

ARTICLES

BETWEEN DIALOGUE AND DECREE: INTERNATIONAL REVIEW OF NATIONAL COURTS

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Recent years have seen dramatic growth in the number of international tribunals at work across the globe, from the Appellate Body of the World Trade Organization and the International Tribunal for the Law of the Sea, to the Claims Resolution Tribunal for Dormant Claims in Switzerland and the International Criminal Court. With this development has come both increased opportunity for interaction between national and international courts and increased occasion for conflict. Such friction was evident in the recent decision in Loewen Group, Inc. v. United States, in which an arbitral panel constituted under the North American Free Trade Agreement found a Mississippi jury trial to have been "the antithesis of due process."

Much of the interaction of courts across national borders—including the citation of foreign legal authority, transnational coordination of complex litigation, and the enforcement of foreign judgments—has been analyzed through the metaphor of "dialogue." As suggested by the Loewen case, however, there is a growing pattern of interaction between international tribunals and national courts for which dialogue is an ill-suited analogy. Contrary to conventional expectations of incapacity and restraint in international adjudication, recent interactions between international tribunals and domestic courts incorporate a significant dimension of "review" in both a literal and a figurative sense. Although such review is not appellate in nature, it shares with appellate review some potential to effectuate its mandate without the consent of the court subject to review. This dimension of "power" further distinguishes emerging cases of international review from transnational dialogue. Standing between the hierarchy of appellate review and the comity of judicial dialogue, Loewen and similar occasions for international engagement with national courts represent a distinct pattern of judicial interaction, one I develop and detail as "dialectical review."

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Defined broadly as a hybrid of appellate review and dialogue, the nature of dialectical review can be elaborated by examining other hybrid judicial interactions—federal habeas review of state criminal convictions and appellate courts' use of dicta as a signaling device to lower courts. In each of these cases, a form of dialectical review serves as a mechanism of legal innovation. In the face of accelerating trends of globalization, a pattern of dialectical review between international and national courts can help to facilitate the emergence, evolution, and internalization of universal norms of due process. The present analysis thus offers international and domestic judges, as well as policymakers, a framework for understanding and facilitating beneficial judicial interaction in an ever-shrinking world.

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INTRODUCTION

*By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. . . . By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.*¹

In recent years, a wave of international judicialization has washed over the globe.² Whether permanent or ad hoc, human rights oriented or commercial, international or quasi-international, such tribunals have multiplied exponentially. The collective jurisdictional reach of international tribunals has also expanded, both by design and through gradual accretions of judicial authority.³ Unsurprisingly, the incidence

¹ Loewen Group v. United States, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 702, ¶ 119 (NAFTA Ch. 11 Arb. Trib. 2003). Publicly released documents on all North American Free Trade Agreement (NAFTA) disputes are available online at <http://www.naftalaw.org>.

² See Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 677–79 (2003) (noting array of new international tribunals formed in recent years); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 370–73 (1997) (describing growing transnational interaction among judges and increased citation to foreign and international sources); see also Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13–14 (Thomas M. Franck & Gregory H. Fox eds., 1996) (acknowledging growing community of courts around globe). It bears noting at the outset that the reference to “international tribunals” herein is intended to be broadly descriptive. For purposes of the immediate analysis, it is not necessary to differentiate “international” tribunals from “transnational” or “supranational” ones. Nor is it necessary to draw a fine line between tribunals, courts, and arbitral bodies.

³ See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430, 436–37 (2003) (noting recent “flurry of judicialization” in which diverse international tribunals have emerged).

and extent of transnational judicial interaction—including citation of foreign decisions, negotiated divisions of judicial responsibility in complex cross-border litigation, and the enforcement of foreign judgments—has also grown.

Much of this interaction has been explored both descriptively and normatively through the metaphor of “dialogue.”⁴ The characterization of transnational judicial interaction as dialogue is hardly surprising, given an understanding of international relations as shaped by “passive virtues” of a sort, including respect for national sovereignty and heavy reliance on diplomacy. However, a growing pattern of transnational interactions among courts challenge the adequacy of the dialogic metaphor. In these cases, the relevant judicial engagement incorporates a strong dimension of judicial “review” and at least a threat of meaningful international “power.”⁵

In *Loewen Group, Inc. v. United States*,⁶ an ad hoc tribunal convened under Chapter 11 of the North American Free Trade Agreement (NAFTA) subjected the judgments and procedures of the Mississippi courts to a searching review.⁷ In doing so, the tribunal threatened to impose a massive damages award on the ultimate “deep

⁴ See, e.g., Helfer & Slaughter, *supra* note 2, at 323–27, 358–62, 373–87 (describing dialogue between European Court of Justice (ECJ) and European Court of Human Rights (ECHR)); Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991) (proffering that “institutional dialogue” is important characteristic of transnational public law litigation); Martinez, *supra* note 3, at 434 (advocating antiparochial pattern of dialogue between courts).

⁵ See *infra* Parts II.B & IV.B.1.

⁶ 4 J. WORLD INVESTMENT at 675. For more on the *Loewen* case, see generally William S. Dodge, *International Decision*, 98 AM. J. INT’L L. 155 (2004).

⁷ Specifically, the tribunal considered claims of “denial of justice,” discriminatory treatment, and indirect expropriation, based on the Mississippi litigation of a civil claim against the Loewen Group. During that trial, repeated suggestions of racism in the Loewen Group’s management, irrelevant references to the wealth of its founder (particularly to his yacht), and even an analogy of the Loewen Group’s business practices to the Japanese bombing of Pearl Harbor were permitted. See Jake A. Baccari, *The Loewen Claim: A Creative Use of NAFTA’s Chapter 11*, 34 U. MIAMI INTER-AM. L. REV. 465, 468–69 (2003) (describing plaintiff’s emphasis on defendant’s race, wealth, and nationality); Michael I. Krauss, *NAFTA Meets the American Torts Process: O’Keefe v. Loewen*, 9 GEO. MASON L. REV. 69, 77 (2000) (noting plaintiff’s analogy of the Loewen Group’s actions to Japanese bombing of Pearl Harbor); see also Stefan Matiation, *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT’L ECON. L. 451, 455 (2003). This collective pattern of misconduct at trial contributed to a jury’s award of \$500 million in compensatory and punitive damages—the largest damage award in Mississippi history—on contracts worth less than \$5 million. See Baccari, *supra*, at 468–69 (describing types of damages awarded to plaintiff). Furthermore, the Loewen Group insisted that it was unable to appeal this shocking verdict because of its inability to post the \$625 million supersedeas bond that Mississippi law required to stay performance pending appeal—a requirement the Mississippi courts could waive for good cause, but would not. See Matiation, *supra*, at 456 (noting trial court’s rejection of Loewen Group’s motion to post reduced bond amount of

pocket,” one capable of placing meaningful pressure on recalcitrant courts—the U.S. government. This prospect of a significant award against the federal government meant that the tribunal’s review and critique of the Mississippi courts had real potential to influence those courts, regardless of their immediate receptivity to a dialogue regarding their compliance with international norms of due process.

The pattern of international review of national courts exemplified by *Loewen* is a far cry from the “dialogue” manifest in constitutional courts’ citation of one another and in the transnational management of cross-border litigation.⁸ As suggested above, this divergence begins with the international tribunal’s close and critical *review* of the judgment and procedures of the national court for consistency with due process, non-discrimination, and substantive requirements of international law. Such searching review is not without precedent. Denial of justice claims—which rest on a national court’s violation of international legal norms—have a long pedigree, even if the courts of the developed world have rarely been the subject of such review.⁹ In recent years, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) have engaged in some analogous review, and shades of an international review of national courts also can be found in decisions of the International Court of Justice (ICJ) and the World Trade Organization (WTO).¹⁰ Yet, instances of such review have been rare.¹¹

\$125 million); *see also* Baccari, *supra*, at 469–70 (citing Mississippi courts’ failure to waive or reduce bond requirement among grounds for Chapter 11 claim).

⁸ It is interesting to note, in this vein, that Chief Justice Margaret H. Marshall of the Massachusetts Supreme Judicial Court, among the most enthusiastic judicial advocates of conventional judicial *dialogue*, in which courts pay greater heed to foreign decisions, *see, e.g.*, Margaret H. Marshall, “*Wise Parents Do Not Hesitate to Learn from Their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004); *see also* Emily Bazelon, *A Bold Stroke*, LEGAL AFF., May/June 2004, at 30, 32–33, has expressed consternation about a recent Chapter 11 decision, *see* Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, § 1, at 20, in which the tribunal assessed the potential for a denial of justice in the Massachusetts Supreme Judicial Court’s dispensation of an appeal by a Canadian real estate company, *see* *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, 109–15, ¶¶ 126–156 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* <http://www.naftalaw.org>; *infra* notes 397–413 and accompanying text.

⁹ *See infra* Part V. The claims of interest herein are thus unprecedented because they include denial of justice claims against highly developed countries, and not only developing or underdeveloped countries. *See* Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT’L L.J. 531, 537–38 (2002) (discussing novelty of NAFTA’s investor-state claim mechanism between two developed countries).

¹⁰ *See infra* Part VI.B.

¹¹ Even if Chapter 11 review was simply a replication of the pattern of supranational review in Europe, it would represent an interesting case study because of its application to the United States, a nation traditionally resistant to international judicialization. Given

Even where it has occurred, international review of national courts commonly has not been coupled with any meaningful capacity of the international tribunal to effectuate its judgment without the consent and cooperation of the relevant national court. By contrast, notwithstanding Chapter 11 tribunals' lack of formal authority over national courts, they enjoy just such power. This power arises from the prospect of a substantial damage award to a private litigant, who can readily enforce it against federal authorities.¹² Given this institutional design, Chapter 11 tribunals would appear to enjoy a greater capacity than most international courts to exercise power in their interactions with national courts.¹³ Chapter 11 consequently manifests some equipoise of judicial power, in which neither judicial interlocutor can afford to ignore the other.

If dimensions of review and power make Chapter 11 review and similar interactions between international tribunals and national courts more than dialogue, those interactions still do not amount to appellate review. Some alternative paradigm for the design and operation of the growing pattern of international review in Chapter 11 and similar investment agreements, as well as in certain decisions of the ECJ and the ECHR, and even potentially in the work of the ICJ and the WTO, is therefore necessary. By way of response, I offer a model of "dialectical review"—a pattern of judicial *review*, yet one with *dialogue* at its core. Consistent with classical usage, such dialectical review might be said to rest on a recurrent engagement of international and national courts, advancing toward a synthesis of shared norms of due process.

The basic character of dialectical review can be found in its incorporation of distinct elements of dialogue and appellate review. It is a hybrid pattern of judicial interaction, with values of horizontal comity operating alongside elements of vertical hierarchy. This broad pattern can be further elucidated by reference to cases of hybrid judicial interaction outside Chapter 11. I offer two potential analogies: First, I analogize the Chapter 11 interaction of international and national courts to historical patterns of federal habeas corpus review of state criminal convictions. As explored by Robert Cover and Alex Aleinikoff, the interaction of federal and state courts in habeas review has much to offer to our understanding of the growing pattern of

this "innovation" of Chapter 11, the analysis herein proceeds with a particular orientation to U.S. court interactions with international tribunals.

¹² See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1135, 107 Stat. 2057, 32 I.L.M. 289, 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA] (outlining remedies available under Chapter 11).

¹³ See *infra* Parts IV.A.1 & B.1.a.

international-national court interaction in the world today.¹⁴ Second, I draw parallels to appellate courts' use of dicta as a signaling device to other institutions, in forms explored by Alexander Bickel, Guido Calabresi, and Neal Katyal.¹⁵

This Article's analysis of Chapter 11 and potential domestic analogies points to dialectical review as a distinct form of judicial interaction inadequately captured within available paradigms. Such review begins with an interaction of international and national courts to which each brings a distinct set of perspectives. Each enjoys some capacity to press its views on the other but suffers from an inability to impose its will. Each can force the other to listen but not necessarily to act. Given as much, there arises a recurrent pattern of dialectical engagement, critique, and counsel, from which learning and innovation can emerge. The beginning of such a pattern can already be discerned in the Chapter 11 context, and perhaps in the interaction of other international tribunals and national courts. Hope for such engagement might thus be found in the receptive rejoinder of the Oklahoma Court of Criminal Appeals to the ICJ's recent decision in *Avena and Other Mexican Nationals*.¹⁶

¹⁴ See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 648 (1981) (describing opportunities for redundant litigation of norms of constitutional criminal procedure because of concurrent federal and state competency); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977) (outlining Warren Court's approach to reforming criminal procedure through dialogue between state and federal courts). Ronald Wright and Marc Miller have explored a similar pattern in the habeas review of capital cases using a rubric of "interactive federalism" and stressed the need for each court to reflect on its role in the system. See Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 660 (1986); see also *id.* at 693-94 (offering cases in which state courts grappled with their relationship with federal courts). The present analysis is an attempt to engage in analogous reflection on the place of national courts and international tribunals in an emerging international judicial order.

¹⁵ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 69-71, 197-98 (1962) (identifying various mechanisms of restraint by Supreme Court as important tools in Court's pursuit of its constitutional mission); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 101-19 (1982) (suggesting that courts can use threat of judicial revision of statutes and sunset language to induce legislative reconsideration of anachronistic laws); Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991) (suggesting importance of legislative "second-look" at hastily passed legislation in face of constitutional questions); Neal K. Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1711 (1998) ("The combination of 'narrow holding + advicegiving dicta' enjoys a natural advantage over a broad holding in terms of democratic self-rule, flexibility, popular accountability, and adaptability.").

¹⁶ (Mex. v. U.S.) 43 I.L.M. 581 (Mar. 31, 2004). The Oklahoma Court of Criminal Appeals granted an indefinite stay of execution and a hearing on Torres's Vienna Convention on Diplomatic Relations claims, following the International Court of Justice's (ICJ) ruling in *Avena*. *Torres v. Oklahoma (Torres II)*, No. PCD-04-442 (Okla. Crim. App. May

The following Part introduces the subject with a description of the nature of Chapter 11 and its application in *Loewen*. Part II considers appellate review and dialogue as alternative paradigms of judicial interaction and suggests the present incompatibility of international review of national courts with either model. Part III explores the desirable ends of a regime of international review of national courts. Drawing on the habeas and dicta analogies, I suggest the particular utility of international review as a source of innovation in the development of legal norms.

Part IV offers a synthesis. Drawing on the respective elements of appeal and dialogue in the international review of national courts, together with the proposed role for such review in fostering innovation, I outline the model of dialectical review. After identifying three core characteristics of such review, I consider their manifestation in the design and operation of Chapter 11 review, both confirming the applicability of the model I propose and helping to flesh out its details. Part V completes the articulation of the paradigm of dialectical review under Chapter 11, positing the development of international norms of due process as an appropriate end of the international review of national courts. Finally, Part VI concludes with some consideration of the future of dialectical review, both under Chapter 11 and similar investment agreements, and in a growing array of other interactions among international tribunals and national courts. In the years ahead, sometimes jarring occasions for intersystemic judicial review—and a resulting need for effective models of such interaction—can be expected to grow.

I

WHEN FREE TRADE MET MISSISSIPPI

In several recent international arbitrations, ad hoc tribunals convened under Chapter 11 of NAFTA have had occasion to review the judgments and the procedural course of litigation in the domestic courts of the United States, Canada, and Mexico.¹⁷ Most significantly, the Chapter 11 tribunal in *Loewen Group, Inc. v. United States* had occasion to consider the quality of due process provided in a

13, 2004) (order granting stay of execution and remanding case for evidentiary hearing); see *Oklahoma Court Halts Execution*, AUGUSTA CHRON., May 14, 2004, at A14; S. Lynne Walker, *Mexican Man's Death Penalty Lifted: World Court Swayed Oklahoma Execution*, SAN DIEGO UNION-TRIB., May 14, 2004, at A3; see also *infra* notes 556–58 and accompanying text.

¹⁷ On NAFTA, see generally Patricia I. Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 TEX. INT'L L.J. 489 (2003) (describing NAFTA's various provisions for international adjudication and recent cases under those provisions).

Mississippi trial. Its conclusions were not generous: "By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. . . . By any standard of evaluation, the trial judge failed to afford Loewen the process that was due."¹⁸ The award of \$400 million in punitive damages against the Canadian corporation was subject to particular criticism: "The total award (even the award of compensatory damages) appears to be grossly disproportionate to the damage suffered by O'Keefe."¹⁹ Moreover, the highly irregular process by which judge and jury reached that award was "the antithesis of due process."²⁰

The NAFTA signatory states—the United States, Canada, and Mexico—included Chapter 11 to protect the interests of investors from each state who direct their investments into the other signatory states.²¹ To this end, Chapter 11 enumerates a set of party obligations vis-à-vis such investors, including non-discrimination obligations of national treatment (Article 1102) and most-favored-nation treatment (Article 1103), provision of the minimum standard of treatment required by international law (Article 1105),²² and protection against direct or indirect expropriation (Article 1110),²³ among others.²⁴ Such obligations begin with the federal authorities of each signatory state, who are responsible for compliance with Chapter 11.²⁵ By way of the law of state responsibility, however, these obligations ultimately apply to all state actors within the signatory state, from the President of the United States to the Registrar of Vital Records in New York City and from the U.S. Supreme Court to the Traffic Violations Bureau of the State of New York.²⁶

¹⁸ *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 702, ¶ 119 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>. The tribunal continued: "There was a gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O'Keefe and its counsel." *Id.* at 695, ¶ 87.

¹⁹ *Id.* at 700, ¶ 113.

²⁰ *Id.* at 703, ¶ 122.

²¹ See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 40–41 (2003) (outlining Chapter 11 provisions designed to protect foreign investors).

²² See NAFTA, *supra* note 12, arts. 1102–1107, at 639–40.

²³ See *id.* art. 1110, at 641.

²⁴ See, e.g., *id.* art. 1106, at 640 (prohibiting use of performance requirements by NAFTA signatories).

²⁵ See *id.* art. 105, at 298 (prescribing responsibility of state parties for implementation of NAFTA).

²⁶ See *id.* art. 1108 §1(a), at 640 (referencing application of NAFTA obligations to sub-national authorities).

To enforce these obligations, Chapter 11 goes on to establish an investor-state arbitration mechanism, unique among developed economies, by which an aggrieved foreign investor can bring a claim against the relevant federal authority, be it the United States, Canada, or Mexico.²⁷ Under these provisions, following waiver of any local judicial remedies that might be available,²⁸ investors can seek establishment of an ad hoc arbitral tribunal to adjudicate any asserted violation of their rights under Chapter 11.²⁹ Upon creation, a tribunal enjoys wide jurisdiction to receive evidence and conduct hearings regarding the investor's Chapter 11 claims.³⁰ Ultimately, it is authorized to adjudicate those claims through an enforceable award of monetary damages against the relevant state party.³¹ Notably, however, the enforcement of Chapter 11 awards through national courts, as well as potential petitions for review or annulment of those awards, may offer national courts of the relevant state party some opportunity to critique and even stymie the decrees of Chapter 11 tribunals,³² laying the foundation for some pattern of interaction and exchange.

The treatment of the Loewen Group, a Canadian corporation, in the Mississippi courts would appear to be a textbook case of the conduct that Chapter 11 was designed to address.³³ The Loewen Group's Chapter 11 claims arose from the litigation of a civil suit against the company in Mississippi state court. In the Loewen Group's view, the "introduction of extensive anti-Canadian . . . testimony and counsel comments" during the trial violated the non-discrimination require-

²⁷ See *id.* arts. 1116–1117, at 642–43; see also *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, 103 ¶ 95 (NAFTA Ch. 11 Arb. Trib. 2002), available at <http://www.naftalaw.org>; Been & Beauvais, *supra* note 21, at 44–46. Chapter 11 is unprecedented in its multilateral character and in its inclusion of multiple developed-country parties. The array of bilateral investment treaties (BITs) entered into prior to Chapter 11, and on which the latter was based, involved only two parties, one of whom was invariably a developing country, unlikely to have investment opportunities in the partner state.

²⁸ See William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HAST. INT'L & COMP. L. REV. 357, 370–71 (2000) (explaining that foreign investors must waive their rights to domestic court).

²⁹ See NAFTA, *supra* note 12, art. 1121, at 643.

³⁰ See *id.* arts. 1133–1134, at 646.

³¹ See *id.* arts. 1135–1136, at 646.

³² See *infra* Part IV.B.1.

³³ See Renée L. Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 258–60 (describing rulings by Mississippi judge in *Loewen* case that seemingly demonstrate prejudice against foreign corporation); see also William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 565 (2002) (describing plaintiff counsel's efforts to stir anti-Canadian sentiment among jurors).

ments of Articles 1102 and 1105 of NAFTA.³⁴ The Loewen Group also argued that plaintiff's counsel had stoked racial and class biases, without intervention by the trial judge.³⁵ Implications that the Loewen Group engaged in policies harmful to African Americans and repeated references to its founder's ownership of a large yacht were cited as examples.³⁶

Given the limited monetary value of the underlying contract and antitrust claims brought against the company, the Loewen Group argued further that the jury's \$400 million punitive damage award, as well as its massive emotional-distress award, constituted both a "denial of justice" under international law and a failure to accord fair and equitable treatment.³⁷ As such, it violated the minimum standard of treatment prescribed by Article 1105.³⁸ On the same grounds, the Loewen Group challenged the flawed process by which the jury arrived at, and the court approved, the damages award.³⁹ A further violation of the minimum standard of treatment, the Loewen Group argued, arose from the unwillingness of the trial and appellate courts to waive the standard appeal bond requirement of 125%, which would have required a \$625 million bond in this case. This refusal, the Loewen Group suggested, essentially prevented it from appealing the deeply flawed trial court judgment.⁴⁰

Taking up these claims, the *Loewen* tribunal first held that Chapter 11 and its strictures were fully applicable to the actions, deci-

³⁴ Notice of Claim, *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 49, ¶ 139 (NAFTA Ch. 11 Arb. Trib. 1998), at <http://www.naftalaw.org>. At its extreme, the Loewen Group's business practices were compared to the Japanese bombing of Pearl Harbor. See *id.* at 37–38, ¶ 103.

³⁵ See *id.* at 20–25, ¶¶ 53–69.

³⁶ See *id.* at 20–25, 28–29, ¶¶ 53–69, 78.

³⁷ "Denial of justice" is the paradigmatic international claim of judicial wrongdoing in violation of international law. See Lerner, *supra* note 33, at 250–51; see also *infra* Part V.

³⁸ See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 706, ¶ 137 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

³⁹ Mississippi law requires a bifurcated trial procedure in which the jury first determines liability and compensatory damages and then considers whether to award punitive damages. After the jury erroneously returned punitive damages in the first phase, Judge Graves denied Loewen's motion for a mistrial, reduced the initial award from \$260 million to \$100 million, and then directed that the trial enter the second stage. How \$160 million of the initial award was identified as punitive damages remains a mystery. See *Loewen*, 4 J. WORLD INVESTMENT at 695–97, ¶¶ 88–97.

⁴⁰ *Id.* at 678, ¶ 6. The Loewen Group further asserted that the discriminatory nature of the trial violated Article 1102's national treatment requirement. Finally, it argued that all of the foregoing constituted an indirect form of expropriation in violation of Article 1110 of NAFTA. See *id.* at 683, ¶ 39; see also Lerner, *supra* note 33, at 258–60.

sions, and procedures of judicial institutions.⁴¹ With that jurisdictional bar brushed aside, the tribunal found little to dispute in Loewen's substantive claims. In the tribunal's assessment, basic standards of due process were not met in the Mississippi trial, or even approximated.⁴² Consequently, the minimum standard of treatment required by international law had been denied. Likewise, the tribunal found the proceeding to have been infected by gross discrimination.⁴³ As the Tribunal summarized its analysis:

Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to manifest injustice as that expression is understood in international law.⁴⁴

Notwithstanding this harsh critique, the Loewen Group's claim for damages ultimately was denied on what many saw as technical—or

⁴¹ See *Loewen Group v. United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3, ¶¶ 39–60 (NAFTA Ch. 11 Arb. Trib. 2001), at <http://www.naftalaw.org>; see also Been & Beauvais, *supra* note 21, at 79–83; Lerner, *supra* note 33, at 234. In essence, the *Loewen* tribunal rejected U.S. conceptions of judicial exceptionalism. See Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 834–36 (2002) (noting that body of expropriation law as exemplified in most investment treaties does not distinguish between judicial and other governmental action). This conclusion may have been unavoidable, given the capacity of governments otherwise to direct controversial decisions through the courts and thereby insulate them from Chapter 11 review. It was also in line with most states' resistance to any distinction among state actors. Even the United States was ill-positioned to argue otherwise, given its past assertion of just this position in cases in which it was the petitioner. See Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 380 n.79 (2003) (giving example of U.S. State Department position that BIT prohibitions on expropriations apply to any state measure, regardless of form); see also Lerner, *supra* note 33, at 261–63 (asserting that United States has repeatedly endorsed view that denials of justice include manifestly unjust judicial decisions). The tribunal's decision was also in accord with an important line of U.S. constitutional jurisprudence. See *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (holding that actions of state judicial authorities constitute actions of state government for purposes of Fourteenth Amendment). It is not surprising, then, that the United States came to concede this point. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 706, 708 (2002) ("The United States accepts the Tribunal's ruling that 'conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State.'").

⁴² See *Loewen*, 4 J. WORLD INVESTMENT at 702, ¶ 119 ("By any standard of measurement, the trial . . . was a disgrace."); *id.* at 706, ¶ 137 (trial did not meet international standard of "fair and equitable treatment").

⁴³ See Todd Weiler, *Dodging Bullets: A Quick Synopsis of the NAFTA Award in Loewen & The Loewen Group v. U.S.A.* 6–7 (July 11, 2003) (unpublished manuscript, on file with the *New York University Law Review*).

⁴⁴ *Loewen*, 4 J. WORLD INVESTMENT at 687 ¶ 54.

at least non-meritorious—grounds. First, the tribunal held that Loewen's post-bankruptcy reorganization as a U.S. corporation, and consequent loss of Canadian nationality, deprived it of standing to proceed under Chapter 11.⁴⁵ Additionally, the tribunal found that Loewen could not prevail, given its failure to pursue all available opportunities to challenge the trial court judgment in the national courts.⁴⁶

While these grounds allowed the United States to “dodge the bullet” of Chapter 11 liability in *Loewen*,⁴⁷ their technical and perhaps fortuitous nature offers little reason to believe that liability for U.S. judicial conduct will not be imposed in the future. *Loewen* was not the first Chapter 11 case in which U.S. courts were subject to review, and similar claims continue to be proffered.⁴⁸ In fact, they are likely to proliferate for a number of reasons.⁴⁹ First, the statutory bases for such review are multiplying as the number of international agreements, including Chapter 11-like provisions, grows.⁵⁰ Second,

⁴⁵ See *id.* at 730, ¶¶ 238–240.

⁴⁶ See *id.* at 708, 710, 711, 714–24, ¶¶ 143, 151, 154, 172–217 (applying finality principle); see also Weiler, *supra* note 43, at 8. While a party seeking international review normally must exhaust local remedies, see RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES §713 cmt. f & n.5 (1986); Dodge, *supra* note 28, at 361, Chapter 11 waives the local remedies rule, see Dodge, *supra* note 33, at 567. Nonetheless, the *Loewen* tribunal concluded that where the relevant claim is directed to a judicial institution, that decision must have been challenged through the legal system in its entirety. The tribunal thus identified a “finality” requirement for challenges to judicial action under Chapter 11, under which there could be no substantive violation of international law by a judicial body—no “denial of justice”—until the domestic legal process had been permitted to run its course. See *Loewen*, 4 J. WORLD INVESTMENT at 685–86, 707–11, ¶¶ 48–50, 142–156; Murphy, *supra* note 41, at 707–09; see also Counter-Memorial of the United States of America, *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, 107–14 (2001), at <http://www.naftalaw.org>. As for the Loewen Group's other claims, the tribunal rejected its discrimination claim based on a failure to submit evidence that the treatment it received was inferior to that of every defendant in the Mississippi courts, see *Loewen*, 4 J. WORLD INVESTMENT at 707, ¶ 140, and its expropriation claim, based on its failure to establish (because of the lack of finality) a denial of justice. See *id.* at 707, ¶ 141.

⁴⁷ See Weiler, *supra* note 43, at 1.

⁴⁸ See *infra* notes 394–424 and accompanying text (describing *Mondev* and *Azinian* arbitrations); see also *Waste Mgmt., Inc. v. Mexico*, Case No. ARB(AF)/00/3, ¶ 129 (NAFTA Ch. 11 Arb. Trib. 2004) (implying criticism of “rather technical grounds” of decision in several Mexican judgments against Chapter 11 claimant), at <http://www.naftalaw.org>; Post-Hearing Brief of Claimant, *International Thunderbird Gaming Co. v. Mexico*, at 14–17 (NAFTA Ch. 11 Arb. Trib. 2004), at <http://www.naftalaw.org>.

⁴⁹ See Martinez, *supra* note 3, at 430.

⁵⁰ Although provisions for investor-state arbitration existed before Chapter 11 in an array of BITs, see Hansen, *supra* note 17, at 499. NAFTA included the first such agreement between two developed economies. Canada, unlike other investment agreement partners of the United States, directs substantial foreign direct investment into the country. See Legum, *supra* note 9, at 537. The United States has primarily concluded BITs with countries such as Albania, Cameroon, Estonia, and Georgia. See Int'l Ctr. for the Settlement of

through such agreements, the relevant international law claim directed to judicial wrongs—assertion of a “denial of justice”—now is grounded more explicitly in positive law, making violations easier to identify and assert.⁵¹ Third, more claims can be expected because Chapter 11 and similar agreements grant private investors the ability

Inv. Disputes, Bilateral Investment Treaties 1959–1996: Chronological and Country Data, at <http://www.worldbank.org/icsid/treaties/united-states.htm> (last visited Nov. 5, 2004). As the number of BITs, as well as free trade agreements with investment protections, to which the United States is a party has grown, the counterparties have come to include a growing number of countries with some—even if still limited—capacity for direct investment in the United States. Recent free trade agreements with Jordan, Singapore, Chile, and Australia thus are potential sources of investment inflows. See United States–Australia Free Trade Agreement, May 18, 2004, at http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html; Chile–United States Free Trade Agreement, June 6, 2004, at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html; United States–Singapore Free Trade Agreement, May 6, 2003, at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, at http://www.ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html. Consequently, they are vehicles for Chapter 11–type claims against the United States as well. Cf. Courtney C. Kirkman, Note, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL’Y INT’L BUS. 343, 346 (2002) (noting growth in international investment treaties and debate over vague meaning of fair and equitable treatment in BITs).

The inclusion of investment protections, an investor-state dispute settlement mechanism, and provisions pointing to the creation of an appellate tribunal in the recently signed Dominican Republic–Central America–United States Free Trade Agreement suggest continuing growth in the extent of investment arbitration, including review of national courts. See Dominican Republic–Central America–United States Free Trade Agreement, Aug. 5, 2004, annex 10-F, http://www.ustr.gov/Trade_Agreements/Bilateral/DR-CAFTA/DR-CAFTA_Final_Texts/Section_Index.html; see also *infra* note 523 and accompanying text. Most dramatically increasing the potential reach of investor-state arbitration, including its potential application to national courts, are the pending negotiations to establish a Free Trade Area of the Americas (FTAA) and the Doha Round negotiations of the World Trade Organization (WTO). Should investment protections be included in either final agreement (investment protection is among the so-called “Singapore Issues” being considered for inclusion in both agreements, see Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT’L L. 123, 124–26 (2003))—or in an ensuing round of FTAA agreements or WTO negotiations—the opportunity for judicial impingement on investor rights can be expected to increase dramatically. The incidence of international review of national courts can be expected to rise with it.

⁵¹ See Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 639–40 (2002) (suggesting relevant strength of norms articulated in positive law). Historically, denial of justice claims—claims of judicial wrongdoing—were grounded in customary international law. See Detlev F. Vagts, *Minimum Standard*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 382 (Rudolf Bernhardt ed., 1985) (describing minimum standard of treatment generally developed in customary international law rather than treaties). As such, denial of justice claims were difficult to identify and make out, and the number of relevant decisions consequently was limited. See Dodge, *supra* note 33, at 570. With the rise of the BITs, NAFTA, and related free trade agreements, such claims—now a product of positive law—are seemingly more accessible.

to bring claims themselves, rather than having to rely on their country of citizenship to espouse their claims. Finally, the general growth of international trade and investment can be expected to contribute to an increase in opportunities for objection to, or challenge of, national judicial conduct.⁵²

As I will suggest below, moreover, the growing pattern of international review of national courts is unique neither to Chapter 11 nor to the protection of foreign investment generally.⁵³ Under a variety of

⁵² Cf. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1497–98 (1991) (noting growing importance of international trade in U.S. economy and resulting increase in extent of international litigation); Molly W. Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 634–35 (2001) (noting growing number of international tribunals and resulting increase in prospect of conflict between international and national courts). A final reason to expect growth in denial of justice claims might be the prominence they have gained through the *Loewen* litigation.

A pattern of growth in Chapter 11-type review of national courts, of course, is not inevitable. In fact, it could well be stymied by some of the very concerns of sovereignty and judicial independence that I will describe herein. If Chapter 11 and other investment-review mechanisms do not develop in a careful and sensitive fashion, there is every reason to fear a backlash against Chapter 11 and similar review, as discussed below. See *infra* Part VI.A.2. This would reduce the likelihood that Chapter 11-style provisions will actually be included in the growing number of trade and investment agreements. This may already be evident in state resistance to the inclusion of investment protections in both the FTAA and Doha Round negotiations. See, e.g., David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. LAW 381, 403 (1997) (noting that most South American states oppose binding arbitration under FTAA); Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 224 (2001) (suggesting Canadian leadership will oppose investment protections in FTAA); Bruce Stokes, Column, *Fists Across the Water on Trade*, NAT'L J. CONG. DAILY, Nov. 18, 1999 (quoting U.S. diplomat, who asked, "If a couple dozen industrial countries couldn't agree on investment rules, how will 135 nations, mostly from the Third World, agree?") at <http://nationaljournal.com/cgi-bin/iftch4?ENG+ALL+-CONGRESS+7-cr0199+1119140-DBSCORE+256+15+12876+F+16+79+11+%22Bruce+Stokes%22>. An even more telling possibility is suggested by the presence of substantive investment rules in the free trade agreement recently concluded between the United States and Australia, but the replacement of a mandatory investor-state dispute settlement process, as in Chapter 11 of NAFTA, with adjudication requiring the consent of both state parties. See U.S.-Australia Free Trade Agreement, *supra* note 50, art. 11.16. The investment provisions of the U.S.-Australia agreement can be found in Chapter 11 while the dispute settlement provisions are in Chapter 21. *Id.* arts. 11.1–11.17, 21.2–21.15.

⁵³ See *infra* Part VI.B. It is also important to note again that the review of national courts by international tribunals is itself not a new phenomenon. Rather, international claims of denial of justice date back centuries. Most recently, a series of international claims commissions were formed in the late nineteenth and early twentieth centuries to adjudicate disputes arising in the aftermath of the expropriation or collapse of international commercial projects in developing countries. These commissions litigated a significant number of denial of justice and other claims directed to national courts. See RICHARD B. LILICH, *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 5, 25 (1983). Such claims were almost universally directed to national courts in developing and underdeveloped countries, however, as distinct from the present-day claims against the United States and other industrialized nations. See Legum, *supra* note 9, at 537–38. Even

international agreements, national courts have occasionally been, and increasingly are, subject to external review. The U.S. experience with such review dates at least to 1874, when an international tribunal constituted under the Treaty of Washington of 1871 reviewed, and repudiated, several decisions of the U.S. Supreme Court.⁵⁴ Most recently, the application of procedural default rules in U.S. criminal trials of foreign nationals has been challenged by the ICJ.⁵⁵

Other national courts are even more familiar with such review. Most significantly, the ECJ and the ECHR have progressively developed what is now a conventional practice of reviewing European national court judgments.⁵⁶ Yet Chapter 11 involves an arguably stronger pattern of review of national courts, in at least some respects, than what has occurred to date in the interaction of other international tribunals and national courts. It is also significant, of course, that Chapter 11 is applicable to the United States, which has shown substantially less receptivity to international review than the nations of Europe. *Loewen* thus represents an important measure of the long-term prospects of international review of national courts.⁵⁷

claims against less-developed countries all but disappeared over the last century, as the claims commission process fell into substantial disuse. *See infra* Part V.

⁵⁴ *See, e.g.*, 4 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3902–03, 3911–12, 3920–22 (1898) (describing arbitral decisions); *see also infra* note 544 and accompanying text. In fact, an even earlier mechanism of international review of U.S. courts came with the Jay Treaty of 1794, under which bilateral arbitration commissions were formed to adjudicate disputes between U.S. and British parties following the American Revolution, including several disputes previously heard in the U.S. courts. *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1559 n.7 (2003) (describing concerns with arbitration commissions formed under Jay Treaty); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2081 (1999) (“British claimants could appeal to the commission from American courts and were not bound by the rules of evidence that obtained there.”).

⁵⁵ *See infra* notes 545–58 and accompanying text.

⁵⁶ I elaborate on the international review of national courts in the case of the European courts, the ICJ, and the *Prize Cases* below. *See infra* Part VI.B.

⁵⁷ Anne-Marie Slaughter predicts that the ultimate reach of NAFTA will extend beyond its drafters’ intentions. Just as the European Union has emerged as a legal system more extensive than European diplomats imagined at the outset—largely through the interaction of national courts with the ECJ—Chapter 11 may serve as an impetus for a greater American union as well. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 66–67 (2004).

II

BETWEEN HIERARCHY AND COMITY: THE NATURE OF
INTERNATIONAL REVIEW OF NATIONAL COURTS

The international review of national court judgments and procedures represents a relatively unfamiliar pattern of interaction among judicial institutions. Chapter 11 review of the Mississippi trial court's oversight of the litigation against the Loewen Group, and the trial court's and Mississippi Supreme Court's refusal to waive or reduce the Mississippi appeal bond requirement, does not easily fit into conventional categories of court-to-court relations. *Loewen* thus calls attention to the need for better appreciation of such interaction, definition of its ultimate goals, the development of institutional forms that are consistent both with those goals and with a commitment to national sovereignty and judicial autonomy. How should we understand such interaction? How is it best designed, and how best conducted? What exactly, in blunt terms, is going on here?

In assessing how international review of national courts,⁵⁸ under Chapter 11 and otherwise, is best understood, designed, and conducted, two alternative paradigms of judicial interaction offer themselves as possible models. The first pattern—appellate review—might be said to be the most familiar pattern of interaction among domestic courts. The second—judicial dialogue—is the most common characterization of transnational interactions among courts. The nature and potential relevance of each alternative is considered in turn.

A. The Hierarchy of Appellate Review

I identify four core characteristics of “appellate” review. First, and perhaps foremost, is the authority of an appellate court to undo the determinations of law, and sometimes even the findings of fact, reached by the court subject to review.⁵⁹ Following naturally from this phenomenon is the binding nature of that review.⁶⁰ Minimally, the judgment of an appellate court binds the trial court in the case at bar. More expansively, decisions on appeal consequently have some

⁵⁸ Chapter 11 review extends to domestic tribunals generally. References to “national courts” herein consequently encompass both federal and state courts, including the array of adjudicatory bodies that come within the auspices of state judiciaries. This definitional point calls attention to a necessary point of clarification: The particulars of the analysis herein are directed to the interaction of U.S. courts with Chapter 11 and other international tribunals. The model articulated also has application to the other NAFTA states and beyond. For ease of analysis and discussion, however, I explain the model with reference to the U.S. courts.

⁵⁹ See PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2 (1976) (describing role of appellate review in correcting errors made at trial).

⁶⁰ See *id.* at 2–3.

formal or informal *stare decisis* effect, binding lower courts in future cases as well.⁶¹ The pattern of review characteristic of the appellate interaction of courts, moreover, is largely unidirectional. With notable exceptions, appellate judgments are not, in the ordinary case, subject to substantive critique in a trial court. Finally, appellate review is constrained in its reach yet expansive in its depth. Appellate review is rarely *de novo*.⁶² Factual findings are subject to an exceedingly deferential standard of review, if they are subject to review at all.⁶³ As to questions of law, however, courts of appeal possess relatively plenary powers of review and reversal.⁶⁴

The basic purposes of appellate review are in line with these characteristics. Appellate review is commonly described as serving two primary functions: First, appellate review is an effective mechanism of error correction.⁶⁵ Second, appellate review enhances consistency both within and across relevant jurisdictions.⁶⁶ Following naturally

⁶¹ See RUSSELL F. MOORE, *STARE DECISIS: SOME TRENDS IN BRITISH AND AMERICAN APPLICATION OF THE DOCTRINE* 34 (1958). Judgments ordinarily do not bind the issuing court itself, which is free to alter its own decision. See Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277, 278 (2004) ("In the common-law context . . . the court has a relatively low barrier for overturning itself.").

⁶² See 5 AM. JUR. 2D *Appellate Review* § 662 (1995).

⁶³ See, e.g., FED. R. CIV. P. 52(a) (stating that federal appellate courts shall set aside only clearly erroneous findings of fact).

⁶⁴ See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (holding that questions of law should be addressed anew by appellate courts); see also 19 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 06.04(1) (3d ed. 1999).

⁶⁵ See ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 3 (1941).

⁶⁶ Cf. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38–41, 76–77 (1994) (noting importance of jurisprudential consistency). Carrington characterizes these functions as review for correctness and institutional review. See CARRINGTON, *supra* note 59, at 2. They have also been described as resolving concrete disputes and providing guidance for future cases. See Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 298 (1996) (arguing that U.S. Supreme Court's avoidance doctrine prioritizes resolution of concrete disputes and downplays Court's "important function of providing guidance on federal constitutional questions").

Additional functions of appeal have been identified, but these are best understood as subsumed within the functions mentioned above. See ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS* 18–19 (1983) (other purposes of appeal include protection against outside interference by allowing judicial system to correct itself, provision of psychological relief for losing party, and "doing justice"); W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 4 (1992) (describing functions of "control systems" in adjudication); Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (three functions of appellate review include error correction, consistency, and lawmaking). Dramatically different conceptions of the appellate relationship also have been offered. See generally Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (applying principal-agent model to U.S. Supreme Court's relationship

from these dual purposes, it might be said that appeal serves some legitimization function by enhancing confidence in the judicial system.⁶⁷ Efforts to introduce appellate mechanisms into international trade-dispute settlement, for example, have been framed in just these terms.⁶⁸

Collectively, the various characteristics and functions of appellate review enumerated above suggest that some gradation of judicial authority is central to the nature of appellate review. Appellate courts sit in a relationship of superiority to rather than parity with the courts subject to their review.⁶⁹ An appellate system of review, as such, is one defined by *hierarchy*. In slightly different terms, appellate courts enjoy some meaningful *power* over the courts subject to their review.⁷⁰

Is Chapter 11 review of national courts a form of appeal? It does have some unidirectional character, given that any domestic “review” that follows on the Chapter 11 process is either limited in scope or arises in the context of a new fact pattern.⁷¹ It also exhibits some of the complex mix of broad and narrow authority in appellate review. Most importantly, as I will outline below, Chapter 11 tribunals possess

to federal appeals courts). Finally, Martin Shapiro offers what is perhaps the broadest array of possible functions of appellate review. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 49–56 (1981) (mentioning “allow[ing] the loser to accept his loss without having to acknowledge it publicly,” “ensuring against the venality, prejudice, and/or ignorance of trial court judges,” facilitating “an independent flow of information to the top on the field performance of administrative subordinates,” ensuring that lower courts “are following rules or laws or policies of social control acceptable to the regime,” and “sort[ing] out unresolved issues of policy and mov[ing] them toward the top for decision” among possible functions of appellate review).

⁶⁷ See CARRINGTON, *supra* note 59, at 2.

⁶⁸ This includes the introduction of an “Appellate Body” into the GATT’s dispute settlement procedures, see Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT’L L. 477, 480 (1994), proposals to include an appellate mechanism in the investment dispute procedures of the FTAA, see Valerie Hughes, *Essay on John C. Thomure, Jr.’s Presentation*, 28 U. MIAMI INTER-AM. L. REV. 685, 695 (1997), and the formation of a negotiating group under the recently signed Dominican Republic–Central America–United States Free Trade Agreement to draft provisions for an investment dispute appeals mechanism, see *infra* note 523.

⁶⁹ See Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 967 (2000) (“[J]udges of the lower, or ‘inferior,’ federal courts are viewed by the Court, and even view themselves, as subordinates who must defer to ‘judicial superiors.’”); Caminker, *supra* note 66, at 41–42; Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’L L. 1, 53 (2003) (“Common lawyers are accustomed to great weight being given higher court precedent in lower courts.”); see also Bhagwat, *supra*, at 982–83 (suggesting that Supreme Court has hierarchical view of appellate process).

⁷⁰ See Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC’Y REV. 143, 143–49 (2003) (discussing appellate courts’ use of review power to control decisionmaking in lower courts).

⁷¹ See *infra* Part IV.B.2.b.

a certain degree of power, similar to that possessed by appellate courts but unlike that of many international tribunals.⁷² Yet Chapter 11 review deviates from the pattern of appellate review in too many respects to be characterized fairly in that fashion.⁷³

Although somewhat unidirectional, Chapter 11 review is constrained by an important dimension of bidirectionality. This bidirectionality is manifested in the prospect of national review of the tribunal's award upon enforcement or petition for review or annulment, as outlined below,⁷⁴ as well as the ability of national courts to critique and even reject the Chapter 11 tribunal's view in future decisions. The power of Chapter 11, moreover, is far less than that of a court of appeals.⁷⁵ Chapter 11 tribunals do not have the ability to "reverse" national court decisions⁷⁶ nor are their awards formally binding on national courts in the same or future cases.⁷⁷ Finally, recalling the purposes of appellate review, Chapter 11 review does not appear to be designed to serve as a mechanism of error correction⁷⁸ or jurisprudential consistency.⁷⁹

⁷² See *infra* Part II.B.

⁷³ See *Azinian v. Mexico*, Case No. ARB(AF)/97/2, 14 ICSID REV. 538, 568, ¶ 99 (NAFTA Ch. 11 Arb. Trib. 1999) ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."), available at <http://www.naftalaw.org>.

⁷⁴ See *infra* Part IV.B.2.b.

⁷⁵ Other differences with appellate review might also be noted, including the application of a different body of law by Chapter 11 tribunals and national courts, Chapter 11 tribunals' lack of directive authority vis-à-vis national courts, and the completely independent origins and financing of Chapter 11 and national court adjudication processes.

⁷⁶ See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 731, ¶ 242 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>; *Azinian*, 14 ICSID REV. at 568, ¶ 99; *Mondev Int'l Ltd. v. United States* ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, 110, ¶ 129 (NAFTA Ch. 11 Arb. Trib. 2002), available at <http://www.naftalaw.org>.

⁷⁷ Rather than a hierarchical relationship, the interaction of Chapter 11 tribunals with national courts appears more in line with that of independent courts. Cf. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 756 (2003) (describing challenges arising from lack of hierarchy in international judicial order). Chapter 11 tribunals are not subject to any law of the case arising from the national adjudication; rather, they apply a distinct body of law and authority.

⁷⁸ Cf. James M. Fischer, *Discretion and Politics: Ruminations on the Recent Presidential Election and the Role of Discretion in the Florida Presidential Election Recount*, 69 U. CIN. L. REV. 807, 815-17 (2001) (describing lower court "discretion" as restraining appellate review). The limitation of Chapter 11 remedies to money damages directed at federal authorities appears ill-suited to error correction. See NAFTA, *supra* note 12, art. 1135, at 646 (noting available remedies under Chapter 11).

⁷⁹ Molly Warren Lien's vertical model of "integrative comity" comes close to the relationship of Chapter 11 tribunals and national courts but remains a doctrine of *comity* and

Given the seeming inconsistency of Chapter 11 with appellate review, it should come as little surprise that Chapter 11 panels have repeatedly rejected any conception of themselves as courts of appeal.⁸⁰ They have explicitly done so, in fact, at nearly every opportunity. In *Loewen*, the panel could “find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation.”⁸¹ Likewise, in *Mondev v. United States*, the panel held that “it is not the function of NAFTA tribunals to act as courts of appeal.”⁸²

Yet widespread dismay over Chapter 11’s perceived creation of an international court of appeals persists.⁸³ If the Chapter 11 panels are to be believed, such concerns can be put aside. Is it possible, however, that the lady doth protest too much?

B. Judicial Dialogue and Transnational Comity

If a paradigm of appellate review is too strong to capture the interaction of Chapter 11 tribunals with national courts, perhaps judi-

thus does not incorporate the dimension of power that is present in Chapter 11 review. See *infra* Part II.B; see also Lien, *supra* note 52, at 639 (proposing that where United States has consented to jurisdiction of international tribunal and courts receive decision from that tribunal, “American courts should accord a high degree of comity, deference, and respect for that court and should generally aid it in protection of its jurisdiction and enforcement of its judgments unless to do so would violate a clear and express constitutional or statutory prohibition under U.S. law”); *id.* at 648.

Mirjan Damaska famously has characterized common law regimes as systems of coordinate adjudication, by contrast with the hierarchical adjudicatory system of civil law jurisdictions. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 18–28 (1986). See generally Mirjan R. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) (developing theory of coordinate and hierarchical systems). I characterize the U.S. system as hierarchical in a different sense, however, focusing not on the adjudicatory system as a whole, but on the relationship of appellate and trial courts within it. Cf. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 452 n.254 (2003) (arguing that, while Mirjan Damaska situates U.S. system as operating under “coordinate” model, functioning of U.S. Supreme Court is in fact more “hierarchical”).

⁸⁰ See *Loewen*, 4 J. WORLD INVESTMENT at 731 ¶ 242; *Azinian*, 14 ICSID REV. at 568, ¶ 99; *Mondev*, 42 I.L.M. at 109, ¶ 126; cf. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 43 I.L.M. 581, 598, ¶ 37 (2004). The United States claimed that Mexico’s submission in *Avena* was inadmissible because Mexico sought to have the ICJ function as a court of criminal appeal. *Id.*

⁸¹ *Loewen*, 4 J. WORLD INVESTMENT at 731, ¶ 242; see also *Azinian*, 14 ICSID REV. at 568, ¶ 99.

⁸² 42 I.L.M. at 109, ¶ 126.

⁸³ See, e.g., PUB. CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY i (2001) (claiming corporate investors are using Chapter 11 as appeal of domestic judicial decisions), at <http://www.citizen.org/documents/ACF186.pdf>; Bill Moyers Reports: *Trading Democracy* (PBS television broadcast, Feb. 1, 2002) (criticizing Chapter 11 review for disruption of American jury verdicts), transcript available at http://www.pbs.org/now/transcript/transcript_td.html.

cial “dialogue,” the standard-form model used to capture the interaction of courts across national borders, offers a closer approximation.⁸⁴ Articulated most thoroughly by Anne-Marie Slaughter,⁸⁵ the dialogic notion of judicial interaction has been offered as a prism through which transnational judicial interactions—such as national court referrals of European law issues to the ECJ,⁸⁶ New York and British bankruptcy judges’ extended colloquy over jurisdictional and merits issues in the dissolution of the Maxwell Communication Corporation,⁸⁷ and, more conventionally, national courts’ deference to the jurisdiction of foreign tribunals and enforcement of those tribunals’ judgments—can be understood and analyzed.⁸⁸ In essence, the dialogic metaphor posits a symbiotic relationship among autonomous judicial institutions. Grounded in a sense of “judicial comity,”⁸⁹ it arises where

⁸⁴ In fact, various domestic interactions among courts might also be characterized in dialogic terms. See Caminker, *supra* note 66, at 54–55; Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161, 1163, 1167 (2000) (proposing dialogic model of relationship between state and federal courts). Various doctrines of U.S. federal-state court relations, from the rules of abstention to the *Rooker-Feldman* doctrine, might then be measured by the extent to which they facilitate or discourage domestic judicial dialogue.

⁸⁵ See, e.g., Helfer & Slaughter, *supra* note 2; Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 708, 709–11 (1998) [hereinafter Slaughter, *Court to Court*] (developing theory of “judicial comity”). See generally Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) [hereinafter Slaughter, *Typology*] (describing importance of transjudicial communication to formation of international rule of law). Besides the strong orientation to the metaphor of dialogue in the study of transnational judicial interaction, the latter literature is also characterized by an emphasis on the treatment of international decisions in national courts. See, e.g., INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996); Alford, *supra* note 2. Less attention has been given to the treatment of national decisions by international tribunals. But see Pippa Tubman, *National Jurisprudence in International Tribunals*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra*, at 107. This “top-down” inquiry is the emphasis of the present analysis.

⁸⁶ See Slaughter, *Typology*, *supra* note 85, at 101.

⁸⁷ See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 213–15 (2003) [hereinafter Slaughter, *Community of Courts*] (describing creation of “private insolvency treaty” by U.S. and English judges); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1114 (2000) [hereinafter Slaughter, *Judicial Globalization*] (noting extensive discussions between judicially appointed administrators to resolve issues surrounding liquidation).

⁸⁸ See, e.g., Martinez, *supra* note 3, at 465–68 (identifying judicial dialogue as new paradigm reconciling overlap in authority that theories focused on hierarchical judicial enforcement or pure national sovereignty commonly overlook).

⁸⁹ See Slaughter, *Court to Court*, *supra* note 85, at 711 (“Comity requires more than consultation born of intellectual curiosity. It expresses an appreciation of different assignments and a global allocation of judicial responsibility, sharpened by the realization that the performance of one court’s function increasingly requires cooperation with others.”); Slaughter, *Judicial Globalization*, *supra* note 87, at 1112 (describing “judicial comity” as “deference not to foreign law or foreign national interests, but specifically to foreign courts”); see also Lien, *supra* note 52, at 593–94 (“A common definition of comity, a word derived from the simple Sanskrit verb for ‘he smiles,’ is that it refers to the informal and

courts actively engage and cooperate with one another. Such dialogue, Slaughter suggests, can help promote acceptance of reciprocal international obligations, encourage the cross-fertilization of ideas and innovations, enhance the legitimacy of individual decisions, and foster patterns of collective deliberation.⁹⁰

While a precise dissection of judicial dialogue is beyond the scope of this Article, several core characteristics capture much of the transnational judicial interaction that the dialogic view seeks to describe.⁹¹ To begin with, intersystemic judicial dialogue is ordinarily prospective rather than retrospective.⁹² In judicial dialogue, a court does not seek to critique the prior decision of another. Rather, its orientation is to some future decision or norm. The borrowing that takes place among

voluntary recognition that the courts of one nation accord to the judicial decisions of another.”); Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 3–4 (1991) (“Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or ‘considerations of high international politics concerned with maintaining amicable and workable relationships between nations.’”); cf. *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (“Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.”).

⁹⁰ See Slaughter, *Typology*, *supra* note 85, at 116–19. I would argue that the dialogic model of judicial relations has been applied to a wider variety of interactions than warranted. It has thus come to encompass interactions that have little in common with one another. Slaughter has spoken of a gradation from horizontal to vertical dialogue. See *id.* at 103–11. Horizontal dialogue captures the tendency of national courts, in particular constitutional courts, to look to one another’s decisions in similar or related cases. See *id.* at 103–06. The South African Constitutional Court has engaged actively in such dialogue. See Slaughter, *Community of Courts*, *supra* note 87, at 195. Even the U.S. Supreme Court has made recent moves in this direction. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). Vertical dialogue, by contrast, has been invoked to reference the complex interactions of the ECJ and the ECHR with the national courts of Europe. See Slaughter, *Typology*, *supra* note 85, at 106–11 (describing European national courts’ referral of European law issues to ECJ under Article 177 of Treaty of Rome and enforcement of ECHR decisions as domestic law). In particular, Slaughter considers the ECJ’s extended colloquy with the German Constitutional Court emblematic of this pattern. See *id.* at 100. The analysis herein is intended to challenge the capacity of the paradigm—or metaphor—of dialogue to encompass this broad array of interactions. Rather, I will suggest that the patterns of interaction which Slaughter characterizes as vertical dialogue encompass elements of dialogue, but also aspects of direct review. They demand, as such, some alternative construct for their appreciation. See *infra* notes 103–08 and accompanying text.

⁹¹ Given the wide breadth that has been given to the dialogic metaphor, see *supra* note 90, no enumeration of features is likely to capture all its forms. Instead, I focus on what I consider the true pattern of judicial dialogue—what Slaughter terms “horizontal” dialogue. See Slaughter, *Typology*, *supra* note 85, at 103.

⁹² Cf. ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 26–27 (1969) (suggesting potential prospective function of judicial decisions).

constitutional courts is a prime example.⁹³ In such cases, courts engage one another in the explication of new jurisprudential norms.⁹⁴ The explicit negotiation among courts involved in the resolution of multinational litigation or transnational business matters, as in the insolvency proceedings of the Maxwell Communication Corporation, reveals a similarly prospective orientation.⁹⁵ In these cases, courts engage one another, not to the end of assessing one another's past decisions or norms, but with an eye to resolving new questions or dilemmas. Stated slightly differently, judicial dialogue does not involve the "review"—in a judicial sense—of one court's decision by another. Given a prospective orientation, past determinations of a court are not the focus of judicial dialogue.⁹⁶ The focus of judicial dialogue is instead on the implications for forthcoming decisions.

A second important characteristic of judicial dialogue—and a point of contrast with appellate review—is its bidirectionality. Neither side is privileged in its contribution to a judicial dialogue. European courts may borrow from U.S. courts in one case, while U.S. courts borrow from their European counterparts in another. By contrast, the appeals process involves one court consistently engaging in review while the other is consistently subject to it. This does not mean that every dialogue invariably incorporates multiple voices. Rather, in any given case, only one side may be heard. Even over an array of cases, one court may be more active in the dialogue. At a minimum, however, dialogue must exclude any barrier to the participation of both judicial parties, should they choose to participate.

Finally, judicial dialogue is characterized—unlike appeal—by some dimension of voluntariness.⁹⁷ When the South African Constitutional Court draws on the jurisprudence of the U.S. Supreme Court, the German Constitutional Court, or the ECHR,⁹⁸ and, at least

⁹³ See Slaughter, *Judicial Globalization*, *supra* note 87, at 1116–19 (citing examples of South African, British, and U.S. national courts looking to decisions of foreign courts for guidance).

⁹⁴ The U.S. Supreme Court essentially did just this in *Lawrence*, 539 U.S. at 573, 576–77, a decision that other constitutional courts, faced with related questions of sexual preference, can be expected to consider, cite, and discuss in turn.

⁹⁵ See Slaughter, *Community of Courts*, *supra* note 87, at 213–15.

⁹⁶ It bears restating that others might enumerate a distinct set of characteristics to describe judicial dialogue. For purposes of the present analysis, however, it is enough to argue that the core characteristics I set out capture most of what is commonly intended by references to judicial dialogue.

⁹⁷ See Martinez, *supra* note 3, at 467 (noting voluntary communication among courts).

⁹⁸ See Slaughter, *Community of Courts*, *supra* note 87, at 195; Slaughter, *Judicial Globalization*, *supra* note 87, at 1116. In fact, the South African court even has had occasion to cite decisions of the California Supreme Court and the Massachusetts Supreme Judicial Court. See *id.* Among other cases, the South African court looked to foreign and international jurisprudence in its landmark decision on the death penalty. See *State v.*

nominally, even when lower national courts in Europe refer cases to the ECJ,⁹⁹ they do so voluntarily.¹⁰⁰ Such voluntary, discretionary engagement would seem to be a *sine qua non* of any conception of dialogue.¹⁰¹ This voluntariness suggests the limited role of judicial *power* in the dialogic interaction of courts. True dialogue does not depend on, and is arguably inconsistent with, the assertion or exercise of power between the relevant judicial bodies. Neither court enjoys authority over the other; hence, their engagement is a dialogue rather than a monologue.

Given its transnational application, dialogue offers itself as a promising framework for understanding Chapter 11 and similar international review of national courts. I will suggest, in fact, that there is an important dialogic dimension to Chapter 11, given its prospectivity and bidirectionality—the first and second characteristics described above. On the whole, however, Chapter 11 and analogous forms of international review of national courts are difficult to reconcile with the collective character of dialogue, and particularly with the third characteristic of voluntariness. Chapter 11 review is not grounded primarily in judicial comity. Chapter 11 and analogous mechanisms of international review involve a dimension of *power* more in line with appellate review than with dialogue.¹⁰² Even the prospectivity and bidirectionality of Chapter 11 review are limited in important ways.

Makwanyane & Another, 1995 (3) SALR 391 (CC). The court does so, moreover, based on constitutional provision—grounded, perhaps, in the country's long pariah status—for the review of international and foreign case law. See Slaughter, *Community of Courts*, *supra* note 87, at 201 n.48.

⁹⁹ See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 2001 O.J. (C 80) 1, art. 234. The “preliminary reference” procedure, by which European national courts refer questions to the ECJ, is voluntary for all courts other than those of last resort. See *id.* Even the high courts of Europe's member states enjoy some scope of interpretation in determining whether to submit a preliminary reference. See *infra* note 586 and accompanying text.

¹⁰⁰ See Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. (forthcoming 2005) (manuscript on file with the *New York University Law Review*) (“[C]ourts engage in this comparative dialogue not out of a sense of legal obligation.”).

¹⁰¹ The *Oxford English Dictionary* defines “dialogue” as “[a] conversation carried on between two or more persons; a colloquy, talk together.” 4 THE OXFORD ENGLISH DICTIONARY 601 (2d ed. 1989).

¹⁰² To similar effect, Karen Alter has rejected a characterization of the interactions of European institutions, including national courts and the ECJ, as dialogue. See KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* 38 (2001). Instead, she posits a pattern of “doctrinal negotiation”:

A dialogue implies two or more actors talking to each other, using reason to reach a mutually accepted outcome. The notion of a dialogue implies that the outcome reached is the best reasoned outcome, the one that convinces all sides. A negotiation, on the other hand, implies competing interests where

As to the initial element of prospectivity, under Chapter 11 and similar international regimes, the relevant international tribunal is focused on *review*—in an appellate sense of the word—of the national court’s judgment and procedure.¹⁰³ The international tribunal engages in such review with reference to a particular case brought before it by the aggrieved litigant from the national court proceeding.¹⁰⁴ In *Loewen*, for example, the magnitude of the damages award imposed by the court (by way of the jury) was a focus of review.¹⁰⁵ The tribunal also considered the court’s refusal to sustain specific objections and order specific jury instructions and the courts’ discretionary judgments regarding a variety of other trial issues.¹⁰⁶ In such an analysis,¹⁰⁷ the international tribunal is not engaged in what can fairly be characterized as a dialogue. Instead, it is explicitly considering *and critiquing* the national court’s substantive judgments and procedural determinations.¹⁰⁸ Its analysis is not primarily prospective,

parties recognize that they may not be able to have it as they most like it. Negotiations usually lead to compromises that take into account the power of the negotiating parties, the conflicting interests of the different actors, and the intensity of those interests.

Id. In essence, Alter’s “negotiation” acknowledges the pattern described herein, in which no party to the relevant interaction enjoys complete autonomy. *Compare id. with infra* Part IV.A.1.

¹⁰³ In *Loewen*, thus, the “claim of injury [was] based upon judicial action in a particular case.” *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 708, ¶ 143 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>; see also *id.* ¶ 161 (noting “judicial violation of international law”). Similarly, in *Mondev*, “the measure challenged [was] that of a local court.” *Mondev Int’l Ltd. v. United States*, Award, Case No. ARB(AF)/99/2, 42 I.L.M. 85, 103, ¶ 97 (NAFTA Ch. 11 Arb. Trib. 2002), available at <http://www.naftalaw.org>. To related effect, Slaughter has spoken of the growing occasion for judges to evaluate the “independence and quality of fellow judges of other nations.” SLAUGHTER, *supra* note 57, at 86.

¹⁰⁴ This distinguishes the “review” of Chapter 11 from that of a forum non conveniens determination, in which the court makes a generalized assessment of the subject judicial system. *Cf. Loewen*, 4 J. WORLD INVESTMENT at 708, ¶ 143. While also likely to offend the latter, such broad review raises an entirely different set of concerns than does the Chapter 11 review of a previously adjudicated case.

¹⁰⁵ See *id.* at 685, 698–700, 702, ¶¶ 46, 104–114, 122.

¹⁰⁶ See *id.* at 685, 693–95, ¶¶ 47, 78–87.

¹⁰⁷ In *Mondev*, described in greater detail below, see *infra* notes 397–413 and accompanying text, the Massachusetts Supreme Judicial Court’s asserted rationale for official immunity was subject to review, see *Mondev*, 42 I.L.M. at 112, ¶ 139.

¹⁰⁸ A separate question concerns the constitutionality of such review under U.S. law. See A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877, 891–92 (2000) (arguing that Article III of U.S. Constitution precludes United States from entering into treaties allowing review of federal court decisions by international tribunals, and that principles of constitutional federalism do not allow federal government to subject state courts to international judicial review). There have been previous incidents of international tribunals undermining decisions of U.S. courts, including the Supreme Court, but even those cases involved limited review of the *Loewen* variety. See, e.g., Martinez, *supra* note 3, at 473 (noting international commission created by United States and Britain

even if, as I will argue, its conclusions ultimately are. The charge of the Chapter 11 tribunal is to review the decision of the national court. At least from the latter's perspective, this is more than a dialogue.

Bidirectionality is also relatively constrained in Chapter 11 and similar review. As I describe below, such bidirectionality does exist; Chapter 11 tribunals review decisions of national courts, but national courts may subsequently review the arbitral award. A general back-and-forth may emerge across cases as national courts respond to prior Chapter 11 reviews of their decisions and Chapter 11 tribunals respond in turn. In this respect, Chapter 11 and analogous international review of national courts exhibits some dialogic character. The response of national courts to Chapter 11 review, however, is distinct from bidirectional dialogue as described above. It is not parallel. As such, it is unlike the reciprocal borrowing amongst constitutional courts or U.S. and British courts' negotiation of the Maxwell bankruptcy.¹⁰⁹ Chapter 11 tribunals' interaction with national courts is more in the nature of *seriatim*, rather than parallel, interactions.

The ultimate obstacle to squeezing Chapter 11 and similar international review of national courts into the rubric of judicial dialogue is the important place of power in any judicial exchange under Chapter 11 and its analogues.¹¹⁰ It is worth pausing to consider this feature, as it represents the most important innovation of Chapter 11 review of national courts. In what sense does Chapter 11 review involve the exercise of power? We have already established that the power of Chapter 11 is not that of hierarchical appeal. To understand the power of Chapter 11 more fully, one might begin with the contrast between Chapter 11 review and the engagement of courts in dialogue.

following Civil War, which reviewed and reversed several Supreme Court decisions, as well as U.S. courts' enforcement of international arbitration agreements); *see also supra* note 54 and accompanying text.

¹⁰⁹ *See Slaughter, Community of Courts, supra* note 87, at 213–16; Slaughter, *Judicial Globalization, supra* note 87, at 1116–19.

¹¹⁰ Eric Posner and John Yoo recently have argued that more powerful international tribunals—as defined by greater independence and jurisdiction to hear individual claims, among other features—are actually less effective institutions of international adjudication. *See* Eric A. Posner & John C. Yoo, *A Theory of International Adjudication*, 91 CAL. L. REV. (forthcoming 2005) (manuscript on file with the *New York University Law Review*). Others have challenged their analysis directly. *See, e.g.,* Laurence R. Helfer & Anne-Marie Slaughter, *Of States, Bargains, and Judges: The Limited Role of Dependence in International Adjudication*, 93 CAL. L. REV. (forthcoming May 2005), available at <http://law.vanderbilt.edu/faculty/helfer.html>. It is unclear how Chapter 11 and similar review would fit within Posner and Yoo's typology, as they do not address it directly. For present purposes, it is sufficient to note that the features of Chapter 11's institutional design, which I characterize as introducing a dimension of power, enhance the relative autonomy of Chapter 11 tribunals in their interaction with national courts. Whether this is ultimately more or less effective—in Posner and Yoo's terms—is a question for another day.

Dialogic courts do not stand in a position of authority vis-à-vis one another. In citing decisions of the U.S. Supreme Court or the ECHR, the South African Constitutional Court is not acting out of any sense of obligation. The same can be said of courts deferring to the jurisdiction of a foreign court, or enforcing that court's prior judgment. They do so not because of any mandate held by their counterpart—because of its power—but out of a sense of comity or respect.

Even vertical judicial interactions may lack a significant dimension of power. The historical relationship between the ICJ and U.S. courts may be one example. The ICJ is not completely without persuasive influence in its relations with U.S. courts.¹¹¹ In the aftermath of the ICJ's recent decision in *Avena*, national courts—including state courts—have exhibited some broad sense of obligation to at least acknowledge the Court's interpretation of the Vienna Convention on Consular Relations and its critique of the application of the procedural default rule to asserted violations of the Convention.¹¹² While I will suggest below that *Avena* may signify the stirrings of a power dynamic in ICJ relations with national courts,¹¹³ as it has historically functioned, the ICJ's diffuse influence is different in kind from the manifestation of power that emerges from the design and practice of Chapter 11 review of national courts.¹¹⁴ The rare occasion on which meaningful political pressure may follow from a decision of the ICJ does not alter this conclusion. Such pressure is more in the nature of political, rather than judicial, pressure.

I would argue that two features of Chapter 11 and similar regimes may contribute to a strengthened dynamic of power in Chapter 11 review of national courts. First is the use of investor-state mechanisms by which individual litigants bring claims directly against national authorities.¹¹⁵ Eliminating the requirement of espousal, through

¹¹¹ See, e.g., Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HAST. INT'L & COMP. L. REV. 27, 108 (1999) (arguing that by publicly criticizing U.S. commitment to Vienna Convention on Consular Relations, ICJ placed U.S. citizens traveling abroad at risk of reciprocal treatment, potentially creating incentive for American courts to "introduce transjudicial communication by being responsive to the holdings of the World Court").

¹¹² See *infra* notes 556–58 and accompanying text.

¹¹³ See *id.*

¹¹⁴ See Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1238–39 (2004) (suggesting generally limited power of international tribunals). In their recent work, Ginsburg and McAdams offer an alternative theory of the power of international tribunals, complementary to, but distinct from, the theory of power in Chapter 11 that I offer herein. See generally Ginsburg & McAdams, *supra*.

¹¹⁵ See Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 536 (2003) (describing private right of action against national governments under Chapter 11 and its potential impact); see also José E. Alvarez, *The New Dispute Settlers*:

which individual claims were historically adjudicated in international fora only if taken up by the home state of the aggrieved party, increases the volume of cases before Chapter 11 and similar tribunals. Such an increase offers international judicial actors greater opportunity to speak to, and to influence, national adjudication. Direct access also eliminates the role of political commitments in filtering out sensitive cases before they reach the tribunal.¹¹⁶ Such cases might include those requiring international review of national courts—the cases of interest herein. In this sense, international tribunals open to individual claims might be said to enjoy greater relative control over their docket. Non-espoused claims also may enhance the power of Chapter 11 tribunals by encouraging the emergence of domestic constituencies committed to effectuating tribunal decrees.¹¹⁷ Those constituencies can be expected to pursue that goal without the political constraints of amicable foreign relations, which might preclude state action to enforce an international judgment even if they permitted the case to proceed at the outset.

This suggests the somewhat counterintuitive second source of power in the institutional design of Chapter 11. By offering monetary damages as the relevant remedy, rather than injunctive or other direct forms of relief, Chapter 11 dramatically enhances the potential for enforcement of remedial decrees and hence increases the power of Chapter 11 tribunals. By relying on a regime of liability rules of a sort—rather than property rules—Chapter 11 essentially manages to create an effective mechanism of *international* judicial power.¹¹⁸ By

(*Half*) *Truths and Consequences*, 38 TEX. INT'L L.J. 405, 415 (2003) (noting rarity of "commitment to dispute settlement" manifest in Chapter 11). In the terms offered by Keohane, Moravcsik, and Slaughter, the power of Chapter 11 review arises from its combined elements of independence, access, and embeddedness. See Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 458 (2000). These features come together to create a high degree of delegation, with resulting enhancement of the power of Chapter 11 and similar tribunals. See *id.* at 486.

¹¹⁶ See Frederick M. Abbott, *NAFTA and the Legalization of World Politics: A Case Study*, 54 INT'L ORG. 519, 543 (2000); Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489, 517 (2000). For example, early in the development of the European legal community, political concerns caused the European Commission, as well as member states themselves, to be hesitant about pursuing claims against member states. The European legal system consequently remained ineffective at compelling compliance with European law until the development of the direct effect doctrine, which allowed individual litigants to raise European law issues before the national courts. See ALTER, *supra* note 102, at 11–16 (noting that original European legal system was ineffective at compelling compliance with European law and that scholars and judges attribute increased effectiveness to direct effect doctrine).

¹¹⁷ See Keohane et al., *supra* note 115, at 477.

¹¹⁸ See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) (suggesting potential benefits of liability rules over property rules in constitutional jurisprudence); see also Guido Calabresi & A.

contrast with directive judgments of the ICJ, for example, monetary liability is difficult for state respondents to resist.¹¹⁹ Such relief requires no legislation, regulation, or other domestic reform. It simply requires payment.

Such a payment obligation is especially likely to be met under the Chapter 11 regime because it is directed not to the offending national court or other subnational entity, but rather to the ultimate deep pocket—the federal authorities of the relevant NAFTA state party.¹²⁰ Hence, the role of comity in international relations is turned on its head, with the state entity most sensitive to amicable foreign relations charged with the liability for any Chapter 11 award. Lest even federal authorities waver in their commitment to their foreign obligations, the efficacy of a Chapter 11 award, and hence the power of the issuing tribunal, is further enhanced by the relatively ready enforceability of the award in the national courts of the state faced with the payment obligation.¹²¹ Given the private invocation of Chapter 11 dispute settlement and the monetary nature of any resulting judgment, if a liable state party refuses to comply with a Chapter 11 judgment, the private claimant can be expected to take any and all measures necessary to enforce it.¹²²

Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972) (arguing that transaction costs and difficulty of assessing damages affect choice between property and liability rules).

¹¹⁹ Cf. Stephan, *supra* note 51, at 640 (“[W]here international law rests on explicit commitment, including acceptance of an enforcement process that operates independently of the state subject to the law, we need to take notice.”). I will argue below that the interaction of international tribunals and national courts explored herein is analogous to the Warren Court–era interaction of federal and state courts on habeas review, as elucidated by Robert Cover and Alexander Aleinikoff. See *infra* Part III.B.1. Notably, Cover and Aleinikoff cite the Warren Court’s failure to invoke equitable remedies in its criminal procedure jurisprudence, as distinct from its reapportionment and civil rights decisions, as one of the critical catalysts behind the non-traditional pattern of intersystemic judicial interaction they observe in habeas review. See Cover & Aleinikoff, *supra* note 14, at 1039–40.

¹²⁰ See NAFTA, *supra* note 12, art. 1136, at 646.

¹²¹ Such enforcement is not automatic, see Abbott, *supra* note 116, at 537, but is easier to accomplish than would be enforcement of any form of injunctive relief, with the likely need for some form of legislative or regulatory intervention.

¹²² Given the continuing failure of Canada and Mexico to join the ICSID Convention, Chapter 11 awards are enforced in national courts, under the terms of the New York Convention. See 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, 1441, 1443 (2003). While the latter allows some room for national tribunals to resist enforcement, primarily on grounds of public policy, the New York Convention ordinarily leads to enforcement of challenged international arbitral awards. See *id.* at 1443; see also Abbott, *supra* note 116, at 537. The New York Convention, of course, is the common name for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. On the Convention generally, see Alford, *supra* note 2, at 700–04.

International review under Chapter 11 therefore suggests a capacity for, if not necessarily the overt assertion of, judicial power.¹²³ Such power is limited, even by comparison with the constrained power of domestic courts. Compared to traditional international adjudication, however, Chapter 11 tribunals possess meaningful judicial power. As outlined, however, the power of Chapter 11 tribunals operates between courts and executive or legislative bodies. Such inter-branch engagement among international courts and national executive and legislative agencies is notable,¹²⁴ but is different in kind from the assertion of power among judicial institutions. The capacity of Chapter 11 tribunals to assert power, however, ultimately extends to national courts as well. While I explore this power dynamic between Chapter 11 tribunals and national courts in greater detail below, its essence lies in two factors.¹²⁵

First, Chapter 11 awards have the capacity to undo certain types of national judicial decisions, including any award of exemplary or punitive damages and any denial of the liability of a federal government entity.¹²⁶ Second, and perhaps more importantly, by directing its damage awards against the federal government, Chapter 11 creates an institutional mechanism for putting pressure on national courts, whether at the federal or state level.¹²⁷ Had the Loewen Group succeeded in winning its \$750 million claim against the federal govern-

Admittedly, a pattern of engagement grounded in national review upon enforcement (or petition for annulment or revision) has the potential to produce an odd dynamic, with national courts potentially reviewing the decision of an international tribunal, which itself reviewed the decision of a national court. This peculiarity would be especially pronounced where the national court charged to review the international award is either the *same* court that the international tribunal reviewed or is inferior to that court. In the latter dynamic, a lower national court is indirectly called to review the decision of its hierarchical superior. Shades of this occurred in the *Köbler* case, described *infra*, in which an Austrian trial court was forced to review the decisions of an Austrian high court. See Case C-224/01, *Gerhard Köbler v. Republik Österreich*, 41 C.M.L.R. 813 (2004); see also *infra* notes 598–603 and accompanying text.

¹²³ With an eye to the dimensions of power in Chapter 11 review of national courts, Anne-Marie Slaughter has classified Chapter 11 as a form of “enforcement network.” See SLAUGHTER, *supra* note 57, at 21, 145. In broader terms, Slaughter sees Chapter 11 as part of an emerging pattern of vertical government networks, in which supranational authorities act in tandem with national authorities to effectuate policy ends. The former, in essence, “borrow” authority from the latter. See *id.* at 20–21.

¹²⁴ This pattern is a significant worry for many. It is not, however, the issue of interest herein.

¹²⁵ See *infra* Parts IV.A.1 & B.1.a.

¹²⁶ See *infra* notes 320–22 and accompanying text.

¹²⁷ In Part IV.B.1.a, I suggest several possible mechanisms of such pressure, including statutorily authorized enforcement of NAFTA’s provisions by the executive branch, judicial or legislative steps to eliminate or curtail the complete diversity rule in cases involving aliens, and federal efforts to secure state or local indemnification of Chapter 11 awards.

ment, various pressures on the Mississippi authorities, including the courts, might have been predicted.¹²⁸

Given the manifestation of power in Chapter 11 review of national courts, the recurrent engagement of judicial systems can hardly be said to be voluntary. National courts do not face Chapter 11 review by way of a voluntary dialogue. Rather, such review is forced upon them.¹²⁹ Unlike the dialogic interactions noted above, Chapter 11 review of national courts does not arise from the consent of the relevant judicial participants.¹³⁰ At the conclusion of such review, moreover, Chapter 11 tribunals enjoy some meaningful capacity to achieve desired results without the cooperation of the counterpart national court. Such power distinguishes Chapter 11 review from most conventional mechanisms of international judicial review, which

¹²⁸ This is not to deny that the imposition of Chapter 11 awards arising from state- or municipal-court malfeasance on the federal government, as opposed to the offending jurisdiction, if not the court itself, also limits Chapter 11 power in important respects. If imposition of liability on the state or local court were possible, Chapter 11 might be even stronger. By creating a mechanism of effective pressure, however, an award issued against the federal government offers its own dimensions of power, as suggested above and described in greater detail below.

In fact, federal liability may be preferable in at least one respect. As I will suggest below, the efficacy of Chapter 11 review of national courts as a source of judicial innovation depends on the emergence of a regularized pattern of cases. *See infra* Part IV.A.3. Absent a certain volume of decisions, Chapter 11 will be far more limited in its impact. Because of its orientation to federal authorities, however, it is not necessary that Chapter 11 review of national courts occur with the frequency of ordinary appeal if such review is to influence court behavior generally. The direction of Chapter 11 awards to federal authorities may enhance their influence and cause their effects to be felt more widely than if they had been directed to any single state or local jurisdiction. *Cf.* Bhagwat, *supra* note 69, at 985–86 (suggesting that U.S. Supreme Court enjoys meaningful power over lower courts, notwithstanding limited occurrences of review); Caminker, *supra* note 66, at 80–81 (same); Tidmarsh, *supra* note 84, at 1163 (arguing that federal-state dialogue does not require participation of each system in every case: “it is enough that the court has the opportunity to comment over a range of cases”). Even if the federal authorities do not expressly disseminate the lessons of a Chapter 11 judgment, greater public exposure of an award against the federal government might be expected to facilitate that end.

¹²⁹ Of course, such review arises out of the voluntary accession to NAFTA or other relevant international agreements. Yet such generalized consent is distinct from the consensual nature of judicial dialogue, a case-specific election to engage another court.

¹³⁰ *Cf.* Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 558 (2002) (“[C]ourts speak to each other across jurisdictions not because they have to but because they want to.”). That jurisprudential notions of dialogue have some origins in Alexander Bickel’s conception of the passive virtues, *see* Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 378–79 (1990), would seem to confirm the difficulty of reconciling Chapter 11’s relatively proactive review with a purely dialogic vision of judicial action.

are obliged to rely on dialogue with national courts for their efficacy and success.¹³¹

Chapter 11 review of national courts thus sits uneasily with conventional assumptions of the limited authority of international institutions, and of courts in particular. It is not simply another case of transnational judicial dialogue, given elements incompatible with a model of interaction grounded in voluntary exchange and a spirit of comity. It borrows from appellate review some capacity to undo the effects of the relevant national court decision, even if not to reverse it,

¹³¹ Examples of judicial institutions that engage in close judicial review of the judgment or procedures of a foreign court or have some meaningful capacity to pursue desired policy outcomes without the consent and cooperation of the court subject to review can be offered. See also *infra* Part VI.B. Chapter 11 is relatively unique in combining both elements. Hence its exploration herein.

As for engagement in close review, I have previously mentioned the sometimes harsh review of forum non conveniens inquiries. See *supra* note 104. Besides its lack of case specificity, however, such review involves a limited assertion of power, because the relevant ends do not encompass the application of any resulting judgment to the subject judicial system. The ICJ's gentle admonishment of the U.S. Supreme Court in the *LaGrand* case, with its suggestion that the Court could have done more to effectuate the ICJ's provisional measures, also might be noted: "[I]t would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it 'time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved.'" *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, at 508 ¶ 114 (citing *Federal Republic of Germany v. United States*, 526 U.S. 111, 113 (1999) (Breyer, J., dissenting)). Again, however, the element of power is absent. See *infra* notes 554–55 and accompanying text. A similar case of "review" might be found in the ECJ's encouragement of lower national courts in Europe to disregard directives from their national high courts not to submit questions of European law to the ECJ. See Helfer & Slaughter, *supra* note 2, at 310; see, e.g., *Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629 (counseling lower Italian court to apply European law rather than Italian constitutional rule, notwithstanding earlier directive from Italian Constitutional Court (ICC) to refer any such conflict to ICC). Besides the indirect nature of such review, the power at work in this case remains limited. See *infra* notes 590–94 and accompanying text (exploring pattern of interaction of ECJ and European national courts).

Perhaps the closest parallel to the invasive review of Chapter 11 comes in decisions regarding the enforcement of foreign judgments. Here, one might even identify some degree of effective "power"—the capacity to prevent enforcement. Such review is worthy of further study. It is at least clear, however, that the power dynamic arising in the enforcement of foreign judgments is a less active (and perhaps less invasive) one than that of Chapter 11.

What about courts that have meaningful power but do not engage in national court review? The best example of this pattern, notably, is another international trade court. The dispute settlement panels of the WTO, as well as its Appellate Body, wield tremendous power. They are more than able to create effective incentives to achieve their desired ends. The WTO dispute settlement process, however, as well as that of the General Agreement on Tariffs and Trade (GATT) before it, have had little occasion to interact with national courts. Rather, WTO review is conventionally directed to the executive and legislative branches of the WTO member states. As with the ICJ, however, there is no institutional bar to the emergence of such review of national courts in the future. See *infra* notes 559–63 and accompanying text (analyzing judicial interactions under GATT and WTO regimes).

and some resulting influence on national court decisions. In its retrospective orientation—its *review* of the prior national court decision—it operates in a unidirectional pattern and exhibits some degree of hierarchy. Moreover, as in appellate review, Chapter 11 tribunals enjoy significant authority within a narrow scope of jurisdiction.

Most importantly, Chapter 11 review of national courts exhibits a dimension of power echoing the relationship between appellate and trial courts. It does not arise from the voluntary consent of the court subjected to review. Effectuation of the ultimate judgment, moreover, may occur even absent the cooperation of the court reviewed.

While Chapter 11 review of national courts consequently amounts to something more than judicial dialogue, it remains something less than a true appeal. For it exhibits important dialogic features as well. Chapter 11 decrees are not binding on national courts in any formal sense. Furthermore, though not bidirectional in a purely dialogic sense, there is some inevitable back-and-forth among Chapter 11 tribunals and national courts, both within and across cases. I will suggest below that Chapter 11 review also has some prospective dimension, coupled with the retrospective character of its substantive analysis. Like judicial dialogue, it is oriented to norm development, at least as much as error correction.

Most importantly, as suggested above and explored in greater detail below, the power of Chapter 11 and similar international review is limited in scope.¹³² It is characterized by a distribution of power in which each judicial body enjoys some autonomous capacity to effectuate its will, but not unlimited capacity to do so. Within this dynamic, some pattern of exchange—of discourse—remains essential.

Chapter 11 review of national courts, then, has some hybrid quality, exhibiting important features of both appellate review and judicial dialogue.¹³³ While the appropriate effectuation and particular characteristics of Chapter 11 and analogous review of national courts, given its hybrid nature, requires greater consideration,¹³⁴ it is useful to first consider the ends of such review. What benefits might international review of national courts, in institutional forms such as Chapter 11, have to offer?

¹³² See *supra* notes 75–77 and accompanying text; *infra* Part IV.B.1.a.

¹³³ See Wright & Miller, *supra* note 14, at 660–61 (describing similarly mixed nature of federal–state court interaction on habeas review of capital sentences). Frank Cross has posited legal interaction as defined by either hierarchy or dialogue. See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1308 (1999). The present analysis posits something in the middle.

¹³⁴ See *infra* Part IV.A.

III

JUDICIAL INNOVATION AND THE ENDS OF INTERNATIONAL REVIEW

It becomes clear from the foregoing that Chapter 11 review of national courts incorporates elements of appellate review as altered—and limited—by elements of intersystemic judicial dialogue. Yet this descriptive view of Chapter 11 and similar international review of national courts points to a normative inquiry: What is the function of international review of national courts? More specifically, what is the function of the hybrid pattern of judicial interaction evident in Chapter 11?

At a minimum, the hybrid nature of such review suggests that it is not exclusively directed to the appellate ends of correcting error or achieving consistency of law.¹³⁵ On the face of Chapter 11, one might alternatively point to monetary relief for individual investors as the primary end of such review. The limitations of Chapter 11, however—the infrequency of review, the relatively forgiving standard of conduct mandated by Chapter 11, the deferential approach of tribunals in the application of even that low standard of conduct, and the limited size of awards in cases that have proceeded to judgment—undermine a reading of Chapter 11 review of national courts as serving primarily to provide monetary relief to injured investors.

Robert Cover, looking to another case of judicial interaction shaped by similar hybrid features—federal habeas review of state criminal convictions—offered innovation as an important function of what he termed “jurisdictional redundancy.”¹³⁶ I would suggest the

¹³⁵ See *supra* notes 65–68 and accompanying text.

¹³⁶ See Cover, *supra* note 14, at 673 (noting that when multiple bodies generate norms, likelihood that at least one of them will attempt innovation increases); see also *id.* at 662–65 (describing role of redundancy in facilitating change); Katyal, *supra* note 15, at 1720 (describing role of courts in “education”). Multiple sources of norm articulation, essentially, can limit the cost of error by any given judicial institution. See Cover, *supra* note 14, at 673. Thus, jurisdictional redundancy “makes it more likely that at least one such center will attempt any given, plausible innovation.” *Id.* Cover’s reference to innovation is somewhat distinct from the present concept, however, as it is oriented more to the array of state voices that are heard in a system of polycentric norm articulation—the familiar notion of experimentalism in federal systems, see *id.* at 673–74, while the pattern of judicial interaction I develop herein emphasizes vertical exchange between judicial systems as the driver of innovation. The pattern of interaction between international tribunals and national courts is thus distinct from the “percolation” of issues in the U.S. courts of appeal before their resolution by the Supreme Court. See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1444–45 (1999). Among international and national courts, we have no ultimate adjudicator, but simply an ongoing exchange among near equals. As such, I offer a less determinate, and deterministic, pattern of interaction than that of the U.S. federal court system. My model does parallel the percolation notion, however, insofar as the relevant exchange

same ends for the redundancy created by international review of national courts.¹³⁷ In the face of judicial resistance to efficient innovation, such review can serve to encourage beneficial legal transition and reform—the emergence and evolution of legal norms.¹³⁸

After outlining the potential importance of some mechanism of judicial review to ensure an efficient pace of judicial innovation, this Part explores other cases of judicial interaction standing between dialogue and appeal. Specifically, I suggest how analogous patterns of federal habeas review of state courts and appellate courts' use of dicta as a signal to lower courts may serve to facilitate judicial innovation. I conclude by offering a rough picture of the interaction of international tribunals and national courts under Chapter 11, pointing to the various ways in which that interaction may encourage desirable innovation and norm internalization.

A. *The Ends and Means of Judicial Innovation*

International review of national courts may have a valuable role to play in fostering innovation both in national judicial systems and in the development of international norms generally. Oona Hathaway has argued that legal norms may exhibit multiple forms of "path

serves to detail the context surrounding broad principles. See Ann Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WIS. L. REV. 929, 932 (describing how Supreme Court allows lower courts to apply and define law to create context reflecting social and political climate of country).

¹³⁷ Cover refers to a pattern of "sequential redundancy." See Cover, *supra* note 14, at 673.

¹³⁸ A few words of clarification are in order. I do not dispute that protection of the rights of individual foreign investors represented the primary goal of Chapter 11's authors and signatories. I would argue, however, that the goal of jurisprudential evolution—by means of intersystemic judicial dialogue—has come to enjoy at least equal billing with investor protection in Chapter 11's actual implementation. Of course, the relevant legal innovation under Chapter 11 ultimately serves the goal of protecting individual investors. Innovation by way of the pattern of interaction that I propose aspires to an evolution of investor rights over time, however, rather than their imposition in any immediate case. In the litigation of individual cases, thus, my proposal potentially alters outcomes. This tension is hardly unique; it is simply a new manifestation of the perennial tug-of-war between a court's role in achieving justice in the case before it and its obligation to ensure doctrinal consistency and coherence. See Alicia Juarrero-Roqué, *Fail-Safe Versus Safe-Fail: Suggestions Toward An Evolutionary Model of Justice*, 69 TEX. L. REV. 1745, 1766–67 (1991). The emergence of this tension in the jurisprudence of Chapter 11 tribunals is significant, however, for its transmutation of international norm development—the evolution and innovation of international norms of due process—from a secondary benefit of Chapter 11 review of national courts into a primary goal of Chapter 11. While perhaps not intended as such by Chapter 11's authors—and surely not by NAFTA's member states—in the hands of Chapter 11 tribunals, such review may be a mechanism of lawmaking as much as one of dispute resolution. But see generally Stephan, *supra* note 51 (critiquing broad conception of U.S. litigation as serving ends beyond interests of parties, and reading Chapter 11 to eschew such broad aspirations).

dependence”—patterns of development in which present decisions continue to be shaped by past decisions, regardless of their actual wisdom or, in the modern parlance, efficiency.¹³⁹ Drawing on social-science and evolutionary-biology literatures, Hathaway identifies multiple sources of path dependence in the law.¹⁴⁰ Given these tendencies, the capacity of law—and courts in particular—for innovation may be limited.¹⁴¹ Others echo this concern.¹⁴²

The general conception of common law jurisprudence as a vehicle of progressive legal evolution, as articulated in the familiar law and economics notion of an efficient common law, posits a countervailing

¹³⁹ See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001) (positing pattern of path dependence—or “lock-in”—of law); cf. Katyal, *supra* note 15, at 1714 (noting inflexibility of binding judicial decisions).

¹⁴⁰ See Hathaway, *supra* note 139, at 606–08.

¹⁴¹ See *id.* at 650. In line with what Hathaway terms “increasing returns path dependence,” I previously have considered the potential for network externalities to produce patterns of lock-in, or inertia, in the law. See Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 721–24 (2004) [hereinafter Ahdieh, *Between Mandate and Market*] (describing network effects barriers to efficient evolution in standardized contract terms); see also Robert B. Ahdieh, *Law’s Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 227–28 (2004) [hereinafter Ahdieh, *Law’s Signal*] (suggesting potential role of law in overcoming network obstacles to efficient development of securities market structures); Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277, 317–20 (2003) [hereinafter Ahdieh, *Making Markets*] (identifying network effects in securities markets and resulting resistance to emergence of strong markets).

¹⁴² See Clayton P. Gillette, *The Path Dependence of the Law*, in *THE PATH OF LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 247–48 (Steven J. Burton ed., 2000) (noting Holmes’s doubts that law and legal patterns would change, even if social conditions indicate that current laws are inefficient or outmoded); Sophie Harnay & Alain Marciano, *Judicial Conformity Versus Dissidence: An Economic Analysis of Judicial Precedent*, 23 INT’L REV. L. & ECON. 405, 416 (2004) (suggesting that “adoption externalities” in legal market results in doctrinal stability); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (arguing that innovation in law is limited due to ties to history and tradition, such that legal rules “simply persist[] from blind imitation of the past”); Frederick Schauer, *Legal Development and the Problem of Systemic Transition*, 13 J. CONTEMP. LEGAL ISSUES 261, 272–73 (2003) (describing path dependence of legal system brought about by uniform training of lawyers); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 853 (2002) (examining transaction costs of legal reform); see also Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 757 (2002) (proposing model of judicial decisionmaking that explains stability of legal rules and standards); cf. Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT’L REV. L. & ECON. 295, 296 (1996) (suggesting circumstances in which courts will be relatively more daring); Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 176 (2002) (arguing that constitutional doctrines are essentially settled and constitutional cases litigated today are merely applying existing doctrines to new facts).

tendency.¹⁴³ These claims of efficiency have come into increasing question in recent years.¹⁴⁴ At a broad level, however, the prospect of an inadequate rate of innovation is not inconsistent with the gradual development of the law. Hathaway and others do not claim that judicially defined norms cannot evolve; rather, they suggest that they may not evolve in an efficient fashion.¹⁴⁵

From the perspective of evolutionary biology, one of the disciplines that Hathaway employs in modeling legal innovation and change, deviation from patterns of path dependence—of judicial “lock-in”—will ordinarily come in episodic phases or at “critical junctures.”¹⁴⁶ During these periods, substantial doctrinal change may occur before the altered norms are again locked in.¹⁴⁷ Yet it remains unclear what might prompt such “punctuations”¹⁴⁸ in otherwise stable norms. Even if the pattern of legal transition is not episodic but is continuous (if still constrained), how is it effectuated in the face of the path dependence of law?

While various potential triggers might be suggested, including the obvious influence of legislative and social change, one might look to other courts as a particularly promising source of episodic—and even general—legal transition.¹⁴⁹ This prospect is rooted in the common enterprise in which judicial institutions are engaged.¹⁵⁰ Given the fact

¹⁴³ See *Funk v. United States*, 290 U.S. 371, 382 (1993) (“[F]lexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.”); Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 253 (1980) (noting arguments of common law efficiency); see also Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 822 (1998) (describing conditions in which common law and legislation are more or less susceptible to stasis); Hathaway, *supra* note 139, at 631, 635–36 (describing claim of common law efficiency).

¹⁴⁴ See Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 87–93 (1999) (summarizing recent legal scholarship criticizing analogy between markets and common law).

¹⁴⁵ See Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2030–39 (2001) (summarizing recent scholarship on efficiency of norm evolution).

¹⁴⁶ See Hathaway, *supra* note 139, at 641–42 (defining “critical juncture” as “burst” phase of institutional change, followed by period of stability).

¹⁴⁷ See *id.* at 641–45.

¹⁴⁸ See *id.* at 643 (defining “punctuations” as periods of sudden change that interrupt long periods of stability).

¹⁴⁹ See Koch, *supra* note 69, at 4–5, 17; Schapiro, *supra* note 136, at 1444; Waters, *supra* note 100, at 47–48; cf. Juarrero-Roqué, *supra* note 138, at 1769 (suggesting role of sequential judicial redundancy in encouraging innovation). Other authors have noted the role of extrinsic judicial institutions in triggering judicial innovation, but without particular emphasis. See, e.g., Harnay & Marciano, *supra* note 142, at 418 (referring to role of appellate courts in fomenting innovation); Hathaway, *supra* note 139, at 641, 643.

¹⁵⁰ See Slaughter, *Community of Courts*, *supra* note 87, at 194 (“Common principles and an awareness of a common enterprise will help make simple participation in transnational litigation into an engine of common identity and community.”). Of course, this flags the

that they are engaged in a common enterprise, judges may find the decisions of fellow judges to be a particularly attractive source of new ideas. Perhaps even more importantly, decisions of other courts may enhance the confidence of any given court in its pursuit of innovative doctrinal choices.¹⁵¹ This possibility may explain the reliance of domestic courts on non-binding authority from other courts within the same national jurisdiction.¹⁵² State supreme courts in the United States regularly look to other state supreme courts in making doctrinal shifts, as do the federal courts of appeal.¹⁵³

Significant doctrinal evolution, and perhaps any substantial doctrinal reassessment, however, may require courts to look beyond their national borders. Similar patterns of path dependence may constrain other courts within a common jurisdiction.¹⁵⁴ Foreign and international tribunals, by contrast, may start with a different framework and adopt distinct approaches (even if constrained by their own patterns of path dependence).¹⁵⁵ They may consequently be better positioned

other side of the same coin: Courts may look to one another given a common set of biases and rational preferences for doctrines that enhance judicial authority.

¹⁵¹ See Bhagwat, *supra* note 69, at 1006–09 (describing how Supreme Court could benefit from looking to practical experience gained by lower courts in implementing Supreme Court doctrines); Keohane et al., *supra* note 115, at 484.

¹⁵² The recurrent critique of courts' citation of foreign decisions also acknowledges the role of such citation as a mechanism of change. U.S. decisions cannot justify the relevant holding, goes the standard dissent, so the offending majority must turn to foreign cases instead. See, e.g., *Foster v. Florida*, 537 U.S. 990, 990 n.* (Thomas, J., concurring in denial of certiorari) ("In any event, Justice Breyer has only added another foreign court to his list while still failing to ground support for this theory in any decision by an American court.").

¹⁵³ Cross-citation between state and federal courts, among federal district courts, and other permutations of precedent-borrowing also might be offered. Additionally, it bears noting that I do not wish to suggest that direct review cannot serve as a valuable means of legal innovation. See David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 75 (2003) (arguing that appellate review provides means by which law can evolve to reflect changing needs of society). But see Juarrero-Roqué, *supra* note 138, at 1772 (suggesting limitations of hierarchical review as source of innovation). Such innovation, however, is less likely to offer especially distinct perspectives.

¹⁵⁴ Cf. Juarrero-Roqué, *supra* note 138, at 1772 (suggesting judicial redundancy internal to judicial system may not be adequate spur to innovation). If Evan Caminker is correct that lower courts utilize elements of a proxy model in their decisionmaking, attempting to predict how an appellate court would decide a given issue, see Caminker, *supra* note 66, at 55, then external sources of jurisprudence are clearly necessary for desirable innovation.

¹⁵⁵ John Orth has identified transplantation of judicial authority between common law and civil law jurisdictions as a source of innovation. See John V. Orth, *The Secret Sources of Judicial Power*, 50 LOYOLA L. REV. (forthcoming 2004) (manuscript on file with the *New York University Law Review*). Paul Stephan, by contrast, has suggested that extrinsic judicial review may actually function to constrain innovation. See Stephan, *supra* note 41, at 792.

to offer a domestic court the alternative perspectives necessary to promote, or even to suggest the possibility of, innovation.¹⁵⁶

As between foreign and international tribunals, finally, international tribunals may be particularly suited to encouraging jurisprudential change in domestic courts.¹⁵⁷ In Chapter 11 and similar cases, the direct and explicit review that takes place, together with the presence of some degree of power in the hands of the international tribunal, ensures that the latter will be heard by the national court.¹⁵⁸ Foreign tribunals, on the other hand, are more easily ignored.

B. Hybrid Judicial Interaction and the Means of Innovation

International review of national courts may be an effective catalyst of judicial innovation. To better appreciate this role, one might consider other examples of judicial interaction standing between appellate review and dialogue. Two cases of such hybrid interaction are emphasized herein. The first is the domestic case of federal habeas corpus review of state criminal convictions. The second is appellate courts' affirmative (rather than incidental or inadvertent) use of dicta as a signaling device. These patterns of interaction suggest ways in which courts in a position of balanced power may help to encourage shared innovation.

1. The Innovation of Habeas Corpus

Writing of the criminal procedure jurisprudence of the Warren Court some twenty-five years ago, Robert Cover and Alexander Aleinikoff observed a pattern they termed "dialectical federalism."¹⁵⁹ Within this model, lower federal courts and state courts charged with the adjudication of constitutional norms of criminal procedure—the state courts by way of their general police power and the federal courts through their habeas jurisdiction to review state criminal con-

¹⁵⁶ International and foreign courts may be particularly capable of inciting "punctuated" change. Cf. Hathaway, *supra* note 139, at 643. In the terms used by Harnay and Marciano, extra-jurisdictional courts may not be constrained by the same potential professional costs and sanctions. Cf. Harnay & Marciano, *supra* note 142, at 409. From a network economics perspective, a competing jurisprudential network may break the dominant network's pattern of lock-in by displacing the status-quo equilibrium. See Ahdieh, *Between Mandate and Market*, *supra* note 141, at 749–50.

¹⁵⁷ Cf. Keohane et al., *supra* note 115, at 479–80 (suggesting that transnational tribunals have even greater capacity to encourage innovation than international tribunals).

¹⁵⁸ See *infra* Part IV.A.1.

¹⁵⁹ See Cover & Aleinikoff, *supra* note 14, at 1046–68. For another application of Cover and Aleinikoff's premises to international tribunals, see Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 349–53 (1999).

victions—engaged in a pattern of recurrent interaction akin to the international review of national courts explored herein.¹⁶⁰ In the case of habeas review, as analyzed by Cover and Aleinikoff, neither court enjoyed complete autonomy to implement its own jurisprudential vision.¹⁶¹ Nor were they completely constrained by their counterpart.¹⁶² Given this dynamic, Cover and Aleinikoff suggested, the judicial interaction of habeas review functioned to encourage beneficial evolution in constitutional criminal procedure.

As an example, Cover and Aleinikoff explore the jurisprudence that followed *Mempa v. Rhay*, in which the Supreme Court held that petitioners facing revocation of probation and the potential for reimposition of a suspended sentence should have the benefit of counsel at their revocation hearing.¹⁶³ Soon after the *Mempa* decision, a split emerged among the federal courts of appeals as to how far to extend the Supreme Court's holding, with several circuits initially adopting a narrow view of the Court's decision.¹⁶⁴ In *Hewett v. North Carolina*,¹⁶⁵ the U.S. Court of Appeals for the Fourth Circuit became the first circuit court to extend *Mempa*'s reach.¹⁶⁶ In *Hewett*, the court held that the Sixth Amendment required that counsel be provided at all probation-revocation hearings, regardless of whether a new sentence is imposed.¹⁶⁷ *Hewett* thus emerged as the primary articulation of a broad reading of *Mempa*, just as state courts began to

¹⁶⁰ See *infra* notes 214–22 and accompanying text. The writ of habeas corpus permits post-conviction review of allegedly unlawful detention. See Rex R. Perschbacher & Debra L. Bassett, *The End of Law*, 84 B.U. L. REV. 1, 51 (2004). Both intrasystemic and intersystemic opportunities for post-conviction review exist. A state criminal conviction may thus be subject, following the completion of direct appellate review, to both state post-conviction review for asserted violations of federal or state constitutional protections—claims of ineffective counsel, lack of competency to stand trial, and violation of evidentiary rules, among others—and ensuing habeas review in federal district court for federal constitutional claims. See Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 595 (2004). Although the Burger and Rehnquist Courts have overseen a dramatic transformation—and contraction—of federal habeas review of state criminal convictions, its essential form persists.

¹⁶¹ See Cover & Aleinikoff, *supra* note 14, at 1050–51 (describing utopian vision of federal courts and pragmatic vision of state courts).

¹⁶² See *id.* at 1052–54. I elaborate on this balanced pattern of interaction below. See *infra* Part IV.A.1.

¹⁶³ 389 U.S. 128 (1967). See Cover & Aleinikoff, *supra* note 14, at 1054–55 (describing decision in *Mempa v. Rhay*).

¹⁶⁴ See Cover & Aleinikoff, *supra* note 14, at 1055–56 (describing court of appeals decisions interpreting reach of *Mempa*).

¹⁶⁵ 415 F.2d 1316 (4th Cir. 1969).

¹⁶⁶ See Cover & Aleinikoff, *supra* note 14, at 1056 (“The Fourth Circuit [in *Hewett*] provided the first careful enlargement of *Mempa v. Rhay*.”).

¹⁶⁷ See *Hewett*, 415 F.2d at 1325.

undertake their own consideration of the right to counsel in the context of parole and probation-revocation hearings.¹⁶⁸

Faced with the decision in *Hewett*, state courts took varied approaches. Most significantly for present purposes, notwithstanding *Hewett*'s lack of binding effect as to any state court, and least of all those outside the Fourth Circuit, the state courts almost universally addressed *Hewett* and framed their decisions as joining in or dissenting from its reading of *Mempa*.¹⁶⁹ The New York Court of Appeals carefully considered *Hewett*, along with other relevant federal and state decisions, and chose to adopt *Hewett*'s interpretation.¹⁷⁰ The Pennsylvania courts also adopted *Hewett*'s expansive reading of *Mempa*, notably rejecting contrary Third Circuit authority.¹⁷¹ The Maryland Court of Appeals, on the other hand, carefully considered *Hewett*, but declined to overrule its prior decision in *Knight v. State*,¹⁷² where it had limited *Mempa* to its facts—probation proceedings involving sentence imposition.¹⁷³

Most interesting was the development of relevant doctrine in the Wisconsin Supreme Court.¹⁷⁴ Citing an earlier decision of the U.S. Court of Appeals for the Seventh Circuit,¹⁷⁵ the Wisconsin court invalidated some existing state practices in probation and parole revocation in the aftermath of *Mempa*.¹⁷⁶ The court held, however, that there was a right to counsel only for sentence imposition, limiting *Mempa* to its facts and rejecting *Hewett*.¹⁷⁷ Shortly after the Wisconsin Supreme Court's decision, the Seventh Circuit held in *Gunsolus v. Gagnon*¹⁷⁸ that counsel was required in all probation-revocation hearings. In support of its holding, the Seventh Circuit relied

¹⁶⁸ See Cover & Aleinikoff, *supra* note 14, at 1056 ("Hewett served as the paradigm for a broad reading of *Mempa*.").

¹⁶⁹ See *id.* at 1056–58 (describing state courts' engagement with *Hewett*).

¹⁷⁰ *People ex rel. Menechino v. Warden*, 267 N.E.2d 238, 240–41 (N.Y. 1971); see also Cover & Aleinikoff, *supra* note 14, at 1056–57.

¹⁷¹ See *Commonwealth ex rel. Rambeau v. Rundle*, 314 A.2d 842 (Pa. 1973); see also Cover & Aleinikoff, *supra* note 14, at 1057 (describing Pennsylvania's acceptance of "expansive reading of the principles of *Mempa v. Rhay*").

¹⁷² 255 A.2d 441, 446 (Md. Ct. Spec. App. 1971).

¹⁷³ See *Dugas v. State*, 277 A.2d 620, 621 (Md. Ct. Spec. App. 1971).

¹⁷⁴ See Cover & Aleinikoff, *supra* note 14, at 1057–58 (describing Wisconsin court's extension of doctrine first to juvenile revocation of probation proceedings and later to all revocation of probation proceedings).

¹⁷⁵ See *Hahn v. Burke*, 430 F.2d 100, 103 (7th Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

¹⁷⁶ See *State ex rel. Johnson v. Cady*, 185 N.W.2d 306, 315 (Wis. 1971).

¹⁷⁷ See *id.* at 310.

¹⁷⁸ See *Gunsolus v. Gagnon*, 454 F.2d 416, 423 (7th Cir. 1971), *aff'd in part and rev'd in part sub nom.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

on *Hewett*, along with other cases that had followed it.¹⁷⁹ Faced with *Gunsolus*, the Wisconsin Supreme Court reversed its stance, adopting the decision of the Seventh Circuit¹⁸⁰ in a spirit of “voluntary acquiescence.”¹⁸¹ Such acquiescence, the court suggested, was essential to the “harmonious ordering of federal–state court relations.”¹⁸²

The jurisprudence surrounding *Hewett* also suggests the bidirectionality of the federal–state influence in habeas and, by analogy, in the international–national court interaction of Chapter 11 and similar international regimes. Having set a dialectical pattern of interaction in motion with *Hewett*, the Fourth Circuit returned to the issue of probation revocation two years later in *Bearden v. South Carolina*.¹⁸³ With particular reference to the obstacles to a broad right to counsel identified by state courts in the intervening years, the Fourth Circuit elected to narrow its original decision. With an enhanced appreciation of state court concerns, it articulated a compromise position between its broad standard in *Hewett* and an interpretation of *Mempa* as limited to its facts.¹⁸⁴

In the presence of habeas’ balanced dynamic of judicial power, as Cover and Aleinikoff describe, and as I elaborate below, each court must develop an appreciation of the distinct values and norms of the other. “[T]here are incentives for each court system to acknowledge and, if possible, satisfy some of the more reasonable demands of the other.”¹⁸⁵ Since neither party in such a system can disregard the interests of the other, they must instead exhibit flexibility and identify paths of compromise.¹⁸⁶ In the jurisprudence surrounding *Mempa*,

¹⁷⁹ See *id.* at 421–22.

¹⁸⁰ See *State ex rel. Bernal v. Hershman*, 196 N.W.2d 721, 723–24 (Wis. 1972); *Oestrich v. State*, 198 N.W.2d 664, 665 (Wis. 1972).

¹⁸¹ See Cover & Aleinikoff, *supra* note 14, at 1059 (“Although the majority of the Wisconsin court retreated to the requirements of *Scarpelli*, they did not characterize their prior position as having been compelled by the Seventh Circuit.”).

¹⁸² *Id.* at 1058–59. Notably, the Wisconsin court later would describe its decision as based “not ‘on the basis of an independent judgment or policy,’ ” but on the nature of the federal–state relationship under the habeas regime. *Id.* at 1059 (quoting *State ex rel. Cresci v. Schmidt*, 215 N.W.2d 361, 365–67 (Wis. 1974)).

¹⁸³ 443 F.2d 1090, 1094 (4th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 972 (1972).

¹⁸⁴ See *id.* at 1092–93; see also Cover & Aleinikoff, *supra* note 14, at 1059–60 (quoting from *Bearden*). Walter Murphy offers *Williams v. Georgia*, 349 U.S. 375 (1955), as another example of intersystemic judicial dialogue. See Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

¹⁸⁵ Cover & Aleinikoff, *supra* note 14, at 1053; see also *id.* at 1048 (noting impact of institutional design that creates “areas of overlap in which neither system can claim total sovereignty”).

¹⁸⁶ In the alternative, the relevant courts might attempt—with ill consequences for both—to ignore one another. A prime example of this is the lack of interaction between federal and tribal court systems in the United States. See Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections From the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439,

the courts were obliged to acknowledge one another and adopt an approach of creative analysis and experimentation. This dynamic in habeas jurisprudence contributed to the emergence and evolution of core features of modern constitutional due process, including aspects of the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination.¹⁸⁷ This suggests the significant potential for innovation in a balanced regime of intersystemic judicial interaction.

2. *The Signals of Appellate Dicta*

An understanding of habeas review as creating a pattern of dynamic exchange points logically to the second case of hybrid judicial interaction explored herein—appellate courts' use of dicta as a signaling device to lower courts. The power exhibited in habeas review, as in the international review of national courts, is not hierarchical, but shared. As such, it includes a significant expressive, rhetorical, or discursive dimension. The resulting innovation of habeas corpus review—and of international review of national courts, I would argue—occurs when the respective courts talk to each other.¹⁸⁸ The hybrid judicial interaction arising from the use of dicta and similar mechanisms of judicial communication may thus help to confirm and clarify the role of international review of national courts in encouraging judicial innovation.

While less obvious an analogy than habeas corpus review, the use of dicta in the interaction of superior and inferior courts within the same system can also be compared to the interaction of international

459–60 (1999) (noting federal courts' lack of deference to tribal courts, and arguing that tribal courts should use their opinions to educate federal courts regarding basic tribal law and values); *see also infra* note 255.

¹⁸⁷ Habeas cases contributing to constitutional norms of criminal procedure included *Minnick v. Mississippi*, 498 U.S. 146 (1990), which held that Fifth Amendment protections were not terminated or suspended following a prisoner's consultation with counsel, *Brewer v. Williams*, 430 U.S. 387 (1977), which defined attachment and waiver of right to counsel, and *Gideon v. Wainwright*, 372 U.S. 335 (1963), which outlined a broad right to counsel in criminal proceedings, among others.

¹⁸⁸ Such advisory means of legal innovation may be especially appropriate, given the relevant audience of Chapter 11 and similar review. In some sense, Chapter 11 review of national courts speaks more to the absent party-in-interest—the national court—than to the actual parties to the claim. As such, we have a different dynamic than in Martin Shapiro's triad of two parties plus a third-party adjudicator. *See* SHAPIRO, *supra* note 66, at 1 (describing triad model of adjudication); *see also* Ted L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran–U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1, 32 (1984). Instead, the subject national court is a fourth participant in the process of dialectical review. For that court, the dicta of dialectical review is likely to be as effective as any formal holding, and may actually be more effective.

tribunals with national courts.¹⁸⁹ Like the interaction of international tribunals with national courts, appellate courts' use of dicta incorporates dimensions of both appellate hierarchy and dialogic comity. Unlike the operative holding of a decision, dicta is not binding on trial courts within the jurisdiction of the relevant appellate court.¹⁹⁰ Where the appellate court speaks to issues beyond the legal questions presented, trial courts subsequently faced with those issues are not bound by the extramural pronouncements of the appellate court. On the other hand, those pronouncements are hardly irrelevant to a trial court whose decisions ultimately will be subject to the review of that same court of appeal. Rather than the random prognostications of an outside observer, dicta constitutes highly predictive statements of what an appellate court might do when actually faced with the question addressed.¹⁹¹ It is in this sense that dicta constitutes something less than a binding appellate decree, but something more than mere dialogic pronouncements.

The assertions of tribunals in the collateral review of habeas petitions, or upon Chapter 11 review, echo this intermediate form. As with appellate dicta, the pronouncements of federal courts on habeas

¹⁸⁹ "Dicta" has been defined as "[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court" or "[e]xpressions in court's opinion which go beyond the facts before court and therefore are individual views of the author of the opinion and not binding in subsequent cases as legal precedent." BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

¹⁹⁰ See *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). The Court stated:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Id.

¹⁹¹ See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2026-27 (1994) (suggesting that power of dicta derives in part from difficulty in distinguishing it from precedential holdings); Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 784, 796 (1999) (describing power of dicta, along continuum); Matthew T. King, *Towards a Practical Convergence: The Dynamic Uses of Judicial Advice in United States Federal Courts and the Court of Justice of the European Communities*, 63 U. PITT. L. REV. 703, 716-17 (2002); see also Caminker, *supra* note 66, at 46-48 (describing dicta as source of predictive data); Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1418-20 (2000) (describing lower courts' treatment of dicta as controlling authority). Kannan suggests an understanding of dicta as a form of "guidance." See Kannan, *supra*, at 796 ("The key word here is 'guidance.' Dicta can suggest a path and provide reinforcement if the court goes down that path."). Dicta thus can be understood to have a strongly prospective orientation. It is, in some sense, a window into the future. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 699 n.12 (1995) (referring to *TVA v. Hill*, 437 U.S. 153, 184-85 & n.30 (1978), as foreshadowing decision); Kannan, *supra*, at 794-95; see also RONALD DWORKIN, *LAW'S EMPIRE* 155-56, 402 (1986) (suggesting role of judicial decisions in warning of impending changes in law).

review are not binding on state courts, just as the decisions of Chapter 11 tribunals are not binding on state and federal courts. They offer, however, useful guidance on the potential treatment of future cases by the reviewing courts. As such, they warrant close attention, respect, and even deference.¹⁹² Because of its capacity to call attention to distinct perspectives without imposing them, dicta may help to encourage fruitful innovation.¹⁹³

Somewhat analogously, international review of national courts calls to mind the power of what Alexander Bickel termed the “passive virtues.”¹⁹⁴ Bickel famously opined that the Supreme Court should utilize various discretionary mechanisms¹⁹⁵ and justiciability rules¹⁹⁶ to avoid unnecessary constitutional decisions.¹⁹⁷ Through such restraint, the Court can allow issues to ripen and thereby permit relevant constitutional questions to come into focus.¹⁹⁸ The Court’s restrained engagement will thus encourage the other branches and the public to engage the issue more fully.¹⁹⁹ Within this scheme, the apparent weakness of the Court becomes a form of strength, as it fos-

¹⁹² As suggested by the U.S. Court of Appeals for the Tenth Circuit: “[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings.” *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996). Lower courts’ generalized deference to dicta, however, does not precisely track the power behind the interactive pattern of judicial engagement I describe herein, as it rests more on the predictive power of dicta than its analytical force. See Maltz, *supra* note 191, at 1418–20 (stating that justification for lower courts’ use of dicta is that dicta is most reliable predictor of Court’s likely holding).

¹⁹³ See Kannan, *supra* note 191, at 792, 794. A similar pattern might be posited in the publication of dissenting opinions to the decisions of collegial courts. Such dissents, of course, do not bind lower courts. On the other hand, they offer useful data to lower courts regarding future jurisprudential developments, the potential limits of the majority’s holding, and avenues of future analysis and argument. Dissents, as such, may represent important mechanisms of dialectical communication.

¹⁹⁴ See BICKEL, *supra* note 15, at 187–88 (“Even when it is ultimately constrained to yield to necessity . . . the Court can exert immense influence. . . . [I]t need not abandon its concomitant role of ‘teacher to the citizenry’ [T]he Court can explain the principle that is in play and praise it, and thus also guard its integrity.”). Bickel’s analysis, along with that of Calabresi and Katyal, described below, offer useful lessons for international tribunals in the pursuit of fruitful innovation, but deviate from the analogy of Chapter 11 review to the use of dicta, in that their theories were articulated as mechanisms of inter- rather than intra-branch communication.

¹⁹⁵ See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 726 (2000).

¹⁹⁶ See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1835 (2001).

¹⁹⁷ See Cooper & Berman, *supra* note 195, at 725–27.

¹⁹⁸ See *id.* at 727.

¹⁹⁹ See Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1586 (1985) (describing Bickel’s conception of advantages of permitting Court to postpone decisions).

ters productive dialogue and ultimately enhances public acceptance of a role for the Court as arbiter of constitutional disputes.²⁰⁰

The inevitable limits of international review of national courts²⁰¹ might similarly be construed as a source of judicial empowerment. Such limitations may serve to enhance fruitful dialogue by preventing its untimely foreclosure. This view may explain the holdings against liability in *Loewen* and in another recent Chapter 11 decision, *Mondev*.²⁰² In those cases, the Chapter 11 tribunals may have declined to impose liability and to correct any error in the particular case before them, in favor of a greater focus on sustaining a progressive dialogue with the U.S. courts, and thereby encouraging innovation.

More proactive mechanisms of judicial communication can also be suggested.²⁰³ Further evidence of the capacity of Chapter 11 and similar review of national courts to encourage innovation and to foster a means for such innovation might be found in the second-look doctrine of Judge Guido Calabresi.²⁰⁴ The second-look doctrine developed by Calabresi encourages judges to return constitutionally suspect legislation to the legislature for further review "with the eyes of the people on it."²⁰⁵ If a court makes a decision when the legislature's intent is unclear, Calabresi argues, it runs the risk of either validating an infringement of rights that the legislature did not intend or striking down a law where the state interest appears minimal but actually is quite significant.²⁰⁶ From these risks arise the benefits of returning legislation for a "second look." Again, Calabresi's second-look doctrine might be said to capture the spirit of *Loewen*, which encouraged

²⁰⁰ See Cooper & Berman, *supra* note 195, at 727. More generally, Bickel's analysis is relevant to the present case, given its acknowledgement of the non-traditional mechanisms by which courts may exercise their authority. See, e.g., BICKEL, *supra* note 15, at 188.

²⁰¹ See *supra* notes 74–79 and accompanying text.

²⁰² See *infra* notes 397–413 and accompanying text (describing *Mondev* decision); cf. Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 405–06 (1997) (describing utility of prudential abstention in functioning of ICJ).

²⁰³ See Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 57–60 (1998) (suggesting benefits of active judicial engagement). As a general category, dicta is relatively active in nature. See King, *supra* note 191, at 716–17. This is what Sunstein essentially acknowledges in his shift in emphasis from "passive virtues" to "decisional minimalism." See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–5 (1999).

²⁰⁴ See Martinez, *supra* note 3, at 455 ("[S]econd-look' doctrines . . . serve the purpose of engaging the political branches in dialogue and reconsideration of the issues in question.").

²⁰⁵ Calabresi, *supra* note 15, at 104.

²⁰⁶ See *Quill v. Vacco*, 80 F.3d 716, 742 (2d Cir. 1996) (Calabresi, J., concurring).

innovation through aggressive review and critique of the relevant national court but left any imposition of liability to another day.²⁰⁷

Neal Katyal's various forms of judicial advicegiving—most closely resembling the basic use of dicta with which we began but intended by Katyal for executive and legislative listeners—are similarly suggestive of the ways in which international review of national courts may help to encourage innovation.²⁰⁸ In his exemplification and demarcation approaches, for example, a court either strikes down a legislative act while suggesting a constitutional means to the same ends, or upholds an act while counseling the legislature that more restrictive statutes will not pass constitutional muster.²⁰⁹ These approaches suggest the latent powers of an international tribunal, as under Chapter 11, to further doctrinal innovation.²¹⁰ Katyal's pattern of self-alienation, by which a court denies its jurisdiction to resolve a constitutional question but nonetheless offers its interpretation of it,²¹¹ similarly suggests the potential for judicial institutions to contribute to innovation in constitutional discourse even where their formal authority is limited.²¹² This readily echoes the dynamic of international review of national courts.²¹³

²⁰⁷ See *supra* Part I.

²⁰⁸ Katyal offers judicial advicegiving as an alternative, yet constitutionally permissible, approach to judicial review. See Katyal, *supra* note 15, at 1715–16. Among the categories of advicegiving that Katyal identifies are clarification, self-alienation, personification, exemplification, demarcation, prescription, education, and moralization. See *id.* at 1716–20. Tom Ginsburg has similarly described Korean and Taiwanese courts' use of various signals to guide executive authorities. See Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 775, 792 (2002). The provision of such advice, Ginsburg suggests, was possible given its grounding in Confucian traditions of a central political role for learned counselors. See *id.* at 795. Wright and Miller, finally, explore the use of such techniques in the interaction of state and federal courts in criminal procedure, including cases in which state courts articulated their objection to relevant federal law but proceeded to issue judgments in accord with it. See Wright & Miller, *supra* note 14, at 688–89.

²⁰⁹ See Katyal, *supra* note 15, at 1718–19.

²¹⁰ Cf. *id.* at 1718–19. Several of Robert Keeton's techniques of prospective judicial action also offer useful lessons for the operation of intersystemic adjudication as a source of innovation. See KEETON, *supra* note 92, at 27–30. Michael Dorf, meanwhile, has suggested an important role for "conscious asides" by courts. See Dorf, *supra* note 191, at 2006–07.

²¹¹ See Katyal, *supra* note 15, at 1717.

²¹² See *id.* at 1736–37.

²¹³ A characterization of international review of national courts as rhetorical in nature—akin to dicta—should not be taken to deny its efficacy as a mechanism of innovation. Cf. Ahdieh, *Law's Signal*, *supra* note 141, at 259–61 (suggesting capacity of non-binding speech to influence behaviors and outcomes). As I elaborate below, international review may effectuate desired results without the consent or cooperation of the subject national court. See *infra* Parts IV.A.1 & B.1. Further, it offers a credible threat of future review. See *infra* Parts IV.A.3 & B.1.c. Judge Calabresi's concurring opinion in *United States v. Then*, 56 F.3d 464, 466–69 (2d Cir. 1995) (Calabresi, J., concurring), suggests the power of

When analogized to habeas review, to the appellate use of dicta, and to the types of judicial action emphasized by Bickel, Calabresi, and Katyal, the potential of Chapter 11 as a mechanism of innovation becomes apparent. Hybrid judicial interactions in which neither court enjoys complete autonomy can be attractive sources of creativity and change. By utilizing such interactions effectively, legal systems may overcome patterns of path dependence and achieve efficient innovation in legal norms.

C. *The Innovation of Chapter 11 Review*

If judicial innovation can be identified as an important institutional need and hybrid judicial interactions as an effective tool for meeting that need, what can be said of the particular operation of Chapter 11 as a mechanism of innovation? I consider this issue in three phases. First, I describe the rough pattern of intersystemic adjudication that one might envision under Chapter 11. I then posit the quite distinct understanding of judicial process—and particularly judicial review—on which this pattern rests. Finally, I consider the extent to which the innovation that follows from the international review of national courts under Chapter 11 and similar regimes constitutes true learning—an internalization of new legal norms—and not simply error correction by another name.

this combination. See Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 82–83 (2000). In *Then*, Calabresi joined the majority's conclusion that sentencing disparities dictated by the federal Sentencing Guidelines had not been shown to violate the guarantee of equal protection, notwithstanding their disproportionate impact on African Americans, since no intentional animus had been shown. See *Then*, 56 F.3d at 466–67. He went on to say, however, that the Sentencing Guidelines could not thereafter be defended on such grounds. Rather, Congress and the Sentencing Commission were now on notice of the Guidelines' disparate impact, such that their continued failure to remedy the disparities might no longer meet constitutional muster. See *id.* at 468–69. Katyal describes a similar dynamic under the rubric of “penalization”:

Penalization is a judicial attempt to make sure that the political branches heed advice. Because advice is not binding, courts that dispense it run the risk that it will be disregarded—a particularly unattractive outcome when courts use advicegiving in lieu of judicial review. Penalization techniques use judicial warnings to make clear that if the political bodies do not heed the judicial advice, a court will hold their “foot-dragging” . . . against them. These cautions work as judicial fuses: If political actors do not listen, then the judicial time bomb will explode and the court will strike down the act.

Katyal, *supra* note 15, at 1721 (citation omitted). Paul Carrese likewise notes the “moderating” effect of judicial action, even without any mechanism of formal reversal. See PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* 3 (2003); see also *id.* at 263 (describing “cloaking” power of judiciary); Ahdieh, *Law's Signal*, *supra* note 141, at 261.

1. *The Interaction of National Courts and International Tribunals in Chapter 11*

If the role of international review of national courts as a mechanism of innovation is grounded in its expressive character, how is such a rhetorical function actually operationalized? The cases of habeas review and judicial dicta described above suggest some pattern of conversational exchange between relevant tribunals.²¹⁴ The desired innovation, in this view, arises from a succession of cases in which each court recurringly returns to a common theme. With each decision, each tribunal articulates or rearticulates its perspective, as shaped by the most recent decision of its counterpart. It is this repeated pattern of experimentation, learning, and growth based on a common discourse that furthers the development of new approaches and the ultimate emergence of new doctrinal norms.²¹⁵

In Chapter 11 review, this process is initially set in motion with the Chapter 11 tribunal's review of a particular national decision and embedded legal rule. In subsequent cases, the national courts, faced with the same question of law but now with the benefit of the analysis of the Chapter 11 tribunal, may elect to adopt the view of the Chapter 11 tribunal, hold to their prior decision, or adopt some intermediate

²¹⁴ The primarily rhetorical relationship of international and national courts described above also helps to distinguish the judicial power at work in that relationship from conventional appellate power. The decrees of appellate courts can be expected to restrain lower courts, without particular regard to the quality or extent of their reasoning. cursory unpublished dispositions by U.S. courts of appeal and summary reversals by the Supreme Court are quite efficacious, notwithstanding their lack of analysis. On the other hand, unconvincing or summary analysis is unlikely to meet the threshold for deference by tribunals petitioned to enforce a foreign judgment or asked to adopt a judgment consistent with that of a foreign tribunal. Compelling analysis and argument is thus essential to any relationship patterned along the lines described herein. See generally Dorf, *supra* note 191 (suggesting importance of rationale as basis for respect of judicial decisions); Wright & Miller, *supra* note 14, at 690 ("Where state and federal courts disagree, the true power of the state court lies in persuasive argument."). The rhetorical nature of the relationship between international and national courts also affirms the prospective orientation of their interaction. Cf. King, *supra* note 191, at 715. Rather than being directed primarily to the retroactive review of a past decision, dicta and similar judicial pronouncements are designed to offer counsel for future cases.

²¹⁵ The jurisprudential development envisioned herein thus occurs in both fora. Rather than the internalization of international norms or the externalization of domestic norms, the proposed pattern of engagement predicts correlated moves toward a universal standard. In this vein, my analysis echoes Melissa Waters's "co-constitutive" conception of the interaction of national courts. See Waters, *supra* note 100, at 5, 25. In her vision of transnational judicial dialogue, national courts both internalize and shape international norms. See *id.* at 4–5, 25.

position. Subsequent Chapter 11 tribunals may respond in turn, creating the desired pattern of exchange.²¹⁶

Beyond this broad pattern, the innovation arising from the international review of national courts might be expected to occur in two phases.²¹⁷ At the outset, such review may spark change by way of some initial shock to the judicial system under review. One might think of the attention attracted by the Chapter 11 review in *Loewen*.²¹⁸ But the greater impact of Chapter 11 and similar review of national courts can be expected to come through a pattern of recurrent engagement between relevant international tribunals and national courts. The institutional design of Chapter 11, as I will suggest below, produces just the pattern of balanced judicial power that Cover and Aleinikoff observed in federal habeas jurisdiction.²¹⁹ To navigate this balance, relevant judicial institutions must inevitably engage one another over a succession of cases. Such recurrent interaction can be expected to facilitate a progressive—and perhaps more sustainable—pattern of legal transition.²²⁰ The balanced power

²¹⁶ See Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 82–83 (2001). In this pattern, one can see not only dimensions of Slaughter's "enforcement network" characterization of Chapter 11 review of national courts, see SLAUGHTER, *supra* note 57, at 100, but also aspects of both a "harmonization network" designed to facilitate convergence and an "information network" designed to collect and disseminate otherwise dispersed information, see SLAUGHTER, *supra* note 57, at 21–22 (describing potential for given international regime to function as both enforcement network and harmonization or information network). In this perspective, the pattern of dialectical engagement among international tribunals and national courts can be seen as part of a broader growth in transgovernmentalism—complex interactions among subnational state actors operating in related substantive realms. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 10–11 (2002).

²¹⁷ See Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 410 (1998). One commentator suggests a gradual implementation of broad international review:

[I]nternational tribunals should move cautiously in their early years, striking a delicate balance between independence and deference that permits states to develop a level of comfort with international review and to become habituated to complying with unfavorable outcomes in specific cases. Only later will a more assertive approach be feasible

Id.

²¹⁸ See *supra* Part I.

²¹⁹ See *infra* Parts IV.A.1 & B.1.a.

²²⁰ Chapter 11 review may strike an appropriate balance in this vein, with *Loewen*'s introduction of a requirement of finality. See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 723–24, ¶¶ 215–217 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>. This requirement conserves resources by resolving disputes in the national courts and thereby minimizing international intervention. Cf. Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 332 (1988) (noting that exhaustion requirement in takings claims against states reduces need for federal interven-

dynamic of international review of national courts thus may enhance the internalization of international norms, as national courts participate jointly in their articulation and elaboration.²²¹ The interaction of international and national courts may thus facilitate the domestication of international norms, through both their evolution and their internalization.²²²

2. *Conflict and Innovation*

As described to this point, Chapter 11 review of national courts must be understood to serve a different set of goals than conventional judicial review, at least in the short term. Ordinary appellate review can be conceived to seek the minimization of conflict through episodic appellate decision; hence the notion of review as correcting error and encouraging consistency.²²³ International review of national courts, by contrast, does not operate to eliminate conflict or inconsistency,

tion, with result that states retain greater control of state law). It allows local courts to develop much of their own law, with only intermittent intervention by external tribunals, and even that in expressive rather than directive forms. The proposed pattern of review thus seeks the benefits of international norm development while limiting the risks of over-centralization. *See id.* at 335 n.228. The proposed pattern may also help to strengthen national courts, particularly in developing countries such as Mexico. A requirement of finality is therefore well-warranted. Mexico's decision to give direct effect to NAFTA's protections would likewise appear to be a wise course. *See Dodge, supra* note 6, at 161 n.56; *see also* NAFTA, *supra* note 12, annex 1120.1(a), at 648. Through the latter provision, the points of potential intersection between national courts and international tribunals grow exponentially.

²²¹ *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 626–27 (1998). As to the execution of any international review of national courts, it arguably should take a shape suited to its “dialectical” nature. Specifically, what Helfer and Slaughter describe as a casuist style of reasoning might be especially appropriate for such review. *See* Helfer & Slaughter, *supra* note 2, at 321–22. This pattern, by which arguments systematically are posed, critiqued, and resurrected or rejected, may be well-suited to a model that is rhetorical or expressive in nature. *Cf.* Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 TEX. INT'L L.J. 505, 523–24 (2003); Stein, *supra* note 188, at 34 n.167. Such an approach acknowledges the reliance of such review on the effective advocacy of any given position, rather than on hierarchy alone. *See supra* note 214.

²²² Mark Rosen has outlined a gradation of Native American tribal court approaches to federal case law, ranging from complete disregard to wholesale incorporation. *See* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORD. L. REV. 479 (2000). Between these extremes, he suggests the prospect of deviation as to broad goals (re-targeting), as to more particularized standards (re-standardizing), or as to the specific rule selected (tailoring). *See id.* at 492–98. Review of the sort described herein might be most closely analogized to the intermediate approach of re-standardizing, in which the goals of the competing judicial system are preserved but the standards utilized in their implementation are altered. *See id.* at 496.

²²³ *See supra* notes 65–66 and accompanying text.

but uses them as a trigger for innovation.²²⁴ International review of national courts thus is best understood to encourage the negotiation of conflict and indeterminacy rather than their avoidance—whether through sharp jurisdictional delimitations or assertions of strong appellate power.²²⁵ In this proposed scheme, the distinct perspectives of the participating judicial institutions provoke legal innovation both within each system and as a common enterprise.²²⁶

²²⁴ See Cover & Aleinikoff, *supra* note 14, at 1065–67 (suggesting as much in context of habeas review). See generally Juarrero-Roqué, *supra* note 138; Schapiro, *supra* note 136, at 1447. Slaughter echoes this notion in the context of transnational governmental networks more generally. See SLAUGHTER, *supra* note 57, at 27 (“[G]overnment networks constituted in this way could harness the positive power of conflict as the foundation of lasting political and social relationships. . . . Among disaggregated government institutions, national and supranational, conflict should be resolved, but not necessarily avoided. It is likely to be the long-term engine of trust.”); see also *id.* at 68; William W. Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 84 (2002) (“Conflict, deliberation, argument, and contention can lead to better outcomes.”).

²²⁵ See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249 (2001) (citing Cover & Aleinikoff, *supra* note 14, at 1048); see also Cover & Aleinikoff, *supra* note 14, at 1048–50. In Cover and Aleinikoff’s habeas dialogue, indeterminacy is created when the Supreme Court either has not spoken on an issue or has defined a constitutional norm so broadly that its specific applications are left open. See *id.* at 1049 (describing how federal review can encourage dialogue by bringing together different viewpoints). Such indeterminacy creates the opportunity for the dialectical exchange that ensues. See *id.* at 1048, 1050. Conflict, meanwhile, arises when the participating court systems interpret the values identified by the Supreme Court differently. See *id.* at 1050. Such conflict perpetuates a dialogue and results in each court system expounding its views and concerns regarding relevant issues, see *id.* at 1065, outlining its perspective and informing both the competing court system and the Supreme Court of the distinct perspectives on any given issue, see *id.* at 1053–54.

Of course, an approach to legal development grounded in conflict and indeterminacy has its shortcomings. It is an inevitably gradual process, see Kloppenberg, *supra* note 66, at 315–18 (describing long-term nature of dialogic interactions among political institutions), with the result that attendant legal uncertainty persists for a longer period of time. Besides the prospect of delay, an indeterminate approach to legal change also produces law that “is less precise but more communal.” See Harding, *supra* note 79, at 438 (quoting H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 297 (1987)). As this suggests, uncertainty and indeterminacy undoubtedly have costs which may, in any given case, outweigh the benefits of the evolutionary interaction of courts outlined herein. At least in some cases, however, and as to some questions of law, the costs of uncertainty may pale in comparison with the benefits of progressive legal innovation through intersystemic judicial interaction. Moreover, indeterminacy may be inevitable in the absence of some centralized international authority. In this sense, one might conceive of the proposed engagement of international tribunals and national courts as a necessary attempt to coordinate around the absence of any central international authority.

²²⁶ In this way, the proposed pattern of engagement may help to facilitate each step of Harold Koh’s transnational legal process: interaction, interpretation, and internalization. See Koh, *supra* note 221, at 626. Yet, it is important not to exaggerate the role of such review; it will not be adequate to all issues. Cf. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434–35 (1990) (arguing that dialogue is not panacea for all ills).

To be sure, as I will elaborate below, international review ultimately may serve to move the distinct norms of the relevant jurisdictions toward a more harmonized law.²²⁷ In this sense, Chapter 11 review of national courts, like appellate review, identifies convergence as its ultimate goal.²²⁸ However, the convergence of Chapter 11 review emerges through a progressive evolution of thought rather than being dictated by way of judicial hierarchy. Institutions of international review do not “give” law, in this sense, but instead create a process for its refinement.²²⁹ Across literal and figurative borders, international review of national courts might thus be conceived as a form of progressive translation.²³⁰

3. *Norm Internalization or Mere Error Correction?*

Before turning to the characteristics of a regime of international review of national courts that is hybrid in nature and directed to inno-

Sometimes urgency will dictate prompt resolution of legal issues. Likewise, a sufficiently high degree of conflict in any given situation may act as a barrier to efficient interchange. In such cases, where the benefits of coordination do not outweigh the benefits of the individually preferred norms, Chapter 11 review could produce détente rather than productive engagement. See Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2520 n.82 (1992) (arguing that limitations on power of state and federal courts to force other court to accept its views may not result in dialogue).

²²⁷ See *infra* Part V.

²²⁸ See Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 41–42 (1993); see also Georges Abi-Saab, *Fragmentation or Unification*, 31 N.Y.U. J. INT'L L. & POL. 919, 926–27 (1999) (suggesting that international adjudication can spur cumulative process that “progressively condense[s] and crystallize[s]” law). On this point, the pattern of interaction I describe diverges from that of Cover & Aleinikoff, which is oriented more toward exposing the diversity of perspectives on relevant issues and permitting the Supreme Court ultimately to resolve any persistent conflict. See Cover & Aleinikoff, *supra* note 14, at 1053. In the absence of the escape valve of a high court in the interaction of international tribunals and national courts, I would argue that the exchange *itself* becomes the source of harmonization and not simply a contributor to such harmonization. See *supra* note 225. Of course, even Cover and Aleinikoff predict some convergence from the dialectic engagement of federal habeas review, but of a more limited variety. See Cover & Aleinikoff, *supra* note 14, at 1053 (describing cooperation born of “mutual ability to frustrate”).

²²⁹ See Harding, *supra* note 79, at 438–39. Harding explores the value of judicial dialogue with foreign courts and of comparative reasoning more generally. To analogous effect, Alan Watson has written of “legal transplants,” arguing that an understanding of legal change is necessarily grounded in a study of historical borrowing (i.e., transplanting) of foreign law. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 95–97 (2d ed. 1993). Watson terms this the study of historical relationships in law. Such borrowing, he argues, is the mechanism of legal change and evolution. See *id.* The model of review I offer herein sits well with this notion. The proposed pattern might thus be understood as a sharing of “foreign” law, through which Watson’s transplantation, and resulting legal evolution, may occur.

²³⁰ See Powell, *supra* note 225, at 251. International law has been a component of U.S. law since the adoption of the Constitution. Yet it remains “foreign” to most Americans. *Id.* Chapter 11 and its analogues may help to remedy this anomaly.

vation, a final point regarding the nature of the relevant innovation should be noted. In the simplest terms, Chapter 11 and similar international review might be understood as no more than a mechanism to spotlight particular judicial failures in the national courts and thereby prompt beneficial, but relatively conventional, error correction.²³¹ This is innovation of a sort, but only of the most limited variety.²³² With the emergence of some pattern of cases and resulting engagement, however, international review may go further to encourage genuine learning.²³³

U.S. courts appear to be increasingly receptive to a role for foreign and international jurisprudence in domestic adjudication. The most recent, and rather dramatic, manifestation of this trend came in the Supreme Court's 2003 decision in *Lawrence v. Texas*.²³⁴ In *Lawrence*, the Court invoked as persuasive authority the ECHR's rejection of Northern Ireland's sodomy laws in *Dudgeon v. United Kingdom*.²³⁵ Further, the Court approvingly cited the amicus brief filed by former U.N. High Commissioner for Human Rights Mary Robinson,²³⁶ highlighting the brief's discussion of a U.N. Human Rights Committee report criticizing U.S. sodomy statutes. Lastly, the Court noted Australia's repeal of its own sodomy laws in response to the Human Rights Committee's analysis.²³⁷ In its citation to international and foreign authority, moreover, *Lawrence* is far from unique.²³⁸

²³¹ Cf. *supra* note 65 and accompanying text.

²³² Analogously, Koh distinguishes "conformity" and "compliance" from "obedience." See Koh, *supra* note 221, at 628.

²³³ Hopeful examples of intersystemic judicial learning abound, from the habeas cases highlighted by Cover and Aleinikoff, see *supra* notes 163–84 and accompanying text, to the analogous interactions of European supranational and national courts, see *infra* Part VI.B, and perhaps even to the recent Chapter 11 tribunal–national court exchanges on a potential requirement of transparency under Chapter 11, see *infra* notes 438–45 and accompanying text.

²³⁴ 539 U.S. 558 (2003); see also Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT'L L. 913, 915 (2004) (majority of Supreme Court "relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution").

²³⁵ See *Lawrence*, 539 U.S. at 573.

²³⁶ See *id.* at 576–77.

²³⁷ See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 89 n.41 (2004) (describing discussion of Human Rights Committee in section of amicus brief cited by Supreme Court in *Lawrence*); see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 54 (2004) (describing benefits of comparative and international analysis in judicial construction of constitutional norms).

²³⁸ Other recent U.S. Supreme Court citations to foreign authority include *Atkins v. Virginia*, 536 U.S. 304, 317–18 n.21 (2002); see also *id.* at 312 ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing

Anne-Marie Slaughter has framed the U.S. courts' growing acknowledgment of foreign and international tribunals as suggestive of the emergence of a "community of courts."²³⁹ Slaughter observes judges coming together in any number of ways, from meeting at training programs and through judicial organizations to citing one another's decisions and negotiating over complex multinational cases.²⁴⁰ Given this interaction, judges increasingly see themselves as fellow professionals, joined in a common international endeavor.²⁴¹ Some have challenged Slaughter's hypothesis.²⁴² Regardless, the increased rate of citation and other patterns of interaction that she identifies make clear that U.S. courts increasingly are amenable to some dialogue of the conventional, horizontal variety.²⁴³

From such horizontal dialogue, there is only a limited further leap to the pattern of recurrent engagement necessary for meaningful learning, rather than mere error correction, to occur. No less dramatic, if somewhat less heralded, than the *Lawrence* decision has been numerous U.S. courts' receptivity to the teachings of the ICJ regarding the Vienna Convention on Consular Relations and application of the procedural default rule to violations of it.²⁴⁴ If such cases are any indication, a recurrent pattern of interaction with international tribunals, analysis of and close reliance on the jurisprudence of those tribunals, and the genuine learning that may be expected to follow from this pattern, may not be anathema to U.S. courts.²⁴⁵ In fact, one might even construct an analysis in which national courts encourage active engagement with international courts in order to

society." (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))), and *Knight v. Florida*, 528 U.S. 990, 995–98 (1999) (Breyer, J., dissenting) ("A growing number of courts outside the United States . . . have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.").

²³⁹ See Slaughter, *Community of Courts*, *supra* note 87; see also Burke-White, *supra* note 224, at 75–76; Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 377 n.70 (1998) (noting "epistemic communities" of courts).

²⁴⁰ See Slaughter, *Community of Courts*, *supra* note 87, at 192.

²⁴¹ See *id.*

²⁴² See, e.g., Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 521 (2000) (questioning "the role that differences in power and resources may play in the dissemination of law through judicial networks, and the function of these networks' informality and flexibility in promoting dialogue as opposed to domination").

²⁴³ See *supra* note 90.

²⁴⁴ See *infra* notes 556–58 and accompanying text.

²⁴⁵ Of course, this result also will depend on the approach taken by international tribunals in the future, see *infra* Part VI.A, and on the continued tolerance of state parties toward such engagement, see *id.*

advance their own institutional—and even doctrinal—agendas.²⁴⁶ Ultimately, then, there is potential for genuine learning to displace mere error correction as the end result of international review.

Even if a pattern of genuine learning is to emerge, however, the essential nature of that process still might be questioned. At the simplest level, the learning of Chapter 11 and similar international review of national courts arise from the offer of new ideas and frameworks for the analysis of national courts. In this view, international review facilitates learning through the provision of new information to national courts. This is essentially the premise behind the encouragement of U.S. courts' study, appreciation, and even invocation of foreign jurisprudence in their analysis of domestic legal questions. Foreign court decisions may offer alternative possibilities and approaches, and thereby encourage beneficial innovation.²⁴⁷

The interaction of Chapter 11 and similar international tribunals with national courts goes beyond such dialogic consideration of extra-judisdictional precedent.²⁴⁸ As such, the relevant learning process is also distinct. The learning (or innovation) of Chapter 11 and similar review has some grounding in the obligation imposed on the national courts to grapple with the new information offered by the international tribunal. International review as described herein thus refuses to leave the relevant learning to chance. Recall that in Chapter 11 and similar institutional regimes, neither court can ignore its counter-

²⁴⁶ Cf. *Commerce Official Sees U.S. Courts Leaning on WTO Panels for Precedent*, INSIDE U.S. TRADE, Mar. 12, 2004, at 9 (noting U.S. courts' assertion of "Charming Betsy" doctrine to permit reliance on WTO precedent). *But see* *Timken Co. v. United States*, 354 F.3d 1344, 1344 (Fed. Cir. 2004) (declining to apply WTO decision, under Charming Betsy doctrine, to strike down U.S. Department of Commerce's "zeroing" practice). In the European context, Karen Alter has theorized that lower national courts embraced the ECJ's preliminary reference procedure, *see infra* notes 581–90 and accompanying text, as a way to pursue their goals of social reform and extend their institutional authority. By assisting in the expansion of the universe of European law binding on member states, and thereby enhancing the range of substantive rules and rights that demanded adjudication and protection by the courts, the lower national courts were able to extend their jurisdiction. Further, lower court preliminary references offered a mechanism by which the latter might resist the will of appellate courts superior to them in their national judicial hierarchy. *See* ALTER, *supra* note 102, at 47–50.

The mildly coercive nature of the Chapter 11 pattern of learning I suggest below, *see infra* Parts IV.A.1 & B.1.a, is not inconsistent with the potential receptivity of U.S. courts to such review. Such learning is somewhat coercive for national courts, in its imposition of an obligation to engage with the international lesson being offered. It is also voluntary, however, as to the extent and the nature of any internalization of that lesson.

²⁴⁷ *See* Note, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2052 (2001) ("[D]omestic courts engage in the dialogue because they view outside jurisprudence as a helpful resource that indicates how other courts have dealt with similar legal issues.").

²⁴⁸ *See supra* Part II.B.

part systematically.²⁴⁹ While a court may do so in any given case, over time the costs of such a strategy undermine its viability. Learning may be voluntary under the scheme I propose, then, but attendance is not.

The learning characteristic of the pattern of interaction outlined herein, then, is neither a voluntary borrowing of international approaches and views by domestic courts nor a direct imposition of international views on domestic courts. Rather, consistent with the structural design of such review, the resulting learning is a product of the relevant courts' recurrent interaction and of the institutional need for each court to listen and respond to the other. The particular efficacy of international review as a mode of judicial innovation consequently rests on its careful balance of hierarchy and comity.

IV

TOWARD A HYBRID MODEL OF JUDICIAL REVIEW

The international review of national courts under Chapter 11 and analogous international regimes would appear to be minimally characterized by a mix of retrospective review of the national court decision and some prospective orientation toward legal innovation and reform. International review of national courts, as outlined herein, also exhibits some limited pattern of bidirectionality, in that each tribunal speaks within a given case and over a series of cases to the legal norms or questions of interest. Most importantly, the pattern of review explored herein is distinguished from most international legal process by the presence of some degree of international judicial power. Such power amounts to something less than the power of appeal, but something more than conventional judicial dialogue.

As such, the international review of national courts under Chapter 11 and similar regimes constitutes a hybrid pattern of judicial interaction, combining elements of both dialogue and appellate review. I label this pattern "dialectical review," acknowledging both the judicial dialogue at its heart and its dynamic of review.²⁵⁰ Collectively, these elements suggest a dialectic of recurrent engagement among international tribunals and national courts, in which thesis and antithesis ultimately yield—in the crucible of effective judicial innovation—a synthesis of harmonized legal norms. In its hybrid character,

²⁴⁹ See *supra* notes 123–31 and accompanying text.

²⁵⁰ Cf. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 1 (1981) (describing interaction of ECJ with European national courts as "complex dialectic process"). Such a pattern of interaction is somewhat akin to Slaughter's characterization of vertical governmental networks, in which supranational and national authorities act in coordination to pursue a variety of regulatory ends. See SLAUGHTER, *supra* note 57, at 21.

such review is analogous both to federal habeas review of state court criminal convictions and to the various forms of judicial dicta discussed above—analogy which point to judicial innovation as a critical function of dialectical review.

Given these broad characteristics, three features can be identified as central to the creation and operation of an effective regime of dialectical review. The incorporation of these features into regimes of international review of national courts can help to ensure the emergence of a pattern of dialectical review and resulting judicial innovation. Existing regimes such as Chapter 11 might therefore be enhanced to better exhibit these features, while new regimes of international adjudication are constructed with them in mind.

A. *The Elements of Dialectical Review*

If there is to be some occasion for international review of national courts—some transnational judicial engagement with some dimension of both review and power—what should be its precise character? How should it be designed to best facilitate the ends of innovation identified above? How might those ends be achieved without unnecessarily challenging values of national sovereignty, and thereby risking a backlash against relevant international regimes?

To address these questions, we can look to both Chapter 11 and beyond for counsel.²⁵¹ We have seen that Chapter 11 and similar international regimes constitute a hybrid pattern of judicial interaction that lies between appellate review and dialogue. Domestic interactions which are similarly hybrid in nature may thus offer guidance on the form of an idealized pattern of international review of national courts or, as I term it, dialectical review.²⁵² We therefore can again look to Warren Court-era federal habeas corpus review of state court criminal convictions²⁵³ and appellate courts' affirmative use of dicta to

²⁵¹ Such inference from structure might be credited to constitutional law scholar Charles Black. See Martinez, *supra* note 3, at 456 (citing CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (2d ed. 1985)). Black suggests that, in addition to textual analysis and reliance on judicial precedent, inference from structure represents a third method of constitutional interpretation. See BLACK, *supra*, at 23–32.

²⁵² Certain other international judicial interactions also have hybrid qualities, as I will suggest in Part VI.B, and might further contribute to an understanding of the ideal nature of a pattern of dialectical review. That analysis, however, is largely beyond the scope of this Article.

²⁵³ It bears reiterating that Cover's model of jurisdictional redundancy and his and Aleinikoff's model of dialectical federalism were derived from a habeas regime that no longer exists. Given its parallels to that regime, however, one might venture to characterize Chapter 11 as a building block of a "new habeas." See Kathleen Patchel, *The New Habeas*, 42 HAST. L.J. 939, 943 (1991). It should also be noted that the analogy to federal habeas review of state courts emphasized herein is not meant to diminish the lessons one

communicate with lower courts, to further define the operation of a regime of dialectical review between international and national courts. These patterns are not identical to the international review of national courts, but as analogies, they offer useful lessons.

Drawing on these twin analogies, as well as Chapter 11 itself, one can identify three essential features of an effective pattern of international engagement with national courts: (1) the operation of a bipolar power dynamic, in which both judicial participants possess some capacity for control, and hence power, but neither can assert complete authority over the other; (2) the presence of alternative, and perhaps competing, legal and institutional perspectives; and (3) the existence of structures designed to encourage and facilitate adjudicatory continuity. With these in place, Chapter 11 and similar international review can be expected to persist and to produce the benefits of efficient innovation. As we will see, Chapter 11 exhibits these features to a significant—yet incomplete—degree, as revealed by its institutional design and judicial decisions surrounding Chapter 11 to date.²⁵⁴

1. *An Equipose of Power*

Perhaps the most essential characteristic of a pattern of dialectical review, or at least its most significant distinguishing trait, is its incorporation of an element of international judicial power. It is thus unique in its inclusion of some international capacity to effectuate judgments without regard to the consent or cooperation of the national judicial institution.²⁵⁵ In essence, dialectical review takes

might derive from other opportunities for federal and state court interaction under modern jurisdictional rules in the United States. This includes U.S. Supreme Court review of state supreme court decisions. Other forms of collateral review might also be analogized to the pattern of engagement explored herein.

²⁵⁴ In important respects, the model of dialectical review I describe herein echoes Koh's model of "transnational legal process." See Harold Hongju Koh, *Transnational Legal Process*, 75 N.E. L. REV. 181, 183–84 (1996). Most importantly, the dynamic and normative characteristics of Koh's model are in line with the reliance of dialectical review on a dynamic balance of judicial power, as well as the primary orientation of such review to legal innovation. See *id.* at 184.

²⁵⁵ As we turn to the elements of dialectical review as a potential paradigm of intersystemic judicial interaction, given the institutional design of Chapter 11, it is useful to acknowledge other possible trajectories of such interaction within the construct of Chapter 11. To begin with, the relevant national and international judicial systems might simply ignore one another. While the presence of some degree of judicial power on each side increases the cost of such a strategy, it does not preclude it. A prime example of such disregard is the interaction—or non-interaction—of federal and state courts with tribal courts in the United States. See *supra* note 186. Notwithstanding the apparent capacity of each to interfere with the efficacy of the other, these courts have largely avoided meaningful engagement with one another. See Carl H. Johnson, *A Comity of Errors: Why John v. Baker is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1 (2001).

from the pole of appellate review some element of power in the international tribunal's approach to the relevant national court.²⁵⁶ In Chapter 11, this is manifested in the tribunals' non-trivial capacity to effectuate the ends articulated in their judgment, a power ordinarily absent in international adjudication.²⁵⁷ Yet such power is far from unalloyed. It is not solely appellate in nature, but includes a dimension of dialogue—of cooperative exchange—as well.²⁵⁸ Dialectical review involves a dynamic distribution of power between interna-

It is often easier for state courts to ignore tribal court decisions than to undertake the difficult task of interpreting and applying unfamiliar tribal law. It may also be easier for state courts to ignore tribal court decisions out of some underlying, yet mistaken, belief that tribal courts are inherently illegitimate.

Id. at 38; see B.J. Jones, *Welcoming Tribal Courts Into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 461–63 (1998) (describing inconsistent federal court standards for deference to tribal court interpretations); see also Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-existence, Understanding and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 208–211 (1994) (advocating re-examination of extent of deference of federal courts to tribal court jurisdictional determinations); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 405–06 (2004) (“[U]nlike state courts, whose convictions and sentences are given due respect by the United States Sentencing Commission . . . in sentencing for subsequent federal offenses, past offenses adjudicated by tribal courts are ignored in the federal sentencing process.”).

Besides the prospect of disregard, the institutional design of Chapter 11–driven interaction between national and international tribunals also might trigger greater polarization of the paired systems. Rather than irrelevant, as in the latter approach, the *opposing* judicial system might come to be seen as just that, in every sense of the word. Each system, in this case, would mark the other as its counterpoint, or competitor, producing further entrenchment of positions and views, rather than cooperation or convergence. These alternatives, however, exhibit both descriptive and normative shortcomings. They either cut against (if not contradict) the design of Chapter 11 or they fail to maximize the potential returns of Chapter 11 review of national courts, whether as a source of innovation or otherwise.

²⁵⁶ Of course, even appellate review need not mean absolute hierarchical authority. See Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 212–14 (1978) (suggesting that while lower courts generally accept obligation to adopt Supreme Court decisions, when Court undertakes significant new direction in policy, as in Southern desegregation cases, lower court judges are most likely to resist Court decisions); Songer et al., *supra* note 66, at 692–93 (suggesting ability of circuit courts to find outlets to express policy preferences).

²⁵⁷ See *supra* Part II.B; *infra* Part IV.B.1.a.

²⁵⁸ This constraint is suggested by the extent to which Chapter 11 tribunals, as well as federal habeas courts, bespeak caution about their limited jurisdiction, intervening based not on mere error, but only subject to a higher standard of review. See, e.g., *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (upholding “reasonable, good-faith interpretations of existing precedents made by state courts”); *Loewen Group v. United States, ICSID Case No. ARB(AF)/98/3*, 4 J. WORLD INVESTMENT 675, 705, ¶ 132 (NAFTA Ch. 11 Arb. Trib. 2003) (applying “manifest injustice” standard), available at <http://www.naftalaw.org>. A related constraint, also evident in both Chapter 11 and habeas, is an emphasis on finality. See *Butler*, 494 U.S. at 431 (Brennan, J., dissenting) (“‘This Court has never held . . . that finality, standing alone, provides a sufficient reason for federal courts to compromise their

tional and national courts, in which each can exercise some authority vis-à-vis its counterpart but is simultaneously constrained by the latter.²⁵⁹

Within this scheme, neither court can impose its will on the other,²⁶⁰ producing a degree of *incident autonomy* within an overall pattern of *systemic dependence*. Thus, within the Warren Court's approach to federal habeas review of state criminal convictions²⁶¹ from which Cover and Aleinikoff drew their model of beneficial jurisdictional redundancy, state courts could impose the substantial costs of conviction, and the attendant costs of appeal and habeas review, on individual defendants and the federal courts.²⁶² Federal courts, however, could direct the release or retrial of any given criminal defendant on habeas review.²⁶³ Each institution thus enjoyed some element

protection of constitutional rights under § 2254.' Until today." (internal citation omitted)); *infra* note 501 and accompanying text.

²⁵⁹ See REISMAN, *supra* note 66, at 2 ("Controls effected by balances may dispense with hierarchies; they depend, for their effectiveness, on power parities."). It bears noting that Reisman's analysis is directed at the narrower task of "control," while the present analysis speaks to the broader form of review he would characterize as "appeal." See *id.* at 8–9.

²⁶⁰ See Cover & Aleinikoff, *supra* note 14, at 1049, 1052–53 (describing interplay of federal and state courts); see also Wright & Miller, *supra* note 14, at 660–61, 697. It bears emphasis that the model of habeas described by Cover and Aleinikoff is largely a historical curiosity. It was already disappearing as they wrote amidst a series of Burger Court habeas rulings. The final nail in the coffin came with *Teague v. Lane*, 489 U.S. 288, 300–01 (1989), and its retroactivity rules.

²⁶¹ See Cover, *supra* note 14, at 648. Cover and Aleinikoff's theory was grounded in a defense of redundant litigation in the federal and state courts. See *id.* at 1043–44. As a concept, "redundancy" originated in the technology literature. See Matthew Tuchband, *The Systematic Environmental Externalities of Free Trade: A Call for Wiser Trade Decisionmaking*, 83 GEO. L.J. 2099, 2111 (1995) (suggesting that "theory of redundancy originated in the fields of information science and neural networks (cybernetics)"). At heart, the notion of redundancy is directed to the goal of achieving the identical results even where some component of a given system fails. See *id.* at 2110–11 (applying redundancy ideal to international trade flows with multiple global producers, thereby challenging preference for comparative advantage–driven specialization); see also Juarrero-Roqué, *supra* note 138, at 1765 (noting that "context-free" redundancy—in which message is repeated to improve accuracy of transmission—produces stability at cost of limiting message variety). Cover essentially suggested the benefit of this concept in seeking to understand institutional redundancy generally, and particularly in the context of federal habeas review of state criminal convictions. See Cover, *supra* note 14, at 642, 648. See generally DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 30–31 (1991) (describing application of mechanisms of redundancy in various areas).

²⁶² See Cover & Aleinikoff, *supra* note 14, at 1052–53. Thus, "[w]hile the state court pays a price in released prisoners, it can exact a price from the federal court by frustrating the court's objectives in the majority of cases which will never eventuate in a petition for federal habeas corpus." *Id.* at 1053.

²⁶³ See *id.* at 1052 (pointing out that no decision may stand unless both federal and state courts concur).

of incident autonomy.²⁶⁴ On the other hand, each institution also faced a systemic dependence on its counterpart. For state courts, effectuation of the policy choices of its criminal law depended on federal courts' willingness not to undo systematically the convictions achieved at some cost in trial and appeal.²⁶⁵ Even with the opportunity for retrial, such costs would often prove prohibitive. Yet because such an aggressive pattern of habeas review would consume substantial federal court resources and was therefore unattractive to the federal judiciary as well,²⁶⁶ the federal goal of institutional reform was similarly hostage to some degree of state court cooperation with the federal courts' constitutional constructions.²⁶⁷

What is the utility of a dimension of power in an international regime of dialectical review? Several benefits might be suggested

²⁶⁴ The Warren Court-era federal court, by dint of its later temporal position in the habeas process, arguably enjoyed a greater degree of autonomy in any individual case than the state court. Nonetheless, state prosecutors' ability to retry criminal defendants produced some rough equilibrium of incident autonomy.

²⁶⁵ See *id.* at 1052 (explaining state courts' incentive to take federal decisions seriously); cf. Caminker, *supra* note 66, at 80 (describing systemic dependence of Supreme Court and lower courts on one another).

²⁶⁶ Federal courts would thus have been buried under a tidal wave of time-consuming habeas litigation if state courts had elected a strategy of consistent resistance to federal court interpretations of constitutional guarantees. Even if the federal courts had found this unobjectionable, they still would be constrained by the fact that most state criminal convictions are never challenged in the federal courts. See Cover & Aleinikoff, *supra* note 14, at 1053.

²⁶⁷ See *id.* at 1052–53 (observing that lower federal courts' lack of supervisory power over state courts meant that reform strategies of federal courts could be blocked by state court non-acquiescence to federally articulated constitutional rules in later state prosecutions). This result arises from the fact that lower federal courts' decisions, however directly relevant they might be, are not binding on state courts. *Id.* The federal courts are further constrained by the sequential character of state and federal review, as it binds them to state court findings of fact. See *id.* Notably, a similar balance might be posited in the interaction between the ECJ, the ECHR, and the national courts of Europe. See SLAUGHTER, *supra* note 57, at 68, 82 ("Here is a system of vertical checks and balances."); see also *id.* at 84 (suggesting that in interaction of ECJ with national courts, "each court is a check on the other, but not a decisive one"); King, *supra* note 191, at 720–22. Joseph Weiler has referred to this balance of power as a mechanism of "autointerpretation," given the continued autonomy of national courts, even in the face of the genuine power of the ECJ. See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 299–308 (1999).

It bears noting that among the most important variations between the international-domestic dialectic I develop and the habeas dialectic of Cover and Aleinikoff is the absence of any ultimate referee within the present model. Cover and Aleinikoff's pattern of engagement relies on an initial intervention by the Supreme Court and on the Court's ultimate willingness to step in to bring the dialogue to a close. See Cover & Aleinikoff, *supra* note 14, at 1048–49. The international-domestic dialectic is even more essential, in this sense, given the lack of any alternative judicial avenue by which collective norms might be developed. In the international-domestic case of dialectical review, there are neither "foreordained answers," nor foregone conclusions.

using Chapter 11 as an operative example. At the most basic level, placement of meaningful power in the hands of Chapter 11 and similar international tribunals is consistent with the rule of law. Non-judicial domestic authorities increasingly have faced the constraints of international judicial review by the WTO, a growing number of human rights tribunals, and even international criminal tribunals. The pattern of more assertive review proposed herein simply extends that trend to national judiciaries as well. It appreciates that just as the domestic rule of law is advanced by intra-judicial mechanisms of control (i.e., appellate review), the international rule of law can also be enhanced by such controls (e.g., dialectical review).

But the importance of power in Chapter 11 review of national courts can also be understood in more mundane terms. The minimal efficacy of Chapter 11 and similar mechanisms of intersystemic adjudication may depend on such power. Recall that the judicial engagement of which we speak is one in which the subject judicial system is placed under a microscope of close review, from which sharp criticism may potentially emerge. Such review, it seems safe to predict, is unlikely to be well-received, at least in most instances. In the conventional terms, national courts are unlikely to welcome a dialogue with international critics on Chapter 11 and similar tribunals. Less voluntary mechanisms of international intervention may therefore be necessary if there is to be any interaction at all.

The power of the Chapter 11 tribunal, in essence, allows it to command the attention of a national court. It permits issues to be put on the table even without the voluntary—let alone enthusiastic—participation of the relevant national court. Even after forcing an issue into debate, moreover, the power of dialectical review may remain essential to the emergence of a recurrent pattern of interaction and the resulting prospect of gradual domestic reform.²⁶⁸ The power of Chapter 11 review may undermine the avoidance mechanisms of the passive virtues,²⁶⁹ but with good reason.

If the rule of law and the functionality of a system of international review require power, why institute the bilateral power scheme

²⁶⁸ In operational terms, the power of Chapter 11 tribunals to bring an issue back for consideration in subsequent cases allows it to employ Sunstein's "minimalism," see Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996) (defining "minimalism" as pervasive practice of "doing and saying as little as necessary to justify an outcome"), a pattern appropriate to intersystemic adjudication, especially across national borders. In slightly different terms, some degree of international judicial power may also help to address the need for adjudicatory continuity identified below. See *infra* Part IV.A.3.

²⁶⁹ See BICKEL, *supra* note 15, at 111–13 (praising restraint by Supreme Court in face of contested constitutional questions).

described above, in which we observe a balance of power between the participating judicial institutions? Why, in the terms of the present analysis, introduce an element of dialogue into a regime of appellate review, and thus arrive at the proposed system of *dialectical* review, rather than simply accepting a regime of international appeal? In light of the goals that I assume, would a system of appellate review not be even better?

Review across jurisdictional systems, rather than within a single legal system, may preclude a hierarchical pattern of direct review, of “appeal” to an external institution.²⁷⁰ Such intersystemic review may depend for its legitimacy—and consequently its functionality—on some affirmation of the independence, autonomy, and *power* of the system under review.²⁷¹ Just as a commitment to the rule of law and the functionality of a system of extrinsic review require that the international or other external tribunal enjoy meaningful power—i.e., something more than dialogue—necessary acceptance of a system of extrinsic review may require that the courts subject to review not be rendered powerless, as through a system of ordinary appeal.²⁷²

²⁷⁰ In habeas, for example, one might note the multifarious constitutional limitations that have been asserted to preclude more aggressive review of state criminal trials. See Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1704–05 (2000) (discussing Congress’s constriction of federal court authority to adjudicate federal rights in habeas). In Cover and Aleinikoff’s historical analysis, state criminal law was not susceptible to the equitable approach utilized by the Warren Court in reapportionment and civil rights cases. “Direct action” against the relevant state actor in the administration of criminal law, as opposed to those responsible for the maintenance of segregation, simply was not feasible. See Cover & Aleinikoff, *supra* note 14, at 1039, 1041 (citing constraints imposed by narrow construction of civil rights removal statute and equitable restraint, among other factors).

²⁷¹ Cf. Martinez, *supra* note 3, at 466–67. In this vein, it is important to appreciate that the most important party-in-interest in Chapter 11 review—the national court—is absent from the proceedings. See *supra* note 188. Of course, courts ordinarily do not have a voice in subsequent judicial proceedings, beyond the conventional mechanism of judicial communication—the initial court’s decision. Yet, if the Chapter 11 system of review is correctly understood to be oriented as much to jurisprudential evolution as to individual case decision, see *supra* Part III, then a constrained role for the court reviewed appears problematic. More interactive and ongoing involvement by the national court therefore might warrant consideration. One might imagine, for example, some mechanism of referral or reference, by which the views and participation of the national court might be solicited. See, e.g., *infra* note 608. Even more dramatically, one might imagine a place for the national court as an adjunct to the reviewing court—a special master of sorts.

²⁷² The incorporation of an element of dialogue can thus be expected to soften the hierarchical appearance of a system of collateral review. See Althouse, *supra* note 136, at 938. Concerns with such review are unlikely to disappear completely, nor should they. Under Chapter 11, for example, given the necessary chronology of the pattern of review, some implied hierarchy favoring the international tribunal survives. Cf. *id.* at 941–42 (noting that federal judges “speak second” in habeas dialogue). But this remaining pattern of hierarchy is mitigated by the very keen sense of restraint that follows from a dialectical, versus an error correction, model of review. This is readily apparent in Chapter 11 arbitral decisions themselves, which make clear the tribunals’ sense of their status as courts of limited

The preservation of an element of dialogue in Chapter 11 and similar regimes, notwithstanding the introduction of some dimension of power, also may be preferable to pure hierarchy, given the strategic dynamic among the relevant judicial interlocutors. Thus, where neither judicial system can dictate ultimate outcomes, as in Chapter 11,²⁷³ the paired systems may, at least sometimes, face a coordination-game dynamic.²⁷⁴ In the classical paradigm of the Battle of the Sexes, each court may prefer its own policy position (whether on process or substance), but prefer coordination on a common policy (even if it is the other system's position) over an even more inefficient divergence of policies.²⁷⁵ In such a coordination-driven strategic environment, dialectical review may be adequate to achieve desired ends without need for more costly and invasive direct review.²⁷⁶

Preservation of the reviewed court's judicial power may therefore be both necessary to overcome resistance to intersystemic judicial review and consistent with a potential coordination dynamic across judicial systems. More broadly, the balance of power that I outline and a concomitant preference for dialectical over direct review comports with the nature of intersystemic judicial review. By definition, such review involves distinct realms of expertise and experience. This is essential to the goal of innovation highlighted above as the desirable ends of the type of judicial interaction explored herein.²⁷⁷ Given this diversity of expertise, a distribution of power designed to force each side to actively consider and draw on the wisdom of the other is neces-

jurisdiction. The best evidence of this conception may be *Loewen*, in which the tribunal called sharp attention to its unwillingness to go as far as it wished, given its limited authority under Chapter 11. See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 731 ¶ 242 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

²⁷³ See generally *infra* Part IV.B.1.a.

²⁷⁴ See John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP. PROB. & TR. J. 445, 488–90 (2001) (describing coordination-game dynamic in litigation of federal just compensation claims).

²⁷⁵ See Ahdieh, *Law's Signal*, *supra* note 141, at 240 n.102. In the Battle of the Sexes, husband and wife are eager to spend an evening together, but one would like to go to the ballet, while the other would like to see a boxing match. See *id.*

²⁷⁶ See *id.* But see *id.* at 239–45 (discussing limitations of several potential mechanisms for resolving coordination games). One might also favor the restrained power of dialectical review over the broader power of appeal, given some analogy to the nature of domestic constitutional review. Cf. Katyal, *supra* note 15, at 1711. The same concerns of sovereignty and democracy that favor a more advisory approach to the constitutional review of the U.S. Supreme Court may encourage a similar approach in the dialectical review of Chapter 11. See *id.*

²⁷⁷ See *supra* Part III; see also SLAUGHTER, *supra* note 57, at 147–48 (describing need to maintain balance of power between supranational and national authorities).

sarily to be preferred. In such a system, each institution can best contribute its piece.²⁷⁸

2. *Alternative Legal and Institutional Perspectives*

If dialectical review takes an element of international judicial power from its vertical/hierarchical/appellate character, what does it take from the horizontal dialogue that constitutes the other half of its hybrid character? I would highlight the centrality of alternative—if not competing—judicial perspectives. Here, again, one might speak of balance: The functionality of dialectical judicial engagement rests on the existence of some diversity of perspective across the relevant judicial systems.²⁷⁹ As we will see, dialectic review also requires some degree of commonality around which borrowing and learning may occur.²⁸⁰ To begin with, however, we might identify two sources of the diverse perspectives necessary for effective dialectical review: diversity of law and diversity of institutional context.

Perhaps most importantly, an effective pattern of dialectical review in the interaction of international and domestic tribunals relies on distinct legal perspectives. More specifically, judicial dialogue is most commonly grounded in some diversity in sources of law. In the transnational borrowing among constitutional courts, for example, the potential for beneficial innovation arises from differences in the legal authorities upon which each court relies. Similarly, in habeas review, federal courts' orientation to federal rather than state law and to constitutional rather than criminal law might be cited.

Yet the relevant sources of law cannot be entirely divergent. They must instead be at least partially overlapping if they are to pro-

²⁷⁸ Each of these arguments for a dialectical rather than direct (or appellate) pattern of review—to enhance legitimacy, to align the system more closely with the strategic dynamic at work, and to build on distinct expertise—is enhanced where the relevant pattern of review occurs not merely across systems (as in federal review of state courts), but across national borders as well. The need for sensitivity is yet greater in the transnational interaction of federal states, such as the United States, Canada, and Mexico. See Perez, *supra* note 202, at 406–07 (describing need for ICJ to be conscious of federal character of states subject to court judgments).

²⁷⁹ Cover and Aleinikoff have spoken, in more general terms, of the need for “two distinct voices” in the habeas dialogue. See Cover & Aleinikoff, *supra* note 14, at 1049 (“[D]ialogue requires . . . that there be two distinct voices.”); cf. Schapiro, *supra* note 136, at 1416.

²⁸⁰ See Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 53 (2003) (describing European fundamental rights jurisprudence as playing off tension between “the commonality of Europe and the particularity of national and local identity”). For a general discussion of the relationship between commonality and effective discourse, see ROBERT C. STALNAKER, CONTEXT AND CONTENT 48–49 (1999).

vide a common ground for discourse.²⁸¹ Again, this is evident in habeas, where both judicial systems ultimately are oriented to federal constitutional requirements and where even state constitutional provisions may be interpreted with reference to parallel federal norms. The same also is true in the dissemination of human rights norms, which often draw on the same ultimate sources of law.²⁸²

Distinct institutional contexts are a further important source of the diverse perspectives that underlie effective dialectical review.²⁸³ The framework within which any given court adjudicates is likely to be important to the perspective it brings to its judicial interactions. Even judges at home in both systems—retired U.S. judges who sit on Chapter 11 tribunals or state court judges who are appointed to the federal bench, for example—are likely to come to any given issue with a distinct perspective depending on where they sit.²⁸⁴

In describing the distinct perspectives of federal and state courts, Cover and Aleinikoff have spoken of “utopian” versus “pragmatic” perspectives respectively.²⁸⁵ In slightly different terms, Ann Althouse speaks of adjudication grounded in an ideology of neutrality, which she identifies in federal habeas review, as opposed to an ideology of context, which is more characteristic of the state criminal trial.²⁸⁶ Ultimately, such perspectives are a product of the surrounding judicial culture, the composition of the given bench, and the nature of the

²⁸¹ In the comparative law literature, Alan Watson has highlighted the need for some degree of identity in order for comparison to be useful. See WATSON, *supra* note 229, at 5.

²⁸² Cf. Helfer & Slaughter, *supra* note 2, at 290–91.

²⁸³ See Schapiro, *supra* note 136, at 1451 (“Federal courts could help guarantee that state constitutional provisions do not languish unenforced. Federal courts could not reject state constitutional precedent, but they could provide a valuable alternative perspective, rooted in a different institutional context.”); cf. Loewen Group v. United States, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 727–28, ¶¶ 231–233 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

²⁸⁴ Judith Resnick has sought to apply a dialogic concept of review to the interaction of federal and state systems in the area of family law:

To the extent that two court systems are populated by judges empowered by differing institutional arrangements (life tenure, appointment, and election) and working in contexts with different ideologies, their simultaneous and, to some extent, redundant exploration of issues of family life provide opportunities for confirmation of shared norms, as well as for dialogue about the disjunctions that emerge.

Judith Resnick, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1758 (1991).

²⁸⁵ Cover & Aleinikoff, *supra* note 14, at 1051. The federal courts’ utopian perspective is oriented to the protection of constitutional rights and notions of fair and limited government. *Id.* at 1051–52. The state courts’ pragmatic perspective, by contrast, is focused on the day-to-day administration of justice. *Id.*

²⁸⁶ See Althouse, *supra* note 136, at 939. Ultimately, Althouse questions the actual extent of difference between these ideologies. See *id.* at 941.

cases at bar, among other factors.²⁸⁷ Brought into contact with one another, such varied perspectives might be credited with helping to produce the constitutional jurisprudence of U.S. criminal procedure and may yet encourage development of the international norms of due process to which I would target Chapter 11 review.²⁸⁸

The composition of the relevant bench, finally, also can be expected to contribute to distinct institutional contexts and a resulting range in perspective. In the case of Chapter 11 review, by way of example, the different nationalities of the relevant adjudicators on the tribunals and in the national courts, as well as their distinct training and background, can be expected to contribute to distinct perspectives on the questions presented.²⁸⁹

Importantly for our purposes, the need for distinct perspectives does not rely on any notion of “superior” court review. It is not, as such, a question of parity or the lack thereof.²⁹⁰ Nor does it turn on any preference for non-ideological adjudication versus ideological adjudication. Rather, both perspectives are valued in a pattern of dialectical review, and are, in fact, likely to be rebalanced in different ways across different cases.²⁹¹

3. *Continuity of Adjudication*

The final characteristic of dialectical review—adjudicatory continuity—draws on aspects of both vertical appeal and horizontal dialogue.²⁹² To begin with, the hierarchical dimension of international-

²⁸⁷ Distinct perspectives also may be created by distinct procedural and access rules in different judicial systems, which give rise to particular types of claims, litigants, and the like. See Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 552 (1984) (suggesting as much in context of federal standing limitations). Diversity in procedural rules therefore may facilitate a dialectic pattern of exchange.

²⁸⁸ See *infra* Part V. Competing perspectives are likewise at the heart of several of Katyal’s advicegiving forms, including exemplification, demarcation, and prescription. See Katyal, *supra* note 15, at 1718–19.

²⁸⁹ Cover speaks of jurisdictional redundancy’s efficacy being dependant on judges in the alternative systems coming from different social groups. See Cover, *supra* note 14, at 665. Further, he identifies federal versus state court judges as being drawn from national versus local elites respectively, with resulting educational and referential experiences. See *id.* The two groups may, he suggests, vary in their “[l]evels of education, bonds of loyalty, status, and even economic class.” *Id.*

²⁹⁰ See generally Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593 (1991) (describing debate of parity, or lack thereof, between federal and state courts).

²⁹¹ See Althouse, *supra* note 136, at 939 (describing value of dual perspectives, without regard to relative superiority).

²⁹² While Cover and Aleinikoff identify elements of power and perspective analogous to those described above, they do not explicitly highlight issues of continuity. See Cover & Aleinikoff, *supra* note 14 (describing process by which state and federal courts struggle for dominance).

domestic judicial interaction favors an assessment of the same underlying case, or common nucleus of facts.²⁹³ Such is the essence of “review.” Identity of the relevant case, or at least its essential factual predicate, is likely to maximize the functionality of any pattern of dialectical review.²⁹⁴ In Cover and Aleinikoff’s model of habeas review, litigation of the relevant constitutional norm with reference to the same criminal defendant helps to ensure that the dialogue is at its sharpest.²⁹⁵ By eliminating ambiguities arising from the distinguishing traits of different cases, the force of the dialectical exchange in any given case, and ultimately across cases, is likely to increase. Treatment of the same case also encourages a stronger dynamic of exchange, given the second court’s access to the decision of the initial court.²⁹⁶ With greater case continuity, a more effective engagement can be predicted.

The dialogic element of dialectical review, meanwhile, requires some continuity of litigation across cases. For a dialogue to be effective, it must involve a series of opportunities for engagement across a pattern of cases and a period of time.²⁹⁷ No single case, or even limited quantity of cases, can suffice to provide the evolutionary infrastructure of a functional pattern of dialectical review.²⁹⁸ The progressively developmental nature of both dialogue itself, and the product (i.e., subject) of that dialogue, depends on the existence of a

²⁹³ This is the “diachronic or sequential redundancy” described by Cover, in which review occurs seriatim. See Cover, *supra* note 14, at 648. It is distinguished from “synchronic redundancy,” where review is simultaneous. See *id.* at 646–47.

²⁹⁴ Cf. Beermann, *supra* note 220, at 335 n.232 (suggesting potential for both federal and state courts to learn from study of each other’s treatment of related cases).

²⁹⁵ See Cover & Aleinikoff, *supra* note 14, at 1048 (“The dialogue becomes most intense when state and federal court systems both have input into the resolution of a single dispute.”); see also King, *supra* note 191, at 731–32 (suggesting quality of ECJ advice results partially from presentation of facts in concrete context).

²⁹⁶ See Cover, *supra* note 14, at 678.

²⁹⁷ See *id.* at 681. Additionally, Slaughter posits that an increased quantity of transnational interactions among courts facilitates the conception of an integrated system of courts across the globe. This conception reduces the degree of “deference” among courts, but enhances the extent of dialogue. See SLAUGHTER, *supra* note 57, at 85–86, 94; see also *id.* at 92 (suggesting that courts’ sense of identity with foreign tribunals diminishes deference).

²⁹⁸ Katyal’s judicial-advisory mechanisms of exemplification and demarcation likewise assume some succession of cases. See Katyal, *supra* note 15, at 1718–19. Exemplification, for example, involves the coupling of the decision to strike down a given legal act with advice as to what provisions the court will uphold in future litigation. See *id.* In even more basic terms, a succession of cases is essential to the success of dialectical review, given the need for each court in that relationship to reason progressively with the other court. Unlike direct review, dialectical review depends on effective argumentation. See *supra* note 214. A single presentation of any given argument is relatively unlikely to be effective. Rather, effective articulation can be expected to require some succession of argument, counterargument, and response.

sufficient pattern of cases to allow gradual evolution rather than abrupt breaks with prior precedent.²⁹⁹ This is evident in habeas jurisprudence, in which most constitutional norms progressively emerged over an array of cases and a number of years.³⁰⁰ An even better example may be the extended interaction of the ECJ and the German Constitutional Court over a period of more than twenty years.³⁰¹

A third and final element of continuity in dialectical review is the need for a degree of what I would term “institutional” continuity. In some sense, this final element arises from both the appellate and the dialogic dimensions of dialectical review. An effective pattern of dialectical review necessarily requires the presence of repeat players to participate in a process of legal innovation.³⁰² Through such repeat participation, institutional participants can be expected to develop a growing appreciation of the dynamic within which they are operating and an expertise in its subject matter. This emerged in the habeas context because of the substantial number of relevant cases and their ultimate concentration in state high courts and federal courts of appeals. In the Chapter 11 context, on the other hand, as I will suggest below, this is arguably the weakest element of the institutional design and one that warrants significant adjustment and enhancement.

Institutional continuity is essential to the functionality of dialectical review. Such review inevitably will involve the prospect of review, as in the certiorari review of the U.S. Supreme Court, but limited incidence of it. Hence, it relies on the combination of both a convincing dialogue and the threat of review in order to produce desired outcomes.³⁰³ This pattern requires the expectation of a persistent

²⁹⁹ See Helfer & Slaughter, *supra* note 2, at 301 (“A court that is scarcely used, for whatever reason, cannot hope to make much of a mark.”).

³⁰⁰ Continuity can operate across cases, of course, only so long as the same core issues are presented in the various cases. See Steinglass, *supra* note 287, at 551–52.

³⁰¹ See Helfer & Slaughter, *supra* note 2, at 310–11; see also *infra* note 583. Over a line of cases, extended over several decades, the ECJ progressively convinced the German court of its commitment to the fundamental rights of German citizens and the democratic values of the German state. See Helfer & Slaughter, *supra* note 2, at 310–11; see also *infra* note 583.

³⁰² See REISMAN, *supra* note 66, at 7–8 (noting detrimental impact of randomness of arbitrator combinations on international control systems).

³⁰³ See Songer et al., *supra* note 66, at 693. The authors note that:

The extreme rarity of reversals may at first appear to pose a challenge to a principal-agent analysis of the judicial hierarchy. But the ‘paradox’ of (relatively) effective control and rare reversals is more apparent than real. If an appeals court anticipates that it will be sanctioned in the form of a reversal, the anticipated response will keep the court in check.

Id.

fidelity to the rules in place and their predictable application by the relevant tribunal upon review.³⁰⁴

Institutional continuity is also important to the legitimacy of dialectical review. This can be understood with reference to the function of precedent.³⁰⁵ In Chapter 11, as in international law generally, there is no provision for binding precedent.³⁰⁶ The function of precedent as a mechanism of control, however, is essential to the legitimacy of any legal system.³⁰⁷ Given the lack of provision for binding precedent in the Chapter 11 context, some institutional substitute is necessary. In Chapter 11 and other cases of dialectical review, that substitute is a continuity of participation in the judicial exchange of interest.³⁰⁸ If the relevant international adjudicator and the relevant national court consistently reappear, a species of 'precedent'—the capacity to develop reliable expectations of applicable norms—can be expected to emerge. Dialectical review therefore requires repeat players, and repeat plays. Through such repeat interactions, legitimacy may be assured, and the opportunity for learning created.³⁰⁹

Institutional continuity thus also serves the ultimate goal of dialectical review, as outlined above: effective innovation. A pattern of repeat participation in the relevant dialogue can be expected to build trust and confidence among the judicial parties to the exchange. In this way, receptivity to alternative perspectives, and even external

³⁰⁴ In Reisman's terms, these are mechanisms of international "control." See REISMAN, *supra* note 66, at 7.

³⁰⁵ "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Michael S. Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1543 (2000) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992)).

³⁰⁶ See MOHAMED SHAHABUDDIN, *PRECEDENT IN THE WORLD COURT* 2 (1996) (noting absence of doctrine of *stare decisis* in international law).

³⁰⁷ See *id.* at 9 (suggesting "clear necessity for legal issues arising within the international community to be resolved by recourse to general propositions of law if the solutions reached are to command some critical minimum level of supporting respect"); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) ("An important tenet of our political/moral culture, however, is that judges should feel strongly constrained by prior case law."); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.").

³⁰⁸ In some regards, mechanisms of institutional continuity actually may be preferable to formal precedent, given the relative inflexibility of the latter. See Katyal, *supra* note 15, at 1714.

³⁰⁹ See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 30–31 (1984) (describing role of repeat plays in resolving strategic games); cf. Ken Binmore, *Game Theory and the Social Contract II: Just Playing* 29–32 (1998) (discussing importance of learning over repeat iterations of Ultimatum Game).

pressures, may grow.³¹⁰ Innovation along any given legal dimension, furthermore, may be more likely to take root within a framework generally characterized by stability. Mechanisms of institutional continuity offer just such stability.³¹¹

B. Chapter 11 as Dialectical Review

Having defined a balanced power dynamic, competing legal and institutional perspectives, and mechanisms of adjudicatory continuity as the core characteristics of dialectical review, it is useful to lend these elements greater specificity by considering their manifestation in Chapter 11. Successive analysis of the elements of dialectical review in the structure of Chapter 11 review and in Chapter 11–related adjudication to date thus offers an opportunity to lend concrete form to the abstract model of dialectical review. Ultimately, I will conclude, the institutional design of Chapter 11 is conducive, if only imperfectly so, to a pattern of judicial engagement characterized by dialectical review. In the national and international litigation surrounding Chapter 11 to date, hints of this pattern can already be observed.³¹²

1. The Dialectical Structure of Chapter 11 Review

The institutional design of Chapter 11 offers a fertile ground for the implementation of a dialectical approach to intersystemic judicial review. Consequently, Chapter 11 is also suggestive of more particularized elements in the design of a dialectical pattern of judicial interaction. This is evident in a consideration of the three core characteristics of dialectical review outlined above.

a. The Distribution of Power in Chapter 11 Review

Chapter 11 review of national courts manifests both the enhanced power of the reviewing court and the resulting balance of power that characterize dialectical review. National courts subject to Chapter 11

³¹⁰ See Helfer & Slaughter, *supra* note 2, at 310–11 (discussing dialogue between German Constitutional Court and ECJ which resulted in ECJ's development of system of human rights protection).

³¹¹ Katyal's advicegiving mechanisms have some repeat-player dimensions, as they rely on the premise that the relevant advice will still be good when the next case arrives. See Katyal, *supra* note 15, at 1714.

³¹² Notwithstanding the emphasis on Chapter 11 review of national courts herein, it bears noting that most Chapter 11 claims to date have been directed to alleged misconduct of executive and legislative branch officials. Denial of justice claims thus represent a limited subset of Chapter 11 petitions to date. The model of dialectical review, needless to say, is not intended to speak directly to these inter-branch interactions. Some application of the theory of dialectical review, however, might be made to the transnational interaction of state institutions generally.

review face precisely the pattern of incident autonomy and systemic dependence described above.³¹³ National courts are independent of the Chapter 11 arbitral process. Decisions emanating from Chapter 11 tribunals do not constitute binding precedent for national courts.³¹⁴ Nor do Chapter 11 arbitral decisions reverse or undo, in any formal sense, the judgment of the relevant national institution. Instead, Chapter 11 remedies are limited to monetary damages.³¹⁵ Further, Chapter 11 awards run not against the claimant's adversary in the domestic proceeding, but against the federal authorities of the host state.³¹⁶ National courts consequently enjoy significant incident autonomy with reference to Chapter 11 review.

On the other hand, that autonomy is not unbounded. Chapter 11 tribunals can exert significant pressure on executive and legislative authorities. As described above, this arises particularly from the ability of individual claimants to invoke Chapter 11.³¹⁷ The potential influence of Chapter 11 tribunals is further enhanced by Chapter 11's reliance on monetary damage awards readily subject to domestic enforcement.³¹⁸ It is clear, then, that Chapter 11 review may place meaningful constraints on non-judicial domestic authorities.

Yet Chapter 11's constraints ultimately extend to domestic courts as well, whether directly or indirectly.³¹⁹ In certain cases, one can observe direct mechanisms of national court dependence on the Chapter 11 arbitral process. This is perhaps most apparent with reference to domestic awards of punitive damages. Such damages are intended to serve a deterrent and retributive function.³²⁰ Any such effect is subject to undoing, however, by Chapter 11 review. Had the Loewen Group been compensated at the close of the Chapter 11 proceedings in an amount equivalent to the punitive damages award imposed by the Mississippi jury (or greater amount), the deterrent and

³¹³ See *supra* Part IV.A.1.

³¹⁴ See NAFTA, *supra* note 12, art. 1136(1), at 646 ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

³¹⁵ See Hansen, *supra* note 17, at 497; see also NAFTA, *supra* note 12, arts. 1134–1135, at 646.

³¹⁶ See NAFTA, *supra* note 12, art. 1136(4), at 646.

³¹⁷ See *supra* notes 115–17 and accompanying text.

³¹⁸ See *supra* notes 118–22 and accompanying text.

³¹⁹ Anne-Marie Slaughter has identified vertical arrangements such as Chapter 11 as a form of "enforcement network" operating between Chapter 11 tribunals and national courts. See SLAUGHTER, *supra* note 57, at 100.

³²⁰ See John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L. L. 391, 434–35 (2004) (discussing function of punitive damages).

retributive functions of the award, by definition, would have been undone.³²¹

In any case in which the defendant in the national proceeding is a federal government entity, Chapter 11 review also might be said to undo some part of the impact of the underlying judgment. Thus, a holding denying the liability of a federal defendant in U.S. district court would be directly undermined by a Chapter 11 finding of liability and resulting award of damages against the federal government.³²²

Across a pattern of cases, the systemic dependence of national courts on the Chapter 11 process—following indirectly from Chapter 11's impact on executive and legislative authorities—may be greater still. Over time, recurrent Chapter 11 liability might be expected to trigger some intervention against the relevant federal or state court and/or its rules and procedures.³²³ Even absent a pattern of liability, a single, large Chapter 11 award against the federal government—such as the \$750 million award sought by Loewen—would almost inevitably create pressure to restrain or otherwise regulate the relevant judicial body, whether state or federal.³²⁴

With particular reference to the state courts—arguably both the most sensitive nexus in the effectuation of NAFTA awards and the more objectionable occasion for Chapter 11-driven federal pressures—several potential mechanisms of such pressure might be imagined.³²⁵ These include: (1) direct enforcement of NAFTA

³²¹ See Chief Justice Taney's Memorandum for Opinion in *Gordon v. United States* 2 Wall. 561, 117 U.S. app. I at 697, 698–702 (1864) (recognizing impact of undoing effects of judgment, even if formal judgment is preserved).

³²² For example, a denial of just compensation from the U.S. Army Corps of Engineers for the limited impact of a water project on adjoining land owned by a Canadian citizen might be “reviewed” under NAFTA Article 1110 and an award of damages (equivalent to the compensation denied in U.S. district court) imposed against the Judgment Fund of the U.S. government.

³²³ Political pressure to modify state procedural rules, as well as relevant substantive law and even aspects of institutional design, such as the use of judicial elections, might emerge in the face of such awards. Adjustments to the rules of complete diversity to minimize the possibility of continued federal liability also might be provoked by successful Chapter 11 claims. See *infra* notes 331–34 and accompanying text.

³²⁴ Cf. *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 717, ¶ 187 (NAFTA Ch. 11 Arb. Trib. 2003) (noting change in Mississippi appeal-bond requirement), available at <http://www.naftalaw.org>. A distinct response to the imposition of Chapter 11 liability might be a “backlash” not against state or federal courts, but against Chapter 11, international investment protections, or perhaps even international arbitration generally. This prospect has been considered widely. See, e.g., Been & Beauvais, *supra* note 21, at 132 n.459; Matiation, *supra* note 7, at 462.

³²⁵ I do not mean to suggest that pressure would be absent were Chapter 11 liability to arise from the federal courts. To the contrary, such pressure might be even more acute. I simply give the restraint of state courts priority of place because of the broader concerns

against state or local authorities, as authorized by federal statute; (2) federal efforts to secure state or local indemnification of Chapter 11 awards; (3) legislative or judicial alteration of the rules of diversity or removal; (4) expanded use of federal preemption; (5) spending power restraints on state or local authorities; and (6) U.S. Supreme Court pressure to encourage state and local judicial conformity. These various avenues can be described in turn, with some subsequent consideration of their actual likelihood.

To begin with, the federal government might take enforcement action against state or local authorities proximate to the relevant courts, or even the courts themselves, as authorized by NAFTA's implementing legislation.³²⁶ 19 U.S.C. § 3312 grants federal authorities exclusive power to challenge state laws for asserted incompatibility with NAFTA obligations.³²⁷ Short of actual enforcement, but itself a source of potential pressure, § 3312 mandates federal consultation with state authorities regarding any potentially non-compliant measure, including court rules and other judicial regulations, if they are the relevant "measure" asserted to violate the Agreement.³²⁸

Somewhat analogously, Vicki Been has suggested the possibility of some federal effort to seek state or local contribution or indemnification in the face of any Chapter 11 award.³²⁹ Such claims would require legislative grounding, but would be likely to survive constitutional muster.³³⁰ Broader legislative change also might be imagined.

Most commonly referenced has been the possibility of changes in the diversity rules for removal to federal court.³³¹ Given the rule of complete diversity, claims against foreign corporations or investors brought in the state courts are likely to remain there, so long as some local defendant can be identified.³³² This is precisely what occurred in

likely to arise from any case of federal pressure on the state courts, versus the federal courts. As to the latter, however, several of the same mechanisms described above, or analogues, might be used to bring them in line with the demands of Chapter 11.

³²⁶ See 19 U.S.C. § 3312 (2000) (authorizing United States to challenge action of state entity on grounds of inconsistency with NAFTA).

³²⁷ See *id.* § 3312(b)(2) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.").

³²⁸ See *id.* § 3312(b)(1)(B) (describing opportunity of states to voice opinions on NAFTA-related matters that will directly impact them).

³²⁹ See Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 32 ENV. L. REP. 11001, 11012-14 (2002).

³³⁰ See *id.* at 11012-14.

³³¹ See, e.g., Lerner, *supra* note 33, at 297-302.

³³² See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that each defendant must be citizen of different state from each plaintiff in order to support federal diversity jurisdiction).

Loewen, where the plaintiff named a Mississippi corporation purchased by the Loewen Group as a co-defendant.³³³ The requirement of complete diversity might be abandoned in the case of aliens, however, either by judicial action (or inaction, as the case may be) or by legislative mandate.³³⁴ The possibility of such a jurisdiction grab from the state courts might alone serve as a source of potential pressure on those courts.

Another legislative avenue of pressure on state courts might be the threat of selective preemption of certain issues likely to pertain to the litigation of claims against foreign corporations and investors.³³⁵ Such a tool might actually be even more effective than the possibilities already mentioned, with Congress's selective preemption subject to progressive extension in the face of continued state court non-compliance. Similar ends might be achieved even more directly by Congress through the spending power.³³⁶ Federal funding to the states might be conditioned on certain forms of access to state or local courts, certain treatment of foreign-investor defendants, certain rules for supersedeas bonds, or other measures to bring the courts in compliance with Chapter 11.

Finally, assuming some relatively greater sensitivity of the U.S. Supreme Court (than lower courts) to the policy concerns that would emanate from substantial and recurrent federal liability for asserted violations of Chapter 11, the Court also might be expected to contribute to the pressure on state courts (as well as federal courts, for that matter) to draw their decisions into greater alignment with NAFTA's apparent demands.³³⁷ Liability in *Loewen*, for example, might well have played into future Supreme Court certiorari determinations on an array of issues. These include the application of complete diversity requirements to aliens, the constitutionality of supersedeas bond requirements, the constitutionality of punitive damage awards of a certain magnitude, and the procedural rules for jury determinations on damages, among other possibilities.³³⁸

³³³ See Lerner, *supra* note 33, at 297.

³³⁴ See *id.* at 299 (noting potential for courts to abolish complete diversity rule for aliens, or for Congress to amend removal statute to allow aliens to remove cases to federal courts regardless of diversity); Stephan, *supra* note 41, at 795, 822, 872–73, 874–75.

³³⁵ See Been, *supra* note 329, at 11015. It bears noting that restraints on the federal courts in the face of Chapter 11 liability can be accomplished more directly by federal legislation.

³³⁶ See *id.* at 11014–15.

³³⁷ Cf. Stephan, *supra* note 41, at 872 (“When the Court believed that the state courts would discriminate against out-of-state investors, it adopted interpretations of diversity jurisdiction that made it easier for these investors to assert their claims in federal court.”).

³³⁸ See *supra* Part I.

As this enumeration suggests, avenues surely exist for federal pressure on the state courts, in the face of Chapter 11 liability. Pressure on the federal courts to come into line is likely even easier to accomplish. A separate question, of course, is the *likelihood* that any of these mechanisms of control over state courts might actually be implemented. It might be doubted that an executive-branch agency, the Congress, or the Court would actually pursue any of the enumerated approaches. On the other hand, given the limited extent of Chapter 11 litigation to date and the narrow avoidance of U.S. liability in the cases against it, it is at least difficult to predict how things may ultimately play out. It cannot be stated with confidence that any of the foregoing means are likely to be invoked. Nor is there reason to decisively conclude that they will not be invoked.³³⁹

Beginning with the possibility of an enforcement action under 19 U.S.C. § 3317, the prospects would seemingly depend on the particulars of the case presented. Given the explicit congressional authorization of federal enforcement of NAFTA,³⁴⁰ it is at least plausible that intervention might occur in a sufficiently egregious case. It is notable, moreover, that Congress recently declined to eviscerate this authorization, by way of a denial of relevant appropriations, even when given the opportunity to do so.³⁴¹ As for indemnification or contribution, meanwhile, it is of interest that both Canada and Mexico have had some recent occasion to deal with the prospect that Chapter 11 liability might be transferred to subnational entities.³⁴²

Adjustment of the rules of complete diversity is not implausible either. Both Congress and the federal courts have generally been sympathetic to the protection of foreign defendants from local bias. Given the recurrent attention to this possibility, it cannot be discounted.³⁴³ The same might be said of the prospects of federal pre-

³³⁹ See Young, *supra* note 115 (describing advent of global constitutionalism and how supranational lawmaking, as embodied in NAFTA and WTO, threatens disruption of domestic constitutional order).

³⁴⁰ See 19 U.S.C. § 3312 (2004).

³⁴¹ See Alvarez & Park, *supra* note 41, at 385 n.101 (describing unsuccessful attempt by Congressman Dennis Kucinich to amend U.S. Department of Justice appropriations bill to prohibit use of funds to challenge state laws under § 3312).

³⁴² See Been, *supra* note 329, at 11012 (exploring potential imposition of Chapter 11 liability on subnational entities).

³⁴³ See, e.g., Dodge, *supra* note 33, at 572 n.54 (suggesting Congress should consider making state suits by or against potential Chapter 11 claimants removable to federal court); Lerner, *supra* note 33, at 300–03 (noting congressional attempts to alter diversity requirements in other areas, including class action litigation); Stephan, *supra* note 41, at 874–76 (discussing potential issues attendant to congressional legislation authorizing removal in cases implicating foreign relations of United States); cf. Krauss, *supra* note 7, at 98 (criticizing plaintiff's tactics in *Loewen* and anticipating modifications to rules of removal); Thomas D. Rowe, Jr., *And All That: Recodifying Federal Supplemental Jurisdic-*

emption or conditional spending restraints. While both would likely require a significant trigger for their invocation, the Loewen Group's \$750 million claim may well have been in the ballpark. Given the importance and growing volume of foreign direct investment, the federal government could readily offer a compelling rationale for such intervention.

Finally, the Supreme Court might be unlikely to join in any direct pressure on state, or even federal, courts to accommodate the restraints of NAFTA or similar international agreements. By analogy, in *Barclays Bank v. Franchise Tax Board*, the Court declined to interfere with California's corporate-tax regime, notwithstanding its seeming international reach.³⁴⁴ Rather, it concluded that it was for Congress—not the Court—to determine the appropriate balance of uniformity and diversity of tax law necessary to advance the national interest.³⁴⁵

As suggested above, however, the relevant question is not one of direct Supreme Court intervention. Rather, the issue is whether the Supreme Court's assessment of rules of alienage jurisdiction, determination of the constitutionality of supersedeas bonds, or consideration of other issues of court procedure, jurisdiction, or substance might be influenced by a pattern of (potentially significant) federal government liability for the legal standards the Court adopts or even simply condones. This, it would seem, is at least a possibility.³⁴⁶

Each of the potential mechanisms of pressure suggested above naturally operates against a backdrop of concern with preserving judicial independence and, as applied to the state courts, federalism. There can be little doubt that these values are likely to militate heavily against the invocation of any of the enumerated mechanisms of federal pressure on the courts. Yet neither judicial independence nor federalism are absolutes, for either Congress or the courts.³⁴⁷ Given

tion, 74 IND. L.J. 53, 61 (1998) (discussing desirability of minimal rather than complete diversity in alienage cases).

³⁴⁴ 512 U.S. 298, 328–31 (1994) (deferring to legislative and executive authorities' failure to restrict application of California's corporate-franchise tax to foreign and multinational corporations).

³⁴⁵ *Id.* at 331.

³⁴⁶ See Stephan, *supra* note 41, at 872.

During both the nineteenth and twentieth centur[ies], the Supreme Court not only engaged in substantive review of state court decisions that it regarded as hostile to federal interests, but tweaked the rules governing federal court jurisdiction to make it easier for persons likely to suffer at the hands of state judges to obtain a federal hearing.

Id.

³⁴⁷ See, e.g., *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (stating that, in most cases, "comity and respect for federalism compel us to defer to the decisions

as much, it is difficult to deny at least the possibility that one among the foregoing measures might be undertaken. That prospect alone is enough to create some indirect mechanisms of power in the hands of Chapter 11 tribunals. These mechanisms support the existence of a systemic dependence of national courts on Chapter 11 review, notwithstanding the formal insulation of national courts from the Chapter 11 process.³⁴⁸

b. Competing and Complementary Perspectives in Chapter 11

Beyond the shared power of dialectical review, Chapter 11 review of national courts also exhibits the second characteristic of dialectical review enumerated above—a diversity of judicial perspectives.³⁴⁹ To begin with, Chapter 11 tribunals and national courts draw on distinct sources of law.³⁵⁰ Chapter 11 tribunals look to the terms of Chapter 11, other provisions of NAFTA, and the norms of customary international law.³⁵¹ National courts, by contrast, are relatively unlikely to draw on any of these sources of law. This is particularly true in the United States.³⁵² International law is occasionally referenced in U.S.

of state courts on issues of state law. . . . But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government"); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 964, 976–95 (2002) (describing balance between protections for individual judges and systemic dependence of judiciary on other branches of government).

³⁴⁸ Cf. Young, *supra* note 115, at 535–36 (suggesting ways that decisions of international trade bodies impact national policymaking). Of course, the dependence of Chapter 11 tribunals on domestic courts follows from the converse of the above circumstances. Chapter 11 judgments are limited to damage awards against the federal government. Enforcement of such awards lies with the domestic courts of the respondent state.

³⁴⁹ See *supra* Part IV.A.2.

³⁵⁰ See *supra* notes 279–82 and accompanying text.

³⁵¹ See NAFTA, *supra* note 12, arts. 102(2), 1131(1), at 297, 645; Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. INT'L & COMP. L. REV. 229, 233–34 (2003).

³⁵² U.S. courts have cited Chapter 11, for example, only in suits challenging the constitutionality of NAFTA. See, e.g., *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1238 (N.D. Ala. 1999). See generally Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millenium*, 26 HOFSTRA L. REV. 273, 276 (1997) ("The fact is that as the century draws to a close, the American bench and bar are rarely reaching beyond our national borders when seeking guidance in resolving domestic legal issues."); James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 422 (Supp. 1998) (explaining limited legal effect of U.N. Charter in domestic courts, given "dualist" approach of U.S. courts to international law, common presumption against self-executing status of international agreements, and "later-in-time" principle). On the citation of customary international law in national courts, see Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 225, 234 (1995), who suggests that U.S. courts actively resist customary international law, and Arthur M. Weisburd, *The Executive Branch and*

court opinions, but will not be invoked simply because one of the parties to the relevant disputes is a foreign investor.

As required for a functional pattern of dialectical review, however, the law invoked by Chapter 11 tribunals and by national courts is also overlapping.³⁵³ Customary international law is shaped in part by U.S. law and norms.³⁵⁴ This is particularly true with reference to claims of denial of justice, given their origin in the demands of the United States, Great Britain, and other developed countries regarding the treatment of their citizens abroad.³⁵⁵ Chapter 11 itself, meanwhile, is a product of negotiations in which the United States played the dominant role and in which it specifically sought to ensure U.S.-style legal protections for American investors abroad.³⁵⁶

Chapter 11 review of national courts also manifests the second source of perspective suggested above—diversity of institutional context.³⁵⁷ The diversity of institutional perspectives in Chapter 11 review may, in fact, be even greater than in domestic analogues, such as federal habeas review of state criminal convictions.³⁵⁸ Chapter 11 panels include arbitrators from different countries, with expertise in international law and international trade; areas in which most domestic judges lack training.³⁵⁹ These panels engage in forms of litigation distinct from those of national courts, with different forms of hearings, briefs, and sources of authority.³⁶⁰ They apply distinct standards of review and have different conceptions of review. Chapter 11 adjudications are held before a panel of judges from the outset, rather than being decided by a single judge. Questions of fact are therefore

International Law, 41 VAND. L. REV. 1205, 1206 (1988), who notes that the Supreme Court rarely relies on customary international law.

³⁵³ See *supra* notes 279–82 and accompanying text.

³⁵⁴ See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 46, § 102(2).

³⁵⁵ See generally LILICH, *supra* note 53, at 5.

³⁵⁶ See, e.g., David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 671 (2001) (noting U.S. need for strong investor protection in Mexico); Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 885 n.172 (1996–97) (noting that United States was dominant party in NAFTA negotiations).

³⁵⁷ See *supra* notes 283–89 and accompanying text.

³⁵⁸ See *supra* notes 285–86 and accompanying text.

³⁵⁹ See Brower, *supra* note 216, at 78; cf. Cover, *supra* note 14, at 665 (describing American federal and state court judges as distinct elites with distinct educational backgrounds and constituencies). On the other hand, the extent of diversity should not be exaggerated. The *Loewen* panel, for example, was composed of three appellate judges from common law jurisdictions. See Dodge, *supra* note 33, at 564 n.7.

³⁶⁰ Cf. Cover & Aleinikoff, *supra* note 14, at 1050–51 (describing different patterns of adjudication in federal and state courts).

subject to collegial review. Neither questions of fact nor the tribunal's conclusions of law, however, face any form of appellate review. Such differences are to be expected, given that Chapter 11 tribunals are created and financed in a manner entirely different from national courts. Collectively, however, they suggest the potential for significant diversity of institutional perspective in Chapter 11 review of national courts.

c. Continuity in Chapter 11

Finally, turning to the last structural characteristic of dialectic review, we can also identify elements of continuity in Chapter 11 review of national courts, although to a lesser extent than one might seek in an idealized case of dialectical review.³⁶¹ With respect to the first requirement of continuity enumerated above—consideration of the same essential “case” in the paired judicial systems—Chapter 11 provides for the assessment of a common nucleus of facts.³⁶² While the broad pattern of dialectical review in Chapter 11 extends across cases, any given occasion for review under Chapter 11 entails review of a particular national court decision involving related parties and facts. Such sequential redundancy³⁶³ results in review that is more precise and of a higher quality.³⁶⁴

This leads to the second facet of continuity outlined above—existence of a pattern of relevant claims across an array of cases. Such recurrence, it can be recalled, is essential to the progressive doctrinal development sought through dialectical review. As to this feature, Chapter 11 review to date has not achieved the necessary volume of cases to generate patterns of relevant claims.³⁶⁵ Yet it is not especially surprising that there are still relatively few Chapter 11 cases alleging a “judicial violation of international law.”³⁶⁶ Chapter 11 remains in its relative infancy, especially with respect to claims of denial of justice, which have only begun to emerge as a viable cause of action in recent years.³⁶⁷ Even today, the standard for such claims remains relatively

³⁶¹ See *supra* Part IV.A.3.

³⁶² Cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (holding that “state and federal claims must derive from a common nucleus of operative fact” in order to warrant pendent jurisdiction for state claim).

³⁶³ See Cover, *supra* note 14, at 648.

³⁶⁴ Cf. Beermann, *supra* note 220, at 335 n.232. This alone is important, given how much interaction among courts outside the appellate relationship is across, rather than within, cases.

³⁶⁵ See *supra* notes 297–301 and accompanying text.

³⁶⁶ See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 712, ¶ 161 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.nafta-law.org>.

³⁶⁷ See *supra* Part I.

unclear. As suggested above, however, a variety of factors favors growth in the number of such cases in the years ahead.³⁶⁸

Similar growth might be predicted with respect to the third requirement of continuity suggested above—institutional continuity.³⁶⁹ While such continuity has been lacking in Chapter 11 adjudication because of the ad hoc composition of Chapter 11 arbitral panels and the absence of any exhaustion of local remedies requirement,³⁷⁰ recent developments—namely, the prospect of appellate review in investment-protection regimes³⁷¹ and the requirement of finality introduced in *Loewen*—suggest the potential for greater continuity to develop. With time, a more efficient degree of continuity and resulting greater capacity for dialectical review might thus be expected to emerge in Chapter 11 and similar regimes.³⁷²

2. *Chapter 11 and the Operation of a Dialectical Pattern of Review*

If the institutional design and nature of Chapter 11 review of national courts is largely consistent with a pattern of dialectical review, is that pattern likewise evident on the ground, in the litigation surrounding Chapter 11 to date? Are the arbitrations in which there has been some claim of denial of justice by a national court consistent with a dialectical conception of review? Does the role of national courts in the process to date also comport with the pattern of exchange characteristic of dialectical review? This Part considers these questions.

a. The Dialectical Dimension of Chapter 11 Arbitration

Although only a limited number of Chapter 11 claims have presented an explicit opportunity for NAFTA tribunals to review a national court, those decided to date manifest both a generalized pattern of dialectical review and the three characteristics of dialectical review enumerated above. Such congruence begins with the jurisdic-

³⁶⁸ See *supra* notes 49–52 and accompanying text.

³⁶⁹ See *supra* notes 302–11 and accompanying text.

³⁷⁰ See NAFTA, *supra* note 12, arts. 1123–1124, 1126, at 644–45 (describing composition of tribunals). Article 1121 imposes no requirement to exhaust local remedies. Rather, it requires investors, under subsection (1)(b), to waive their right to initiate or continue proceedings before any tribunal or court under the law of any party. See *id.*, art. 1121, at 643.

³⁷¹ See *infra* Part VI.A.1.

³⁷² It bears noting that some dimension of institutional continuity is introduced by Chapter 11 panels' citation to one another, notwithstanding the absence of any formal precedential effect. This also flags a further dimension of dialogue—a horizontal pattern of interaction among Chapter 11 panels. Such cross-panel analysis and jurisprudential development represents an important trend in Chapter 11 adjudication, but is beyond the scope of this Article.

tional and final awards in *Loewen*, but is true of other Chapter 11 decisions as well. A survey of these cases supports the generalized use of a dialectical approach in Chapter 11 review of national courts. Equally important, such a survey may help to lend greater precision to our understanding of the implementation and operation of dialectical review in actual practice.

In the *Loewen* Final Award, the tribunal went to great lengths to determine whether there had been a denial of justice during the Mississippi trial or in the ensuing determination of damages and rulings on the Loewen Group's petition for waiver of the required appeal bond.³⁷³ Yet the tribunal already had resolved the case on not one, but two, independent grounds.³⁷⁴ Many have questioned the inclusion of a lengthy disquisition on the facts and law applicable to Loewen's claim of denial of justice—an analysis that consumed much of the Final Award—given the tribunal's strong assertion of hesitation to do any more than it was permitted to do.³⁷⁵ Why include what has been widely characterized as dicta of a rather extensive and strongly worded variety given such supposed caution? Why, given an asserted unwillingness to stray beyond the permissible bounds of authority and jurisdiction, directly challenge the standard of due process applied in—of all places—the courts of the United States?

A model of dialectical review finds this dicta eminently understandable.³⁷⁶ Given the need to elaborate the vague standard of denial of justice and the prominence of the *Loewen* case as a vehicle for that purpose, dialectical review would favor just such a treatment

³⁷³ See *Loewen*, 4 J. WORLD INVESTMENT at 702–26, ¶¶ 119–227.

³⁷⁴ First, the claim failed because of Loewen's corporate restructuring and resulting loss of continuous Canadian nationality. See *id.* at 728, ¶ 232. Chapter 11 only permits an investor of one NAFTA party to bring a claim against another NAFTA party. An American investor—which the Loewen Group had become—could not sue the U.S. government under Chapter 11. Second, by failing to pursue an appeal to the Mississippi Supreme Court or to petition for certiorari to the U.S. Supreme Court, the *Loewen* claimants had failed to meet the requirement of “finality.” As argued to the tribunal by the United States, the obligation to avoid a denial of justice requires that the judicial system as a whole be fair and accessible. The question is not whether the national courts make errors, but whether they have the capacity to correct such errors. See Counter-Memorial of the United States of America (*Loewen v. United States*), ICSID Case No. ARB(AF)/98/3, at 124–30 (Mar. 30, 2001) (holding that international law requires “fundamentally adequate system of justice as a whole”), at <http://www.naftalaw.org>; see also *Loewen*, 4 J. WORLD INVESTMENT at 724, ¶ 217.; *Loewen v. United States*, Op. of Christopher Greenwood, ¶¶ 23, 30, at <http://www.naftalaw.org>.

³⁷⁵ See *Loewen*, 4 J. WORLD INVESTMENT at 731, ¶ 242.

³⁷⁶ Likewise Katyal's advicegiving approach: “[T]hose jurists who want to avoid interference with legislative power announce narrow holdings, but superimpose broad advice (a form of dicta) by fully explicating the rationale and assumptions behind a decision.” Katyal, *supra* note 15, at 1711.

of the due process obligations of national courts under international norms of denial of justice.³⁷⁷ The Final Award in *Loewen* might thus be conceived as an outline of the proposed parameters of a denial of justice standard, specifically designed to provoke reaction and response from—and hence a dialogue with—the national courts of the United States, as well as Canada and Mexico. Further elaboration in subsequent Chapter 11 litigation might be expected to follow. Initiation of the dialectical exchange, however, necessitated some preliminary elaboration of the relevant standard, as was accomplished in the “dicta” of the Final Award.

Both awards in *Loewen* also manifest the casuist pattern of reasoning described above.³⁷⁸ In its analysis of the appropriate definition of “measure,” the Jurisdictional Award proceeds through a dialectical treatment of the arguments on either side of each successive proposition before reaching its ultimate conclusion. In seeking to determine whether actionable measures under Chapter 11 include domestic judgments in civil litigation, for example, the tribunal outlines and actually acknowledges the arguments against inclusion, but then sets out the contrary arguments favoring inclusion. In doing so, the tribunal acknowledges the limitations of its argument, notwithstanding its ultimate adoption of the broader conception of actionable measures favored by the claimants.³⁷⁹ As described by Helfer and Slaughter, this pattern of reasoning “fosters a dialogue between judges, lawyers, politicians, and even lay people, as the court’s response to each argument can be responded to in turn”—a distinctly dialectical pattern of engagement.³⁸⁰ In the Final Award, a similar pattern is evident in the tribunal’s analysis of both the law and facts of finality, which moves dialectically from the apparent absence of an exhaustion of local remedies requirement under Chapter 11 to the seemingly contrary conclusion that a requirement of finality nonetheless exists.³⁸¹

Finally, both *Loewen* opinions include elements suggestive of the structural characteristics of dialectical review—a dynamic of bilateral power, alternative legal and judicial perspectives, and continuity of adjudication. In its Jurisdictional Award, the panel explicitly high-

³⁷⁷ See *infra* Part V.

³⁷⁸ See *supra* note 221.

³⁷⁹ See, e.g., *Loewen Group v. United States*, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3, ¶¶ 40–42, 52–53, 55. (NAFTA Ch. 11 Arb. Trib. 2001), at <http://www.naftalaw.org>; see also *id.* at ¶¶ 61–74 (treating finality argument).

³⁸⁰ See Helfer & Slaughter, *supra* note 2, at 321–22.

³⁸¹ See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 708–09, 711–12, 721–23, 729–30, ¶¶ 143–148, 158–164, 208–214, 237–239 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

lighted Chapter 11's distribution of power, holding that it was authorized to review national courts,³⁸² but noting its lack of plenary jurisdiction³⁸³ and the critical need to preserve the role of national courts in resolving objections to domestic judicial process.³⁸⁴ Suggesting a dimension of continuity in Chapter 11, the Jurisdictional Award in *Loewen* looks back to the Chapter 11 decision in *Azinian v. Mexico*, citing it not as binding precedent, but instead as part of a line of developing Chapter 11 jurisprudence on the standards of denial of justice.³⁸⁵

The Final Award is even clearer in its manifestation of these structural elements of dialectical review. As for the dynamic of power, it too emphasizes that it is not a court of appeal,³⁸⁶ highlighting the important limitations of arbitration.³⁸⁷ It does so particularly with reference to the importance of the exhaustion of local remedies and the requirement of finality.³⁸⁸ In the absence of some such requirement, the tribunal suggests, the balance of judicial power under Chapter 11 would be difficult to reconcile with the efficacy and prestige of the NAFTA parties' national courts.³⁸⁹ Dialectical review's careful allocation of power is most evident, however, in the tribunal's repeated assertions of its unwillingness to act on its differences with the Mississippi courts on the merits,³⁹⁰ and especially in its concluding emphasis on the unhappy realization that it could offer no relief to *Loewen*.³⁹¹ The Final Award also exhibits an appreciation of the distinct perspectives that characterize dialectical review, suggesting the tribunal's inability to judge asserted violations of municipal law—which must necessarily be considered with a distinct mindset and approach.³⁹² Finally, some suggestion of institutional continuity is evident in the *Loewen* tribunal's reliance on yet another recent Chapter 11 decision, *Mondev*.³⁹³

³⁸² See *Loewen*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3, ¶¶ 40–60.

³⁸³ See *id.* at ¶ 48.

³⁸⁴ See *id.* at ¶ 67.

³⁸⁵ See *id.* at ¶ 49.

³⁸⁶ See *Loewen*, 4 J. WORLD INVESTMENT at 686, 705, ¶¶ 51, 134.

³⁸⁷ See *id.* at 702, 718, ¶¶ 120, 189; *cf. id.* at 711, ¶ 156 (noting NAFTA and international law constraints on arbitrator's review of national courts).

³⁸⁸ See *id.* at 712–14, ¶¶ 162, 167.

³⁸⁹ See *id.*

³⁹⁰ See *id.* at 717, 719, ¶¶ 184–185, 197; *see also id.* at 728, ¶ 232.

³⁹¹ See *id.* at 731, ¶ 242.

³⁹² See *id.* at 705, 728, ¶¶ 134, 233; *cf. id.* at 686, ¶ 51 (describing distinct body of law applicable in Chapter 11 adjudication).

³⁹³ See *id.* at 726, ¶ 227. The Final Award also manifests some spirit of Katyal's advicegiving. In fact, the tribunal is occasionally quite explicit with its counsel. See *id.* at 677, ¶ 2; *cf. id.* at 731, ¶¶ 241–242. It even cites U.S. jurisprudence in its critique of the

Besides *Loewen*, other Chapter 11 cases involving alleged judicial wrongdoing also support a dialectical conception of Chapter 11 review. Two of these have proceeded to decision—*Mondev*³⁹⁴ and *Azinian*³⁹⁵—while others remain unresolved.³⁹⁶

discriminatory character of the *Loewen* trial, impliedly counseling the U.S. courts to better police their own rules. See *id.* at 703, ¶ 123. The Jurisdictional Award also manifests some tendency toward such advicegiving. See *Loewen Group v. United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3, ¶ 74 (NAFTA Ch. 11 Arb. Trib. 2001), at <http://www.naftalaw.org>.

³⁹⁴ *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85 (NAFTA Ch. 11 Arb. Trib. 2002), available at <http://www.naftalaw.org>.

³⁹⁵ *Azinian v. Mexico*, Case No. ARB(AF)/97/2, 14 ICSID REV. 538 (NAFTA Ch. 11 Arb. Trib. 1999), available at <http://www.naftalaw.org>. *Azinian* was the first Chapter 11 case decided on the merits. See Alejandro A. Escobar, *Introductory Note to Robert Azinian and Others v. United Mexican States*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 125, 125 (2000) (noting that *Azinian* was "first arbitral decision on the merits to be given by a tribunal established under Chapter Eleven of the North American Free Trade Agreement").

³⁹⁶ See Notice of Claim and Demand for Arbitration, *Sun Belt Water, Inc. v. Canada*, ¶ 13 (1999) (alleging that "through a series of perverse judgments Sun Belt was denied due process and access to justice in the British Columbia domestic court system"), at <http://www.naftalaw.org>. In *Sun Belt*, which seems to have been settled out of court, as it never proceeded to arbitration, the petitioner claimed that several justices of the Supreme Court of British Columbia acted to deny the company's due process rights. See *id.* at ¶¶ 8, 10 (k-m); see also Notice of Intent to Submit a Claim to Arbitration, *Sun Belt Water, Inc. v. Canada*, ¶¶ 32-33 (1998), at <http://www.naftalaw.org>. Although also settled or otherwise dropped, the *Frank* case included even stronger accusations of malfeasance against the Mexican judiciary. See Notice of Arbitration and Statement of Claim, *Frank v. Mexico*, ¶ 18 (Aug. 5, 2002) ("In subsequent judicial and administrative proceedings, Respondent and Mexican Nationals were given highly preferential treatment, evidenced by, among other things, the disappearance of many of the Disputing Investor's filed, official documents."), at <http://www.naftalaw.org>; see also *id.* ¶ 28 (claiming Mexican courts failed to "provide . . . basic procedural fairness and due process rights, such as legitimate and unmolested access to effective dispute settlement mechanisms"). Even in the infamous *Metalclad* case, at least the implication of a denial of justice arose. Although never pressed by the investor, the *Metalclad* panel raised the possibility of a denial of justice during its hearing on the merits. See Submission of the Government of the United States of America, *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, ¶ 15 (1999), at <http://www.naftalaw.org>; see also *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664, ¶ 15 (noting dismissal of writ of amparo to Mexican judiciary without hearing on merits); *Metalclad Corp. v. Mexico*, 5 ICSID Rep. 209, 222, ¶ 56 (NAFTA Ch. 11 Arb. Trib. 2000), available at <http://www.naftalaw.org>. To similar effect is the *Thunderbird* case, in which issuance of an injunction in the investor's favor was overruled on appeal, but the investor has not, to date, specifically asserted a claim of denial of justice. See Notice of Arbitration and Statement of Claim, *Thunderbird v. Mexico*, ¶ 16 (Aug. 1, 2002), at <http://www.naftalaw.org>. Although dealing with administrative rather than independent court adjudications, the related cases of *Canfor* and *Doman* involve challenges by Canadian lumber producers to longstanding U.S. administrative procedures for the imposition of antidumping and countervailing duties. See Notice of Intent to Submit a Claim to Arbitration, *Canfor v. United States*, ¶¶ 8-12 (Nov. 5, 2001), at <http://www.naftalaw.org>; Notice of Intent to Submit a Claim to Arbitration, *Doman v. United States*, ¶¶ 5-13 (May 1, 2002), at <http://www.naftalaw.org>. In these cases, the claim is specifically one of a denial of justice. An analogous situation is presented in the widely discussed *Glamis* case. See

The claim in *Mondev* arose out of a Canadian real estate company's contract with the Boston Redevelopment Authority.³⁹⁷ While the alleged misconduct was that of the Redevelopment Authority, that conduct preceded NAFTA's entry into force.³⁹⁸ As such, *Mondev*'s Chapter 11 claims instead were based on the way the Supreme Judicial Court of Massachusetts handled the appeal of *Mondev*'s civil suit against the City of Boston and the Redevelopment Authority.³⁹⁹ Like the Final Award in *Loewen*, the *Mondev* tribunal's decision is suggestive of a dialectical pattern of engagement. This begins with the tribunal's exploration of a number of issues not directly presented, but potentially relevant to future domestic cases.⁴⁰⁰ Most significantly, this included a lengthy discussion of the permissible scope of a judicial definition of sovereign immunity.⁴⁰¹ The *Mondev* tribunal's seeming willingness to police, albeit at the margins, the lawmaking of common law courts;⁴⁰² its close review of the legislative rationale behind Massachusetts's rules of official immunity; and its suggestion that a grant of generalized sovereign immunity, as opposed to the relatively narrow immunity identified by the Supreme Judicial Court, might trigger Chapter 11 liability⁴⁰³ all suggest a dialectical dynamic. The tribunal's employment of a decidedly casuistic mode of reasoning also suggests a dialectic pattern, as particularly evident in the tribunal's

Notice of Intent to Submit a Claim to Arbitration, *Glamis Gold v. United States*, ¶¶ 13–15 (July 21, 2003), at <http://www.naftalaw.org>.

³⁹⁷ See *Mondev*, 42 I.L.M. at 86, ¶ 1.

³⁹⁸ See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 437, 437 (2003).

³⁹⁹ See *id.* at 438. The decision of the Supreme Judicial Court was asserted to have manifested “flagrant procedural deficiencies” and “gross defects in the substance of the judgment itself.” See Hearing Transcript Volume III, *Mondev v. United States*, at 736 (May 22, 2002), at <http://www.naftalaw.org>. Specifically, *Mondev* objected to the Supreme Judicial Court's (1) dismissal of its contract claims against the city itself, (2) failure to remand the contract claim, (3) failure to consider whether it was retrospectively applying a new rule for government contracts, and (4) finding of statutory immunity for the Redevelopment Authority. See Murphy, *supra* note 398, at 439.

⁴⁰⁰ See *id.* at 114, ¶ 148 (criticizing, but not condemning, “the sometimes artificial ways in which [exceptions to official immunity] have been circumvented”). This pattern in *Mondev* might be classified to fall within Katyal's “clarification” form of advicegiving. See Katyal, *supra* note 15, at 1716.

⁴⁰¹ See *Mondev*, 42 I.L.M. at 112–15, ¶¶ 139–156. The Supreme Judicial Court had offered a somewhat novel theory of sovereign immunity. See Stephan, *supra* note 51, at 642.

⁴⁰² See *Mondev*, 42 I.L.M. at 111, 113, ¶¶ 133, 146 (suggesting deference to common law rules, insofar as they do not “shock or surprise . . . [a] judicial sensibility” and cannot “be regarded as exceptional or eccentric in international terms”).

⁴⁰³ See *id.* at 114, ¶ 151 (noting that some judicial grants of sovereign immunity might violate Chapter 11); see also *id.* at 113, ¶ 148. The *Mondev* tribunal also suggested limits on the ability of appellate courts to determine issues of fact without remand or a hearing. See *id.* at 111, ¶ 136.

treatment of the scope of sovereign immunity, in which it invokes but then rejects various potential arguments for a finding of liability.⁴⁰⁴

The final award in *Mondev* also hints at the balanced power dynamic, the competing perspectives, and the continuity dimension of dialectical review. Evidencing dialectical review's characteristic equipoise of power, the tribunal emphasizes that it is not a court of appeals.⁴⁰⁵ Further, it makes clear that its treatment of a national high court necessarily must differ from its approach to a local magistrate⁴⁰⁶ and that it will not interfere in the procedural determinations of national courts.⁴⁰⁷ In this light, it suggests that its willingness to engage in review of national courts is tempered by some deference to them.⁴⁰⁸ As for the diversity of perspectives of dialectical review, the *Mondev* tribunal looked to domestic legal norms—including the exceptions to the Federal Tort Claims Act's abrogation of immunity—for guidance on the questions of interstitial lawmaking and sovereign immunity that were presented.⁴⁰⁹ Further, the panel suggested the wisdom of some deference to the assessment of the jury, given its direct access to the evidence.⁴¹⁰ Finally, some indication of continuity can also be identified in the *Mondev* tribunal's reliance on norms emerging from the pre-NAFTA bilateral investment treaties;⁴¹¹ in its close analysis of prior Chapter 11 decisions;⁴¹² and, to slightly different effect, in its implicit advice to future Chapter 11 litigants.⁴¹³

Perhaps the most notable suggestion of a pattern of dialectical review in Chapter 11 review of national courts was the distinctly dialogic decision in *Azinian*, in which a claim of denial of justice essentially was not even presented.⁴¹⁴ Rather, it was simply implied as a

⁴⁰⁴ See *id.* at 98, 107–08, 113, ¶¶ 70–71, 113–118, 143. *Mondev* also includes additional references of an advicegiving nature. See *id.* at 114, ¶ 152 (suggesting requirements of Chapter 11 should not be interpreted as coextensive with requirements of domestic tort or contracts law); cf. *id.* at 101, ¶ 86 (advising claimants in future NAFTA litigation to be more cautious about invocation of Article 1116 versus 1117).

⁴⁰⁵ See *id.* at 111, ¶ 136.

⁴⁰⁶ See *id.* at 109, ¶ 126.

⁴⁰⁷ See *id.* at 111, ¶ 136.

⁴⁰⁸ See *id.* at 111, ¶ 133.

⁴⁰⁹ See, e.g., *id.* at 113, ¶ 146.

⁴¹⁰ See *id.* at 93, ¶ 40 (“[T]he jury did have the advantage of seeing the witnesses and reviewing the evidence at length on the particular issues it was asked to address.”).

⁴¹¹ See *id.* at 100, ¶ 79.

⁴¹² See *id.* at 94, ¶ 44.

⁴¹³ See *id.* at 101, 114, ¶¶ 86, 152.

⁴¹⁴ See *Azinian v. Mexico*, Case No. ARB(AF)/97/2, 14 ICSID REV. 538, 565, ¶ 92 (NAFTA Ch. 11 Arb. Trib. 1999), available at <http://www.naftalaw.org>.

possibility, given the underlying posture of the claim.⁴¹⁵ Notwithstanding the lack of an overt claim, the *Azinian* court considered, at some length, the historical and modern standards of denial of justice and the appropriate application of those standards under Chapter 11.⁴¹⁶ In doing so, it helped to lay the foundation for the claims advanced in *Mondev* and *Loewen*, as well as for the decisions in those cases.

Azinian, in which American investors challenged a Mexican municipality's decision to cancel a waste-disposal contract with their company,⁴¹⁷ also exhibits some dialectical pattern of review. Although a possible claim of denial of justice was not advanced by the claimant,⁴¹⁸ as noted, the tribunal highlighted the legitimacy of such claims under Chapter 11 and took pains to outline their general parameters.⁴¹⁹ Specifically, the tribunal opined that it was "not paralyzed by the fact that the national courts [had] approved the relevant conduct of public officials."⁴²⁰ If a claimant could show "that the court decision itself constitute[d] a violation of the treaty," damages would be available in the future.⁴²¹

Beyond laying the foundation for the denial of justice claims subsequently advanced in *Mondev* and *Loewen*, the *Azinian* decision also articulated a clear set of limitations on such claims, especially in the context of a claim preliminarily directed to executive and legislative officials.⁴²² In addition, the tribunal reviewed the evidence considered by the Mexican courts, notwithstanding its having already dismissed any claim of denial of justice.⁴²³ In doing so, it helped to outline further the scope of a domestic judgment consistent with the minimum standard of treatment under international law and the denial of justice requirement encompassed thereunder.⁴²⁴ Such a prospective analysis,

⁴¹⁵ The claimant, before submitting its Chapter 11 claim, had unsuccessfully challenged the relevant executive and legislative actions before the Mexican courts. *See id.* at 566, ¶ 96.

⁴¹⁶ *See id.* at 566–69, ¶¶ 96–105.

⁴¹⁷ *Azinian*, 14 ICSID REV. at 540, 544; *see* Coe, *supra* note 122, at 1424 (describing Chapter 11 decision in *Azinian*); Escobar, *supra* note 395, at 126–27 (same); *see also* Charles H. Brower, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 79–80 (2001) (noting *Azinian* tribunal's refusal to exercise appellate power to set aside Mexican court's judgment).

⁴¹⁸ *See Azinian*, 14 ICSID REV. at 565, ¶ 92.

⁴¹⁹ *See id.* at 566–69; *see also* Escobar, *supra* note 395, at 127.

⁴²⁰ *Azinian*, 14 ICSID REV. at 566–67, ¶¶ 96–98.

⁴²¹ *Id.* at 568, ¶ 99.

⁴²² *See id.* at 566, 568–69, ¶¶ 96, 99–105.

⁴²³ *See id.* at 568, ¶ 100.

⁴²⁴ *See id.* at 569–72, ¶¶ 104–120. As in the earlier examples, *Azinian* also was suggestive of dialectical review's power dynamic, alternative perspectives, and adjudicatory con-

with its invitation to future jurisprudential development, looks to be very much in the nature of dialectical review.

Other Chapter 11 cases with some dialectic dimension also should be noted. *Feldman v. Mexico*, for example, included a striking example of dialogue in the tribunal's suggestion of the apparent error in a national court decision that was still pending before the Mexican courts.⁴²⁵ *Feldman* also hinted at the balanced power of dialectical review, with its successive notation of the authority of and the constraints on both NAFTA tribunals and the Mexican courts.⁴²⁶ In its heavy reliance on *Azinian* and other prior cases, *Feldman* likewise revealed some appreciation of institutional continuity.⁴²⁷ Finally, *Metalclad Corp. v. Mexico* also included some suggestion of dialectical review, notwithstanding limited emphasis by the claimant on its denial of justice dimension. The *Metalclad* panel, despite the claimant's failure to raise the issue, thus questioned the parties at oral argument as to why the claimant's writ of *amparo* before the Mexican courts had been dismissed without a hearing on the merits.⁴²⁸ One might infer that the tribunal was eager to engage the attention of its counterparts in the Mexican judiciary.⁴²⁹

tinuity. See *id.* at 566, 568–69, ¶¶ 96, 99–105. As to the latter, most notably, the panel appeared to be speaking quite clearly to future Chapter 11 litigants. See *id.* at 568, ¶ 104.

⁴²⁵ See *Feldman v. Mexico*, Award, Case No. ARB(AF)/99/1, ¶ 138 (NAFTA Ch. 11 Arb. Trib. 2002), at <http://www.naftalaw.org>.

⁴²⁶ See *id.* ¶ 140.

This is a standard [of denial of justice] that the nullity and assessment decisions almost certainly do not meet. Given as noted earlier that Mexican courts and administrative procedures at all relevant times have been open to the Claimant, the Claimant's victory in the 1993 *Amparo* decision, and the availability of court review in the nullity and assessment decisions filed by the Claimant in 1998, there appears to have been no denial of due process or denial of justice there as would rise to the level of a violation of international law. As the Respondent concedes, this Tribunal could find a NAFTA violation even if Mexican courts uphold Mexican law (counter-memorial, para. 364); this Tribunal is not bound by a decision of a local court if that decision violates international law. Also, as discussed in Section G2, NAFTA does not require a claimant to exhaust local court remedies before submitting a claim to arbitration. The Claimant is limited only by the requirements of Article 1121(2)(b).

Id. ¶ 140 (citation omitted); see also *id.* ¶ 140 n.27 ("Moreover, the Mexican courts have been deciding issues of national law which it is inappropriate for the Tribunal to review, except and unless those determinations (or of Mexican administrative agencies such as SHCP) are themselves denials of justice or otherwise in violation of NAFTA or international law.").

⁴²⁷ See *id.* ¶ 139; see also *id.* ¶¶ 137, 140, 144.

⁴²⁸ See Submission of the Government of the United States of America, *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, ¶ 15 (1999), at <http://www.naftalaw.org>.

⁴²⁹ In *Ethyl Corporation v. Canada*, finally, a Canadian dispute settlement panel convened under Canada's Agreement on Internal Trade struck down a piece of challenged legislation after submission of a parallel Chapter 11 claim, and immediately before announcement of the Chapter 11 panel's jurisdictional award. *Ethyl Corp. v. Canada*,

b. Toward a Domestic Party to the Chapter 11 Dialectic

Given the relative youth of the Chapter 11 process, it should come as little surprise that the domestic side of the dialectical exchange that I propose—the reaction and response of the national courts—has not yet fully materialized. This can be expected to change as the number of Chapter 11 arbitrations following upon national court decisions grows, the prospect of Chapter 11 review gains prominence, and national courts begin to grapple with it.⁴³⁰

Already today, the domestic courts have begun to join in the dialectical engagement of Chapter 11. In *Loewen* itself an example of such interplay might be noted. Among the central issues in the case was the substantial supersedeas bond requirement, which both the Mississippi trial court and Supreme Court declined to waive or reduce.⁴³¹ On April 24, 2001, however, the Mississippi Supreme Court amended Mississippi Rule of Appellate Procedure 8 to cap the size of the bond, based both on the net worth of the liable party and a sum certain.⁴³² While not the developed pattern of dialectical interaction envisioned herein, the Mississippi court's decision to adjust its rules in the face of Chapter 11 review suggests the type of interplay that might ultimately be expected to emerge.

Closer to the pattern of dialectical review, if still somewhat distinct, has been the review of several Chapter 11 awards in national courts. The Chapter 11 awards in *Metalclad*, *S.D. Myers v. Canada*, and *Feldman* were each challenged by the respondent state party in the Canadian national courts.⁴³³ In essence, Mexico and Canada

Award on Jurisdiction, 38 I.L.M. 708 (NAFTA Ch. 11 Arb. Trib. 1998), available at <http://www.naftalaw.org>; see Alan C. Swan, *Ethyl Corporation v. Canada*, Award on Jurisdiction, 94 AM. J. INT'L L. 159, 159–60 (2000).

⁴³⁰ It bears noting that numerous Chapter 11 cases include some nexus with domestic litigation. In most such cases, however, the relevant Chapter 11 claim alleges misconduct by executive or legislative branch officials and only incidentally references the subsequent review of that conduct in the national courts. Even in such cases, an element of beneficial dialogue may ensue and contribute to the pattern of engagement I describe herein. Any such interaction, however, lacks a strong dimension of review.

⁴³¹ See *supra* Part I. As it stood at the time of the Mississippi litigation, Mississippi Rule of Appellate Procedure 8 required a 125% supersedeas bond to stay a monetary judgment pending appeal. See Miss. R. APP. P. 8(a).

⁴³² See David W. Clark, *Life in Lawsuit Central: An Over-View of the Unique Aspects of Mississippi's Civil Justice System*, 71 Miss. L.J. 359, 380 (2001). The *Loewen* tribunal's Jurisdictional Award, in which it rejected or put off the United States's various jurisdictional and other preliminary defenses, was issued on January 5, 2001.

⁴³³ Article 1136 of NAFTA provides for the judicial enforcement of Chapter 11 awards. See NAFTA, *supra* note 12, art. 1136(4), at 646. In doing so, however, it also envisions the possibility of annulment proceedings, such as those brought in *Metalclad*, *S.D. Myers*, and *Feldman*, at the situs of the arbitration. See *id.*, art. 1136(3); see also Coe, *supra* note 122, at 1411–12 (describing review of *Metalclad* award). In those three cases, Mexico and

turned to the national courts of Canada (the designated situs of the relevant arbitrations) to set aside the relevant Chapter 11 awards, based primarily on claims that the tribunals had exceeded their jurisdiction.⁴³⁴ Perhaps most notable was *Metalclad*, in which the relevant challenge was upheld, at least in part.⁴³⁵

Metalclad, *S.D. Myers*, and *Feldman*, however, did not involve any significant degree of Chapter 11 review of national courts.⁴³⁶ Rather, the relevant international and national tribunals considered different sets of questions in those cases. In *Metalclad* and *Feldman*, moreover, the national courts reviewing the Chapter 11 awards were from a different jurisdiction than the government institutions originally reviewed by the relevant tribunals, because Mexico was challenging the awards against it in the Canadian courts. As such, the pattern of post-Chapter 11 review in the national courts does not manifest the precise pattern of dialectical review described herein. Such a dialectic would instead arise where a national court takes up the concerns raised by a Chapter 11 tribunal, such as the *Loewen* panel. A future Chapter 11 panel would then have the opportunity to respond further, continuing a productive pattern of exchange that

Canada took advantage of this provision, bringing their claims in the Canadian courts, given the parties' identification of Canada as the seat of the arbitration.

⁴³⁴ See, e.g., *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664, ¶¶ 55–56, available at <http://www.naftalaw.org>. In *S.D. Myers* and *Feldman*, there was also the additional question of whether the award violated Canadian public policy. See *United Mexican States v. Karpis* (Feldman II), No. 03-CV-23500, ¶¶ 10–11, 21–38, 87–97 (Ont. Sup. Ct. Dec. 3, 2003) available at <http://www.canlii.org/on/cas/onsc/2003/2003onsc11923.html>; *Canada v. S.D. Myers*, No. A-252-01, ¶¶ 4–5 (Fed. Ct. Jan. 28, 2002), available at <http://www.naftalaw.org>. Finally, *Feldman II* also involved several procedural challenges to the conduct of the arbitration. See *id.* ¶ 3.

⁴³⁵ See *Metalclad*, 2001 B.C.S.C. ¶¶ 66–76. These cases present some challenge for the paradigm of dialectical review. Charles Brower has criticized the substantive review of the *Metalclad* award by the Canadian court. See Brower, *supra* note 216, at 65–68. Yet some degree of such review is essential to the dialectical engagement envisioned herein. If the national court avoids any meaningful inquiry into the arbitral award, the scope for dialogue becomes a null set. On the other hand, if national court review is unduly invasive, the equipoise of power is distorted and dialectical review undermined. The Canadian decision in *Metalclad* might be construed, in this light, to have sought an appropriate balance of deference and review. See *id.* at 66, 68.

⁴³⁶ In *Feldman*, the plaintiff directed his denial of justice claim primarily at Mexican executive-branch agencies. Feldman also suggested, in passing, that a Mexican circuit court's decision requiring him to present invoices to the Mexican tax authority, as a precondition to receiving tax rebates, conflicted with prior case law. The Chapter 11 Tribunal responded by noting both that the plaintiff had inadequately presented his claim of denial of justice, and that the alleged offense would not meet the standard for denial of justice set out in *Azinian*, even if adequately presented. See *Feldman v. Mexico*, Award, Case No. ARB(AF)/99/1, ¶¶ 138–140 (NAFTA Ch. 11 Arb. Trib. 2002), at <http://www.naftalaw.org>.

might be expected to encourage the development of common legal norms.⁴³⁷

This trio of cases, however, offers some sense of how a pattern of dialectical review might one day play out. A potential requirement of “transparency” in government procedures under Chapter 11 was the subject of some exchange in the international and national decisions in *Metalclad*, which may be the clearest example of a dialectical pattern of engagement to date. Specifically, the *Metalclad* tribunal drew on references to transparency in NAFTA’s statement of objectives⁴³⁸ and in Chapter 18 of the Agreement⁴³⁹ to conclude that Article 1105’s “fair and equitable treatment” requirement encompassed a mandate of transparency in government procedures involving foreign investors.⁴⁴⁰ On Mexico’s petition, the British Columbia Supreme Court considered, critiqued, and rejected this analysis.⁴⁴¹ In particular, it rejected the application of Article 102’s general objectives to Chapter 11, suggesting that NAFTA’s transparency goal was not operational-

⁴³⁷ While this fully developed pattern of dialectical engagement has yet to emerge under Chapter 11, besides the national review of Chapter 11 awards upon petition for enforcement, annulment, or revision, other opportunities for international tribunal interaction with domestic courts also have arisen. In March 2004, for example, the Chapter 11 petitioners in *Methanex v. United States* asked the tribunal to issue an order in support of their petition, asking a U.S. federal court to issue subpoenas for the production of evidence, to the California state government and a U.S. corporation. See *Methanex Submission on Its Application for Reconsideration of the First Partial Award*, *Methanex v. United States* (NAFTA Ch. 11 Arb. Trib. 2004), at <http://www.naftalaw.org>. *Kenex Ltd. v. United States* is another case pairing Chapter 11 and domestic litigation. Claimants in this Chapter 11 case challenged the relevant U.S. Drug Enforcement Agency final rule in U.S. federal court as well, ultimately securing an injunction against its enforcement from the U.S. Court of Appeals for the Ninth Circuit. See *Hemp Indust. Ass’n v. DEA*, 357 F.3d 1012 (9th Cir. 2004). One might also note a pair of challenges to the constitutionality of Chapter 11, filed in Canadian courts several years ago. See *Notice of Application*, *Democracy Watch v. Attorney Gen. of Canada*, No. 01-CV-211576 (Ont. Sup. Ct. May 28, 2001), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/CUPE28.pdf>; *Notice of Application*, *Council of Canadians v. Attorney Gen. of Can.*, No. 01-CV-208141 (Ont. Sup. Ct. Mar. 28, 2001), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/CUP.pdf>. Finally, the *Ethyl* claim against Canada might suggest the capacity of Chapter 11 claims to impact domestic litigation. In *Ethyl*, again, an administrative tribunal convened under Canada’s Agreement on Internal Trade struck down the challenged provision after submission of the Chapter 11 claim, and immediately before the Chapter 11 tribunal issued its preliminary award. See *Swan*, *supra* note 429, at 160.

⁴³⁸ See NAFTA, *supra* note 12, art. 102(1), at 297.

⁴³⁹ See *id.*, art. 1802, at 681.

⁴⁴⁰ See *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, ¶ 70 (NAFTA Ch. 11 Arb. Trib. 2000), at <http://www.naftalaw.org>.

⁴⁴¹ See *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664, ¶¶ 66–76, available at <http://www.naftalaw.org>.

ized through Chapter 11 but could only be the basis of a claim under Chapter 18.⁴⁴²

Notably, the *Feldman* Chapter 11 tribunal later took up this exchange. Considering the apparent lack of transparency in Mexican tax law—and perhaps tax law generally—the tribunal invoked the British Columbia Supreme Court’s analysis of transparency under NAFTA.⁴⁴³ Explicitly flagging its lack of obligation to “reach the same result as the British Columbia Supreme Court,” it nonetheless found the latter’s analysis to be instructive as to the question before it.⁴⁴⁴

Notwithstanding its deviation from a true pattern of dialectical review, then, the *Metalclad* exchange may be suggestive of the dialectical model of international interaction with national courts offered herein. Through such interaction, some groundwork has been laid for future analysis and development of a doctrine of transparency, whether through domestic or international litigation.⁴⁴⁵ The exchange from *Metalclad* to *Feldman*, moreover, reaffirms what I have identified as the core function of Chapter 11 and similar international review of national courts—a fertile source of judicial innovation. In particular, I would argue, dialectical review among international and national tribunals may be expected to contribute to the development of common international standards of due process.

V

DIALECTICAL INNOVATION AND INTERNATIONAL DUE PROCESS

If dialectical review—with its elements of balanced judicial power, varied perspective, and adjudicatory continuity—can serve as a

⁴⁴² See *id.* The British Columbia Supreme Court’s decision actually suggests a pattern of broader dialectical engagement with the Chapter 11 process. The court thus did not limit its focus to the *Metalclad* award under review, but considered a number of Chapter 11 awards in reaching its conclusions. See *id.* at ¶¶ 61–65, 68–69, 74; see also *Canada v. S.D. Myers*, 2002 F.C.A. 39, ¶ 50 (citing Chapter 11 award in *Ethyl Corp. v. Canada*, Award on Jurisdiction, 38 I.L.M. 708 (NAFTA Ch. 11 Arb. Trib. 1998)), available at <http://www.nafta-law.org>.

⁴⁴³ See *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶¶ 107, 133, 147 (NAFTA Ch. 11 Arb. Trib. 2002), at <http://www.naftalaw.org>.

⁴⁴⁴ See *id.*; see also *id.* ¶ 147 (“The *Metalclad* Tribunal’s finding of an expropriation based on transparency . . . was effectively vacated by the British Columbia Supreme Court (British Columbia was the ‘seat’ of the arbitration), responding to a challenge by the Government of Mexico.”). The reviewing national courts’ reference to other Chapter 11 cases is further evidence of a broader pattern of engagement.

⁴⁴⁵ The *Metalclad* tribunal’s notion of a transparency requirement in Chapter 11 thus may continue to offer a viable claim for future litigants. See Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INVESTMENT 685, 700–01 (2001) (suggesting flaws in Canadian court’s analysis of potential transparency requirement).

potential mechanism of innovation, and if Chapter 11 and similar international dispute settlement regimes are at least rough models of dialectical review, what are the appropriate ends of such innovation in Chapter 11 and its analogues? Various possibilities might be offered, including clearer international norms of non-discrimination⁴⁴⁶ and more universal standards for regulatory expropriations.⁴⁴⁷ I would identify the development of international norms of due process as the ideal focus for the dialectical review of Chapter 11 and similar international regimes.⁴⁴⁸

In the habeas context, the dialectical structure of review identified by Cover and Aleinikoff has facilitated the development of constitutional due process norms.⁴⁴⁹ The Supreme Court's open-ended decision in *Mempa*, for example, triggered an exchange between federal and state courts from which emerged a fuller articulation of the constitutional right to counsel at probation-revocation hearings.⁴⁵⁰ To similar effect, the dialectical review of Chapter 11 and other mechanisms of international review of national courts can help to construct international norms of due process, with application not only to international adjudication, but also in national court proceedings across the globe.⁴⁵¹

⁴⁴⁶ Non-discrimination standards likely are relevant to any due process/denial of justice claim, as evident in *Loewen*, where the claimants brought discrimination claims alongside their various due process claims. Ultimately, however, due process claims sounding in international denial of justice norms do not depend on any discriminatory state act. Rather, even if due process is denied to all comers, a denial of justice occurs. This is just how the *Loewen* litigation played out, as suggested by the tribunal's disregard of the claimants' discrimination claims. See Weiler, *supra* note 43, at 5–7.

⁴⁴⁷ Recent works by Vicki Been and Joel Beauvais and by Paul Stephan have focused on Chapter 11's implications for international expropriation standards. See Been & Beauvais, *supra* note 21, at 59–60; Stephan, *supra* note 41 (describing how courts and international bodies have used international and domestic law governing expropriation to constrain governmental action).

⁴⁴⁸ I do not intend to suggest that procedural standards of international law (e.g., denial of justice or international norms of due process) are of greater significance than substantive ones (e.g., definition of standards for expropriation or non-discrimination). Substantive standards, however, may require more precise (i.e., less dialectic) mechanisms of articulation than procedural standards, given their potentially greater sensitivity. See *infra* note 452. Even if dialectical review can further the development of substantive norms effectively, the development of such review may benefit from initial application to procedural norms, before its application to substantive matters such as the permissibility of punitive damages, arguably the major substantive question at stake in *Loewen*. It also bears noting that I do not mean to suggest any rigid demarcation of procedural and substantive review. These categories necessarily overlap. Nonetheless, review of an asserted denial of justice can be meaningfully distinguished from consideration of a claim of expropriation.

⁴⁴⁹ See *supra* note 187 and accompanying text.

⁴⁵⁰ See *supra* notes 163–84 and accompanying text.

⁴⁵¹ I emphasize herein the development of international norms of due process, as distinct from what might be termed international due process norms. The latter encompasses

The development of international norms of due process is a good place for Chapter 11 tribunals to focus their energies at the outset. Procedural critiques are relatively less likely to trigger sensitivities than more merits-oriented review.⁴⁵² International tribunals also can make much stronger claims of competence as to procedure than as to substance.⁴⁵³ The development of common standards of due process,

the due process standards in international proceedings, while my focus is on common norms of due process, applicable not only in international, but also in national, proceedings. See KENNETH S. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 36–61 (1946) (describing need for certain fundamental procedural guarantees to maintain validity of international adjudication); V. S. MANI, *INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS* 12–54 (1980) (describing norms of international procedure); Cristian Defranca, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1393–97 (2001) (describing need for strong procedural due process norms in international adjudication, as in domestic context, in order to maintain integrity of international tribunals); John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173 (1999) (describing general principles of procedural due process in international litigation).

⁴⁵² See Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1485–86, 1488 (2002) (“In the international sphere, the issue of what constitutes fair procedures may be the easiest place to find agreement.”). An emphasis on developing international norms of due process may therefore be preferable, because there may be “no universal principle of substantive justice.” See *id.* at 1486.

Of course, it will not always be the case that international review of process will be less invasive than review of substance. Thus, in the international review of national judicial process, one observes an institutional conflict, while in the review of substantive decisions for error there is a mere conflict of law. It is with this in mind that Ann Althouse has argued that the shift in federal habeas review from the substantive inquiry of *Brown v. Allen*, 344 U.S. 443 (1953), to the Burger Court’s emphasis on state court adequacy ultimately made for an even greater invasion of state sovereignty, since the subject matter of the paired state and federal cases is no longer the same. Rather, federal habeas review becomes a second proceeding about what was wrong with the first proceeding. See Althouse, *supra* note 136, at 943.

Some procedural standards, moreover, manifest particular normative values of a given national polity. Their review and critique by international adjudicators therefore may trigger no less adverse a response than review of any substantive legal choice. Yet we do best not to overestimate such resistance, at least at the outset. Rather, a pattern of caution on the part of international tribunals engaged in dialectical review may well produce a greater receptivity of national courts to innovation and reform than one might suspect. To this effect, I describe below the willingness of national courts to acknowledge the ICJ’s concerns with a strict application of procedural default rules to asserted violations of the Vienna Convention on Diplomatic Relations. See *infra* notes 556–58 and accompanying text. If some pattern of exchange might emerge in so sensitive an area as habeas review, dialectical review may offer greater promise than conventional assumptions might predict.

It is consequently difficult to predict the extent of procedural convergence that might ultimately emerge across legal systems. Rather, this issue is itself one for analysis and resolution in the course of an extended dialectical exchange. The final results of the process of dialectical review for the convergence of norms of due process thus remain to be seen.

⁴⁵³ See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 564. An emphasis on due process

finally, may serve as a foundation for the identification and emergence of substantive areas of legal and institutional harmony.⁴⁵⁴

Common international norms of due process as developed through dialectical exchange also would offer significant benefits in the realm of international economics. In an increasingly globalized world, with trade and investment flows moving in greater volumes and at greater speeds than could have been imagined even a generation ago, a stable framework for global commerce is essential.⁴⁵⁵ Central to that framework are broadly applicable institutional norms, including common standards of due process within which the disputes and claims that arise from a global economy can be consistently, reliably, and expeditiously resolved. As of now, standards of due process vary widely, based on an array of political, cultural, and economic

norms is also consistent with the United States's "procedural liberalism." See CARRESE, *supra* note 213, at 4.

⁴⁵⁴ See Young, *supra* note 115, at 531 (describing foundational character of procedural norms). One might imagine such a shift from procedural to substantive review under Chapter 11. With growing occasion for Chapter 11 review of national courts, and the emergence of a pattern of such cases, such review is likely to gain increased legitimacy. A body of precedent developed with reference to questions of procedure, further, can serve as a framework for the articulation and development of more substantive standards. Subjects of review under a regime of substantive Chapter 11 review might be broad-ranging. Among the most significant possibilities, however, would be challenges to punitive damage awards, a long-standing source of criticism of U.S. litigation practices, and even to the use of assertedly unreliable jury trials. See Lerner, *supra* note 33, at 242–44, 279–81. Following from the *Loewen* case, a further possibility might be challenges to the requirement of a supersedeas bond as a condition for any stay pending appeal.

Review of these familiar practices for conformity with substantive norms of international law—whether by Chapter 11 or other international tribunals—would undoubtedly be controversial. On the foundation of a developed jurisprudence of procedural review, and an attendant reputation for deference, fairness, and rigor, however, it might not be rejected out of hand. This might be especially true of a dialectical pattern of substantive review, with its indirect and limited nature. Such review might enjoy the essential virtue of offering the national systems subject to review significant flexibility in the nature and pace of any resulting reforms.

On the other hand, it is at least possible that substantive review is inherently less suited to dialectical review than the questions of due process that I prioritize herein. To be effective, dialectical review requires meaningful overlap in perspectives. See *supra* notes 281–82 and accompanying text. It also requires room for negotiation and compromise. The substantive subjects of review suggested immediately above, however, may have more of a black-and-white character than questions of due process. An effective regime of substantive international review of national courts might therefore be expected to take at least a slightly, if not significantly, different form than the dialectical pattern of review proposed herein.

⁴⁵⁵ In this vein, a dialectic discourse of international norms of due process is also favored by the need to build a common set of values across jurisdictions. See Slaughter, *Typology*, *supra* note 85, at 126. Such commonality may be more readily identified with reference to process. The development of commonality in the realm of due process, however, may be a foundation for connections in other areas as well. See *id.*

influences.⁴⁵⁶ This is true of international norms of due process generally, including even the relatively more developed natural-person claims of criminal procedure.⁴⁵⁷ Yet the norms applicable to the international economic claims emphasized herein—commonly arising in the context of foreign investment or other commercial activity—remain particularly unsettled and inconsistent.⁴⁵⁸

These norms, including the minimum standard of treatment, the requirements of fair and equitable treatment and of full protection and security, and the prohibition against the denial of justice,⁴⁵⁹ have been subject to only limited elucidation since the end of World War II.⁴⁶⁰ The heyday of these due process norms thus dates back to their recurrent invocation and progressive articulation by the international claims commissions formed from the late nineteenth century through the inter-war period.⁴⁶¹

⁴⁵⁶ See Gaffney, *supra* note 451, at 1178.

⁴⁵⁷ These include the right to counsel, questions of unfair or arbitrary detention, and issues of trial procedure.

⁴⁵⁸ See IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 524–28 (4th ed. 1990) (describing procedural differences based on debate between (mostly) wealthy countries espousing international standard for treatment of aliens and (mostly) non-wealthy countries espousing national standard for treatment of aliens).

⁴⁵⁹ Cf. Jose E. Alvarez, *Collateral Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exxon-Florio*, 30 VA. J. INT'L L. 1, 137 (1989) (describing U.S. claims that investors had been denied effective legal recourse and due process following expropriation of private property); Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HAST. INT'L & COMP. L. REV. 27, 94 (1999) (reviewing claim that U.S. courts failed to meet international requirements of due process in human rights case); Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 233–34 (1988) (reviewing BIT requirements); 3 U.N. CONFERENCE ON TRADE & THE ENV'T, *Fair and Equitable Treatment*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, U.N. Doc. UNCTAD/ITE/IIT/11 (1999).

⁴⁶⁰ See *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, 110, ¶ 127 (NAFTA Ch. 11 Arb. Trib. 2002), available at <http://www.naftalaw.org>; BROWNIE, *supra* note 458, at 525.

⁴⁶¹ See LILICH, *supra* note 53, at 5, 25 (suggesting that developments in law of state responsibility for injuries to aliens was spurred in early post–World War I period through dozens of international tribunals); MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 749–58 (1980) (describing early transnational attempts to define rights of resident aliens); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 6–7 (1982) (describing substantive law applied by international arbitral tribunals and claims commissions over past two centuries); see also *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 710, ¶ 151 (NAFTA Ch. 11 Arb. Trib. 2003) (reviewing decisions of United States–Mexico Claims Tribunal), available at <http://www.naftalaw.org>; *Mondev*, 42 I.L.M. at 107, ¶ 114 (“It has been suggested . . . that the meaning of those provisions in customary international law is that laid down by the Claims Commissions of the inter-war years, notably that of the Mexican Claims Commission in the *Neer* case.”); cf. Anthony D’Amato

Beginning with the Hague Conferences of 1899 and 1907 and the 1906 and 1929 Geneva Conventions,⁴⁶² and progressing through the post–World War II codifications of international law, natural-person claims of denial of justice—issues of detention, access to counsel, and trial procedure⁴⁶³—were progressively drawn out of the then-vibrant claims commission process.⁴⁶⁴ Moving from the realm of customary international law,⁴⁶⁵ such claims were gradually codified in an independent body of “human rights law.”⁴⁶⁶ With the extraction of

& Kirsten Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011, 1031 & n.79 (1988) (describing contribution of claims commissions to substantive norms of international law). The relevant commissions included, perhaps most prominently, the several Venezuelan and Mexican claims commissions, which were formed following early moves toward the confiscation and nationalization of foreign-held property in each country, and decisions of which continue to be widely cited. See, e.g., *North Am. Dredging Co. of Tex. v. United Mexican States (U.S. v. Mex.)*, 4 REP. INT’L ARB. AWARDS 26 (1926) (addressing contract under which U.S. party signed away rights to access U.S. courts in cross-border deal).

⁴⁶² See LOUIS HENKIN ET AL., *HUMAN RIGHTS* 293 (1999) (outlining establishment and development of humanitarian law); NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 18 (2002) (describing early agreements to provide healthcare to sick and wounded soldiers irrespective of nationality).

⁴⁶³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 46, § 711 cmt. a; see also Lerner, *supra* note 33, at 233–34.

⁴⁶⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS, *supra* note 46, § 711 cmt. a (“As regards natural persons, most injuries that in the past would have been characterized as “denials of justice” are now subsumed as human rights violations”); Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Aliens*, 23 COLUM. HUM. RTS. L. REV. 315, 403 (1991) (commenting on Restatement’s characterization of change in definition of denial of justice from failure to provide alien due process to human right with effective remedy); Stephen D. Ramsey, *State Responsibility Under the Restatement*, 83 AM. SOC’Y INT’L L. PROC. 224, 235 (1989) (commenting on Restatement and on whether human rights law has eclipsed or modified provisions available to aliens under state responsibility law); see also Robert Rosenstock & Benjamin K. Grimes, *The Fifty-fourth Session of the International Law Commission*, 97 AM. J. INT’L L. 162, 164–65 (2003) (“It was decided not to include specific provisions on denial of justice; the reasoning was that the concept has been replaced by specific standards contained in international human rights instruments.”); cf. *Mondev*, 42 I.L.M. at 107, ¶ 115. Frederick Sherwood Dunn categorized, according to the actual practice of governments in the past, the international minimum standard of treatment of aliens to encompass two parts: “the security of the person from injury or restraint, and the preservation of private property rights, not only against the actions of other individuals but against the government as well.” Frederick S. Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 166, 176 (1928).

⁴⁶⁵ See Vagts, *supra* note 51, at 382.

⁴⁶⁶ See BROWNLIE, *supra* note 458, at 527–28; Lerner, *supra* note 33, at 233–34. Ultimately, the body of human rights law would come to include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the respective human rights conventions (and resulting institutions) of Europe and the Americas. See Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT’L L. & POL’Y 58, 60–62 (2002) (noting due process rights in ICCPR, Universal Declaration of Human Rights, and regional human rights agreements); see also HENKIN, *supra* note 462, at 331, 491 (listing U.N. conventions on specified human rights subjects and detailing influ-

these claims, the development of denial of justice and other investment and commercial rules of due process lost its jurisprudential momentum.⁴⁶⁷ Human rights law embarked on a still-ongoing pattern of aggressive growth and development,⁴⁶⁸ but norms of denial of jus-

ence of International Covenant on Civil and Political Rights); JAYAWICKRAMA, *supra* note 462, at 71, 76 (describing ECHR and American Convention on Human Rights); Kitty Arambulo, *The International Covenant on Economic, Social and Cultural Rights and the Committee on Economic, Social and Cultural Rights*, in SOCIAL, ECONOMIC AND CULTURAL RIGHTS: AN APPRAISAL OF CURRENT EUROPEAN AND INTERNATIONAL DEVELOPMENTS 57, 58 (Peter Van der Auweraert et al. eds., 2002) (noting early U.N. intention to create single legally binding human rights instrument); Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 101 (Raija Hanski & Markku Suksi eds., 2nd ed. 1999) (stating that International Covenant on Economic, Social and Cultural Rights "was created as one of the central pillars of the international human rights system . . . developed by the United Nations after 1945" and "[a]s such, it stands alongside its sister covenant, the International Covenant on Civil and Political Rights (CCPR), and the Universal Declaration of Human Rights"); F.V. García-Amador, *International Responsibility: Second Report*, reprinted in [1957] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/106, at 17-18 (discussing denial of justice in international case law and codifications); J.G. Merrills, *The Council of Europe (I): The European Convention on Human Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra*, at 287 (discussing origins of European Convention on Human Rights); J.G. Merrills, *Promotion and Protection of Human Rights Within the European Arrangements*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra*, at 275 (describing patchwork of human rights regimes in Europe); Manfred Nowak, *The International Covenant on Civil and Political Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra*, at 83 ("Together with the Universal Declaration of Human Rights . . . the International Covenant on Economic, Social and Cultural Rights . . . constitute[s] the core of United Nations human rights law . . ."); Martin Scheinin, *International Human Rights in National Law*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra*, at 417, 421 (describing success of European Convention on Human Rights); Harmen van der Wilt & Viviana Krsticevic, *The OAS System for the Protection of Human Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra*, at 371 ("[T]he inter-American system for the protection of human rights has developed within the framework of the Organization of American States (OAS) in ways that mirror the European system of human rights protection."); Shirley Williams, *Human Rights in Europe*, in REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 77-109 (Samantha Power and Graham Allison eds., 2000) (describing development of human rights institutions in Europe).

⁴⁶⁷ See LILICH, *supra* note 53, at 16-25; see also *id.* at 224-25; F.V. GARCÍA-AMADOR, DRAFT ARTICLES ON THE RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS, reprinted in RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 17-18 (1974).

⁴⁶⁸ Over the course of the last century, in essence, universally applicable norms of treatment, versus the particularized treatment of aliens—the context in which most civil and wealth-related denial of justice claims had arisen—came to be prioritized. See Vagts, *supra* note 51, at 383-84. A hundred years later, human rights standards of due process are far more developed than the denial of justice, fair and equitable treatment, and other wealth-oriented due process norms emphasized herein. See Ralph Ruebner & Lisa Carroll, *The Finality of Judgment and Sentence Prerequisite in the United States-Peru Bilateral Prisoner Transfer Treaty: Calling Congress and the President to Reform and Justifying Jurisdiction of the Inter-American Human Rights Commission and Court*, 15 AM. U. INT'L L. REV. 1071,

tice as applied to civil claims, particularly investment and commercial claims, fell into desuetude.⁴⁶⁹ Denial of justice and related claims of fair and equitable treatment, and the minimum standard of treatment generally, became static and increasingly dated.⁴⁷⁰

1090–92 (2000) (detailing high degree of uniformity and clarity that has developed within U.N. and regional human rights standards of due process).

⁴⁶⁹ See LILICH, *supra* note 53, at 19–21 (describing decision of International Law Commission to drop subject of state responsibility for injuries to aliens in favor of international responsibility of states in general). Thus, most of the substantive development of denial of justice norms in the claims commissions had come in the criminal context.

⁴⁷⁰ See Rosenstock & Grimes, *supra* note 464, at 164–65. With the rise of human rights law, the centrality of denial of justice and the minimum standard of treatment in international law diminished and, with notable exceptions, claims commissions ceased to be a central feature in the development of international law. See LILICH, *supra* note 53, at 8. Perhaps related, the claims commissions also fell into disuse on account of Latin American objections to denial of justice claims and minimum-standard claims generally, see Vagts, *supra* note 51, at 383, in line with the Calvo Doctrine's rejection of a higher standard of treatment for aliens, versus simply national treatment. As decolonization occurred and more developing country parties joined the international community, this opposition grew stronger and came to prevail. See *id.* Consequently, the volume of international arbitration declined. See *id.* The recent wave of BITs mandating provision of a minimum standard of treatment—the context out of which Chapter 11 arose—represents a sharp reversal of this trend, with the attendant growth in opportunities for international review of national courts explored herein. Given the broader pattern of the last century, however, denial of justice—the core international claim of judicial wrongdoing—remains “one of the worst elucidated [concepts] in international law.” See Lerner, *supra* note 33, at 248 (quoting Charles de Visscher, *Le Deni de Justice en Droit International*, 52 RECUEIL DES COURS 369, 369 (1935)).

A persistent inability to codify the law of state responsibility, especially in its earlier emphasis on injuries to aliens, likely also contributed to the decline of denial of justice as a normative claim—or at least sacrificed a potential source of stability for the doctrine. See Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles, Introduction and Overview*, 96 AM. J. INT'L L. 773, 777 (2002) (describing early series of failed attempts to codify rules of state responsibility for injuries to aliens); see also *id.* (dating shift in emphasis of International Law Commission's efforts to extend state responsibility beyond treatment of aliens to chairman Robert Ago's subcommittee report of 1963). Efforts at the codification of state responsibility thus increasingly focused attention on “secondary” rules, such as imputation, rather than the substantive rules of treatment of aliens, such as denial of justice. See Bodansky & Crook, *supra*, at 776–77; Robert Rosenstock, *The ILC and State Responsibility*, 96 AM. J. INT'L L. 792, 792–93 (2002) (describing post–World War II hostility toward codification of state responsibility, including decades of obstacles arising within International Law Commission); see also James Crawford, *Report of the International Law Commission on the Work of its Fiftieth Session*, U.N. GAOR, 50th Sess., Supp. No. 10, at 1, U.N. Doc. A/53/10 (1998) (discussing distinction between primary and secondary rules of state responsibility), available at <http://www.un.org/law/ilc/reports/1998/98repfra.htm>. State responsibility doctrine thus remains a product of customary international law and various dispersed sources, rather than any single codified enactment. See MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 231 (4th ed. 2000) (associating state responsibility with customary law, judicial pronouncements, treaties, and U.N. resolutions). The League of Nations's attempt at codification of the Responsibility of States for Injuries to Aliens at the Hague Codification Conference of 1930 likewise fell short. Three subsequent efforts at codification also failed. See Roberto Ago, *Second Report on State Responsibility*, [1970] 1 Y.B. INT'L L. COMM'N 177, 178, U.N. Doc. A/CN.4/233/SER.A/

In the last fifty years, little has occurred to alter this state of affairs in any meaningful respect. Non-criminal international norms of due process—including investment and commercial norms—have continued to lack the dynamic mechanism of development and innovation they once enjoyed in the claims commission process.⁴⁷¹ This is not to suggest that relevant international norms of due process are completely stagnant. Rather, such standards have continued to develop in at least two ways.

First, the active development of international human rights norms has had incidental implications for the development of due process in civil and commercial law proceedings.⁴⁷² This has occurred where the relevant human rights norm, even if developed in the context of criminal litigation, speaks to judicial process generally.⁴⁷³ Second, the long-negotiated rules of state responsibility, a work in progress for most of the last century, also incorporate some dimension of international due process.⁴⁷⁴ Treatment of the absence of adequate local remedies in state responsibility doctrine might be noted in this regard. State responsibility is also triggered when states fail to provide due process in the form of access to unbiased and legally constituted courts.⁴⁷⁵ More generally, the emphasis of modern state responsibility

1970 (describing disagreement on components constituting “illicit act”); García-Amador, *supra* note 466, at 17–18; Willem Riphagen, *Second Report on the Content, Forms and Degrees of International Responsibility*, [1981] 2 Y.B. INT’L L. COMM’N, pt. 1, 79, 82, U.N. Doc. A/CN.4/344/SER.A/1981/Add.1 (discussing previous drafts submitted to International Law Commission). On the long string of efforts to codify norms of state responsibility, see LILlich, *supra* note 53, at 16–25; Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT’L L.J. 1, 3 (1988).

⁴⁷¹ See *supra* note 461 and accompanying text.

⁴⁷² See LILlich, *supra* note 53, at 27–29. International human rights law, of course, encompasses an array of due process obligations. See Jinks, *supra* note 466, at 59–62.

⁴⁷³ On the array of international norms of due process, such as the prohibition against arbitrary arrest and the right to prompt appearance before a judge—which are largely oriented to criminal prosecution and were primarily developed and articulated in human rights instruments, see LILlich, *supra* note 53, at 27–29; William J. Aceves, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 94 AM. J. INT’L L. 555, 559 (2000); Dickinson, *supra* note 452, at 1421–22, 1429; Ruebner & Carroll, *supra* note 468, at 1090–92. Article 14 of the ICCPR, establishing minimum due process guarantees, see International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171, 176–77, is an especially important source of due process rights. See Aceves, *supra*, at 559; Defrancia, *supra* note 451, at 1393.

⁴⁷⁴ Cf. *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 709–10, ¶ 150 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

⁴⁷⁵ See C. F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 97–99 (1967) (discussing lack of access to fair courts as breach of international law); A.F.M. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. INT’L L.J. 1, 26 (2001) (positing that state

doctrine on secondary obligations—those that *follow from* breach of a primary obligation—suggests some quasi-procedural mandate.⁴⁷⁶

It is not clear, however, that either of these mechanisms offers as dynamic a tool of due process development—especially outside the criminal context—as a recurrent pattern of dialectical review. At least to date,⁴⁷⁷ in neither case do we have the actively responsive pattern of judicial engagement, which—in the form of habeas litigation—contributed to the emergence and evolution of due process in the United States.⁴⁷⁸ As to human rights doctrine, there are indisputably important mechanisms of judicial development of norms.⁴⁷⁹ Much of the evolution and expansion of human rights law since World War II might, in fact, be credited to these institutions.⁴⁸⁰ Until recently, however, human rights adjudication has not exhibited any strong pattern of intersystemic adjudication between international and national tribunals. Consequently, the potential returns in innovation offered by dialectical review have not been fully capitalized upon.⁴⁸¹ Human

can incur international responsibility for breach of agreement and additionally for denial of justice if it then closes its courts to aliens litigating against state).

⁴⁷⁶ See James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 876 (2002) (noting analogy of modern state responsibility rules to “common law rules of civil procedure—a distinctive set of rules that apply across the various substantive areas of law”) (citation omitted); see also Allott, *supra* note 470, at 6–7 (noting shift of state responsibility rules away from definition of substantive obligations).

⁴⁷⁷ Recent expansion in the ECHR's accessibility to individual claimants, among other changes, may help to facilitate the emergence of more dynamic patterns of engagement in the ECHR's interaction with European national courts. See *infra* Part VI.B.

⁴⁷⁸ See *supra* note 187 and accompanying text. A third, interesting source of international norms of due process has been the litigation of claims before international tribunals themselves. But see *supra* note 451. This judicial framework has provided a helpful context for the development of due process norms. The relevant standards have been internal to international adjudication, however, and do not, as such, constitute the type of norm I emphasize herein.

⁴⁷⁹ See Helfer & Slaughter, *supra* note 2, at 279. The extensive litigation of the due process protections of Articles 9 and 14 of the International Covenant on Civil and Political Rights, *supra* note 473, arts. 9, 14, is perhaps the best example.

⁴⁸⁰ See Aceves, *supra* note 473, at 559 (noting “dynamic evolution” of human rights law) (citation omitted); Defrancia, *supra* note 451, at 1390 (“Through their rulemaking and interpretative jurisprudence, however, the Tribunals play a unique role in resolving gaps and inconsistencies in the sources of human rights law informing the conduct of the trials.”); Ruebner & Carroll, *supra* note 468, at 1090–92.

⁴⁸¹ These include access by individual petitioners and the regular use of potentially more effective monetary damages. See *supra* Part II.B. This is not to suggest that there is no dialogic dimension in international human rights adjudication. There is. See Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, in HUMAN RIGHTS AND LEGAL HISTORY: ESSAYS IN HONOR OF BRIAN SIMPSON 29, 31–40 (Katherine O'Donovan & Gerry R. Rubin eds., 2000) (discussing debates surrounding judicial application of international precedent). It is, how-

rights tribunals are moving in this direction, I suggest below, but they are not there yet.⁴⁸²

Notwithstanding their long provenance, then, international norms of due process could be more developed and more widely applied. This is evident in the relevant Chapter 11 arbitrations to date, each of which has struggled with the appropriate scope and standard of denial of justice. Existing mechanisms of due process development cannot be expected to provide the aggressive and sustained pattern of innovation necessary to address this need. Chapter 11 and analogous forms of international review, however, may help to fill this void.

This prospect begins with the language of Chapter 11 itself. Article 1105 speaks directly to the requirements of the minimum standard of treatment, fair and equitable treatment, and full protection and security, making it a credible nexus for the elucidation, clarification, and elaboration of these doctrines. The replication of this provision in other trade and investment agreements, meanwhile, can be expected to increase the pool of interchangeable precedent on the several standards.⁴⁸³ Such redundancy may encourage a cross-pollination among tribunals, resulting in an enhancement of the global “community of law.”⁴⁸⁴ The capacity of Chapter 11’s dialectical review for innovation further suits it to this role.⁴⁸⁵

ever, less active and direct than the exchange I propose herein. On the other hand, this dynamic may already be changing. *See infra* notes 556–58 and accompanying text.

⁴⁸² *See infra* notes 573–80 and accompanying text.

⁴⁸³ In fact, the recently completed Free Trade Agreement between the United States and Australia may enhance dramatically the potential for a dialectical exchange directed to due process, by defining “fair and equitable treatment” to include “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings *in accordance with the principle of due process embodied in the principal legal systems of the world.*” United States–Australia Free Trade Agreement, *supra* note 50, art. 11.5 (emphasis added). By referring back to domestic standards, this new language may well enhance the degree of transnational interaction on relevant standards of due process. *Cf.* Trade Act of 2002, 19 U.S.C. § 3802(b)(3)(E) (2002) (encouraging future definition of “fair and equitable treatment” in terms “consistent with United States legal principles and practice, including the principle of due process”).

⁴⁸⁴ *See Helfer & Slaughter, supra* note 2, at 323–26.

⁴⁸⁵ *See Brower, supra* note 417, at 79–80; Cover, *supra* note 14, at 673–74. On a related note, an approach to the development of international norms of due process grounded in dialectical review would seem to be favored by the highly contextual nature of due process claims. *See Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, 109, ¶ 126 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* <http://www.naftalaw.org>; *cf.* Aceves, *supra* note 473, at 557. Particular procedures in the relevant jurisdiction, assessment of the efficacy of judicial alternatives, and evaluation of the relevant judicial system in its entirety, are likely to shape resolution of any given claim. This is evident in the close analysis of the denial of justice claims in *Loewen*. *See Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 710, ¶ 151 (NAFTA Ch. 11 Arb. Trib. 2003), *available at* <http://www.naftalaw.org>. In the face of these highly contextual elements, bright-line rules are unlikely to be effective adjudicatory tools, even

What might we say, then, about the actual development of international norms of due process by way of the dialectical review of Chapter 11? At the outset, it bears noting that a pattern of dialectical review directed to international due process does not involve any delegation of authority to create such norms. The latter possibility might be objected to on several grounds, including the greater legitimacy of positive law as the source of such norms, especially in an international, rather than national, setting.⁴⁸⁶ The essence of such norms already exists, however, in the minimum standard of treatment, the rules of diplomatic protection, the bar against denials of justice, and the other standards noted above. In fact, in the somewhat distinct context of due process in international litigation itself, a wide array of procedural obligations have been clearly identified and developed.⁴⁸⁷ The relevant need is not the creation of due process norms, but the refinement of existing norms through their cooperative application in domestic and international settings alike.

The development of international due process by way of Chapter 11 dialectical review has, in fact, already begun. In *Mondev*, questions of judicial lawmaking, as well as norms of official immunity, were sub-

assuming the emergence of a large body of relevant precedent. Rather, claims of denial of justice and other due process challenges may be inherently suited to adjudication through an active interchange among judicial parties. Such a dialectic will allow not only a more nuanced treatment of context, but also the incorporation of valuable expertise from the institutions most steeped in the relevant judicial system—domestic judges themselves.

Finally, one might also identify case-by-case adjudication as a preferred means for the elaboration of international norms of due process, including the generalized doctrines of the minimum standard of treatment and denial of justice particularly, as opposed to an approach grounded in positive law rule-making of one sort or another. *Cf.* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (upholding SEC’s ad hoc interpretations of “fair and equitable” requirement, given number of factors favoring selection of that approach). Essentially, the relevant “problem[s] may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.” *Id.* at 203. Adjudicatory flexibility may therefore be well warranted.

⁴⁸⁶ See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999) (“CIL suffers additional doubts about its legitimacy that do not burden treaties.”); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 530–35 (2000) (describing greater legitimacy of treaty-based international law); *cf.* Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT’L L. 495, 527–28 (1997) (applying Jürgen Habermas’s theory of positive law as instrument of integration to development of international law).

⁴⁸⁷ See CARLSTON, *supra* note 451, at 36–66 (discussing right to be heard, right to due deliberation by a duly constituted tribunal, right to reasoned judgment, right to tribunal free from corruption, and right to proceedings free from fraud in international adjudication); MANI, *supra* note 451, at 25–35 (same); Defrancia, *supra* note 451, at 1384 (outlining right to fair trial under international law); Dickinson, *supra* note 452, at 1488 (noting nature of certain procedural norms in international litigation as customary international law).

ject to analysis and elucidation.⁴⁸⁸ One might imagine a U.S. national court, perhaps even in Massachusetts, seizing on the *Mondev* tribunal's suggestion of a possible appellate duty to remand new factual questions that arise on appeal. Such a court might face some such fact pattern, yet find little in domestic law to assist its analysis. In the extrinsic perspective of *Mondev*, however, the national court might find its starting point, a point which might in turn be taken up by other domestic courts or, in an appropriate circumstance, by another Chapter 11 tribunal, progressively furthering the dialectic pattern.

Evidence of a dialectical exchange over international norms of due process is even more pronounced in *Loewen*. There, the tribunal considered issues ranging from judicial treatment of discriminatory and irrelevant statements at trial to the appropriate degree of detail in jury instructions and from the permissible level of punitive damages in civil litigation to the discretionary determination of whether a national court should agree to waive a statutory appeal-bond requirement.⁴⁸⁹ Any of these questions might subsequently be taken up by a domestic court—whether in Mississippi, Massachusetts or elsewhere—in an appropriate case. In this analysis, the Chapter 11 award might well be relevant.

The *Metalclad* decision and its progeny might be cited as a further example.⁴⁹⁰ As described above, the *Metalclad* tribunal asserted the existence of a due process requirement of transparency under Chapter 11.⁴⁹¹ Upon review, the British Columbia Supreme Court engaged in its own analysis of NAFTA, as well as customary international law, concluding that no such requirement could be located in either.⁴⁹² A subsequent Chapter 11 tribunal, while receptive to a potential transparency requirement, adopted the Canadian court's analysis for the purposes of the case before it.⁴⁹³ While not exactly mirroring the pat-

⁴⁸⁸ See *supra* notes 397–413 and accompanying text.

⁴⁸⁹ See *supra* Part I.

⁴⁹⁰ Again, recall that the initial Chapter 11 review in *Metalclad* was not of underlying judicial conduct. As such, *Metalclad* offers a slightly askew pattern of dialectical review. See *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, ¶ 1 (NAFTA Ch. 11 Arb. Trib. 2000), at <http://www.naftalaw.org>.

⁴⁹¹ See *supra* notes 438–42 and accompanying text. Notably, the Appellate Body of the WTO has tied the requirement of transparency to principles of due process. See Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35, 78 (2003) (citing WTO Appellate Body Report: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, ¶¶ 182–183 (1998)), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e58abr.pdf.

⁴⁹² See *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664, 24–28, ¶¶ 66–76.

⁴⁹³ See *Feldman v. Mexico*, Case No. ARB(AF)/99/1, ¶¶ 107, 133, 147 (NAFTA Ch. 11 Arb. Trib. 2002); see also *supra* notes 443–44 and accompanying text. A further—but quite distinct—stage in this case of dialectical exchange might be the intervention of the NAFTA state parties in 2001, to offer their “interpretation” of Article 1105 as limited to the

tern of dialectical review outlined herein, as noted above, this example offers a window into the potential pattern of engagement that might emerge from Chapter 11 review of national courts.⁴⁹⁴ Through such a process, transparency and analogous due process doctrines may emerge, evolve, and take root. Rather than expressing only international or only domestic due process values, such doctrines are likely to manifest common norms of both systems.

In these various examples, one can readily observe the dialectical operation of intersystemic conflict and indeterminacy. Operating within an institutional mechanism that cannot eliminate conflict as to the requirements of due process—in terms of access, non-discrimination, punitive damage awards, and the like—the relevant interlocutors are forced to engage one another, and thereby arrive at greater clarity on the questions presented. Instead of alleviating indeterminacy, as conventional review might do in pursuit of procedural uniformity and predictability,⁴⁹⁵ Chapter 11 forces judicial institutions to work through it, in a pattern of extended dialectical review.⁴⁹⁶

Chapter 11 review might thus be conceived as a type of institutional feedback loop, in which a balance of power and perspective and the continuity of an adequate supply of cases over time facilitate the development of international norms of due process. Chapter 11 facilitates such development, appropriately, in the context of real cases, in which relevant questions of process are presented in concrete form.

requirements of customary international law. See *infra* note 526–30 and accompanying text. The most important lesson of this intervention is arguably the need for caution in Chapter 11 jurisprudence. See *infra* Part VI.A. On the other hand, it is notable that even the intervention of the NAFTA signatories has not foreclosed a now independent discourse of transparency. See *supra* note 445.

⁴⁹⁴ Outside the Chapter 11 context, Molly Warner Lien describes an analogous transnational interaction. See Lien, *supra* note 52, at 608–09. In *Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000), Judge Richard Posner was faced with the question of whether to enforce an English judgment in Illinois. Faced with a statutory requirement that the judgment have been rendered in accordance with due process, Posner hinted at a pattern of exchange and harmonization similar to that described herein:

It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law; and so we interpret “due process” in the Illinois statute . . . to refer to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers.

Id. at 476–77. The resulting test was not “whether the foreign judgment comported with American notions of due process, but rather whether it met a second international notion of due process.” Lien, *supra* note 52, at 609.

⁴⁹⁵ See CARRINGTON, *supra* note 59, at 2–3; Frisch, *supra* note 153, at 76.

⁴⁹⁶ See Powell, *supra* note 225, at 246 n.7 (leveraging framework for analysis of federal habeas corpus law developed by Cover & Aleinikoff, *supra* note 14, at 1047, to discuss allocation and fragmentation of authority between federal and subfederal systems in implementation of international human rights law).

Further, it relies on those institutions with the greatest comparative advantage in evaluating claims of due process and building on them—the courts themselves.⁴⁹⁷

Two now-familiar parallels to such a dialectical role for Chapter 11 and similar tribunals in the development of international due process deserve note.⁴⁹⁸ First, notwithstanding its limitations, the aforementioned development of human rights law over the last century has undoubtedly exhibited aspects of the proposed process of dialectical review. Some reliance of human rights law on judicial institutions generally, and individual claim procedures particularly, should thus be noted.⁴⁹⁹

More clearly, the proposed dialectical approach to Chapter 11 review, and its expected contribution to the development of international due process, is paralleled by the role of federal habeas review in the U.S. jurisprudence of due process.⁵⁰⁰ As a structural matter, habeas and Chapter 11 review are similar “common law”—and collateral—forms of legal transition.⁵⁰¹ As with Chapter 11, there have always been concerns with the intersystemic nature of federal habeas review.⁵⁰² Regardless, such review has served an indisputably central role in U.S. constitutional development over the last half-century.⁵⁰³

⁴⁹⁷ Cf. Defrancia, *supra* note 451, at 1384 (suggesting role of international criminal courts in articulating international norms of due process). Recalling the discussion above, an emphasis on international norms of due process as the subject of the relevant dialectical exchange is likely more palatable given the courts’ obvious expertise in issues of process.

⁴⁹⁸ Further parallels beyond the two emphasized above also might be offered, including the interaction between national and supranational tribunals within the European Union described below. See *infra* Part VI.B. Others have explored the European relationship from a variety of dialogic perspectives. See, e.g., Helfer & Slaughter, *supra* note 2, at 298–337; J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991) (suggesting transformation in institutional nature of European political discourse).

⁴⁹⁹ See *supra* notes 462–73 and accompanying text.

⁵⁰⁰ See Alvarez & Park, *supra* note 41, at 394. Besides federal habeas review of state courts, other potential analogies in the interaction of federal and state courts might also be offered. As a category, in fact, any form of collateral review might be analogized to the Chapter 11 review of national courts.

⁵⁰¹ The application of distinct bodies of law in both Chapter 11 and habeas review—international and federal law, respectively—is an important parallel between these two forms of collateral review. A further parallel is the presence of some requirement of exhaustion in both cases. See also *supra* note 46.

⁵⁰² See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1998 (1992) (analyzing U.S. Supreme Court’s decision whether to abandon de novo consideration of legal and mixed legal-factual questions in habeas corpus). Concerns of federalism and subsidiarity also are important to both Chapter 11 and habeas. This results in the jurisdictional caution that characterizes both Chapter 11 and habeas review, and their relative deference to underlying judicial proceedings.

⁵⁰³ See *supra* note 187 and accompanying text. Related to this point, both the Chapter 11 and habeas regimes were arguably designed to address the potential for “predatory

Among other provisions, habeas decisions have contributed significantly to the development of the Sixth Amendment right to counsel and the Fifth Amendment bar against self-incrimination.⁵⁰⁴ Thus, the development of due process in the United States has been significantly influenced by the dialectical mechanism of federal habeas review. As described by one scholar, "[t]he interpretation of the meaning of "due process" has been the product of ongoing dialogue among state and federal courts and legislatures."⁵⁰⁵

This, of course, is just the dynamic that I propose herein, on an international scale.⁵⁰⁶ The cycle of habeas may now repeat itself in the development of more universal norms of due process across national borders, designed to help meet the needs of an increasingly globalized world economy.⁵⁰⁷ In this view, Chapter 11 review—like habeas before it—should not be conceived primarily as "a method of giving relief to individuals, but as a way to establish a dialogue about the meaning of rights."⁵⁰⁸

Ultimately, the dialectical review of Chapter 11, with its active incorporation of both international and domestic perspectives, may help to facilitate the acceptance and incorporation of international

localism," by which local authorities might seek short-term advantage over external parties, to the detriment of national commerce. See Stephan, *supra* note 41, at 839–40 (suggesting common orientation of domestic takings law and international expropriation doctrine to protecting outsiders from local coercion); cf. Matiation, *supra* note 7, at 465–66 (noting issues of local bias in *Loewen*).

⁵⁰⁴ See *supra* note 187 (enumerating cases).

⁵⁰⁵ Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799 (1992); see also David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998). Cole writes:

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

Id. at 2502 (quoting *Fay v. Noia*, 372 U.S. 391, 401–02 (1963)).

⁵⁰⁶ See Barry Friedman, *Pas de Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2484 (1993) ("The way to obtain a new set of views and gradually expand the body of criminal constitutional law was to draft the habeas courts as "foot soldiers" in the due process revolution.").

⁵⁰⁷ Some might dispute, of course, the wisdom—let alone the virtue—of such convergence. See, e.g., Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 4–9 (Adamantia Pollis & Peter Schwab eds., 1979) (contending that "universal" norms reflect values of powerful states). This dispute is well beyond the scope of the present analysis. For present purposes, it is enough to suggest that some degree of convergence is probably inevitable. See Martinez, *supra* note 3, at 433. It has happened already, is happening as we speak, and will continue to happen.

⁵⁰⁸ See Althouse, *supra* note 136, at 938 (discussing Cover & Aleinikoff, *supra* note 14, at 1052–54).

norms and standards in domestic law and culture. For most Americans, U.S. law is entirely disconnected from international law.⁵⁰⁹ They would likely be shocked to know that the Constitution itself incorporates international law as an element of our national law.⁵¹⁰ Some mechanism for the translation of seemingly *foreign* international law into domestic discourse is therefore essential.⁵¹¹ This is true today more than ever, given the increasingly transnational nature of commercial enterprise and of civil society as a whole.⁵¹² The dialectical review of Chapter 11 and similar mechanisms of international review can serve as just such a translator. Paraphrasing Harold Koh's analysis of transnational legal process, "[o]nce [courts] begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes."⁵¹³

VI

THE FUTURE OF DIALECTICAL REVIEW

The dialectical review of Chapter 11—notwithstanding its limitations—offers itself as a potentially powerful tool of legal innovation and as a mechanism by which domestic and international legal norms

⁵⁰⁹ See Powell, *supra* note 225, at 260.

⁵¹⁰ See Koh, *supra* note 221, at 669; Powell, *supra* note 225, at 251.

⁵¹¹ See Powell, *supra* note 225, at 251; see also Koh, *supra* note 254, at 199 (suggesting that nations cannot insulate themselves from compliance with international law); Koh, *supra* note 221, at 627 (referring to this pattern as "bringing international law home"). The international-domestic pattern of dialectical review outlined herein might, in this regard, be construed to parallel Cover's goal of enhancing trust in the judicial system by means of jurisdictional redundancy. Cover suggests that jurisdictional redundancy can minimize the actual and perceived influence of ideology on judicial determinations and thereby enhance trust. See Cover, *supra* note 14, at 662, 665, 671–72. A Chapter 11 pattern of dialectical review similarly might help to enhance trust in international judicial institutions and international law generally.

⁵¹² See Powell, *supra* note 225, at 268–69. Helfer and Slaughter, in a related analysis, speak of the role of supranational adjudication in the development of a "global community of law." See Helfer & Slaughter, *supra* note 2, at 281, 367–68, 370–71.

⁵¹³ Koh, *supra* note 254, at 205; see also Burke-White, *supra* note 224, at 84–85 (describing transnational judicial interaction as means of embedding international norms); Helfer & Slaughter, *supra* note 2, at 305–06; Martinez, *supra* note 3, at 467 (suggesting that dialogue, rather than hierarchical enforcement, encourages national governments "to hold onto the ultimate responsibility for their practices and thus to renew and internalize their commitment to human rights as they implement each decision"); Stein, *supra* note 188, at 23 (describing importance of transnational jurisprudence in "sensitizing municipal authorities to the needs of the international system and . . . enlightening other participants in the international legal process about the needs, interests and aspirations of individual states"). From this perspective, dialectical review can be understood as a pattern of transnational legal process, incorporating phases of "interaction, interpretation, and internalization," see Koh, *supra* note 221, at 626–27, and exhibiting the distinctive features of that pattern, see Koh, *supra* note 254, at 184.

may progressively evolve toward shared standards, grounded not in one system or the other, but both. If Chapter 11 as presently constituted and utilized represented the extent of this pattern, however, the dialectical review of that chapter would be little more than a curious anomaly, worthy of note, but not deserving of study or sustained attention. Yet this could not be further from the truth.

The volume of Chapter 11 cases is growing. Shortcomings of the existing regime are being addressed both in Chapter 11 itself and in new investment agreements. Chapter 11 panels are acting to minimize potential resistance to Chapter 11 and its analogues, with some signs of success. Equally important, patterns of dialectical review are emerging outside the investment context. A growing array of international tribunals might thus be said to have the ability to engage in review and to exhibit the power characteristic of dialectical review. Considering the related trends of Chapter 11's evolution and the expansion of opportunities for dialectical review, it becomes clear that dialectical review may have an increasingly important role to play in the world community in the years ahead.

A. The Promise of Dialectical Review in the Protection of Foreign Investment

The volume of Chapter 11 litigation, including claims involving some critique of national court conduct, is undoubtedly on the rise.⁵¹⁴ On present trends alone, a busy future might be predicted for dialectical review. Yet clouds also loom in the distance. In particular, two threats to the operation of Chapter 11 as a mechanism of dialectical review—one we might term internal and the other external—offer themselves.

1. The Limits of Chapter 11 Continuity

Internal to itself, Chapter 11 review of national courts continues to lack the continuity essential for its effectiveness. As described above, the volume of relevant cases remains too small to support a dynamic pattern of dialectical review. More significantly, the institutional design of Chapter 11 continues to lack the institutional continuity—the repeat-player characteristic—necessary for fruitful dialogue.⁵¹⁵ The former difficulty can be dealt with briefly. While some institutional obstacles to a healthy volume of cases might be

⁵¹⁴ See *supra* notes 48–52 and accompanying text.

⁵¹⁵ See *supra* notes 302–11 and accompanying text.

identified,⁵¹⁶ the limited volume of Chapter 11 review of national courts can largely be ascribed to the relative youth of Chapter 11 and limited awareness of its potential application to judicial conduct. With time, a growing pool of potential cases, and heightened incentives to bring them, a sufficient volume of cases to sustain a pattern of dialectical review is therefore quite likely to emerge.⁵¹⁷

The limited degree of institutional continuity in the existing Chapter 11 regime is consequently a greater internal obstacle to a pattern of dialectical review. Chapter 11 tribunals are ad hoc bodies, with limited institutional continuity.⁵¹⁸ From claim to claim, independent and distinct panels are formed and disbanded, with little by way of structure, or even precedent, to link them together.⁵¹⁹ Meanwhile, review by the panels extends to a near-infinite array of national judicial bodies, rather than some limited group of appellate courts into which the domestic voice in the dialectic exchange is concentrated. Chapter 11's efficacy as a source of institutional continuity, and hence dialectical review, is consequently constrained on both the international and domestic sides.

Yet, promising signs for a long-term pattern of dialectical review can be cited. Specifically, institutional continuity on the domestic side of the dialectical exchange is necessarily furthered by the finality requirement in *Loewen*, while continuity on the international side is

⁵¹⁶ These might include the cost of international commercial arbitration, see Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L L.J. 823, 858–62 (2004), the procedural complexity of Chapter 11, see, e.g., NAFTA, *supra* note 12, arts. 1116–1125, at 642–44, and the prospect that the largest potential users of Chapter 11 (i.e., multinational corporations) may pursue political avenues to protect their interests, rather than litigation under Chapter 11, see generally Weiler, *supra* note 43.

⁵¹⁷ See Helfer & Slaughter, *supra* note 2, at 301–02. But see Bhagwat, *supra* note 69, at 985–86 (suggesting influence of U.S. Supreme Court on lower courts, notwithstanding rarity of review); Caminker, *supra* note 66, at 80 (same); Songer et al., *supra* note 66, at 693 (“But the ‘paradox’ of (relatively) effective control and rare reversals is more apparent than real. If an appeals court anticipates that it will be sanctioned in the form of a reversal, the anticipated response will keep the court in check.”); *supra* text accompanying note 128 (noting that lower volume of cases may be sufficient, given imposition of liability on federal authorities).

⁵¹⁸ Cf. REISMAN, *supra* note 66, at 8 (describing diminished capacity for control because of ad hoc review). Even in Chapter 11, institutional continuity is not completely lacking, given tribunals' regular reference to earlier Chapter 11 awards. This has been evident in the denial of justice context, where the decisions have commonly relied upon the earlier “precedent” on point. See, e.g., *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, 109–10, ¶ 126 (NAFTA Ch. 11 Arb. Trib. 2002) (citing *Azinian v. Mexico*, Case No. ARB(AF)/97/2, 14 ICSID REV. 538, 568, ¶ 99 (NAFTA Ch. 11 Arb. Trib. 1999), in explaining variants of denial of justice), available at <http://www.nafta-law.org>.

⁵¹⁹ Cf. NAFTA, *supra* note 12, art. 1123, at 644.

enhanced by the prospect of an appellate mechanism in Chapter 11–type international investment review. As to the requirement of finality, the *Loewen* tribunal held that a Chapter 11 assertion of judicial wrongdoing requires appeal of the asserted national court failure through all reasonable channels of domestic review.⁵²⁰ With a requirement of finality, national decisions subject to Chapter 11 review can be expected to have had at least some exposure to a domestic high court.⁵²¹ Those bodies can therefore serve as the repeat players necessary for an effective dialectical exchange.⁵²²

The second potential source of enhanced institutional continuity, on the international side of the exchange, is the introduction of appellate mechanisms to Chapter 11–style regimes. While this possibility has been discussed for some time, the recently signed Dominican Republic–Central America–United States Free Trade Agreement goes so far as to create a negotiating group charged with addressing it. Ultimately, the latter calls for an amendment to the agreement to establish a standing appellate body responsible “to provide coherence to the interpretation of investment provisions in the Agreement.”⁵²³

⁵²⁰ See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 723–24, ¶¶ 215–217 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

⁵²¹ Cf. Martinez, *supra* note 3, at 449–50 (describing how rules requiring litigants to exhaust remedies in state or administrative agencies promote judicial efficiency and interjudicial dialogue). There is unlikely to be complete convergence to any single domestic tribunal, such as the U.S. Supreme Court, of course, given a finality obligation not to pursue all available judicial processes, but only those that are “reasonably available.” See *Loewen*, 4 J. WORLD INVESTMENT at 677, ¶ 2. In a substantial number of cases, certiorari review is unlikely to meet this threshold. In other cases, Supreme Court jurisdiction will be lacking. Thus, even with a finality requirement, some distribution of cases across state judiciaries is likely. Yet this remains a substantial improvement on the pre-*Loewen* degree of institutional continuity.

⁵²² See *supra* notes 302–11 and accompanying text. As repeat players emerge, it is possible that relevant grants of discretionary appeals may increase. This might extend even as far as the U.S. Supreme Court. To avoid the prospect of Chapter 11 and similar liability, high courts may manifest some greater willingness to hear cases involving foreign investors, perhaps even in some summary fashion specific to cases involving foreign parties. The extent of institutional continuity may therefore continue to develop over time, though at some potential cost in lower court autonomy.

⁵²³ Dominican Republic–Central America–United States Free Trade Agreement, Aug. 5, 2004, annex 10-F, http://www.ustr.gov/Trade_Agreements/Bilateral/DR-CAFTA/DR-CAFTA_Final_Texts/Section_Index.html; cf. *Environmentalists’ Letter to Congress on CAFTA*, INSIDE U.S. TRADE, Feb. 20, 2004, at 4–5 (stating that appeals process established in CAFTA is inadequate and would allow foreign-investor suits against environmental laws to proceed before appeals process is established). The effort to establish the appellate body envisioned would appear to be moving forward. Under the auspices of the inter-agency Trade Policy Review Group, the U.S. negotiating position on the structure and nature of any such body is now being finalized, in advance of the interstate negotiations. See *Decision Close on CAFTA Investor-State Appellate Body Proposal*, INSIDE U.S. TRADE, Sept. 17, 2004, at 1, 14. The Dominican Republic–Central America–United States

Like the WTO Appellate Body, such a body might be expected to have a permanent staff and a roster of standing judges who would hear appellate cases over a fixed tenure.⁵²⁴ As with a requirement of finality, introduction of an appellate body would enhance the institutional continuity of Chapter 11. Again, such reform offers the hope of some repeat player effect, with attendant gains in the capacity of international investment review to serve as a vehicle of dialectical engagement.⁵²⁵

2. Chapter 11 and Resistance to Review

Even if Chapter 11 and similar investment regimes have the capacity to overcome shortcomings internal to their institutional design and present-day operation, external obstacles still lurk. Specifically, the receptivity of relevant national parties to Chapter 11-style review has come into question, as some have begun to resist the process and its further expansion.

To appreciate the state parties' concerns with process, one need simply recall the 2001 "interpretation" of Article 1105 by the United States, Canada, and Mexico, in their capacity as NAFTA's Free Trade

Free Trade Agreement, moreover, is not alone in its reference to the need for an appellate mechanism. *See id.* at 14–15 (noting milder reference to need for appellate body in Moroccan–United States FTA); United States–Morocco Free Trade Agreement, June 15, 2004, U.S.–Morocco, annex 10-D, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text_asset_upload_file651_3838.pdf. In fact, the pressure to create an appellate mechanism is even greater than these examples suggest, given its grounding in broader congressional policy directives. Congress's recent "fast track" legislation, the Trade Act of 2002, thus defined the creation of an appellate body as among the "principal trade negotiating objectives" of the United States. *See* Trade Act of 2002, 19 U.S.C. § 3802(b)(3)(G)(iv) (2002). The ultimate prospects for the emergence of appellate mechanisms in investment regimes may therefore be even stronger.

⁵²⁴ *See* Coe, *supra* note 122, at 1446–48 (analyzing potential mechanisms of appellate review). Drafts of the Free Trade Agreement of the Americas also have proposed establishing an appellate body. *See* Free Trade Area of the Americas Third Draft Agreement, Nov. 21, 2003, ch. 21 art. 13, ch. 23 arts. 25–31, *at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp.

⁵²⁵ The establishment of appellate bodies also might be expected to further strengthen the hand of the international side of the dialectical exchange. A standing appellate body's capacity to put pressure on national courts, as outlined above, might be greater than that of a succession of ad hoc panels. Arguably, this is precisely what has occurred with the introduction of the Appellate Body of the WTO. *See* Richard H. Steinberg, *Judicial Law-making at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 257 (2004) (arguing that permanent WTO Appellate Body is more likely to pursue incremental development of law than ad hoc panels of GATT judiciary). On the other hand, given the necessarily constrained nature of the power balance of dialectical review, as evident in Chapter 11, an appellate scheme is unlikely to undermine completely that balance. Even an appellate body would largely be limited to indirect mechanisms of pressure on domestic courts.

Commission (FTC).⁵²⁶ This interpretation, offered in response to several broad panel readings of the obligations articulated in that article, sought to redefine the applicable standard of treatment under Article 1105 in narrow terms. The FTC characterized the minimum standard of treatment under Article 1105 as the treatment required by customary international law.⁵²⁷ More specifically, it stated that the article's references to "fair and equitable treatment" and "full protection and security" did not require any mandate beyond that required by customary international law.⁵²⁸ Finally, the FTC indicated that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."⁵²⁹ It remains somewhat unclear whether this low threshold is binding on Chapter 11 tribunals.⁵³⁰ To date, however, several panels have construed it as such.⁵³¹

There is also evidence of objections to the expansion of Chapter 11-style provisions to other agreements. Investment protections and investor-state arbitration mechanisms have been actively resisted in recent trade negotiations.⁵³² Even more notable is the inclusion of investment protections in the recent free trade agreement reached by the United States and Australia, but the omission of any Chapter 11-style investor-state dispute mechanism.⁵³³

As these cases of resistance make clear, the long-term development of the pattern of dialectical review will depend on the tempered incorporation of Chapter 11-style mechanisms into future international agreements and their cautious application by the international

⁵²⁶ See N. AM. FREE TRADE COMM'N, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (July 31, 2001), at <http://www.dfait-maeci.gc.ca/tna-nac/nafta-interpr-en.asp>.

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.* While the Free Trade Commission's (FTC) other interpretations and statements to date have been directed to Chapter 11's procedures, the recurrence of these pronouncements suggests the NAFTA parties' willingness to police the implementation of Chapter 11. See Int'l Trade Canada, Dispute Settlement, at http://www.dfait-maeci.gc.ca/tna-nac/nafta_commission-en.asp (last visited Nov. 5, 2004).

⁵³⁰ See Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 HOUS. J. INT'L L. 301, 328 (2003) ("[S]ome commentators question whether the Notes of Interpretation are binding, because the FTC interpreted, but did not amend Chapter 11.").

⁵³¹ See Weiler, *supra* note 351, at 245.

⁵³² See Bruce Stokes, *Column: Looking In—The Trade Bill's "Huge Can of Worms,"* NAT'L J. CONG. DAILY, Mar. 21, 2002.

⁵³³ See *supra* note 52.

tribunals charged with their implementation.⁵³⁴ There is hope for success on this front as well.

In the European context, the ECJ and ECHR both exhibited just such gradualism in their jurisprudential development.⁵³⁵ At the outset, the courts defined their authority, but used it only sparingly and in tandem with grants of substantial flexibility to the national courts under review.⁵³⁶ As the courts' authority came to be more widely accepted, their decrees have progressively grown more invasive.⁵³⁷ Today, the courts are able to issue rulings of a relatively insistent nature, with every expectation that they will be implemented without need for persistent intervention.

⁵³⁴ In this vein, one might recall the role of aggressive international adjudication in the decline of international human rights norms in the Caribbean. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1836 (2002) ("[O]verlegalizing human rights can lead even liberal democracies to reconsider their commitment to international institutions that protect those rights.").

As outlined by Helfer, recent decades have seen a notable reduction in Caribbean participation in international human rights regimes. See *id.* at 1881–85. This pattern was set in motion by a series of successful challenges to the prolonged detention of capital defendants. See *id.* at 1872. Given significant public support for capital punishment in the face of rising crime rates, Jamaica, Trinidad and Tobago, and Guyana initially turned to the Privy Council to seek greater flexibility in the implementation of the applicable human rights norms. See *id.* at 1867, 1880. When this effort was rebuffed, they denounced their obligations under several human rights instruments and replaced the Privy Council with their own Caribbean Court of Justice. See *id.* at 1880–81. Karen Alter has suggested that an analogous backlash may be underway in Europe. See Alter, *supra* note 116, at 512–13.

⁵³⁵ See, e.g., Alter, *supra* note 116, at 495 (noting ECJ's cautious approach); Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217, 223–24 (1993) (tracing success of European Convention on Human Rights to gradual expansion of its reach); Paola M. Koo, *The Struggle for Democratic Legitimacy Within the European Union*, 19 B.U. INT'L L.J. 111, 117–18 (2001) (linking growing supranational role of European Union to ECJ's ability to progressively extend its jurisdictional reach by imposing self-limits on expansion).

⁵³⁶ See Martin Shapiro, *The European Court of Justice, in THE EVOLUTION OF EU LAW* 321, 341 (Paul Craig & Gráinne de Búrca eds., 1999).

⁵³⁷ See Helfer, *supra* note 217, at 409–10 (suggesting ECHR's growing assertion of power); Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1, 16 (2000) (suggesting increased strength and assertiveness of ECJ). To similar effect, Franz Mayer has suggested the possibility that the ECJ increasingly will use the Fundamental Rights Charter to shift responsibility for protecting fundamental rights from political bodies to the judiciary. See FRANZ C. MAYER, *THE EUROPEAN CONSTITUTION AND THE COURTS: ADJUDICATING EUROPEAN CONSTITUTIONAL LAW IN A MULTILEVEL SYSTEM* 68–69 (Jean Monnet Program, Working Paper No. 9/03, 2003), at <http://www.jeanmonnetprogram.org/papers/papers03.html>. The recent ECJ cases discussed below are further evidence of the ECJ's growing willingness to challenge national courts. A NAFTA example of this pattern might be Chapter 19's review mechanism. As suggested below, in the early days of Chapter 19's operation, the binational panels outlined broad procedural norms for national administrative bodies. With the passage of time, they have come to enforce increasingly more stringent requirements. See *infra* note 610.

In the approach of the *Loewen* tribunal itself, one might also find hope for the progressive emergence of a pattern of dialectical review. I have described the pattern of dialectical review as a mix of invasive, yet episodic, interventions in the work of national courts with milder, but ongoing, interventions.⁵³⁸ Some effective calibration of these paired approaches might be said to hold the secret to avoiding any fatal backlash against Chapter 11–style review.

In *Loewen*, the tribunal arguably chose a balance of jolt and systemic intervention perfectly suited to the context in which it acted, and to its specific audience. The *Loewen* award, in essence, was at once a jolt and an invitation to recurrent engagement. It offered a particularly sharp critique of the Mississippi trial court;⁵³⁹ yet it ultimately declined to impose liability on the United States by way of a limited reading of its jurisdiction.⁵⁴⁰ In doing so, it effectively called attention to its authority—and the body of rules for which it was responsible—while both minimizing the prospect of a backlash against the Chapter 11 regime and maximizing the opportunity for ongoing dialogue.

This might be seen as a strategy precisely calibrated to the present-day needs of Chapter 11 dialectical review. Such review remains relatively unfamiliar even among those most closely connected to its operation, including American attorneys, U.S. courts, and even many foreign investors.⁵⁴¹ In helping to break this pattern, the *Loewen* award was a rather effective vehicle. The unfamiliar prospect of Chapter 11 review, in essence, needed *Loewen* to lend it prominence.⁵⁴² Yet given traditional American resistance to international review, such awareness might also have brought ill consequences were liability imposed from the very outset. The *Loewen* tribunal chose to avoid this risk, instead prioritizing the need for ongoing engagement with the U.S. courts.

A sustainable pattern of dialectical review is therefore likely to consist of two components: First, one can expect to see the more

⁵³⁸ See *supra* notes 217–20 and accompanying text.

⁵³⁹ See, e.g., *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 702, ¶ 119 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.naftalaw.org>.

⁵⁴⁰ See *id.* at 708, 710–11, 730, ¶¶ 143, 151, 154, 172–174, 238. Helfer suggests a similar pattern in the approach of the ECHR. See Helfer, *supra* note 217, at 410.

⁵⁴¹ See, e.g., Liptak, *supra* note 8, at 20 (describing Chief Justice Marshall's surprise at Chapter 11 review of Massachusetts Supreme Judicial Court's decision in *Mondev*).

⁵⁴² Recall, however, that given the imposition of Chapter 11 awards on federal authorities, a somewhat reduced volume of cases may be sufficient to ensure the efficacy of a pattern of dialectical review. See *supra* note 127.

familiar jolt of international review and critique.⁵⁴³ There follows, however, a recurrent and interactive pattern of engagement with national courts. As to the second component, explored herein, dialectical review may allow international courts to more actively engage national courts. This dynamic role may be prompted by an initial jolt, as in *Loewen*. That jolt, however, may be just the beginning of an extended—and ultimately more significant—pattern of engagement and dialectical review.

B. National Courts and the Rising Tide of International Review

Even if the expansion in Chapter 11 and similar investment dispute settlement is stymied, the broader pattern of international review of national courts, including U.S. courts, is likely to persist and expand. Such review is not a new phenomenon. In the U.S. experience, it can be traced back at least to the Civil War, when an international arbitral tribunal had occasion to review and reject a number of the Supreme Court's famous *Prize Cases*.⁵⁴⁴ It has been rare to find

⁵⁴³ Examples of the initial jolt of international review might include the ICJ's ruling against U.S. military and paramilitary activities in Nicaragua, *see* *Military and Paramilitary Activities (Nicar. v. U.S.)*, Judgment on Jurisdiction, 1984 I.C.J. 392, and, slightly further afield, the loss of the United States's seat on the United Nations Commission on Human Rights in 2001, *see* Marc Lacey, *U.S. Attacks Rights Group for Ousting It as a Member*, N.Y. TIMES, May 5, 2001, at A4.

⁵⁴⁴ *See, e.g.*, *The Sir William Peel*, 72 U.S. (5 Wall.) 517 (1866) (granting restitution to British claimants whose merchant ship had been captured as prize of war by Union forces during Civil War blockade); *The Circassian*, 69 U.S. (2 Wall.) 135 (1864) (affirming British captured ship's designation as prize of war by ruling that intent to violate blockade can be inferred by cargo and acts of crew); *The Brig Amy Warwick*, 67 U.S. (2 Black) 635 (1862) (affirming various ships as legitimately captured prizes of war by ruling that wartime constitutes justification enough for blockade's legality). The potential for such international review of national courts actually extends even further in U.S. law, to the Jay Treaty of 1794. *See supra* note 54.

While the *Prize Cases* are known in U.S. constitutional jurisprudence for their treatment of the president's authority to initiate military action without a congressional declaration of war, few are aware that an international arbitral tribunal ultimately reviewed—and rejected—a number of those decisions. Under the Treaty of Washington of 1871, the United States and Great Britain established a commission authorized to adjudicate claims by British merchants whose vessels were captured, as prizes of war, by American ships enforcing the blockade of Confederate ports during the Civil War. *See* Weisburd, *supra* note 108, at 897 (describing creation and function of commission). Among these claims, several had already been heard by the Supreme Court. *See* Martinez, *supra* note 3, at 473 ("This commission reviewed several prize claims that had previously been decided by the U.S. Supreme Court and in effect reversed the Supreme Court's decisions. The U.S. government acquiesced in all the Commission's rulings in all of these cases."). *But see* Weisburd, *supra* note 108, at 898 (claiming that actual results of Supreme Court judgments were not disturbed and legal relations created by American judgments were not altered).

The British claimants sharply challenged the adverse Supreme Court decisions in those cases, characterizing them as "wholly unwarranted," and lacking a basis in even "one particle of credible and admissible evidence." *See* HENRY HOWARD, REPORT ON THE PRO-

review exercised in the comprehensive form outlined herein, however, with international review backed up by international power. Rather, international tribunals with power have commonly avoided invasive review, while those engaged in review have tended to enjoy more limited power. Yet this may be changing. As review comes to be increasingly aligned with power, dialectical review may offer a useful paradigm for the understanding and operation of international adjudicatory regimes besides Chapter 11.

International tribunals have become more willing to engage in the review of national courts in recent years. There is also a growing power to make such review stick. This is evident in a review of the most significant international tribunals in operation today—the ICJ, the GATT/WTO dispute settlement process, the ECHR, and the ECJ. While none of these tribunals perfectly manifests the pairing of aggressive review of national courts with a balance of judicial power—the foundational features of dialectical review—they each exhibit some capacity to move in that direction. Recent decisions seem to suggest a move toward more aggressive review or a more insistent assertion of power. Across an array of international tribunals, then, the potential for dialectical review may be on the rise.

Preliminary evidence of this prospect might be found in the ICJ's recent decisions on the Vienna Convention on Consular Relations, issued with reference to the lack of consular notification in innumerable U.S. capital cases.⁵⁴⁵ Over a series of decisions, from *Paraguay v.*

CEEDINGS AND AWARDS OF THE MIXED CLAIMS COMMISSION ESTABLISHED UNDER THE TREATY OF WASHINGTON 112 (1874); *cf. The Sir William Peel*, 72 U.S. at 517 (1866); *The Circassian*, 69 U.S. at 135 (1864). Putting the implications of their petitions in sharp relief, claimants urged the commission to reject the judgment of the U.S. Supreme Court and instead adopt the position espoused by Justice Nelson, in dissent from those judgments. *See* HOWARD, *supra*, at 95, 125.

Over the objection of the sole American member of the commission, who insisted that greater deference ought to be given "to a deliberate judgment of a court whose independence, impartiality, and learning has given it a character in Great Britain not less lofty than it possesses at home," the commission ruled in favor of the claimants in several cases. *See* MOORE, *supra* note 54, at 3922; *see also* HOWARD, *supra*, at 98 (*The Hiawatha*); *id.* at 130 (*The Circassian*); *id.* at 113 (*The Sir William Peel*). For all intents and purposes, the commission thereby reversed the judgments of the Supreme Court. Minimally, by awarding damages to the claimants, they undid the essential effects of the U.S. decisions. *See* Martinez, *supra* note 3, at 473.

⁵⁴⁵ *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36.1(b), 21 U.S.T. 77, 100, 596 U.N.T.S. 261, 292; *see also* Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (Mar. 31, 2004) (determining that United States violated Vienna Convention on Consular Relations by not informing arrested Mexican nationals of their right to contact Mexican consular staff); LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) (finding provisional measures of Vienna Convention on Consular Relations to be legally binding and concluding that United States had violated international law by not informing arrested German nationals of their right to consular access); Vienna Convention on Consular Rela-

United States to LaGrand and, most recently, *Avena*, the ICJ has assessed the consequences of the failure of U.S. law-enforcement authorities to inform foreign nationals charged with capital crimes of their Vienna Convention rights to contact and seek the assistance of consular officials of their home country. Further, the Court has considered the U.S. courts' nearly universal application of the procedural default rule to bar claims of prejudice arising from this lack of notice, where such claims were not raised at trial.⁵⁴⁶

In its most recent decision, the ICJ did not shy away from what the United States had characterized as interference in the U.S. judicial process.⁵⁴⁷ After finding a violation of the Vienna Convention,⁵⁴⁸ the ICJ explicitly rejected the application of judicial doctrines of procedural default to prevent review of a foreign national's assertion of a violation of the Convention.⁵⁴⁹ Quite to the contrary, the Court imposed an obligation on national courts to offer supplemental hearings to defendants to present those claims regardless of any asserted default.⁵⁵⁰ In doing so, the ICJ rejected, though without explicit reference, the U.S. Supreme Court's earlier decision in *Breard v.*

tions (Para. v. U.S.), 1998 I.C.J. 426 (discontinuance) [hereinafter *Paraguay*] (ending Paraguay's pending action alleging that United States violated Vienna Convention by not advising arrested Paraguayan national of his right to consular access).

⁵⁴⁶ See *Paraguay*, 1998 I.C.J. at 5; *Avena*, 43 I.L.M. at 613–14, ¶¶ 111–114; *LaGrand*, 2001 I.C.J. at 488, ¶ 60. These claims were denial of justice claims of a sort. See Djajic, *supra* note 459, at 88–94.

⁵⁴⁷ The ICJ held that:

If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts.

Avena, 43 I.L.M. at 596, ¶ 28; see also *id.* at 597, 598, ¶¶ 32, 37.

⁵⁴⁸ See *id.* at 609, ¶ 95.

⁵⁴⁹ See *id.* at 613–14, ¶¶ 111–114. The ICJ's earlier *LaGrand* decision had, in essence, already held as much. *LaGrand*, 2001 I.C.J. at 488; see *Torres v. Mullin* (*Torres I*), 124 S. Ct. 562, 564–65 (2003) (Breyer, J., dissenting) (acknowledging that ICJ held *Torres* entitled to remedy for violation of rights under Vienna Convention).

⁵⁵⁰ See *Avena*, 43 I.L.M. at 616, ¶ 121; see also *Torres I*, 124 S. Ct. at 565 (Breyer, J., dissenting) (expressing willingness to grant certiorari to answer question of “whether the ICJ has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention”). On the other hand, the ICJ sought to avoid unnecessary interference, rejecting Mexico's request for an order directing the vacation of the relevant Mexican nationals' convictions and sentences, and excluding the use of a substantial amount of evidence. See *id.* at 597. Even in doing so, however, the Court insisted that it did so voluntarily, and not for want of authority. See *id.* at 598.

Greene.⁵⁵¹ There, the Court had held that the Vienna Convention permitted application of procedural default rules to asserted violations of the Convention.⁵⁵² While limited in its explicit review of the U.S. courts, then, the ICJ's analysis included at least an indirect dimension of review.⁵⁵³

Even if this pattern of ICJ engagement were to blossom into full-fledged review of U.S. decisions—not impossible to imagine, should the hearings mandated by *Avena* be widely denied or be of a cursory nature—it would not fully mimic the pattern of Chapter 11 and similar review. The ICJ's review in *Avena* continues to lack the dimension of power at the heart of the dialectical pattern described herein. While ICJ judgments may impose political costs for non-compliance, and enjoy consequent reputational power, this is necessarily limited.⁵⁵⁴ At least as presently constituted, ICJ review represents not dialectical review, but a peculiar case of *horizontal* review: It is not mere dialogue, but is more invasive *review*. In the absence of ready power, however, this review remains essentially horizontal in nature, with any impact dependent more on judicial comity or voluntary deference than on the more coercive dynamic of dialectical review.⁵⁵⁵

⁵⁵¹ 523 U.S. 371, 378–79 (1998) (per curiam).

⁵⁵² See *id.* at 375–76.

⁵⁵³ In another example of nascent dialectical exchange, Mexico's ad hoc judge in *Avena* drew on Justice Stevens's opinion in *Torres v. Mullin* (*Torres I*), 124 S. Ct. 919 (2003) (Stevens, J., respecting denial of certiorari), in which he objected to the Court's failure to grant certiorari, see *Avena*, 43 I.L.M. at 649, ¶ 34 (Mar. 31, 2004) (separate opinion of Judge Sepulveda). Perhaps the most trenchant example of dialogue in this line of cases, however, was the ICJ's response to the U.S. Supreme Court's failure to grant a stay of execution in the *LaGrand* litigation: “[I]t would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . .” *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104, 508, ¶ 114 (June 27) (citations omitted).

⁵⁵⁴ See Djajic, *supra* note 459, at 93–94 (using *Breard* to demonstrate that moral weight of ICJ decision may not always overcome lack of domestic legal enforceability).

⁵⁵⁵ Other forms of transnational review also might be included in this category. The enforcement of foreign judgments, for example, has a similar flavor. In essence, the secondary tribunal engages in a review of background procedures and the determination reached, but does so without any implication that the procedural or substantive norms “reviewed” might require reformation. The same can be said, though perhaps with a somewhat greater caveat, of adequate forum analyses, such as forum non conveniens assessments in the United States. See generally SLAUGHTER, *supra* note 57, at 86–87. See also *id.* at 92–93 (offering examples of critical judicial analyses of adequacy of alternative foreign fora). A final, though somewhat distinct, example might be the presentation of discovery requests to U.S. courts, where similar discovery would not be permitted at the situs of the litigation. See Lien, *supra* note 52, at 595. Here, there is some prospect for horizontal review, though still without any implication of intended or desired reform. Regardless, any such review is likely to be minimal, given the nature of the questions presented.

Yet the ICJ's influence should not be underestimated either. In the aftermath of *Avena*, the Oklahoma Court of Criminal Appeals granted the petition of Osbaldo Torres, one of the defendants named in *Avena*, for a hearing on his otherwise defaulted Vienna Convention claims.⁵⁵⁶ Perhaps even more significantly, the court issued an indefinite stay of execution, triggering the Oklahoma governor's nearly immediate decision to commute his sentence.⁵⁵⁷ Other courts—including state courts—also have acknowledged the ICJ's several rulings on the Vienna Convention and on the application of the procedural default rule to it.⁵⁵⁸ The ICJ's Vienna Convention jurisprudence thus may offer a promising foundation for a dilectical exchange between international and national courts, as national court attention to the ICJ grows more conventional and even comes to be expected. For the moment, however, the ICJ continues to exhibit the review component of dialectical review to a greater degree than its dimension of power.

Arguably, just the reverse might be said of the dispute settlement process of the WTO and its predecessor GATT regime. These regimes, by virtue of their capacity to authorize the withdrawal of trade concessions, possess substantial judicial power.⁵⁵⁹ Yet they have

⁵⁵⁶ *Torres v. Oklahoma (Torres II)*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing); see *Oklahoma Court Halts Execution*, *supra* note 16. Notably, the ICJ had explicitly flagged Torres's impending execution date. See *Avena* and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 594, ¶ 21 (Mar. 31, 2004).

⁵⁵⁷ *Torres II*, No. PCD-04-442; see *Oklahoma Court Halts Execution*, *supra* note 16; Walker, *supra* note 16. Notably, Torres had also been the subject of earlier opinions by Justice Stevens and Justice Breyer, who objected to the Supreme Court's failure to grant his petition for certiorari and challenged the lower federal courts on their refusal—on procedural default grounds—to consider Torres's assertion of a Vienna Convention violation. See, e.g., *Torres I*, 124 S. Ct. at 562.

⁵⁵⁸ See, e.g., *Bell v. Commonwealth*, 563 S.E.2d 695, 705–07 (Va. 2002) (conducting close parsing of ICJ precedent and seeking to reconcile domestic holding with international judgment). In *Avena*, in fact, the ICJ noted that a U.S. court had already found a violation of Article 36 of the Vienna Convention in one of the cases before it. See *Avena*, 43 I.L.M. 581, at 604, ¶ 59. In *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 347–51 (D.N.J. 2003), meanwhile, a federal district court carefully canvassed the ICJ's line of cases in assessing the requirements of Article 36 of the Vienna Convention. Most notably, the district court in *U.S. ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 978–79 (N.D. Ill. 2002), concluded that *LaGrand* “foreclose[s] strict reliance on procedural default rules for violations of the Vienna Convention.” In doing so, the court not only read the applicable Supreme Court precedent narrowly, but actually challenged its precedential authority. See *id.* at 979. But see *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004) (following Supreme Court's decision in *Breard v. Green*, 523 U.S. 371 (1998), on application of procedural default rules to Vienna Convention claims, notwithstanding subsequent ICJ decisions in *LaGrand* and *Avena*).

⁵⁵⁹ See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 23, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, 266 [hereinafter GATT].

had limited occasion to engage in review of a national court. In at least two cases, however, GATT/WTO tribunals have exhibited at least some willingness to review national courts. To begin with, in *United States—Section 337 of the Tariff Act of 1930*, a GATT dispute resolution panel considered the distinct adjudicatory mechanisms available in the United States to challenge foreign versus domestic infringing goods.⁵⁶⁰ Specifically, it considered whether the ability to assert patent violations by foreign-produced goods—but not domestic goods—either in U.S. district court *or* under the administrative procedures of section 337 of the 1930 Tariff Act violated GATT's non-discrimination requirements.⁵⁶¹ In doing so, it was necessary for the panel to assess, however gently, the procedural requirements, the available remedies, and even the caliber of judges in each U.S. forum.⁵⁶²

Offering further evidence of the potential for a pattern of review to emerge in the WTO was the decision in *United States—Section 110(5) of the U.S. Copyright Act*.⁵⁶³ In the latter case, the WTO Dispute Settlement Body considered the U.S. federal courts' interpretation of a provision of the U.S. Copyright Act designed to permit limited broadcast of copyrighted material without infringement of the copyright holder's rights. Section 110(5) of the U.S. Copyright Act offered a "homestyle exemption" restraining the rights of copyright holders to prevent limited public transmission of their copyrighted material, if carried out using "a single receiving apparatus of a kind commonly used in private homes."⁵⁶⁴ Challenging this provision, the European Union objected to the ambiguity of its language, as evidenced by its divergent interpretation in the various U.S. courts of appeal.⁵⁶⁵ Further, the European Union argued that the trajectory of the U.S. jurisprudence pointed toward a broadening of the exemption.⁵⁶⁶ Focusing on the range of interpretations, the United States countered that this was "a typical feature of a common-law

⁵⁶⁰ See *United States—Section 337 of the Tariff Act of 1930*, GATT B.I.S.D. (L/6439-36S/345) at ¶ 3.12 (1989), available at <http://www.sice.oas.org/dispute/gatt/87tar337.asp>.

⁵⁶¹ See GATT, *supra* note 559, art. 3.

⁵⁶² See *United States—Section 337 of the Tariff Act of 1930*, at ¶¶ 2.8, 3.12, 5.19.

⁵⁶³ See *United States—Section 110(5) of the U.S. Copyright Act—Report of the Panel*, WTO Doc. WT/DS160/R (June 15, 2000) [hereinafter *Report of the Panel*], available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

⁵⁶⁴ See *id.* ¶ 2.3.

⁵⁶⁵ See *id.* ¶ 6.137.

⁵⁶⁶ See *id.* ¶ 6.140.

system.”⁵⁶⁷ Moreover, it pointed out that only three U.S. courts had actually applied the exemption since its adoption.⁵⁶⁸

After engaging in some analysis of the U.S. jurisprudence, the WTO panel concluded that the U.S. case law was sufficiently cautious, as well as consistent, in its application of the exemption so as to comply with Article 13 of the TRIPS agreement.⁵⁶⁹ Nevertheless, suggestive of some of the pattern of dialectical engagement outlined herein, the panel twice flagged the ambiguity regarding the future breadth of the U.S. jurisprudence.⁵⁷⁰ In doing so, it referenced “the common understanding of the parties” as militating against any need for the panel to opine upon the possibility of future broadening.⁵⁷¹ In this way, the panel arguably offered some signal to the U.S. courts of its expectation that the future development of the case law would track the commitments to restraint offered by the United States in the course of the litigation.

The WTO, then, is clearly not without capacity to review the decisions of the U.S. courts and to engage in some exchange with them as to its consistency with international legal norms. As the WTO grows in its authority, and perhaps particularly as it increases its reach to a wider area of subject-matter issues through both treaty-based extensions and its own accretions of authority,⁵⁷² the occasion for such review of national courts may be expected to increase.

The most advanced manifestations of a growing pattern of international review of national courts—and of the potential utility of a paradigm of dialectical review—are the supranational courts of Europe. The ECJ and the ECHR are indisputably the most developed transnational judicial systems in the world today. While a comprehensive analysis of the dimensions of dialectical review in the ECJ and ECHR—a deserving subject of study—is beyond the scope of this work, a few closing words regarding each court are appropriate. This is especially true given that recent developments in both courts suggest an accelerating trend toward substantive and recurrent engagement with national courts.

⁵⁶⁷ *Id.* ¶ 6.136.

⁵⁶⁸ *See id.* ¶ 6.141.

⁵⁶⁹ *See id.* ¶ 6.144. In the *ADF* case, a Chapter 11 tribunal was similarly called to construe U.S. case law. *See ADF Group, Inc. v. United States*, 6 ICSID Rep. 470, ¶ 189 (NAFTA Ch. 11 Arb. Trib. 2000), available at <http://www.naftalaw.org>.

⁵⁷⁰ *See* Report of the Panel, *supra* note 563, ¶¶ 6.144, 6.147.

⁵⁷¹ *See id.* ¶ 6.147.

⁵⁷² *See, e.g.,* Debra P. Steger, Afterword: “*The Trade and . . .*” Conundrum—A Commentary, 96 AM. J. INT’L L. 135, 137–38, 143 (2002) (stating that WTO has evolved from contract into international system of binding rules, and its scope has expanded beyond matters viewed as “purely ‘trade’ subjects”).

The ECHR comes to its review of national courts by way of its adjudication of claims under the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁷³ Because the ECHR requires exhaustion of local remedies before any claim can be brought before it,⁵⁷⁴ it has a long history of reviewing national court decisions both on substance and process.⁵⁷⁵ Essentially, in the case of any member of the Council of Europe whose domestic legal regime includes some mechanism of constitutional review, the ECHR is likely to be presented with questions of law previously adjudicated by a national court.

Until 1998, litigation before the ECHR was initiated by the European Commission of Human Rights, to which individuals were required to bring their claims for preliminary review.⁵⁷⁶ With the entry into force of Protocol 11 on November 1, 1998, however, the Commission was merged with the Court, now permitting direct petition to the ECHR.⁵⁷⁷ With this shift, ECHR *power* has grown significantly. As suggested above, greater individual access can be expected to enhance international court influence, both by creating a domestic constituency for the Court's rulings and eliminating discretionary barriers to the review of sensitive cases.⁵⁷⁸ The ECHR, moreover, has explicitly flagged some expansion of the extent of its *review*. In its decision in *Selmouni v. France*, the Court counseled that as the protection of human rights becomes the norm across Europe, it would more aggressively review state action for breaches of fundamental values.⁵⁷⁹ The ECHR regime therefore incorporates both a willing-

⁵⁷³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, II, art. 19, 312 U.N.T.S. 221 (creating European Commission of Human Rights and ECHR).

⁵⁷⁴ See *id.* at III, art. 26.

⁵⁷⁵ See, e.g., *Bentham v. Netherlands*, 97 Eur. Ct. H.R. (ser. A), §§ 41–43 (1985) (reviewing procedure and applicable domestic law in determining that Bentham had not been heard by independent and impartial tribunal as required by Art. 6 of Convention); *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A), §§ 29, 36, 45–49 (1993) (examining national court proceedings, relevant domestic law and practice, and history of Jehovah's Witnesses in Greece, to find violation of Art. 9 (freedom of religion) for Kokkinakis's conviction for proselytism); *Letellier v. France*, 207 Eur. Ct. H.R. (ser. A), §§ 33–53 (1991) (reviewing facts, investigation proceedings, trial proceedings, applications for release, and relevant French legislation, to determine that France's decision to hold Letellier until commencement of trial violated Art. 5 of Convention for Protection of Human Rights and Fundamental Freedoms).

⁵⁷⁶ REGISTRAR OF THE EUR. CT. OF HUMAN RIGHTS, THE EUROPEAN COURT OF HUMAN RIGHTS: HISTORICAL BACKGROUND, ORGANISATION, AND PROCEDURE ¶ 6 (2003), at <http://www.echr.coe.int>.

⁵⁷⁷ See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 123–25 (2003).

⁵⁷⁸ See *supra* notes 115–17 and accompanying text.

⁵⁷⁹ See *Selmouni v. France*, App. No. 00025803/94, 29 Eur. H.R. Rep. 403, 407 (1999).

ness to review national courts and a growing degree of power to effectuate the results of its review.

On the other hand, the regime of the Convention for the Protection of Human Rights and Fundamental Freedom is also limited in important respects. The ECHR regime is relatively less domesticated in the national legal systems of Europe than the ECJ. ECHR power to influence domestic policy is thus more diffuse. When compared to Chapter 11, moreover, the fact that ECHR judgments are ordinarily directives to national authorities to make domestic adjustments,⁵⁸⁰ rather than monetary judgments against the state found in violation of the Convention, means that ECHR power is further constrained. The ECHR's capacity for dialectical review therefore remains incomplete.

The ECJ represents the most elaborate intertwining of international adjudication with national judicial systems in the world today. This judicial relationship has consequently been studied widely and is acclaimed for its role in the transformation of Europe into a common polity.⁵⁸¹ Yet what is most notable about the ECJ's interaction with national courts, I would argue, is not the extent of review of domestic courts, but its avoidance of such review.⁵⁸² The ECJ actually engages in little review of national courts, for the very reason of its acclaimed preliminary reference procedure.⁵⁸³

⁵⁸⁰ See Jörg Polakiewicz, *The Execution of Judgments of the European Court of Human Rights*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000*, at 56-57 (Robert Blackburn & Jörg Polakiewicz eds., 2001) (noting that states enjoy freedom of choice as to means of fulfilling their obligations).

⁵⁸¹ See, e.g., Alec Stone Sweet, *Constitutional Dialogues in the European Community*, in *THE EUROPEAN COURT & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* 305, 306-08 (Anne-Marie Slaughter, Alec Stone Sweet, & J.H.H. Weiler eds., 1998) [hereinafter Sweet, *Constitutional Dialogues*] (describing constitutionalisation of European Community (EC) treaties through integration of EC law into legal systems of member states); Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95*, J. EUR. PUB. POL., Mar. 1998, at 66; Weiler, *supra* note 498, at 2405-07. Fred Abbott has questioned the analogy of NAFTA to the ECJ. See Abbott, *supra* note 116, at 520-21 (characterizing NAFTA as combining hard law with limited institutional delegation, while European legal system consists of soft law with high delegation). But see *id.* at 543 (suggesting Chapter 11 represents case of high delegation within NAFTA).

⁵⁸² Cf. ALTER, *supra* note 102, at 218 (describing ECJ's use of varied preliminary references to acclimatize member states to ECJ's views and to avoid direct conflicts with national courts).

⁵⁸³ There is some such review, of course, or at least the capacity for it. Two lines of cases deserve note in this vein. First, the ECJ's supremacy doctrine developed out of its interaction with, and ultimate review of, the ICC. See Sweet, *Constitutional Dialogues*, *supra* note 581, at 312-15. After a shareholder in an Italian electrical company refused to pay what amounted to a \$3 bill, on the grounds that Italy unlawfully had expropriated the company in violation of Article 37 of the European Economic Community treaty, the trial judge referred the matter to both the ECJ and the ICC. See *id.* The ICC rejected Costa's claim

Under Article 234⁵⁸⁴ of the Treaty Establishing the European Community, the ECJ may give preliminary rulings interpreting European law at the request of any national court.⁵⁸⁵ In the face of ambiguous questions of European law, references for preliminary rulings are discretionary for lower national courts, but mandatory for

on the ground that the nationalization decision postdated the EEC treaty, thereby adopting the rule of *lex posteriori*. The ECJ independently rejected Costa's claim, while simultaneously adopting the doctrine of European law's supremacy. See *Costa v. ENEL*, 1964 E.C.R. 585.

More than a decade later, in *Societa Industrie chimiche Italia centrale*, Corte cost., sez. un., 30 oct. 1975, n.232, II Foro It. I 542, the ICC directed the lower Italian courts to abandon *lex posteriori* national rules, even in the face of contrary European law, only with the ICC's explicit approval. See Sweet, *Constitutional Dialogues*, *supra* note 581, at 314. After the ECJ nonetheless authorized an Italian court to set aside national legislation inconsistent with European law, the Italian government objected, citing *Societa Industrie chimiche*. See *id.* The Italian lower court again submitted the case to the ECJ, leading to the *Simmenthal* decision, in which the ECJ reviewed and roundly rejected the ICC's analysis. It held, rather, that the rule of *lex posteriori* could not trump contrary European law. See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629, 645.

More familiar to students of European law, if exhibiting a weaker pattern of "review" than *Simmenthal*, is the *Solange* line of cases. See ALTER, *supra* note 102, at 87-98; Koch, *supra* note 69, at 14-15 (describing *Solange* and successor cases). The *Solange* case originally arose from a dispute regarding a license application by the Internationale Handelsgesellschaft company. See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr*, 1970 E.C.R. 1125, 1137. The ECJ, responding to a German administrative court's preliminary reference as to whether a particular European regulation violated German law, replied that an EC measure could not be held invalid for running contrary to a national constitution. See *id.* In response, however, the German Constitutional Court (BVerfG) ruled that Community law could not trump Germany's Basic Law, given the absence of analogous protections of fundamental rights within the European law regime. See *Internationale Handelsgesellschaft mbH v. Einfuhr unter Vorratsstelle für Getreide und Futtermittel* (Solange I), BVerfGE 37, 271, [1974] 2 C.M.L.R. 540. Explicit negotiations ensued, to avoid any sharp rupture. See ALTER, *supra* note 102, at 93. Under pressure, the German Constitutional Court held its tongue for more than a decade before returning to the negotiating table with *Solange II*. By then, the Court had softened its stance, concluding that because the ECJ had responded to its earlier decision by expanding its protection of fundamental rights, the BVerfG would no longer exercise authority to regulate the constitutionality of European acts. See *Wünsche Handelsgesellschaft* (Solange II), BVerfGE 73, 339, [1987] 3 C.M.L.R. 225. Most recently, the BVerfG's *Maastricht* decision appeared to revise its position yet further, after noting that acts by supranational organizations could impact protected individuals under German law significantly. See *Brunner and Others v. The European Union Treaty (Maastricht)*, BVerfGE 89, 155, [1994] 1 C.M.L.R. 57. Nonetheless, it declined to exercise its jurisdiction to decide on the validity of European legislation in that case and encouraged a continued spirit of cooperation between the two courts. See *id.* Other cases of ECJ interaction with national courts, and ensuing judicial interchange, are noted *infra* note 597.

⁵⁸⁴ Article 234 previously was encompassed in Article 177 of the Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11, 109.

⁵⁸⁵ CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 26, 2001, O.J. (C 80) 1 (2001), art. 234.

courts of last resort.⁵⁸⁶ While such preliminary rulings originally were intended to address only the validity of European law, the ECJ successfully encouraged national courts to use the mechanism to review the compatibility of national law with European law, thereby creating a decentralized mechanism for the ECJ to monitor member state compliance with European law.⁵⁸⁷ As a result, preliminary references now account for more than half of the ECJ's caseload.⁵⁸⁸

Given the existence of the preliminary reference mechanism, however, the ECJ has had limited occasion to review national courts. Instead, it engages in something more akin to judicial dialogue, as Larry Helfer and Anne-Marie Slaughter have described it.⁵⁸⁹ The ECJ's interaction with the national courts of Europe thus has more in common with national courts' interaction with one another than with the U.S. Supreme Court's interaction with the U.S. courts of appeal. In both the ECJ's interaction with the German Constitutional Court and the German Constitutional Court's interaction with the French Constitutional Council, the relevant courts are, in a sense, "borrowing" from one another. In the former case, they are borrowing an expertise in European or domestic law, while in the latter, they are borrowing comparative case law. They are not, in either case, *reviewing* the decision of the other court. This is especially apparent in the case of the ECJ, as there is not even any decision to review.⁵⁹⁰

The power dimension of the ECJ's interaction with national courts is likewise restrained. No mechanism of obligation—at least in the preliminary reference from lower national courts—compels that interaction. Rather, the courts' dialogue is more in the nature of a voluntary engagement of autonomous judicial institutions.⁵⁹¹ There is greater obligation (and potential conflict) in the interaction of the

⁵⁸⁶ See *id.*; see also Srl CILFIT v. Ministry of Health, Case C-283/81, 1982 E.C.R. 3415, [1983] 1 C.M.L.R. 472 (1982) (holding that court of last resort is required to bring matters to which there is no judicial remedy before Court of Justice). Preliminary references are mandatory for judges of lower-level courts where the national judge doubts the validity of the relevant European law. While national courts may dismiss challenges to the validity of European law, only the ECJ may *invalidate* a community law. See, e.g., Foto-Frost v. Hauptzollamt Lübeck-Ost, Case C-85, 1987 E.C.R. 4199, [1988] 3 C.M.L.R. 57 (1987) (holding that national courts cannot invalidate measures taken by Community institutions). Meanwhile, a court of last resort need not refer a case, if the proper interpretation of European law is irrelevant to the dispute, obvious, or already provided in prior ECJ case law. See Srl CILFIT v. Ministry of Health, 1982 E.C.R. at 3431–32.

⁵⁸⁷ See ALTER, *supra* note 102, at 9–18.

⁵⁸⁸ See Sean Pager, *Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice*, 26 B.C. INT'L & COMP. L. REV. 35, 66 (2003).

⁵⁸⁹ See Helfer & Slaughter, *supra* note 2, at 323–26.

⁵⁹⁰ The preliminary reference to the ECJ thus consists of a question addressed to the European court, raised before any national court decision.

⁵⁹¹ See Helfer & Slaughter, *supra* note 2, at 331–35.

ECJ and the high courts of the member states.⁵⁹² Given that the vast majority of preliminary references come from lower national courts, however, even the presence of some degree of power does not alter the general assessment of the pattern of ECJ interaction with European national courts.⁵⁹³

For the most part, then, the preliminary reference process has minimized the extent of ECJ review of national courts, and hence the occasion for dialectical review. Two quite recent cases, however, may impact the pattern of ECJ review, creating greater prospect of it in the years ahead. The first traces back to the ECJ's 1991 decision in *Francovich v. Italy*,⁵⁹⁴ in which the Court held that a member state could be liable for damages where the state's failure to implement a directive of European law led to private harm.⁵⁹⁵ Absent such compensation, the ECJ held, the effectiveness of European rules would be called into question and the protection of its recognized rights undermined.⁵⁹⁶

Francovich left open a number of questions, including which government institutions have the potential to trigger liability. In *Brasserie du Pêcheur SA v. Germany* and *The Queen v. Sec'y of State for Transport ex parte Factorame Ltd.*, the ECJ sought to resolve this issue, indicating that member state liability could arise not only from executive or legislative action, but from judicial action as well.⁵⁹⁷ The prospect of judicial liability remained merely speculative, however, until the Court's September 2003 decision in *Köbler v. Austria*.⁵⁹⁸

In *Köbler*, the ECJ considered a preliminary reference from a lower Austrian court faced with a claim for compensation based on an allegedly erroneous decision of the Supreme Administrative Court of

⁵⁹² See, e.g., ALTER, *supra* note 102, at 90–98 (discussing *Solange* line of cases); *id.* at 135–78 (tracing acceptance of European supremacy by three French high courts); SLAUGHTER, *supra* note 57, at 85–86, 147. The “turnover tax struggle” between the ECJ and Germany's Tax Court in the late 1960s represents another case of intersystemic judicial conflict in Europe. See ALTER, *supra* note 102, at 80–87; see also *id.* at 160–61 (describing struggle between ECJ and French Conseil d'Etat).

⁵⁹³ See Weiler, *supra* note 498, at 2426. Lower court preliminary references, moreover, might be expected to minimize the prospect that difficult cases and/or those which require a preliminary reference will ever reach a high court.

⁵⁹⁴ Case C-9/90, *Francovich & Others v. Italian Republic*, 1991 E.C.R. I-5357.

⁵⁹⁵ See *id.*

⁵⁹⁶ See *id.* at 5414, ¶ 33.

⁵⁹⁷ Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany* and *The Queen v. Sec'y of State for Transport ex parte Factorame Ltd.*, 1996 E.C.R. I-1029. The ECJ thus held that liability extended to “any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.” *Id.* at 1145, ¶ 32.

⁵⁹⁸ Case C-224/01, *Gerhard Köbler v. Republik Österreich*, 41 C.M.L.R. 813 (2004).

Austria.⁵⁹⁹ The ECJ first affirmed the applicability of *Francovich* to the courts, including a national court of last resort,⁶⁰⁰ notwithstanding concerns of *res judicata* raised by a number of member states in their submissions to the ECJ.⁶⁰¹ Like the tribunal in *Loewen*, however, the ECJ coupled this significant ruling, as well as its rejection of the Supreme Administrative Court's decision on the merits, with a finding against liability.⁶⁰² Notably, the ECJ specifically declined to leave this question of liability to the Austrian court; instead, it went out of its way to offer its own analysis.⁶⁰³ In doing so, it might be understood to have tracked the judgment of the *Loewen* tribunal, both opening, and seeking to avoid foreclosure of, an avenue of future dialectical engagement with national courts. While the relevant liability determinations under *Francovich* and *Köbler* will be first and foremost questions for the national courts in the future, the prospect of liability for national court conduct can be expected to offer occasion for ECJ review as well.

Perhaps even more notable than the decision in *Köbler* has been the recent invocation of Article 226 of the Treaty against the national courts of Europe. Article 226 provides for enforcement of European law by the European Commission.⁶⁰⁴ Until recently, Article 226 had never been applied to a judicial institution. Yet this, too, changed in late 2003 with the case of *Commission v. Italy*, in which the ECJ reviewed the jurisprudence of the Italian courts, particularly that of the Italian Court of Cassation, regarding the burden of proof in national tax cases.⁶⁰⁵ After declining to protect judicial bodies completely from action under Article 226, the ECJ noted that "isolated or numerically insignificant judicial decisions in the context of case law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account."⁶⁰⁶ Given the Italian high court's affirmation of the relevant body of case law,

⁵⁹⁹ See *id.*

⁶⁰⁰ See *id.* ¶¶ 33–36.

⁶⁰¹ See *id.* ¶¶ 20, 39–40. The application of *Francovich* to the courts was, however, held to be subject to a forgiving standard of review. See *id.* ¶¶ 51–56.

⁶⁰² See *id.* ¶¶ 83–88, 123–24. In the course of its merits analysis, however, the Court rebuked the Supreme Administrative Court of Austria for the withdrawal of its own preliminary reference to the ECJ. See *id.* ¶¶ 106–18. As a court of final resort, that reference was obligatory, assuming any ambiguity as to the question of European law. See *supra* note 586 and accompanying text.

⁶⁰³ See *Köbler*, 41 C.M.L.R. ¶¶ 60–88.

⁶⁰⁴ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, 1997 O.J. (C 340) 3, art. 226.

⁶⁰⁵ Case C-129/00, *Commission v. Italy*, ¶¶ 11–13 (2003), at <http://europa.eu.int>.

⁶⁰⁶ *Id.* ¶ 32.

however, the ECJ found Italy—in the form of its high court—to be in violation of its treaty obligations.⁶⁰⁷

In light of the institutional foundations of the ECHR and the ECJ and the recent procedural changes and court decisions described above, international review of national courts may be a growing trend in Europe. Existing patterns of review—coupled with meaningful judicial power—may be expected to increase in incidence and intensity if jurisdictional changes at the ECHR and the ECJ's recent jurisprudence are any indication.⁶⁰⁸ In fact, this trend may be even stronger in the ECJ than its jurisprudence alone might suggest. With the adoption of the European Constitution, the supranational courts of Europe may have even more to review in the years ahead.⁶⁰⁹

As the foregoing examples make clear, Chapter 11 is not unique in its review of national courts.⁶¹⁰ Yet Chapter 11's institutional

⁶⁰⁷ See *id.* ¶¶ 34–35.

⁶⁰⁸ Likewise, proposals for national courts to offer suggested interpretations along with their preliminary references, see King, *supra* note 191, at 736–37, would move the ECJ–national court interaction closer to a dialectical pattern.

⁶⁰⁹ See *Signing of EU Constitution to Take Place in Rome November 29*, ANSA ENG. MEDIA SERVICE, July 9, 2004.

⁶¹⁰ Other potential sources of such review are Chapter 19 of NAFTA and the International Criminal Court. Under Chapter 19 of NAFTA, binational panels review U.S., Canadian, and Mexican administrative-agency adjudications in antidumping and countervailing duty cases, applying relevant national law. See Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996); see also Alford, *supra* note 2, at 687 n.37. Such review might be construed essentially as a statutory regime of dialectical review, especially given the panels' reliance on domestic legal norms. This is evident in descriptions of the Chapter 19 pattern of engagement:

[T]he FTA boards created a reputation, through repeated remands, for being suspicious of the manner in which the U.S. bureaucracy handled unfair trade cases. They did this through a series of initial decisions in which they specified procedures for the bureaucracy to follow. The bureaucracy had the choice of accepting the panels' orders or readjudicating the case. After repeated remands, often of the same case, the bureaucracy sent forward fewer cases.

Id. at 552. A dialectical norm in which cases pass back and forth several times has thus become the convention under Chapter 19. See *id.* at 551. A ready example of this pattern was the series of exchanges in the Canadian pork countervailing duty case. See *id.* at 554–55. An even more notable case may be recent proceedings in the ongoing Softwood Lumber dispute between Canada and the United States. In that case, after a series of remands, the Chapter 19 panel finally issued an order giving the U.S. International Trade Commission (ITC) ten days to issue a finding that there was no threat of injury to the U.S. industry, without further analysis or evidentiary review. See *NAFTA Lumber Panel Orders ITC to Find No Injury Threat in 10 Days*, INSIDE U.S. TRADE, Sept. 3, 2004, at 1. While explicitly challenging the Chapter 19 panel's authority to issue such an order, the ITC nonetheless complied. See *ITC Complies With NAFTA Lumber Panel, Setting Up Future Challenge*, INSIDE U.S. TRADE, Sept. 17, 2004, at 3. Extending this pattern of exchange, however, the United States announced its intention to challenge the Chapter 19 panel's directive before NAFTA's Extraordinary Challenge Committee. See *U.S. To Pursue Extraordinary Challenge of NAFTA Lumber Ruling*, INSIDE U.S. TRADE, Oct. 15, 2004, at

design and resulting character make it an interesting case study, and one whose analysis may shed light on patterns of international review of national courts generally.⁶¹¹ Perhaps most notable is the fact that Chapter 11 is *not* a European court, but applies in the Americas, and to the United States in particular. Given the general aversion to international review in the United States, Chapter 11 offers a timely test of whether dialectical review can actually work. In Europe, supranational judicial review emerged from a system commonly understood to involve a diminution in sovereignty and designed to facilitate harmonization.⁶¹² This cannot be said of Chapter 11, or of NAFTA generally.⁶¹³ Yet, few could have imagined the extent of European integration—a process extending far beyond the initial vision of its founders. Nor could they have predicted the integral role the ECJ would play in that process. One wonders whether observers might one day look back at Chapter 11 with similar surprise.

CONCLUSION

While the interaction of judicial institutions is commonly conceived to be shaped by a dynamic of either vertical hierarchy or horizontal comity, this Article outlines a hybrid pattern of interaction, standing between these extremes. Alexander Bickel, Robert Cover,

1. As this example may suggest, however, the power of Chapter 19 panels may ultimately be too substantial, compared to the national administrative adjudicators whom they review, for the Chapter 19 process to operate as a true dialectic.

Yet another international opportunity for dialectical exchange may come in the interaction of national courts and the newly established International Criminal Court, under Article 17 of the Rome Statute, Rome Statute of the International Criminal Court, July 17, 1998, art. 17, 37 I.L.M. 1002, 1012, which provides for complementary jurisdiction in the International Criminal Court if national courts fail to exercise their jurisdiction to prosecute actionable international crimes. Articulation of the detailed implications of the latter standard should offer substantial opportunity for a dialectical pattern of engagement. See SLAUGHTER, *supra* note 57, at 148–50; see also Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 389 (1998) (describing choice between primacy and complementarity in jurisdiction of International Criminal Court).

⁶¹¹ A comparative analysis of the various courts noted above, through a prism of dialectical review, is beyond the scope of this Article, but offers a fruitful avenue for future study.

⁶¹² See Jacqueline Bhabha, *European Harmonisation of Asylum Policy: A Flawed Process*, 35 VA. J. INT'L L. 101, 102 (1994) (noting that major objective of European leaders has been to create “increasingly connected and interdependent” Europe).

⁶¹³ See Abbott, *supra* note 116, at 522–23; Alvarez, *supra* note 115, at 430 n.113; see also *Committee Statements on the NAFTA: Hearing Before the Senate Comm. on Finance, Statement of the Committee on Finance on S. 1627 The North American Free Trade Agreement Implementation Act (NAFTA)*, 103rd Cong., 139 CONG. REC. 30,201, 30,203 (1993) (“If in the future a NAFTA dispute settlement panel were to determine that a particular U.S. law was inconsistent with the NAFTA, the Congress would retain the full authority to determine whether or not to amend or modify that law.”).

Alexander Aleinikoff, Guido Calabresi, Neal Katyal, and others have identified an array of non-conventional forms of judicial communication. I offer “dialectical review” in a similar spirit. Judicial institutions engaged in dialectical review participate in more than dialogue, which each can freely disregard. In dialectical review, as revealed by Chapter 11 and its domestic analogies, both courts enjoy some capacity to assert power, albeit not in so direct or final a form as in appellate review. The intersystemic judicial communication of dialectical review, as a result, is not easily ignored. Besides this distinct power dynamic, an effective regime of dialectical review rests on the presence of diverse legal and institutional perspectives and an institutional design crafted to provide adjudicatory continuity. In tandem, these features make dialectical review a mechanism of beneficial legal innovation through which judicial coordination, jurisprudential harmonization, and norm internalization may arise.

This analysis offers its most immediate recommendations to the judges who are party to these forms of interactions and the policy-makers charged with the reform and replication of Chapter 11 and analogous regimes. By only a slight extension, the analysis herein speaks to judicial, legislative, and executive participants in other international dispute settlement regimes, including the ICJ, the WTO, and the ECJ. It may extend further afield, yet closer to home, by its application to the interplay of federal and state courts in habeas and other civil matters, and to the interaction of both federal and state courts with tribal courts in the United States. To the judges who are potential parties to dialectical review, this Article commends an approach characterized by careful but firm assertions of authority, by contextual and casuist analysis, and by efforts to enhance their relevant judicial system’s capacity for continuity. Policymakers charged with the reform of existing mechanisms of intersystemic adjudication and the creation of new systems of review should focus particular attention on maintaining an equipoise of power between participating tribunals, thus furthering the dialectical dynamic and the prospect of efficient innovation.

Yet, the ultimate lessons of the present analysis may extend even further. The model of dialectical review proposed herein ultimately speaks to an array of situations in which institutions—including legislative and executive institutions and even broader social institutions—interact without a dominant convention of either hierarchy or comity. Such situations may represent a far greater—and perhaps growing—proportion of the interactions among institutions than the ordinary dichotomy of mandate versus contract might suggest.

Along horizontal dimensions of governance, the pattern of dialectical engagement may offer meaningful guidance for the complex interaction of legislative, executive, and judicial authorities in the modern administrative state. Vertically, dialectical review bespeaks a conception of federal-state relations grounded not in federalism's conventional project of clear jurisdictional segregation, but in a dynamic interaction directed to a fluid distribution of power. Exploration of the interaction of international tribunals and national courts in the novel setting of Chapter 11 may therefore have important implications well beyond NAFTA and international adjudication. This study and its paradigm of dialectical review may offer fruitful guidance for the management of a growing dynamic of coordination among political and social institutions, both at home and abroad.