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# ***MITSUBISHI*, INVESTOR-STATE ARBITRATION, AND THE LAW OF STATE IMMUNITY**

CHARLES H. BROWER II<sup>\*</sup>

I will not be the first to say that “[i]t is easy to love a beautiful child.”<sup>1</sup> It is much harder to endure the painful recitation of her shortcomings and missteps,<sup>2</sup> and all the more so when pronounced by luminaries whose opinions demand consideration and respect. One, therefore, recoils at the words of United States Supreme Court Justice John Paul Stevens, writing for the dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, that “international arbitration will only succeed if . . . limited to tasks it is capable of performing well—the . . . resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, . . . international arbitration is incapable of achieving satisfactory results.”<sup>3</sup>

One likewise shrinks before the notorious submission of Canada’s Attorney General in the *Metalclad* judicial review that “the awards of

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1. See Jan Paulsson, *Accepting International Arbitration in Fact—And Not Only in Words*, in *ARBITRATION IN AFRICA* 31, 31 (Eugene Cotran & Austin Amissah eds., 1996).

2. See *id.* (comparing the ease of taking pride in the achievements of one’s children with the difficulties of accepting their failures and mistakes).

3. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 665 (1985) (Stevens, J., dissenting).

Chapter 11 tribunals about public measures are not supposed to be *worthy* of judicial deference and not supposed to be protected by a high standard of review.”<sup>4</sup> Momentarily refreshed by the false hope that we have already seen the worst, one opens the New York Times on September 27, 2004, only to find the indictment that “the arbitration process . . . is often one-sided, favoring well-heeled corporations over poor countries, and must be made fairer than it is today. Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt . . . . There is no appeal.”<sup>5</sup>

Some two decades after *Mitsubishi*, a crisis still looms. From the apex of the legal profession, from the highest strata of government, from those who shape public opinion, we continue to hear that the reach of arbitration exceeds its grasp: the traits that won popularity for arbitration in its youth do not qualify it for the mature task of responsible governance.

One must, of course, keep things in perspective. Justice Stevens wrote for the dissent in *Mitsubishi*. Furthermore, at least in theory, the arguments of Canada’s Attorney General failed in at least three cases to provoke open resistance to the authority of Chapter 11 tribunals.<sup>6</sup> So, even in the face of doubt, one may have faith in the

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4. United Mexican States v. Metalclad Corp., Outline of Argument of Intervenor Attorney General of Canada, para. 25 (B.C. Sup. Ct. 2001) (emphasis added), available at [http://www.economia-snci.gob.mx/sphp\\_pages/importa/sol\\_contro/consultoria/Casos\\_Mexico/Metalclad/BC-SCJ/escrito\\_canada.pdf](http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Metalclad/BC-SCJ/escrito_canada.pdf) (last visited Mar. 14, 2005).

5. *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A30.

6. See Canada v. S.D. Myers, Inc., 2004 F.C. 38, 2004 CarswellNat 94, paras. 35, 38, 41, 43 (Can. Fed. Ct. 2004) (repeatedly mentioning the court’s “limited jurisdiction” to review arbitral awards); United Mexican States v. Karpas, 2003 CarswellOnt 4929, paras. 57, 81 (Ont. Super. Ct. J. 2003) (according a “high level of deference” to the tribunal’s decision and reiterating the “very limited opportunity for the courts to provide any recourse against an award”), available at 2003 WL 22846522, *aff’d*, 2005 CarswellOnt 32, paras. 34, 41-43 (Ont. Ct. App. 2005) (emphasizing the need for a “high degree” of judicial deference towards, and sparing recourse to judicial interference with, awards issued by tribunals under NAFTA’s investment chapter), available at 2005 WL 95624; United Mexican States v. Metalclad Corp., 2001 B.C.S.C. 664, 2001 CarswellBC 995, para. 50 (B.C. Sup. Ct. 2001) (referring to the “limited” extent of judicial review contemplated by the British Columbia statute governing international arbitral awards). Notwithstanding its deferential rhetoric, the *Metalclad* court

capacity of arbitration to respond to its critics. But let us consider the particular steps that arbitration must take to meet the charges against it.

To defeat the residual hostility towards arbitration of routine commercial disputes in the last century, the arbitration bar called on judges to undertake a so-called “test of love”: to overcome their “immediate dislike” and to embrace a “higher principle,” namely, the promotion of international commerce.<sup>7</sup> Thus, with an air of superiority, the arbitration bar greeted that early reputational crisis by calling on outsiders to abandon their primitive impulses in favor of enlightened views. Although that campaign succeeded, reliance on past victories often breeds future defeats.<sup>8</sup> Classic battle strategies devised in the nineteenth century proved ineffective in World War I.<sup>9</sup> Tactics honed in World War II, and even thereafter, will likely prove useless in Iraq and in the so-called “Global War on Terror.”<sup>10</sup> One

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surreptitiously applied a heightened standard of review to the tribunal’s interpretation of “fair and equitable treatment,” as well as its application of precedent regarding de facto expropriation of property. *Metalclad*, supra, paras. 64-76, 80; see also José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 415 n.49 (2003); Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT’L L. 465, 476-79 (2002) [hereinafter Brower, *Beware the Jabberwock*]; Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT’L L. 43, 66-68 (2001) [hereinafter Brower, *The Empire Strikes Back*]; Charles H. Brower, II, *Structure, Legitimacy, and NAFTA’s Investment Chapter*, 36 VAND. J. TRANSNAT’L L. 37, 47 (2003) [hereinafter Brower, *Legitimacy*]; Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT’L 415, 430-32 (2003) [hereinafter Brower et al., *The Coming Crisis*]; Charles N. Brower, *NAFTA’s Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOC’Y INT’L L. PROC. 251, 255 (2003) [hereinafter Brower, *Dynamic Laboratory*].

7. Paulsson, supra note 1, at 31-33.

8. See Dan Baum, *Battle Lessons*, NEW YORKER, Jan. 17, 2005, at 42-43 (observing that “[e]very war is different from the last, with its own special learning curve”).

9. See *id.* (“In the First World War, the French, British, and German troops persisted in attempting to storm trenches before recognizing the defensive supremacy of the machine gun.”).

10. See *id.* (explaining that, in Iraq, “the army’s marquee high-tech weapons are often sidelined while the enemy kills and maims Americans with bombs wired to garage-door openers or doorbells”); Greg Jaffe, *Trial by Fire: On Ground in Iraq*, *Capt. Ayers Writes His Own Playbook*, WALL STREET J., Sept. 22, 2004, at

must therefore consider whether the old arguments for arbitration adequately respond to modern concerns about its use for the settlement of regulatory disputes.

With the inquiry properly framed, let us return to *Mitsubishi*, in which the Supreme Court first recognized the arbitrability of antitrust claims for international transactions and, furthermore, instructed national courts to “shake off the old hostility to arbitration.”<sup>11</sup> Taking the Court’s rhetoric at face value, people commonly regard the decision as a triumph for the principle that national institutions must cast aside suspicion, adjust to the needs of arbitration, and accept its natural beauty as a means for resolving disputes, whether grounded in private or public law.<sup>12</sup> Not so!

Recall that the outcome in *Mitsubishi* depended on the tribunal’s consent to apply U.S. mandatory law, as would a U.S. court, instead of applying the Swiss law chosen by the parties.<sup>13</sup> In other words, the Supreme Court required tribunals and courts to make complimentary adjustments. Arbitrators first had to agree to conduct themselves

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A1 (indicating that, in Vietnam, “the Army fought essentially as it had in World War II, with large formations commanded by senior officers and lots of firepower,” but suggesting that “the Army’s success in Iraq will depend largely on the ability of officers on the ground to come up with new solutions”).

11. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

12. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 156-58, 160 (1996) (describing *Mitsubishi* as a “pivotal case” in which the Supreme Court first recognized the “elite image” of international commercial arbitration, “set out to accommodate international commercial arbitration,” and redefined “the willingness of U.S. courts to make space” for arbitration by providing it with “greater independence from the courts”). Compare *Mitsubishi*, 473 U.S. at 629, 638 (emphasizing “concerns [for] international comity, respect for the capacities of . . . transnational tribunals, . . . sensitivity to the need[s] of the international commercial system,” and the potential of arbitration “to take a central place in the international legal order”), with *id.* at 641, 665 (Stevens, J., dissenting) (criticizing the Court’s tendency to rely on “vague notions of international comity” and to depict international commercial arbitration as an “institution designed to implement a formula for world peace”).

13. *Mitsubishi*, 473 U.S. at 636-37 n.19; see also Matthias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT’L L. 753, 771 (2004) (emphasizing the Supreme Court’s expectation in *Mitsubishi* that “arbitrators apply mandatory rules even if in doing so they contravene the parties’ explicit choice of law”).

more like judges charged with responsibility for the public interest. Only then did the Supreme Court require its brethren to cast aside their traditional resistance toward the arbitration of regulatory disputes. The message should be clear: arbitration can handle an increasing share of the public's business without provoking a crisis, but only at a price; tribunals must commit themselves to act more like their judicial counterparts.<sup>14</sup>

Applying the lessons of *Mitsubishi* to investor-state arbitration, one might counsel its proponents to reconstitute the system more in the image of a judicial process.<sup>15</sup> The value of that advice, however, depends on the availability of a suitable template to guide the transformation. Although the relationship between investor-state arbitration and the law of state immunity may not be obvious, and one must not push the analogy too far, the two traditions share common foundations. Both respond to the growing frequency of encounters between private businesses and foreign states.<sup>16</sup> Both seek

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14. See Brower et al., *The Coming Crisis*, *supra* note 6, at 417-18 (indicating that, as arbitral tribunals have increasingly substituted for national courts, their proceedings have inevitably taken on more of the characteristics of judicial proceedings); *cf. Mitsubishi*, 473 U.S. at 656-57, 666 (Stevens, J., dissenting) (criticizing the "rudimentary procedures" used in arbitration, concluding that they lack "even the most elementary guarantees of fair process," and touting the virtues of a judicial system based on "[c]onsideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review").

15. *Cf. Brower, Legitimacy*, *supra* note 6, at 91-92 (proposing the introduction of an Appellate Body with a "judicial" character that would enhance the level of predictability, coherence, and transparency of arbitration under NAFTA's investment chapter).

16. See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 11-12 (1995) (explaining that as "[p]rivate foreign investment has . . . increasingly come to play an integral role" in the economic advancement of developing states, "BITs have served to establish the rules according to which such investments could be safeguarded"); KENNETH J. VANDEVELDE, *UNITED STATES INVESTMENT TREATIES* 20-21 (1992) (identifying the growing sums of capital placed by U.S. investors in developing states, and their increasing vulnerability to expropriation, as part of the impetus for the U.S. BIT program); Brower, *Legitimacy*, *supra* note 6, at 69-70 (indicating that, with the growth of cross-border investment, disputes under investment treaties will arise more often between foreign investors and their host states); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 195 (2001) (suggesting that high volumes of cross-border investment make recourse to investor-state arbitration inevitable); *see also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R.*

to ensure that businesses have access to normal procedures for legal redress in their dealings with foreign states.<sup>17</sup> Both aim to depoliticize the assertion of claims against foreign states.<sup>18</sup> In so

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*11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 24 (1976) (testimony of Monroe Leigh, Legal Advisor, Dept. of State) [hereinafter *Hearings*] (noting the increasing frequency with which "our citizens have legal rights that come into contact with foreign governments and their agencies"); *id.* at 80 (testimony of Cecil J. Olmstead, Chairman, Rule of Law Comm., and Vice President, Texaco Inc.) (mentioning "the increasing advent of foreign governments and their entities upon the commercial and business scene"); H.R. REP. NO. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (pointing out that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states"); S. REP. NO. 94-1310, at 8 (1976) ("In [today's] modern world . . . foreign state enterprises are every day participants in commercial activity.").

17. See North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1115, 32 I.L.M. 605, 642 [hereinafter NAFTA] (establishing a "mechanism for the settlement of investment disputes that assures . . . due process before an impartial tribunal"); Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 52 (2001) (asserting that "[a]ny system for resolving investor-state disputes . . . must provide investors with liberal access to a forum in which to present complaints" against host states); see also *Hearings*, *supra* note 16, at 24 (testimony of Monroe Leigh) (stating that "the general purpose" of the FSIA "is simple: [t]o assure that American citizens are not deprived of normal legal redress against foreign states"); H.R. REP. NO. 94-1487, at 6, *reprinted in* 1976 U.S.C.C.A.N. at 6605 (observing that the growing number of interactions between private businesses and foreign states "call[s] into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes").

18. See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 475-76 (4th ed. 2004); STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION* 223, 395 (1990); VANDELDELDE, *supra* note 16, at 25; Brower, *supra* note 17, at 47, 51; Brower, *Legitimacy*, *supra* note 6, at 65; Brower & Steven, *supra* note 16, at 195; Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 427 (2000) (all identifying depoliticization of disputes as a purpose animating the arbitration of disputes under investment treaties); see also *Hearings*, *supra* note 16, at 29 (testimony of Monroe Leigh), *id.* at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dept. of Justice); *id.* at 60 (testimony of Peter D. Trooboff, Attorney, Covington & Burling); *id.* at 71 (letter from Timothy W. Stanley, President, International Economic Policy Association, to Hon. Walter Flowers, Chairman, Subcomm. on Admin. Law and Governmental Relations, House Comm. on the Judiciary (June 24, 1976)); *id.* at 80 (testimony of Cecil J. Olmstead); Letter from Robert S. Ingersoll, Deputy Sec'y of State, and Harold R. Tyler, Jr., Deputy Att'y Gen., to Hon. Nelson D. Rockefeller, President of the Senate (Oct. 31, 1975), *reprinted in* 15 I.L.M. 88, 88 [hereinafter Letter from Ingersoll]; JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND*

doing, both must strike a balance between the interests of claimants in obtaining remedies and the interests of states in conducting public affairs without interference.<sup>19</sup> Both, thus, serve as key landmarks on the road from a power-based to a rules-based system of international relations.<sup>20</sup> Considering these many points of intersection, one may at

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THEIR CORPORATIONS 34 (2d ed. 2003); Charles H. Brower, II, *Removal from State Court Under the FSIA: Escape Hatch or Booby Trap?*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 1 (2001) [hereinafter Brower, *Removal from State Court Under the FSIA*] (all identifying depoliticization of disputes as a purpose animating the FSIA).

19. See Brower, *supra* note 17, at 52 ("Any system for resolving investor-state disputes must balance two objectives. First, it must provide investors with liberal access to a forum in which to present complaints. Second, the selected mechanism must not create ideal standards that conflict with the regular practices of most orderly states."); *id.* at 85 ("Chapter 11 tribunals show every sign of maintaining an appropriate balance between the rights of NAFTA investors to air their complaints and the obligations of NAFTA Parties to regulate in the public interest."); Brower, *Legitimacy*, *supra* note 6, at 64 ("Thus, . . . most Chapter 11 tribunals have developed clear rules that strike a healthy balance between the interests of foreign investors [and] the regulatory obligations of host states."); see also DELLAPENNA, *supra* note 18, at 35 ("The [FSIA's] structure is designed to balance the need for a remedy for injured parties and the need for protection for foreign states against undue intrusion into the conduct by the foreign state of its public affairs."); Brower, *Removal from State Court Under the FSIA*, *supra* note 18, at 4 ("In brief, the FSIA balances the rights of plaintiffs and defendants by promoting the initiation of legitimate claims against foreign states, but limiting the opportunities for harassment of foreign states.").

20. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 110 (2d ed. 1997) ("To a large degree, the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach."); see also DELLAPENNA, *supra* note 18, at xii ("In a very real sense, the enactment of the Foreign Sovereign Immunities Act and related doctrines were part of the ongoing process of legalizing international relations and world politics."); Brower & Steven, *supra* note 16, at 201-02 (describing NAFTA Chapter 11 as a "rule-based investment regime" that will help to promote the "rule of law" in international economic relations); Brower, *Dynamic Laboratory*, *supra* note 6, at 251 (opining that the "raison d'être" of NAFTA Chapter 11 is to "provide a rule-based investment regime"); Scott R. Jablonski, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Politics*, 32 DENV. J. INT'L L. & POL'Y 475, 534 (2004) (explaining that Chapter 11 establishes a "neutral, rule-based dispute resolution mechanism for investment disputes"); Justin Byrne, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L.J. 415, 422 (2000) (describing NAFTA Chapter 11 as a "good example of the implementation of and commitment to rule-based diplomacy").



least describe the law of state immunity as a potential template for the refinement of investor-state arbitration.

Without making any claims regarding its superiority within the genre of state immunity acts, one may further identify the Foreign Sovereign Immunities Act of 1976 ("FSIA")<sup>21</sup> as an appropriate template for the development of investor-state arbitration. Despite periodic complaints about inelegant draftsmanship,<sup>22</sup> the statute has supplied a generation of lawyers and judges with an effective framework for managing a rising tide of private claims against foreign states.<sup>23</sup> Its success depends, in no small part, on the skillful resolution of six issues critically important to all systems that handle large volumes of private claims against foreign states:

1. The suppression of vexatious litigation tactics;
2. The level of discretion granted to adjudicators;
3. The entitlement of states to claim the benefit of all doubt in close cases;
4. The adoption of mechanisms to promote uniformity of decision;
5. The rejection of post-judgment proceedings that consistently threaten to rob claimants of their victories; and

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21. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (2000).

22. See *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (declaring a provision of the FSIA to be "hopelessly ambiguous"); *Callejo v. Bancomer S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) (labeling the FSIA as a "tangled web of statutory ambiguities"); *Vencedora Oceanica Navigacion, S.A., v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (pronouncing the FSIA to be a "peculiarly twisted exercise in statutory draftsmanship"); Marianne D. Short & Charles H. Brower, II, *The Taming of the Shrew: May the Act of State Doctrine and Foreign Sovereign Immunity Eat and Drink as Friends?*, 20 HAMLINE L. REV. 723, 730 (1997) (observing that the FSIA's compression of distinct concepts has "provoked criticism by jurists"); Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 492-93 (2002) (asserting that the FSIA's structure and language have challenged courts, that some provisions seem awkwardly worded, and that other provisions lack any real definition).

23. See Working Group of the American Bar Association, *supra* note 22, at 493 ("As Congress hoped and expected, the courts have addressed and resolved many of the problems with the FSIA.").

6. The elimination of any role for political entities in the decision-making process.

Having identified the relevant concepts, one may now describe their application under the FSIA and reflect on the possible lessons for investor-state arbitration.

First, in order to handle large volumes of private claims against foreign states without provoking crisis, any system of adjudication must take the steps necessary to suppress vexatious tactics.<sup>24</sup> For example, to relieve a perennial sore point in foreign relations, the FSIA put an end to the common practice of seizing and attaching the property of foreign states for the purpose of obtaining jurisdiction.<sup>25</sup> Likewise, investment treaties recently concluded by the United States allow the respondents to demand the summary adjudication of cases that, while not completely frivolous, fail to state claims on which relief may be granted.<sup>26</sup> Those who wish to sustain the long-

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24. Cf. J.L. BRIERLY, *THE LAW OF NATIONS* 277 (6th ed. 1963) (advocating the establishment of a system that would allow individuals to bring claims against states before international tribunals, provided that "proper safeguards against merely frivolous or vexatious claims could be devised").

25. See *Hearings*, *supra* note 16, at 26, 28 (testimony of Monroe Leigh); H.R. REP. NO. 94-1487, at 8, 26-27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606, 6625-26; S. REP. NO. 94-1310, at 9, 25-26 (1976); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 460 cmt. a (1987); Letter from Ingersoll, *supra* note 18, at 112-13; DELLAPENNA, *supra* note 18, at 36, 208-09, 745.

26. See 2004 United States Model Bilateral Investment Treaty, art. 28(4)-(5) [hereinafter U.S. Model BIT], *available at* <http://www.state.gov/e/eb/rls/othr/38602.htm> (last visited July 11, 2005); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uru., art. 28(4)-(5) [hereinafter U.S.-Uru. BIT], *available at* [http://www.ustr.gov/assets/World\\_Regions/Americas/South\\_America/Uruguay\\_BIT/asset\\_upload\\_file583\\_6728.pdf](http://www.ustr.gov/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file583_6728.pdf) (last visited July 11, 2005); Free Trade Agreement, June 15, 2004, U.S.-Morocco, art. 10.19(4)-(5) [hereinafter U.S.-Morocco FTA], *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Morocco\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html) (last visited July 11, 2005); U.S.-Central American Free Trade Agreement, May 28, 2004, art. 10.20(4)-(5) [hereinafter CAFTA], *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html) (last visited July 11, 2005); Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 10.19(4)-(5) [hereinafter U.S.-Chile FTA], *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html) (last visited July 11, 2005); Free Trade Agreement, May 6, 2003, U.S.-Sing., art. 15.19(4)-(5) [hereinafter U.S.-Sing. FTA], *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html) (last visited July 11, 2005).

term commitment of states—be it remembered that they are the “perpetual respondents” in investor-state arbitration<sup>27</sup>—can only welcome the prompt elimination of vexatious claims as a source of friction.<sup>28</sup>

Second, the maintenance of a balance among various stakeholders often precludes the use of exhaustive definitions<sup>29</sup> and, correspondingly, increases the level of discretion granted to adjudicators.<sup>30</sup> Accepting this principle, the FSIA’s drafters deemed it impractical and, indeed, “unwise” to define a commercial activity,<sup>31</sup> the single most important concept in the entire statute.<sup>32</sup> In

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gov/Trade\_Agreements/Bilateral/Singapore\_FTA/Final\_Texts/Section\_Index.html (last visited July 11, 2005).

27. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1410 (2003).

28. See Andrea Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183, 191 (2001) (advising that “judicious construction of both the procedural and substantive requirements of [NAFTA] Chapter 11 will ensure that it survives to inform the next generation of dispute settlement agreements”); Daniel M. Price, *NAFTA Chapter 11—Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 114 (2001) (cautioning investors to exercise restraint in formulating claims and to avoid the articulation of norms in ways that might provoke an unfortunate over-reaction against a “fragile” institution).

29. See Brower, *Legitimacy*, *supra* note 6, at 87 (doubting the ability of treaty negotiators and other draftsmen to “capture a complex balance of stakeholder interests in simple rules as opposed to more open-textured standards”).

30. See *id.* at 53, 63-64, 66 (explaining that the adoption of indeterminate legal text often requires specification of concepts through judicial or other adjudicative processes; thus, by adopting an obligation of “fair and equitable treatment” towards foreign investors, the drafters of NAFTA Chapter 11 established “a somewhat creative, rather than a purely analytical, charge for ad hoc tribunals”); see also Brower, *The Empire Strikes Back*, *supra* note 6, at 56 (asserting that the “fair and equitable treatment” standard “represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in [the context of] particular disputes”).

31. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615; S. REP. NO. 94-1310, at 16 (1976); Letter from Ingersoll, *supra* note 18, at 105; Letter from William P. Rogers, Secretary of State, and Richard G. Kleindienst, Attorney General, to President of the Senate (Jan. 22, 1973), *reprinted in* 12 I.L.M. 118, 137 [hereinafter Letter from Rogers]; DELLAPENNA, *supra* note 18, at 369; see also HAZEL FOX, *THE LAW OF STATE IMMUNITY* 197 (2002)

so doing, they openly acknowledged the expression of faith<sup>33</sup> and the conferral of discretion<sup>34</sup> implicit in their decision. Likewise, until recently, the drafters of investment treaties left undefined such crucial phrases as “like circumstances,” “fair and equitable treatment,” and “expropriation.”<sup>35</sup> Although states may understandably recoil from the prospect of open-ended liability, one may—as I shall suggest—moderate their exposure to risk without resorting to exhaustive definition.<sup>36</sup> As a result, one may question whether the recent movement toward more detailed provisions<sup>37</sup> and

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(observing that the statute gives “no criterion . . . by which to determine whether an activity is commercial”); Charles H. Brower, II, *International Decision: Republic of Austria v. Altmann*, 99 AM. J. INT’L L. 236, 239 (2005) (mentioning that the FSIA never defines a commercial activity).

32. See DELLAPENNA, *supra* note 18, at 351 (explaining that the exception to immunity for commercial activities lies at the “heart” of the statute); *see also* Brower, *supra* note 31, at 239 (opining that a commercial activity represents the concept most vital to FSIA’s application).

33. See *Hearings*, *supra* note 16, at 53 (testimony of Monroe Leigh) (acknowledging that “we have decided to put our faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental” activities); *id.* (statement by Rep. Barbara Jordan) (expressing the hope that the drafters’ “trust would not be abused by the courts”).

34. See H.R. REP. NO. 94-1487, at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6615; S. REP. NO. 94-1310, at 16; Letter from Ingersoll, *supra* note 18, at 105 (all recognizing that the absence of a textual definition vests courts a “great deal of latitude in determining what is a ‘commercial activity’ for purposes of [the FSIA]”); *see also* DELLAPENNA, *supra* note 18, at 369 (referring to “the large measure of discretion courts have in determining whether to characterize the acts that form the basis of a claim under section 1605(a)(2) as commercial or non-commercial”).

35. See Brower, *Legitimacy*, *supra* note 6, at 60-61 (discussing the high level of indeterminacy associated with these concepts under the NAFTA’s investment chapter).

36. See *infra* notes 38-56 and accompanying text.

37. See U.S. Model BIT, *supra* note 26, arts. 5-6, Annexes A-B; U.S.-Uru. BIT, *supra* note 26, arts. 5-6, Annexes A-B; U.S.-Morocco FTA, *supra* note 26, arts. 10.5-10.6, Annexes 10-A, 10-B; CAFTA, *supra* note 26, arts. 10.5, 10.7, Annexes 10-B, 10-C; U.S.-Chile FTA, *supra* note 26, arts. 10.4, 10.9, Annexes 10-A, 10-D; U.S.-Sing. FTA, *supra* note 26, art. 15.6, Exchange of Letters on Customary International Law, Exchange of Letters on Expropriation (all specifying (1) the relationship among the minimum standard of treatment, treaty obligations, customary international law, and general principles of law; and (2) the degree or type of interference necessary to constitute an expropriation).

away from the exercise of discretion represents a necessary or even a desirable trend for investor-state arbitration.

Third, to compensate states for the uncertainty that accompanies the conferral of discretion on adjudicators, states should have the right to claim the benefit of all doubt in close cases. At first glance, this statement may seem incompatible with a fundamental tenet of procedural justice common to international law and international arbitration: equal treatment of the parties.<sup>38</sup> Nevertheless, one may justify the proposed allocation of deference to states on procedural, substantive, and practical grounds.

Procedurally, equal treatment of the parties does not—and cannot—apply to the burden of proof. By allocating the burden of

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38. See *Canfor Corp. v. United States*, Procedural Order No. 5, para. 22 (May 28, 2004) (emphasizing the tribunal's "duty to conduct the . . . proceeding consistent with the principles of fairness and equality among the disputing parties"), available at <http://www.state.gov/documents/organization/33109.pdf> (last visited Mar. 17, 2005); *Pope & Talbot, Inc. v. Canada*, Decision and Order by the Tribunal, para. 16 n.6 (Mar. 11, 2002) (recounting the tribunal's obligation to treat the disputing parties with equality), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/Decision-Order-11Mar02.PDF> (last visited Mar. 17, 2005); *Pope & Talbot, Inc. v. Canada*, Decision by the Tribunal, para. 1.5 (Sept. 6, 2000) (describing equality of treatment as an "overriding principle"), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc8.pdf> (last visited Mar. 17, 2005); U.N. INT'L L. COMM'N, COMMENTARY ON THE DRAFT CONVENTION ON ARBITRAL PROCEDURE at 55, U.N. Doc. A/CN.4/92, U.N. Sales No. E.55.V.1 (1955) (designating equality of treatment as a "fundamental norm of procedure"); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 290 (1987) (identifying the "juridical equality between the parties in their capacity as litigants" as a "cardinal characteristic[] of a judicial process"); Brower, *Beware the Jabberwock*, *supra* note 6, at 486 (describing equal treatment of the parties as a fundamental tenet of procedural justice and a rule of international law); Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 87 (2000) (identifying equal treatment of the parties as one of the few "commonly accepted requirements of procedural justice at the international level"); Brower, *Legitimacy*, *supra* note 6, at 76 (recognizing "equality of treatment of the parties" as "the most fundamental tenet of procedural justice common to international law, Chapter 11, and the pertinent rules of arbitration"); John P. Gaffney, *Due Process in the World Trade Organization*, 14 AM. U. INT'L L. REV. 1173, 1179, 1195 (1999) (declaring equal treatment of the parties to be an internationally accepted rule of procedural justice).

proof to claimants,<sup>39</sup> domestic and international tribunals create firm presumptions that respondent states act lawfully,<sup>40</sup> thus allowing them to claim the benefit of the doubt in close cases. Substantively, private investors and host states do not possess equivalent rights and obligations under international law.<sup>41</sup> As the principal actors in the international legal system and as the guardians of the public interest within their own borders, states legitimately may demand a significant measure of deference in any substantive evaluation of their public acts.<sup>42</sup> Far from being controversial, this principle routinely, if indirectly, finds voice in the demanding standards for establishing liability for an expropriation<sup>43</sup> or a violation of the

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39. See CHENG, *supra* note 38, at 327; J.L. SIMPSON & HAZEL FOX, *INTERNATIONAL ARBITRATION* 194 (1959).

40. See CHENG, *supra* note 38, at 305-06; JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* 80 (1929); SIMPSON & FOX, *supra* note 39, at 195, 197.

41. See TOOPE, *supra* note 18, at 262 (indicating that private foreign investors do not have the same legal status as their host states).

42. See *id.* at 390-91.

43. See, e.g., *Azinian v. Mexico*, Award, para. 87, ICSID Case No. ARB(AF)/97/2 (Nov. 1, 1999) (declining to construe the NAFTA's provision on expropriation in a manner that would elevate "a multitude of ordinary transactions with public authorities into potential international disputes"), available at [http://www.worldbank.org/icsid/cases/robert\\_award.pdf](http://www.worldbank.org/icsid/cases/robert_award.pdf) (last visited Mar. 17, 2005); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 cmt. b (1965) ("Conduct attributable to a state may deprive an alien's property of value without constituting a taking."); IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 509 (6th ed. 2003) (observing that "[s]tate measures . . . may affect foreign interests considerably without amounting to expropriation"); Brower, *supra* note 17, at 68 (mentioning the high level of tolerance for interference with property rights under international law, and suggesting that many of the expropriation claims brought under NAFTA's investment chapter "are doomed to failure"); G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 1962 BRIT. Y.B. INT'L L. 307, 318 (recognizing situations in which "interference, although very substantial, has been held not to constitute a 'taking'"); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 331 (1982 III) (stating that "interferences with property for economic and financial regulatory purposes are tolerated to a significant degree"); Philip C. Jessup, *Confiscation*, 21 AM. SOC'Y INT'L L. PROC. 38, 39 (1927) (warning against the "hasty" condemnation of governmental measures that injuriously affect property rights).

international minimum standard of treatment.<sup>44</sup> Practically, to the extent that their long-term survival depends on the consent of states, systems for the adjudication of private claims against foreign states must, within the limits of principled decision-making, find ways to accommodate the rights, duties, and long-term interests of those states.<sup>45</sup>

Consistent with the procedural, substantive, and practical justifications for incremental deference to foreign states, the FSIA's drafters intentionally adopted a presumption of immunity as a means of protecting foreign states from liability in doubtful cases.<sup>46</sup> Likewise, investor-state tribunals should take seriously Yves Fortier's recent articulation of a similar concept: "*caveat investor!*"<sup>47</sup>

Fourth, to further compensate states for the uncertainty that accompanies discretion and to protect states from the embarrassment of disparate treatment, systems for the adjudication of private claims against them should incorporate features that promote a uniformity

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44. See *Mondev Int'l Ltd. v. United States*, Award, para. 127, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002) (defining the international minimum standard by inquiring "whether, at an international level and having regard to generally acceptable standards of administrative justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable"), available at <http://www.state.gov/documents/organization/14442.pdf> (last visited July 17, 2005); *S.D. Myers, Inc. v. Canada*, Partial Award, paras. 261-64 (Nov. 13, 2000) (recognizing the "high measure of deference that international law generally extends to . . . domestic authorities to regulate matters within their . . . borders," and declining to use the minimum standard as a tool to "second-guess" the controversial policy choices of a host state), available at <http://www.appletonlaw.com/cases/Myers%20-%20Final%20Merits%20Award.pdf> (last visited July 17, 2005); Brower, *supra* note 17, at 84 (observing that when called to apply the minimum standard under NAFTA's investment chapter, tribunals "have uniformly shown deference to domestic institutions").

45. TOOPE, *supra* note 18, at 389.

46. See H.R. REP. NO. 94-1487, at 17 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6616; S. REP. NO. 94-1310, at 16-17 (1976); Letter from Ingersoll, *supra* note 18, at 106; Letter from Rogers, *supra* note 31, at 137; DELLAPENNA, *supra* note 18, at 35, 324, 643-44.

47. L. Yves Fortier, *Caveat Investor: The Meaning of "Expropriation" and the Protection Afforded Investors Under NAFTA*, NEWS FROM ICSID, Summer 2003, at 1, 13, available at [http://www.worldbank.org/icsid/news/news\\_20-1.pdf](http://www.worldbank.org/icsid/news/news_20-1.pdf) (last visited July 11, 2005).

of decision.<sup>48</sup> For example, to develop a more consistent and systematic body of law, the FSIA's drafters first channeled all claims against foreign states into federal courts<sup>49</sup> and, then, eliminated the possibility of jury trials.<sup>50</sup> With all due respect, one might draw a comparison of sorts between U.S. juries and ad hoc tribunals. Despite their sterling qualifications,<sup>51</sup> which remain above question, and their professional disposition of individual cases, ad hoc tribunals share the institutional tendency of juries to produce clusters of decisions with a deficit of consistency and a surplus of arbitrary distinctions.<sup>52</sup>

Thus, upon reading the *Metalclad* and the *Loewen* awards as bookends, one struggles to reconcile the conflicting images of NAFTA's investment chapter, on the one hand, as a ground-

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48. See Brower, *Legitimacy*, *supra* note 6, at 52 (discussing the role of "coherence" as a factor supporting the legitimacy of international legal regimes).

49. See *Hearings*, *supra* note 16, at 35, 36 (testimony of Monroe Leigh and Bruno A. Ristau); H.R. REP. NO. 94-1487, at 13, 32, *reprinted in* 1976 U.S.C.C.A.N. at 6611, 6631; S. REP. NO. 94-1310, at 11-12; Letter from Ingersoll, *supra* note 18, at 102, 117; Letter from Rogers, *supra* note 31, at 157; DELLAPENNA, *supra* note 18, at 34; ANDREW DICKINSON ET AL., STATE IMMUNITY 219, 224 (2004).

50. See H.R. REP. NO. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611-12; S. REP. NO. 94-1310, at 11-12; DELLAPENNA, *supra* note 18, at 661; DICKINSON ET AL., *supra* note 49, at 221.

51. See Brower & Steven, *supra* note 16, at 200 ("The arbitrators participating in these cases are highly competent members of academia and the international bar, with experience and expertise in the relevant areas of law exceeding that of the vast majority of the domestic judiciary in each of the three NAFTA countries."); see also *Canada v. S.D. Myers, Inc.*, 2004 F.C. 38, 2004 CarswellNat 94, para. 16 (Can. Fed. Ct.) (characterizing one tribunal's members as "knowledgeable, experienced and distinguished in international law, international trade law and international arbitration"); *United Mexican States v. Karpas*, 2003 CarswellOnt 4929, para. 90 (Ont. Super. Ct. J.) (noting that another tribunal "was made up of highly respected individuals with expertise in the field of international commercial arbitration"), available at 2003 WL 22846522; Brower, *The Empire Strikes Back*, *supra* note 6, at 78 (suggesting that the relevant experience of a third tribunal noticeably exceeded that of its counterparts on the North American bench).

52. See Brower, *Legitimacy*, *supra* note 6, at 66-69 (discussing the problem of inconsistent decisions rendered by tribunals under NAFTA's investment chapter and opining that "the uncoordinated commitment of creative lawmaking to a series of ad hoc tribunals creates a considerable likelihood of incoherent results"); see also Brower et al., *The Coming Crisis*, *supra* note 6, at 424 (heralding the "appearance of multiple and conflicting arbitral awards based on the same facts").



breaking, risk-shifting device swept clean of procedural obstacles and, on the other hand, as a peripheral, extraordinary remedy laden with traps for the unwary.<sup>53</sup> Then, after comparing the *Lauder/CME* awards,<sup>54</sup> the possibility dawns that selection of the tribunal—like

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53. *Compare* Metalclad Corp. v. Mexico, Award, paras. 74, 76, 97 n.4, ICSID Case No. ARB(AF)/97/1 (2000) (rejecting exhaustion of local remedies as a procedural requirement under NAFTA's investment chapter, defining "fair and equitable treatment" to include an element of transparency that requires states promptly to remove any room for doubt with respect to laws governing foreign investment and, thus, arguably shifting from the investor to the host state the entire risk of uncertainty with respect to the host state's legal system), *available at* <http://www.worldbank.org/icsid/cases/mm-award-e.pdf> (last visited June 2, 2005), *with* Loewen Group, Inc. v. United States, paras. 132, 137, 151-57, 165-71, 210-17, 220-39, ICSID Case No. ARB(AF)/98/3 (2003) (defining the international minimum standard only to prohibit "clearly improper and discreditable" actions by host states and determining that a Mississippi state court fell below that standard, but dismissing the claim because the investor neglected to petition the United States Supreme Court for discretionary review and because, during the arbitral proceedings, the Canadian investor emerged from bankruptcy as a U.S. company), *available at* <http://www.state.gov/documents/organization/22094.pdf> (last visited June 3, 2005).

54. Ronald Lauder, a U.S. national, controlled CME Czech Republic BV (CME), a Dutch corporation that made an investment in a Czech television company. Following allegations of unlawful state interference with the investment, Lauder commenced an arbitration against the Czech Republic under the U.S.-Czech BIT. Thereafter, CME commenced an arbitration against the Czech Republic before a different tribunal under the Dutch-Czech BIT. The first tribunal denied Lauder's claim on the grounds that he failed to establish a causal link between the Czech Republic's actions and Lauder's damages. On essentially the same facts, the second tribunal reached the opposite conclusion, imposed liability on the Czech Republic for de facto expropriation of CME's assets, and ultimately awarded \$269,814,000. *Compare* Lauder v. Czech Republic, Final Award, para. 313 (Sept. 3, 2001), *available at* <http://ita.law.uvic.ca/documents/LauderAward.pdf> (last visited Mar. 5, 2005), *with* CME Czech Republic BV v. Czech Republic, Partial Award, para. 575 (Sept. 13, 2001), *available at* <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf> (last visited Mar. 5, 2005), *and* CME Czech Republic BV v. Czech Republic, Final Award, paras. 446-47 (Mar. 14, 2003), *available at* [http://ita.law.uvic.ca/documents/CME-2003-Final\\_000.pdf](http://ita.law.uvic.ca/documents/CME-2003-Final_000.pdf) (last visited Mar. 5, 2005). For additional discussions of the *Lauder/CME* awards, see Brower et al., *The Coming Crisis*, *supra* note 6, at 424-28; Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 350-52 (2004); Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV.-FOREIGN INV. L.J. 1, 2-3 (2004); *see also* M. Rushton, *Clifford Chance Entangled in Bitter Lauder Arbitrations*, LEGAL BUS., Oct. 2001, at 108 (quoting Clifford Chance partner Jeremy Carver for the proposition that the conflicting

jury selection—plays a role more dispositive and less unifying than the text of the treaty obligations. When combined with the discretion granted to tribunals, the growing volume of disputes, and their importance to ever broader constituencies, the use of ad hoc tribunals without coordinating mechanisms seems likely to provoke crisis.<sup>55</sup> Therefore, without foreclosing the consideration of alternatives, one should praise the new wave of treaties that contemplate the establishment of appellate bodies for investor-state arbitration.<sup>56</sup>

Fifth, although the point should be obvious, no system for the adjudication of private claims against states can secure the confidence of potential users by adopting post-judgment proceedings that consistently threaten to rob them of the fruit of their victories. For example, before enactment of the FSIA, the United States applied the doctrine of restrictive immunity to *claims* against foreign states, but the doctrine of absolute immunity to the execution of resulting *judgments*,<sup>57</sup> thereby hurling even the most exquisite

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awards “bring[] the law into disrepute, [and] bring[] arbitration into disrepute—the whole thing is highly regrettable”).

55. See Brower, *Legitimacy*, *supra* note 6, at 66-67 (expressing concern about the “uncoordinated commitment of creative lawmaking to a series of ad hoc tribunals”); Sacerdoti, *supra* note 54, at 1-2 (warning that the “intricate, non-coordinated network of BITs” could generate conflicts that might trigger a “backlash to the legal security surrounding international investments”).

56. See U.S. Model BIT, *supra* note 26, art. 28(10), Annex D; U.S.-Uru. BIT, *supra* note 26, art. 28(10), Annex E; U.S.-Morocco FTA, *supra* note 26, art. 10.19(10), Annex 10-D; CAFTA, *supra* note 26, art. 10.20(1), Annex 10-F; U.S.-Chile FTA, *supra* note 26, art. 10.19(10), Annex 10-H; U.S.-Sing. FTA, *supra* note 26, art. 15.19(10), accompanying exchange of letters; see also Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT’L & COMP. L. REV. 303, 308 (2000); Brower, *Legitimacy*, *supra* note 6, at 91-93; William S. Dodge, *International Decision: Metalclad Corp. v. Mexico*, 95 AM. J. INT’L L. 910, 918 (2001) (all endorsing the establishment of a standing appellate body for disputes brought under NAFTA’s investment chapter). In recent months, two prominent international organizations have begun to discuss the possibility of establishing an appellate body for arbitration proceedings brought under investment treaties. See *Enforcement, Review and Appeal Mechanisms in Investor-State Dispute Settlement: Background Note by the OECD Secretariat* (2004) (on file with author); *Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper 14-16* (Oct. 22, 2004) (on file with author).

57. See H.R. REP. NO. 94-1487, at 8, 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606, 6626; S. REP. NO. 94-1310, at 27 (1976); Letter from Rogers, *supra* note 31, at 121; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS

victories back into the jaws of defeat.<sup>58</sup> To ensure a greater coincidence of moral and practical victories for the vast run of cases, the FSIA's drafters established a closer alignment between the rules on immunity from jurisdiction and the rules on immunity from execution of judgments.<sup>59</sup> Turning to investor-state arbitration, one must insist on a similar congruence between the awards of tribunals and their enforcement by municipal courts. Because they would prevent the establishment of that congruence, one must condemn the efforts of Canada and Mexico to establish a system for judicial review of the merits of awards issued by Chapter 11 tribunals.<sup>60</sup> Conversely, one should recognize Canada's Federal Court and Ontario's provincial courts for serving as dependable bulwarks against such trends.<sup>61</sup>

Sixth, and finally, all systems for the adjudication of private claims against foreign states must eliminate any role whatsoever for political entities in the process for resolving individual claims.<sup>62</sup> Before the FSIA's enactment, U.S. courts followed a practice of

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LAW OF THE UNITED STATES § 469, reporters' note 4 (1987); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 reporters' note 2 (1965); Brower, *supra* note 31, at 238 n.42.

58. See Letter from Rogers, *supra* note 31, at 121 (observing that the prevailing system could deny plaintiffs the fruit of their judgments against foreign states).

59. See H.R. REP. NO. 94-1487, at 8, 27, *reprinted in* 1976 U.S.C.C.A.N. at 6606, 6626; S. REP. NO. 94-1310, at 27; Letter from Rogers, *supra* note 31, at 121; DELLAPENNA, *supra* note 18, at 34, 744; FOX, *supra* note 31, at 186. Compare 28 U.S.C. § 1605 (2000) (exceptions to immunity from jurisdiction), with § 1610 (exceptions to immunity from execution). But see Working Group of the American Bar Association, *supra* note 22, at 586 (calling for steps to close the remaining gaps between rules on immunity from jurisdiction and rules on immunity from execution).

60. See Brower, *Beware the Jabberwock*, *supra* note 6, at 484-85; Brower, *The Empire Strikes Back*, *supra* note 6, at 61-88; Brower, *Legitimacy*, *supra* note 6, at 75-78.

61. See *Canada v. S.D. Myers, Inc.*, 2004 F.C. 38, 2004 CarswellNat 94, paras. 35-38 (Can. Fed. Ct. 2004); *United Mexican States v. Karpas*, 2003 CarswellOnt 4929 (Ont. Super. Ct. J.), available at 2003 WL 22846522, *aff'd*, 2005 CarswellOnt 32, available at 2005 WL 95624 (all rejecting Canada's and Mexico's efforts to secure annulment of awards rendered in favor of claimants under NAFTA's investment chapter).

62. See *supra* note 18 and accompanying text (identifying "depoliticization" as a key objective shared by investor-state arbitration and the FSIA).

deferring to the Executive Branch's "suggestions" of immunity, thus establishing a critical role for the State Department in the disposition of claims against foreign states.<sup>63</sup> Finding itself in the incongruous "position of a political institution trying to apply . . . legal standard[s] to litigation already before the courts,"<sup>64</sup> the Department periodically succumbed to the temptations of political expediency.<sup>65</sup> In hearings before Congress, the State Department's Legal Adviser candidly described "this consideration of political factors [as] the very antithesis of the rule of law which we would like to see established."<sup>66</sup> To redress this aberration, the FSIA's drafters transferred immunity determinations from the Executive Branch to the exclusive competence of the Judicial Branch.<sup>67</sup> In so doing, they expressed their desire to assure litigants that "crucial decisions are made on purely legal grounds and under procedures that [e]nsure due process."<sup>68</sup>

Returning for the last time to investor-state arbitration, the FSIA's aspirations reverberate in NAFTA's investment chapter, Article 1115 of which expressly refers to the establishment of "a mechanism for the settlement of investment disputes that assures . . . due process before an impartial tribunal."<sup>69</sup> Despite these inspiring words, the NAFTA Parties have used "Notes of Interpretation"<sup>70</sup> not only to

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63. See *Republic of Austria v. Altmann*, 541 U.S. 677, 689-91 (2004) (quoting and discussing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983)); Brower, *supra* note 31, at 237.

64. *Hearings*, *supra* note 16, at 26 (testimony of Monroe Leigh); H.R. REP. NO. 94-1487, at 8, *reprinted in* 1976 U.S.C.C.A.N. at 6607; *see also* FOX, *supra* note 31, at 186.

65. See DELLAPENNA, *supra* note 18, at 29-30; FOX, *supra* note 31, at 186; Brower, *supra* note 31, at 237; Short & Brower, *supra* note 22, at 729.

66. *Hearings*, *supra* note 16, at 35 (testimony of Monroe Leigh).

67. See *id.* at 26-27 (testimony of Monroe Leigh); H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6606; S. REP. NO. 94-1310, at 9; FOX, *supra* note 31, at 186; Brower, *supra* note 31, at 237.

68. H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6606.

69. NAFTA, *supra* note 17, art. 1115, 32 I.L.M. at 642.

70. Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions*, § B, July 31, 2001, *available at* <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp> (last visited June 22, 2005); *see also* NAFTA, *supra* note 17, art. 1131(2), 32 I.L.M. at 646 (requiring tribunals to apply interpretations

preempt the anticipated imposition of liability in pending claims,<sup>71</sup> but also to force the reconsideration of a partial award<sup>72</sup> that had become *res judicata* and that, truth be told, the tribunal had no power to reopen.<sup>73</sup> Responding to such crude assertions of unrefined power, one feels the temptation to invoke the Legal Adviser's previously stated views on "consideration of political factors" and the "antithesis of the rule of law."<sup>74</sup> One may, however, turn to the European Court of Human Rights for even more potent ammunition. For example, *Stran Greek Refineries* involved a case in which the Greek legislature promulgated an authoritative interpretation of a decree on the eve of a hearing in order to defeat litigation relating to an investment claim then pending against the Greek government in Greek courts.<sup>75</sup> The European Court of Human Rights wasted no time

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of the NAFTA adopted by the Free Trade Commission, which consists of the three NAFTA Parties acting in concert through cabinet-level representatives).

71. See Brower, *Beware the Jabberwock*, *supra* note 6, at 485; Brower, *Legitimacy*, *supra* note 6, at 81.

72. See *Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages, paras. 8-16, 48-69 (May 31, 2002) (revisiting a partial award's determination of liability in light of the NAFTA Parties' intervening adoption of the Notes of Interpretation), available at [http://www.dfait-maeci.gc.ca/tna-nac/documents/damage\\_award.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/damage_award.pdf) (last visited Mar. 5, 2005); see also Brower et al., *The Coming Crisis*, *supra* note 6, at 434 (describing how Canada used the Notes of Interpretation to force the *Pope & Talbot* tribunal to reopen the merits of its decision against Canada); Brower, *Dynamic Laboratory*, *supra* note 6, at 257 (recounting how Canada used the Notes of Interpretation to compel the tribunal to "reopen[] the merits of a decision against Canada").

73. See SIR MICHAEL J. MUSTILL & STEWART C. BOYD, *COMMERCIAL ARBITRATION* 405 (2d ed. 1989) (explaining the consequences of rendering an interim award, whereby the tribunal becomes "functus officio as regards matters dealt with in the award" and therefore "loses power to alter the award without the consent of the parties"); DAVID ST. JOHN SUTTON & JUDITH GILL, *RUSSELL ON ARBITRATION* 235 (22d ed. 2003) (opining that an award "dealing only with particular issues" is "final and binding" with respect to "the issues disposed of by it" and, therefore, the tribunal "does not have power either to reopen its award at some later stage" or to "make a subsequent determination of issues previously disposed of in an interim award"); see also JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 634 (2003) (recognizing that a partial award "terminates the proceedings in respect of the specific issues decided").

74. See *supra* note 66 and accompanying text.

75. See *Stran Greek Refineries v. Greece*, 19 Eur. Ct. H.R. 293, 301-04, 320-21 (1995).

in branding such political intervention as a denial of the right to a fair trial and an affront to the rule of law.<sup>76</sup>

Having witnessed the conduct of the NAFTA Parties, one might with great sadness declare Article 1115 to be a paper commitment to the rule of law. Yet, even that would understate the gravity of the problem for, without fanfare, the inspiring language of that provision has vanished from the U.S. Model BIT and every investment treaty recently concluded by the United States.<sup>77</sup> Apparently, the commitment to the rule of law no longer exists, even on paper. For those who desire to avoid crisis, this hardly portends a healthy turn of events.<sup>78</sup>

Nonetheless, I conclude on a note of optimism. Just as children can grow stronger and more beautiful in the face of adversity,<sup>79</sup> so may arbitration emerge from crisis renewed. To accomplish this feat, its supporters must do no more, but also no less, than to rediscover a handful of sensible principles that we once knew, but seem to have forgotten along the way.

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76. *See id.* at 322-23.

77. Compare NAFTA, *supra* note 17, art. 1115, 32 I.L.M. at 642, with U.S. Model BIT, *supra* note 26, and U.S.-Uru. BIT, *supra* note 26, and U.S.-Morocco FTA, *supra* note 26, and CAFTA, *supra* note 26, and U.S.-Chile FTA, *supra* note 26, and U.S.-Sing. FTA, *supra* note 26.

78. Cf. Brower, *supra* note 31, at 242; Charles H. Brower, II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353, 1356 (2004) (both discussing events that suggest a waning commitment to international law, and even to the rule of law, throughout the United States and its three branches of government).

79. *See* Paulsson, *supra* note 1, at 46 (observing that "a child is strengthened by overcoming difficulties").