispute between Mexico and Cargill, Inc. (Cargill), a producer and distributor of the sugar substitute high fructose corn syrup (HFCS).[176] In accordance with the ICSID Additional Facility Rules, Cargill filed its claims against Mexico in 2005.[177] Cargill's claim centered on a 20% tax Mexico imposed on any drink that used HFCS as a sweetener. As the HFCS tax was not imposed on beverages that used sweeteners made from sugar cane, Cargill argued that the imposition of the tax, whether considered in isolation or viewed as a series of discriminatory acts, eliminated the most significant market for HFCS produced by Cargill and distributed by its Mexican subsidiary. In addition, Cargill asserted that the HFCS tax substantially destroyed the value of its investments in the HFCS production and distribution built to serve the Mexican market.[178] On 18 September 2009 the Tribunal sided with Cargill, awarding it US$77.3 million in damages plus interest and costs.[179] The damages awarded included both "downstream" losses (i.e. lost sales suffered by Cargill's Mexican subsidiary) and "upstream" losses (i.e. lost sales suffered by Cargill in the US as a result of the cost of lost sales to its Mexican subsidiary).[180]

Mexico subsequently challenged the tribunal's award of upstream damages.[181] Challenging the jurisdiction of the tribunal to award such damages, Mexico applied to set aside the award pursuant to Article 34(2)(a)(ii) of the Model Law. That provision permits the Court to set aside an award on the ground that it "…deals with a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration...".[182] The Ontario Superior Court of Justice found that Mexico's objection did not go to the jurisdiction of the Tribunal. Instead the Court found that Mexico's objection went to the merits of the decision, which was beyond the Court's scope of review under the Model Law.[183] As a result, the Court refused to set aside the tribunal's damage award.[184] In so finding, the Court opined on the

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[176] See *Cargill*, *supra* note 17.

[177] *Cargill Incorporated v United Mexican States* (NAFTA Chapter 11), Notice of Arbitration (29 December 2004), available online: naftaclaims <http://www.naftaclaims.com/disputes_mexico_cargill.htm>.

[178] *Ibid* at paras 62-74.

[179] *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB/(AF)/05/2, Award (18 September 2009), online: Investment Treaty Arbitration <http://italaw.com>.

[180] *Ibid* at paras 538-540.

[181] See judgment of the ONSC in *Cargill*, *supra* note 17 at paras 44-45.

[182] *Ibid* at paras 4-5.

[183] *Ibid* at paras 65-68.

[184] *Ibid* at para 80.

standard of review that should be applied by courts when reviewing decisions of international arbitral tribunals such as those constituted under NAFTA Chapter eleven. Referencing numerous Canadian precedents which state that international arbitral tribunals are to be afforded a high degree of deference and that courts should interfere only sparingly or in exceptional cases, the Court determined that the standard of review when considering whether an arbitral tribunal has exceeded its jurisdiction is reasonableness.[185]

Mexico subsequently appealed to the Ontario Court of Appeal.[186] Although Mexico lost in its bid to have the NAFTA tribunal's decision set aside, the Ontario Court of Appeal disagreed with the Superior Court on the proper standard of review to apply when considering the decision an arbitral tribunal reaches regarding its own jurisdiction. After examining the language of the Model Law itself, several Canadian decisions and the decision of the UK Supreme Court in *Dallah v Ministry of Religious Affairs of the Government of Pakistan*,[187] the Ontario Court of Appeal ruled that the proper standard of review on an application to set aside under Article 34(2)(a)(iii) of the Model Law is correctness.[188] In so finding, the Court was careful to recognize that the primary challenge for a reviewing court is navigating the tension between discouraging court intervention in the arbitral process, on the one hand, and the court's mandate to review awards for jurisdictional excess, on the other.[189] While rejecting previous jurisprudence that took a perceptively more deferential stance in articulating the standard of review applicable to arbitral tribunals constituted under NAFTA Chapter eleven, in result the Court of Appeal's decision maintains a deferential posture toward the decisions made by these tribunals. In fact, in this case the Court of Appeal dismissed Mexico's appeal.

In contrast to the cases already discussed which focus their attention on articulating an applicable standard of review that would limit a court's reviewing power, the Court of Appeal prefers to narrowly characterize the facts and legal issues in the dispute, including what does or does not go to scope an arbitral tribunal's jurisdiction.[190] For the Court of Appeal, true jurisdictional questions are narrowly construed and "…arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."[191] Thus, while the Court of Appeal in *Cargill* articulates the standard of review in less

[185] *Ibid* at paras 49-55.

[186] See judgment of the ONCA in *Cargill*, *supra* note 17.

[187] [2011] 1 AC 763.

[188] See judgment of the ONCA in *Cargill*, *supra* note 17 at paras 31-42.

[189] *Ibid* at paras 44-45.

[190] *Ibid* at paras 46-47.

[191] See *ibid* at para 40 citing *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 59.

deferential terms than previously seen in the jurisprudence, it also narrowly construes the questions that a reviewing court can address.[192] In this way deference is still provided to international arbitral tribunals like those constituted under NAFTA Chapter eleven.

V. How Canadian Courts have been a Legitimizing and De-legitimizing Force in the Context of NAFTA Chapter eleven Decisions

At first glance, the NAFTA Chapter eleven cases appear to legitimize the decisions of the arbitral tribunals convened under either the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. As discussed above, federal, provincial and territorial legislation universally provide Canadian courts with the jurisdiction to review NAFTA Chapter eleven arbitral awards. In each instance, with the exception of Quebec, those same statues have adopted the Model Law without amendment.[193] Article 34 of the Model Law provides textual determinacy by clearly articulating the grounds upon which an arbitral award may be set aside.[194] Moreover, in the NAFTA Chapter eleven cases Canadian courts have consistently and explicitly acknowledged that an arbitral award obtained under NAFTA's investment chapter may only be set aside on those grounds,[195] a fact which supports the legitimacy of NAFTA Chapter eleven arbitral awards through coherence.

Beginning with *Metalclad* and up to *Cargill* thus far, Canadian courts have also in one way or another recognized that significant deference is owed to arbitral tribunals convened under NAFTA's investment chapter. They have tended to conceptualize their supervisory role as a limited one and have very rarely interfered with the arbitral tribunal's interpretation or application of standards of protection offered to investors under NAFTA Chapter eleven. Consistent recognition of deference again enhances the legitimacy of such tribunals through both interpretive determinacy and coherence – interpretative determinacy through interpretation and application of Article 34 of the Model Law, and coherence through the consistency of the courts' findings.

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[192] For comments on this case see Marc Gold, (2013) "Judicial Review of International Arbitrations in Canada: Notes on Mexico v Cargill" 90 Can Bar Rev 719.

[193] *Supra* notes 42 and 43.

[194] *Supra* note 45.

[195] The Ontario Superior Court of Justice in *Bayview*, *supra* note 17 at paras 6, 63, 66 & 67 also refers to Article 18 of the Model Law as an additional ground cited by the Applicants for setting aside a NAFTA Chapter eleven tribunal decision. Article 18 provides that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

Lastly and perhaps most obvious, Canadian courts have been a legitimizing force in the context of NAFTA Chapter eleven panels through consistency of results. Aside from *Metalclad*, the first case in which a Canadian court was asked to review a NAFTA Chapter eleven arbitral award, all of the subsequent cases discussed above follow the general trend to find that there is no basis of review under any of the grounds articulated in the Model Law. The exercise of such restraint by Canadian courts is arguably an endorsement of the decisions made by NAFTA Chapter eleven arbitral tribunals. Canadian courts have explicitly recognized the authority such tribunals have to provide clarification on the meaning and application of the protections offered investors under NAFTA's investment chapter and it appears that arbitral awards rendered outside of the ICSID Convention effectively remain final and binding on the parties in any such dispute. In so doing and in that context, Canadian courts have contributed to both the creation of interpretive determinacy and coherence in NAFTA's investment chapter and have therefore been a legitimizing influence.

When one looks closer, however, there are a number of aspects arising out of the NAFTA Chapter eleven cases, which also detract from the legitimacy of NAFTA Chapter eleven arbitral tribunals. Perhaps most significantly there is considerable inconsistency in the analytical frameworks articulated and applied by the courts. Some scholars have correctly criticized Canadian courts for applying inconsistent domestic standards of review to the decisions of NAFTA Chapter eleven arbitral tribunals.[196] The author would extend that criticism to inconsistent findings on the standard of review generally. For example, beginning in 2001 the British Columbia Supreme Court in *Metalclad* stated that it would be an error to import into the BC ICAA Canadian domestic law principles since the standard of review is set out in sections 5 and 34 of that Act.[197] As note above, those sections mirror sections 5 and 34 of the Model Law, which set out the grounds for review but not the standard for review. Subsequently, the Ontario Court of Appeal in *Karpa* applied the *Pushpanathan* list of factors to determine that the standard of review in that case was a high degree of deference.[198] In *Bayview* the Ontario Superior Court of Justice held that its role was not to conduct a trial *de novo* of the merits and that the standard of review is narrower than in the domestic context.[199] That court then curiously noted that the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[200] recently clarified that there are only two standards of review – correctness and reasonableness simpliciter – but the court did not go on to state which one applied in the case at hand. Lastly, in 2011 the Ontario Court of Appeal in *Cargill* held that the standard of

[196] See H Alvarez, "Judicial Review of NAFTA Chapter 11 Arbitral Awards", *supra* note 91 at 132.

[197] See *supra* note 86.

[198] See *supra* note 135.

[199] See *supra* note 172.

[200] [2008] SCJ No 9, 2008 SCC 9 at para 34l.

review on a question of jurisdiction was correctness.[201] Thus over the span of 10 years there have been a disparity of findings as to the applicable standard of review. Further, some courts hold that it is not appropriate to apply Canadian administrative law when reviewing NAFTA Chapter eleven decisions (*Metalclad* and *Cargill*), yet other cases do exactly that (*Karpa* and *Bayview*). Certainly this incoherence detracts from the legitimacy of NAFTA Chapter eleven tribunal decisions being reviewed by Canadian courts.

Another aspect detracting from the legitimacy of NAFTA Chapter eleven arbitral tribunal decisions is inherent in the federal structure of the Canadian court system. Separate federal, provincial and territorial courts inevitably lead to the potential for inconsistent jurisprudence. While reconciliation of divergent lines of authority may ultimately be resolved by the Supreme Court of Canada, in order to be granted leave to appeal to that court, a prospective appellant must meet the "public importance" test.[202] That test has been described as "…the degree to which the case conveys a pressing legal issue that touches on the lives of all Canadians and will have some palpable effect on the way the law evolves in a particular area."[203] The difficulty in meeting the test, however, is illustrated by the Court's own statistic that typically only 60 out of the 800 leave applications filed each year are granted.[204] Further, it may well be especially difficult to be granted leave to appeal if none of the parties to the dispute are Canadian notwithstanding the seat of the arbitration is in Canada, as was indeed the case in *Metalclad*, *Karpa*, *Bayview* and *Cargill*. Thus it would seem quite unlikely that the Supreme Court of Canada will ever opine on the divergent lines of authority in cases reviewing a NAFTA Chapter eleven tribunal decisions, which is exactly what happened when Mexico was denied leave to appeal to the Supreme Court of Canada in *Cargill*.[205]

VI. Conclusion

Perhaps in partial response to the forgoing concerns about Canadian courts reviewing NAFTA Chapter eleven tribunal decisions, Canada's ratification of the ICSID

[201] *Supra* notes 190-192.

[202] *Supreme Court Act*, RSC 1985, c. S-26, s 40(1).

[203] ES Knutsen, "Seeking Leave to Appeal to the Supreme Court of Canada for Personal Injury Cases", *The Litigator: Journal of the Ontario Trial Lawyers Association* 9 (July 2009), available online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448830>; see also SI Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance" (1982) 3 Sup Ct L Rev 479.

[204] Basic information about the Supreme Court of Canada, including statistics about leave applications, is available online: Supreme Court of Canada <http://www.scc-csc.gc.ca/res/unrep-nonrep/app-dem/important-eng.aspx#q4>.

[205] See dismissal of application to appeal to the Supreme Court of Canada in *Cargill*, *supra* note 17.

Convention may be seen as a clarifying and legitimizing force for international investment law dispute resolution in Canada.[206] The ICSID Convention offers a third alternative forum for the settlement of international investment law disputes and, unlike both the ICSID Additional Facility Rules and UNCITRAL Rules, shields the resulting award from any judicial supervision by a domestic court.[207] Rather, the ICSID Convention incorporates a so-called "annulment procedure", which on its face allows for annulment only on very exceptional grounds.[208] That annulment procedure, however, is also not without its critics. Indeed, some have cautioned that the ICSID annulment procedure may actually threaten the finality of arbitral awards.[209] As a result, interesting questions arise about the relative legitimacy of different investor-state dispute settlement processes, including those provided for in the ICSID Convention.

To that end, this paper has taken a first step toward exploring the legitimacy of dispute settlement under NAFTA Chapter eleven. Specifically, it considers whether Canadian courts have been a legitimizing or de-legitimizing force for NAFTA Chapter eleven arbitration in circumstances where the parties to an investment dispute have designated a Canadian locale as the seat for the arbitration. To do this, the NAFTA Chapter eleven cases are examined with reference to Professor Franck's indicia for legitimacy, namely determinacy and coherence. Here, it is important to note that these concepts are conceptualized in relative terms. Consequently, aspects of the jurisprudence considered above are described as either enhancing or detracting from the legitimacy of dispute settlement under NAFTA Chapter eleven.

Conceptualized in this way, Canadian courts have been both a legitimizing and de-legitimizing force when exercising their supervisory function in NAFTA Chapter eleven disputes. As a legitimizing force, Canadian courts have contributed to both the creation of interpretive determinacy and coherence in NAFTA's investment

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[206] See *supra* note 14.

[207] ICSID Convention, *supra* note 12, article 53(1).

[208] See *ibid* at article 52, which provides that:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

[209] See *supra* note 15. See also Carolyn B Lamm, "Trends in International Investment Treaty Law" (2011) 105 Proc of Annual Mtg (Amer Soc Int Law) 335.

chapter. They have consistently acknowledged that an arbitral award obtained under NAFTA's investment chapter may be set aside on the grounds enumerated in Article 34 of the Model Law and recognized that significant deference is owed to arbitral tribunals convened under NAFTA's investment chapter. Additionally, they have tended to find that there is no basis for review under any of the grounds articulated in the Model Law. At the same time, the federal structure of Canada's court system along with other aspects of the NAFTA Chapter eleven cases militate against legitimation of NAFTA Chapter eleven dispute settlement. Particularly problematic in the NAFTA Chapter eleven cases is the incoherent reasoning with respect to defining and applying the appropriate standard of review.

At first such mixed results may seem troubling. They do not provide answers about whether Canadian courts have legitimized or de-legitimized dispute settlement under NAFTA Chapter eleven in absolute terms. Nonetheless, understanding the ways in which Canadian courts have or have not enhanced the legitimacy of NAFTA Chapter eleven tribunals is a useful first step in examining broader questions about which dispute settlement process will have a greater legitimizing effect on NAFTA Chapter eleven decisions. Despite Canada's ratification of the ICSID Convention, NAFTA article 1120 still provides an investor with the option to commence arbitral proceedings under the ICSID Additional Facility or UNCITRAL Rules with the inevitable result that domestic courts in the United States, Mexico or Canada may be asked to review awards rendered under either process. The potential likelihood of such a review is a certainty for the time being in cases where Mexico is a party to a NAFTA Chapter eleven dispute because it has not yet ratified the ICSID Convention, thereby precluding the possibility of utilizing the annulment procedure.

Therefore, questions about whether a review under the ICSID Convention annulment procedure has a greater or lesser legitimizing effect on NAFTA Chapter eleven arbitral awards than a review by Canadian courts applying the Model Law under the ICSID Additional Facility Rules or UNCITRAL Rules remain relevant to NAFTA's investment chapter. Moreover, such questions may be particularly meaningful to Mexico, as well as Canadian and American investors in Mexico, should it consider ratifying the ICSID Convention. In order to answer those questions, a number of inquiries beyond that addressed in this paper need to take place. Recognizing that Canada is not the only jurisdiction in which courts may exercise a supervisory role over decisions of NAFTA Chapter eleven tribunals, the legitimizing effect of US and Mexican courts on NAFTA Chapter eleven awards must be examined having regard to Professor Franck's criteria of determinacy and coherence. Similarly, the ICSID Convention annulment procedure will need to be assessed, having regard to Franck's criteria, and then compared against the foregoing analysis of the NAFTA Chapter eleven cases, as well as those analyses yet to be conducted regarding the legitimizing effect of US and Mexican courts on NAFTA Chapter eleven dispute settlement.