

Article 1135 - Final Award

[Article 1135 Final Award](#)

I. Negotiating Text

- The negotiating draft of May 13, 1992, contained the first text related to matters ultimately provided for in Article 1135. Article XX07(3), proposed by the United States, required an investor to choose between investor-State arbitration and dispute settlement before domestic courts or administrative tribunals. Where the investor opted for investor-State arbitration, the only remedies available were monetary damages or restitution of property.
- The U.S. proposal was maintained in subsequent texts. In addition, Canada proposed a modified version of Article XX07, which was placed immediately after the U.S. text in the June 4, 1992, draft. Article XX07(10a)(c) of the Canadian proposal allowed a tribunal to award only monetary compensation or restitution of property. Article XX07(13)(2) prohibited awards of punitive or aggravated damages and prohibited any order to return property that was not owned and [page "1135-1"](#) controlled by the Party subject to the order. Article XX07(13)(3) stipulated that an order to return property must also allow payment of compensation in lieu of returning the property. Article XX07(13)(4) provided that costs and interest on an award would be governed by the law of the place of arbitration.
- Article 2130 of the August 4, 1992, draft incorporated aspects of both the Canadian and American proposals. Article 2130(6) was entitled "Final Relief" and provided that a tribunal could award only monetary damages or restitution of property, but an award for restitution had to allow payment of compensation in lieu thereof. Punitive damages could not be awarded.
- The August 4, 1992, provision on final relief was essentially copied into the August 11, 1992 text as Article 2124(6). Article 2124(7), entitled "Standing," added that a tribunal must order that any relief awarded to an investor claiming on behalf of an enterprise "be for the benefit of the investment without prejudice to any interest that non-controlling or minority shareholders may have in the relief under the applicable domestic law." A footnote to this provision provided that non-controlling or minority shareholders could not bring separate claims arising out of the same breach. This appears to be a precursor to final Article 1135(2).
- The article on final awards in the September 4, 1992, text was substantially modified. Article 1134(1) provided that a tribunal could award only monetary damages and applicable interest, or restitution of property. An award of restitution was required to provide that the disputing Party had the option of paying damages and interest in lieu of restitution. Article 1134(2) respecting final awards in a claim under Article 1117(1) was identical to final Article 1135(2).
- Article 1134(3) prohibited awards of punitive damages.
- The final changes to this article were made in the draft of December 10, 1992. Article 1135(1) of that text was modified to provide that a tribunal could award, "separately or in combination," only monetary damages and applicable interest, or restitution with the option to the disputing Party to pay money and interest in lieu thereof. A final sentence was added to Article 1135(1) allowing a tribunal to award costs in accordance with the applicable arbitration rules.

II. Commentary

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A. Introduction

Arbitration rules and agreements to arbitrate usually specify the types of relief a tribunal may order. Typical examples of available relief include specific performance, rectification, filling gaps in a contract, damages, declarations, or restitution. Article 1135 restricts the final relief that a NAFTA Chapter 11 tribunal can [page "1135-3"](#) award to monetary damages and interest, alone or in combination with restitution of property. The tribunal may also award costs.

Jurisdiction

Topics

› Investment Arbitration

Source

› **Article 1135 - Final Award** in Meg N. Kinnear, Andrea K. Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. 1, March 2008 (© Kluwer Law International; Kluwer Law International 2006) pp. 1135-1 - 1135-50


B. Types of Award

Numerous types of orders are made in the course of an arbitration. However, the applicable arbitration rules, and most tribunals, do not always define or distinguish among the different types of awards that may issue.

The UNCITRAL Arbitration Rules expressly contemplate different types of awards. Article 32(1) of the UNCITRAL Arbitration Rules provides that, “[I]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.” Likewise, Article 31(1) of the UNCITRAL Arbitration Rules requires majority decision-making for “any awards or other decisions of the arbitral tribunal.” The UNCITRAL Arbitration Rules do not define the different types of awards, nor do they address the appropriate use of each type of award.

In *Methanex v. United States*, the tribunal issued a “Partial Award” rejecting various objections to jurisdiction and admissibility made by the United States but leaving its primary challenge to jurisdiction for decision after the hearing on the merits. The investor subsequently asked for the Partial Award to be reconsidered twice: the first request was made roughly three weeks after the Partial Award had issued and the second request was made roughly 18 months after the Partial Award first issued. The tribunal rejected both requests. In so doing, the tribunal unequivocally held that a partial award made by a tribunal is final and binding. It held:


A partial award is a final and binding award within Article 32(2) of the UNCITRAL Rules in regard to the matter it decides, although it does not leave the tribunal *functus officio*. It is presented as an award; and as an award it disposes finally of certain issues in the arbitration proceedings.

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Under the ICSID Convention Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules, the term “award” refers only to the final award which disposes of the case. These rules do not expressly contemplate different types of awards, although in practice tribunals constituted under these rules issue various awards other than final awards. In addition, the procedural rules under the ICSID Convention and the ICSID Additional Facility contemplate the issuance of procedural orders, distinct from awards. Rule 19 of the ICSID Convention Arbitration Rules and Article 27 of the ICSID Arbitration (Additional Facility) Rules are titled “Procedural Orders,” and allow a tribunal to make any orders that may be required for the conduct of the proceeding.

Awards are usually easily distinguishable from procedural orders or directions. Awards typically determine a specific, substantive issue and may be confirmed by recognition and enforcement. By contrast, procedural orders address the conduct of the proceeding and do not decide a matter in dispute. They are informal, often are not accompanied by reasons, and are subject to change as the arbitration evolves. Tribunals often stipulate that procedural orders may be made by the presiding arbitrator acting alone or in consultation with co-arbitrators. Procedural orders are not usually subject to enforcement.

The various types of awards can be more difficult to distinguish from one another. Awards are styled in numerous ways, including final, interim, interlocutory, preliminary, or partial. While generalizations are dangerous due to the inconsistent use of terminology in this area, interim awards are often defined as awards that do not definitively determine an issue in the proceedings, for example, an award respecting provisional measures. On the other hand, partial awards are often defined as awards that determine a specific issue definitively, for example, an award on jurisdiction or on the merits of a portion of the substantive claim against the disputing Party.

NAFTA Chapter 11 tribunals have not developed a consistent practice for naming awards, and various terms are found in tribunal decisions. Some Chapter 11 tribunals have even issued orders at the beginning of the arbitration  page “1135-5” confirming their capacity to grant different orders. For example, in *Canfor Corp. v. United States*, the tribunal ordered as follows:

Partial and Interim Awards

The Arbitral Tribunal shall be free to decide any issue by way of a partial or interim award, or by its final

award, as it may deem appropriate. All awards, whether interim or final, shall be in writing and shall state the reasons upon which the award is based.

Similarly, in *Pope & Talbot v. Canada*, the tribunal stated that interim, partial and preliminary awards were all considered to be decisions of the tribunal. The absence of a consistent approach to, and terminology respecting, awards is regrettable as it can cause confusion about what is a final award for the purposes of Article 1135 and when an award is final and enforceable for purposes of Article 1136.

C. Final Awards

A final award binds the disputing parties. The tribunal becomes *functus officio* on issuing its final award and cannot amend the award except in accordance with post-hearing powers prescribed by the applicable arbitral rules. As a result, determining when an award is final is vital to establish eligibility to commence post-hearing proceedings such as interpretation, revision, set-aside, recognition, and enforcement of the award and to calculate the time within which parties must seek those remedies.

The distinction between final and other awards can be difficult to draw. While there is no internationally accepted definition of “award” or “final award,” there is some consensus on the attributes of a final award. The final award is the decision which completely decides the dispute and ends the proceedings. As Redfern and Hunter note:

The distinction between a ‘final’ award and the other types of award that may be made by an arbitral tribunal is that a final award will dispose of all (or [page "1135-6"](#) all of the remaining) issues that have been raised in the arbitration . . . a ‘final’ award in the sense used in the various sets of international and institutional rules is literally the last award, the award that concludes the mandate of the arbitral tribunal.

In the NAFTA Chapter 11 context, the final award is usually the award determining liability and awarding damages, interests and costs. In some cases the final award deals with all of these issues, while in other cases the proceedings have been bifurcated and these issues are disposed of in sequential awards.

To date, the following cases have resulted in final awards in NAFTA Chapter 11 proceedings:

Final Awards in NAFTA Chapter 11 Cases

CASE	TRIBUNAL FINAL AWARDS (* indicates set-aside proceedings were taken)
<i>Ethyl Corp. v. Canada</i> , (UNCITRAL), Order of Termination	November 9, 1998 – arbitration settled
<i>Azinian v. Mexico</i> , ICSID (W. Bank), ARB(AF)/97/2, Award	November 1, 1999 – no liability found; costs not awarded
<i>Waste Mgmt, Inc. v. Mexico</i> (I), ICSID (W. Bank) ARB(AF)/98/2, Arbitral Award	June 2, 2000 – dismissed due to invalid waiver; costs of arbitration proceedings paid by claimant
<i>Metalclad Corp. v. Mexico</i> , ICSID (W. Bank), ARB(AF)/97/1, Award	August 30, 2000* – liability found on Articles 1105 & 1110 (liability upheld on Article 1110 only on set-aside proceedings); parties bear own costs and each pays half of tribunal costs
<i>Mondev Int'l Ltd. v. United States</i> , ICSID (W. Bank), ARB(AF)/99/2, Award	October 11, 2002 – no liability found; parties bear own costs and each pays half of arbitral costs
<i>Pope & Talbot, Inc. v. Canada</i> , (UNCITRAL), Award in Respect of Costs [See also April 10, 2001 (Award on Liability) and May 31, 2002 (Award in respect of Damages)]	November 26, 2002 – liability found on Article 1105; partial costs of US\$ 120,000 awarded against Canada
<i>Feldman v. Mexico</i> , ICSID (W. Bank), ARB(AF)/99/1, Award	December 12, 2002* – liability found on Article 1102; parties bear own costs and half of arbitral costs

<i>S. D. Myers, Inc. v. Canada</i> , (UNCITRAL) Final Award [See also November 13, 2000 (First Partial Award on Merits) and October 21, 2002 (Second Partial Award on damages)]	December 30, 2002* – liability found on Articles 1102 & 1105; partial costs awarded against Canada
<i>ADF Group Inc. v. United States</i> , ICSID (W. Bank), ARB(AF)/00/1, Award	January 9, 2003 – no liability found; Canada pays CDN\$ 500,000 partial costs of investor
<i>The Loewen Group Inc. et al v. United States</i> , ICSID (W. Bank), ARB(AF)/98/3, Award	June 25, 2003* – no liability found; costs awarded; award upheld on reconsideration;
<i>Waste Mgmt, Inc. v. Mexico (II)</i> , ICSID (W. Bank), ARB(AF)/00/3, Award	April 30, 2004 – no liability found; parties pay own costs and each pays half of arbitral costs
<i>GAMI Investments Inc. v. Mexico</i> , (UNCITRAL) Final Award	November 15, 2004 – no liability found; parties pay own costs and each pays half of arbitral costs
<i>Methanex Corp. v. United States</i> , (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits	August 3, 2005 – no liability found; costs of US\$ 2,989,423 awarded to United States
<i>Int'l Thunderbird Gaming Corp. (U.S.) v. Mexico</i> , (UNCITRAL) Arbitral Award	January 26, 2006* – no liability found; arbitration costs of US\$ 505,252.08 paid 3/4 by claimant and 1/4 by Mexico; claimant pays 3/4 of Mexico's costs of legal representation (US\$ 1,126,549.38)
<i>Fireman's Fund Insurance Co. (U.S.) v. Mexico</i> , ICSID (W. Bank) ARB(AF)/02/01, Award	July 17, 2006 – no liability found; parties pay own costs and each pays half of arbitral costs
<i>Canfor Corp. v. Canada, Tembec v. United States & Terminal Forest Products Ltd v. United States (Canfor Consolidation Award)</i> (UNCITRAL) Decision on the Preliminary Question	June 6, 2006 – no jurisdiction found; Canfor, Terminal and United States bear their own costs; Tembec bears costs of its own proceedings and pays U.S. legal costs
[See also July 19, 2007 Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings]	
<i>United Parcel Serv. of Am. Inc. (U.S.) v. Canada</i> , (UNCITRAL), Award	June 11, 2007 – no liability found; parties bear costs equally
<i>Bayview Irrigation District et al. (U.S.) v. Mexico</i> ICSID (W. Bank), ARB(AF)/05/01, Award	June 19, 2007 – no jurisdiction found; parties pay own costs and each pays half of tribunal costs
<i>Ascher Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. Mexico</i> , ICSID (W. Bank) ARB(AF)/04/05, Award, Tribunal Correction of Award Rendered January 8, 2008 but not yet public.	November 21, 2007 – liability found on Articles 1102 & 1106; parties bear own costs and each pays half of tribunal and secretariat costs
<i>Corn Products International v. Mexico</i> , ICSID (W. Bank) ARB(AF)/04/01, Partial Award on Liability	January 15, 2008 – liability found on Article 1102; damages and costs to be determined in next phase
<i>Canadian Cattlemen Claims – De Boer et al. (Can.) v. U.S.</i> (UNCITRAL) Award	January 28, 2008 – no jurisdiction found; parties bear own costs and each pays half of tribunal and secretariat costs

D. Bifurcation of Proceedings

Bifurcation orders separate the arbitration into two (or more) phases, with separate pleadings, hearings and awards emanating from each phase. The typical bifurcation order separates issues of jurisdiction from the remainder of the case [\[see page "1135-9"](#) on the merits or separates consideration of the merits from assessment of damages. Whether bifurcation is warranted depends on the facts of the case and the applicable law. In complex arbitrations, bifurcation allows the disputing parties and the tribunal to focus first on the merits of the case, to save costs and time and perhaps to settle on the quantum of damages or other discrete issues. It is especially useful to determine issues of jurisdiction or applicable law on a preliminary basis if they can be decided without tribunal fact-finding or on the

basis of agreed-upon facts. As noted by Redfern and Hunter, “[A]n arbitral tribunal that spent months hearing a dispute only to rule in its final award that it had no jurisdiction would, to put it mildly, look foolish (unless the issue of jurisdiction was inseparably bound up with the merits of the case).” On the other hand, if the facts related to the merits and the assessment of damages are significantly intertwined, it is best to address all issues together.

Bifurcation was rejected by the tribunal in *International Thunderbird v. Mexico* because the facts relating to the preliminary question concerning the investor and its control of the investment were so closely interwoven with the merits of the case. Similarly, bifurcation was rejected in *Glamis Gold v. United States* because the tribunal was not persuaded that bifurcation would ultimately “avoid expense for the Parties, contribute to Tribunal efficiency, or be practical.” Most NAFTA Chapter 11 tribunals have bifurcated the proceedings in some fashion. Some Chapter 11 arbitrations have been separated into liability and quantum of damages phases, some have dealt with preliminary questions and liability in one phase and quantum of damages in a second phase, and others have dealt with preliminary issues first, followed by a combined liability and damages [page “1135-10”](#) phase. In *Fireman’s Fund v. Mexico*, the tribunal split the hearing into three phases dealing with preliminary questions, liability and quantum, respectively. In *Pope & Talbot, Inc v. Canada*, the tribunal ordered a first phase to deal with the application of Articles 1102, 1106 and 1110, and if the investor was successful on any of these grounds, the matter would proceed to damages. If unsuccessful, the tribunal would consider the claims under Article 1105. The *Pope* tribunal modified this approach after the first hearing, asking for further evidence related to Article 1102 and legal argument on Articles 1102 and 1105 in the second phase of the case, with damages to be addressed in a third phase of the case and costs in a fourth phase.

[page “1135-10a”](#) [page “1135-10b”](#)

Recently several NAFTA Chapter 11 tribunals have agreed to sever a particular objection for preliminary hearing while leaving other objections to be determined at the merits stage. For example, in *Grand River*, the tribunal agreed to hear arguments on whether the proceedings were time-barred by Article 1116(2) or 1117(2) at a preliminary hearing. However, it declined to address other preliminary objections raised by the United States and joined these to the merits stage. Similarly, the *Canfor* consolidation tribunal ordered that the jurisdictional objection raised by the United States based on Article 1901(3) of NAFTA be dealt with in a preliminary and separate phase of the proceedings. All other objections as to jurisdiction and admissibility would be considered with the merits.

It can be especially difficult to determine if an award is final and eligible for post-award or set-aside proceedings where a case has been bifurcated. This difficulty is compounded by the wording of Article 1136. Article 1136(2) refers to the applicable review procedure for an interim award but does not explain what that procedure is. Article 1136(3) and (4) address review of a final award. This issue arose in *S. D. Myers v. Canada*, where the tribunal rendered the award on liability separately from the award on damages and costs. The respondent filed an application to set-aside the first “Partial Award” on liability. After filing the set-aside application the respondent applied to the *S. D. Myers* tribunal for a stay of the next scheduled phase of tribunal proceedings on damages and costs. The tribunal denied the stay application. It did not directly address whether the partial award on the merits was a final award for the purposes of a set-aside application or what review procedure might apply to such an award. However, the tribunal hinted at its view when it “... invited the Disputing Parties to reflect on the rhetorical question as to whether common sense might indicate that any judicial review of the Tribunal’s determinations of the overall issues between the parties should await the Final Award?” Canada ultimately filed a second notice of application for set-aside of the “Second Partial Award” on damages and the “Final Award” on costs. These applications were consolidated before the Federal Court of Canada and a single decision was issued on the consolidated set-aside application.

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E. Formal Requirements for Award

The applicable arbitration rules establish formal requirements for awards. The formal requirements are fairly similar in each of the three sets of applicable rules.

Article 32 of the UNCITRAL Arbitration Rules states:

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
5. The award may be made public only with the consent of both parties.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Articles 52 and 53 of the ICSID (Additional Facility) Arbitration Rules state:

Article 52 The Award

- (1) The award shall be made in writing and shall contain:
 - (a) a precise designation of each party;
 - (b) a statement that the Tribunal was established under these Rules, and a description of the method of its constitution;
 - (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
 - (d) the names of the agents, counsel and advocates of the parties;
 - (e) the dates and place of the sittings of the Tribunal;
 - (f) a summary of the proceeding;
 - (g) a statement of the facts as found by the Tribunal;
 - (h) the submissions of the parties;
 - (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and [page "1135-12"](#)
 - (j) any decision of the Tribunal regarding the cost of the proceeding.
- (2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (3) If the arbitration law of the country where the award is made requires that it be filed or registered by the Tribunal, the Tribunal shall comply with this requirement within the period of time required by law.
- (4) The award shall be final and binding on the parties. The parties waive any time limits for the rendering of the award which may be provided for by the law of the country where the award is made.

Article 53 Authentication of the Award; Certified Copies; Date


- (1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:
 - (a) authenticate the original text of the award and deposit it in the archives of the Secretariat, together with any individual opinions and statements of dissent; and
 - (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies;

provided, however, that if the original text of the award must be filed or registered as contemplated by Article 52(3) of these Rules the Secretary-General shall do so on behalf of the Tribunal or return the award to the Tribunal for this purpose.

- (2) The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
- (3) Except to the extent required for any registration or filing of the award by the Secretary-General under paragraph (1) of this Article, the Secretariat shall not publish the award without the consent of the parties. The Secretariat may, however, include in the publications of the Centre excerpts of the legal rules applied by the Tribunal.

Article 46 of the ICSID Convention Arbitration Rules requires an award to be signed within 120 days of the close of proceedings, with the possibility of a 30-day extension. Article 47 of those Rules lists numerous formal requirements for an award and Article 48 provides for the Secretary-General of ICSID to render the award. Articles 47 and 48 of the ICSID Convention Arbitration Rules are similar to Articles 52 and 53 of the ICSID (Additional Facility) Arbitration Rules.

On a practical basis, while arbitrators should be mindful of formal requirements for an award, “[g]enerally, the fact that the award is imperfect as to form does not impede its finality.”

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F. Principles Governing Compensation

The fundamental principles governing compensation for breaches of Chapter 11 are stated in NAFTA. However, the disputing parties must resort to general principles of international law for a detailed consideration of applicable concepts.

1. NAFTA Provisions

The only detailed guidance in NAFTA concerning compensation is found in Article 1110(2) to (6) with respect to expropriation cases. That Article does not address whether, or how, the principles in Article 1110(2) to (6) apply to assessment of compensation for breaches of other NAFTA obligations. One might have expected tribunals to view Article 1110(2) to (6) as a useful guideline in assessing compensation for breach of obligations other than Article 1110. In fact, Chapter 11 tribunals have not embraced such an approach.

In *Metalclad v. Mexico*, the tribunal assumed that the damages arising from a breach of Article 1105 in that case would be the same as for a breach of Article 1110 because Metalclad had completely lost its investment. The tribunal did not address, as a general principle, whether the standard for compensation was different in expropriation and non-expropriation cases. In *S.D. Myers v. Canada*, the tribunal observed that the standard of compensation in expropriation cases was inapt for assessment of damages for breaches of other obligations because the former compensated for a lawful activity whereas the latter compensated for unlawful activities. The tribunal explained that:

Expropriations that take place in accordance with the framework of Article 1110 that is, expropriations that are conducted for a public purpose, on a non-discriminatory basis and in accordance with due process of law are 'lawful' under Chapter 11 provided that compensation is paid in accordance with the ... *fair market value of the asset* ... formula. Under other

provisions of Chapter 11, the liability of the host Party arises out of the fact that the government has done something that is contrary to the NAFTA and is 'unlawful' as between the disputing parties. The standard of compensation that an arbitral tribunal should apply may in some cases be influenced by the distinction between compensating for a lawful, as opposed to an unlawful, [B] page "1135-14" act. Fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor.

The tribunal in *Feldman* also found that the compensation formula in Article 1110 had no application to assessment of damages for breach of obligations other than expropriation and that absent a finding of expropriation, a successful investor would not be entitled to the fair market value or going concern value of the investment.

The *Archer Daniels Midland* tribunal assessed damages for breach of Articles 1102 and 1106, but held there had been no expropriation. It noted that NAFTA does not provide a specific measure of compensation for breaches that do not involve actual takings of property and that "fair market value" was not an apt measure for non-expropriation damages. In these circumstances, the tribunal found it had considerable discretion in establishing a methodology to determine damages and it relied on proof of actual loss in Mexico.

Articles 1116 and 1117 may also be relevant to assessment of damages. Those provisions allow an investor to claim on its own behalf or on behalf of an enterprise if it can establish breach of an investment obligation and that the investor "incurred loss or damage by reason of, or arising out of" that breach. The *Feldman* tribunal reasoned that this wording was a direction to tribunals to award actual loss. It noted: "... if loss or damage is the requirement for the submission of a claim, it arguably follows that the Tribunal may direct compensation in the amount of loss or damage actually incurred."

The *UPS v. Canada* tribunal also considered the link between damages and Articles 1116 and 1117. It held that any obligation associated with losses arising [B] page "1135-15" with respect to a claim could be based only on losses incurred in the three year period preceding the date on which the claim was filed. In the case of a continuing course of conduct, claimants must establish damages not from the inception of the course of conduct but only from the conduct within the three year period allowed by Article 1116(2).

The *UPS* tribunal also commented on the nature of the evidence required to prove damages for the purpose of Article 1116 or 1117, compared to the proof required in an assessment of damages under Article 1135. It stressed that damage and causation are inseparable aspects of a claim for damages – damage must flow from some cause. For the purposes of Article 1116 (or Article 1117), jurisdiction attaches when the investor asserts a breach and a *prima facie* case of resulting damage. A different standard attaches to a showing of damage at the remedy stage. At that point, the claimant must show that it has persuasive evidence of damage from the actions alleged to breach NAFTA and that the damage occurred as a consequence of the breaching party's conduct within the specific time-period subject to the tribunal's jurisdiction. Again, where the damage flows from a continuing course of conduct, the damage must flow from conduct that occurred within the three-year time period preceding the complaint.

In *Archer Daniels Midland Company v. Mexico*, the tribunal considered the effect of Article 1101 on the extent of recoverable damages. The investors argued that the offending measure had caused them damage both in Mexico, the territory of the respondent, and in their home territory, United States, and so they claimed lost profit and lost sales suffered in both States. According to the investors, they would have exported additional products made with high fructose corn syrup (HFCS) to Mexico if the offending measures (an excise tax on products with sweeteners other than cane sugar) had not been imposed. The tribunal noted that Article 1101 accorded protection only to measures relating to the investments of investors of one Party that are in the territory of the other Party that adopted the offending measure. It followed that the tribunal in this case had jurisdiction to compensate only for injury caused to the claimants' investment in Mexico. The claimants were "not entitled to recover the lost profits on HFCS they would have produced in the United States and exported to Mexico 'but for' the [excise] Tax, as these losses were not suffered in their capacity as investors in Mexico."

In summary, other than Article 1110 and perhaps Articles 1101, 1116 and 1117, no provisions of NAFTA address how compensation for breach of Chapter 11 is to be assessed. This absence of direction on assessment of damages for non-expropriation breaches has been interpreted as a clear signal that the drafters of NAFTA intended to give tribunals discretion to fashion the monetary compensation that would best repair the damage incurred. As the *S.D. Myers* tribunal concluded:

the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances [page "1135-16"](#) of the case, taking into account the principles of both international law and the provisions of the NAFTA.

2. International Law

International law provides greater direction on principles applicable to assessment of compensation for breaches other than expropriation than does the text of Chapter 11. Generally speaking, a State is responsible at international law for breaches of its obligations and must make reparations to compensate for the injury caused by its conduct. The reparations must undo the harm caused by the breach and should make the wronged party whole to the extent possible. The classic expression of this principle is found in the *Case Concerning the Factory at Chorzów*, where the Permanent Court of International Justice said:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

This principle is captured in Article 31 of the International Law Commission's Articles on State Responsibility, which provides:

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

[page "1135-17"](#)

The main forms of reparation at international law are restitution, compensation and satisfaction. Only the first two of these are available to the wronged investor under NAFTA Chapter 11.

The *Archer Daniels Midland* tribunal noted the international law underpinnings of the right to damages, quoting extensively from the International Law Commission's Articles on State Responsibility. It found that these rules were applicable pursuant to Article 1131 and also as a matter of customary international law.

3. Causation & Remoteness

Chapter 11 tribunals have required a causal link between the obligation breached and the compensation awarded. This is consistent with the wording of Articles 1116 and 1117 and is a usual prerequisite to an award of damages at international law. In *S.D. Myers*, the tribunal noted that compensation was payable "only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached." The tribunal viewed this as a requirement that the breach of the specific NAFTA provision be the proximate cause of the harm. It also found that the loss must be linked causally to interference with an investment located in the host state, although the loss need not all

be sustained within that host state to be recoverable. The *Feldman* tribunal expressed a similar view in finding that the amount of loss or damage must be “adequately connected” to the breach. The tribunal in *Pope & Talbot Inc v. Canada* also noted that the investor had to prove the loss or damage claimed was causally connected to the breach alleged by the investor. In *Archer Daniels Midland* the tribunal required “a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury.”

In *Metalclad v. Mexico*, the tribunal denied certain claims for relief because the causal connection between the breach and the damage was too remote. For example, Metalclad claimed damages attributable to the negative impact of the respondents' refusal of a permit on Metalclad's other business operations. The tribunal denied this claim because the drop in Metalclad's share prices was due to a variety of factors unconnected with the facts before the tribunal. The *Metalclad* tribunal also disallowed a claim for costs incurred prior to the year in which [page "1135-18"](#) Metalclad purchased COTERIN, the enterprise that owned the landfill and permits at issue. It found that these claims were too remote from the breach for which damages were claimed and therefore were not recoverable.

4. No Double Recovery

Although Article 1135 allows awards of monetary damages and restitution to be given separately or in combination, no award can result in double recovery. Where more than one article of NAFTA has been breached, and damages are awarded, the “damages for breach of any one NAFTA provision can take into account any damages already awarded under a breach of another NAFTA provision” but should not result in double recovery.

G. Monetary Damages

Monetary damages are the most usual form of compensation available under BITs and other international commercial agreements. A variety of tribunals have developed significant jurisprudence concerning awards of monetary damages, including the Iran-United States Claims Tribunal, ICSID tribunals and the International Court of Justice. These cases are cited routinely to Chapter 11 tribunals assessing the value of a breach of the NAFTA investment obligations. A general survey of the principles relevant to assessment of monetary damages is beyond the scope of this text, and the comments below are limited to issues considered by Chapter 11 tribunals to date.

[page "1135-18a"](#) [page "1135-18b"](#)

1. Burden of Proof

The investor seeking damages bears the burden of proving the quantum of loss that it claims. In *S. D. Myers v. Canada*, the tribunal summarized a tribunal's role in assessing monetary damages as follows:

The Tribunal reviews the legal framework for assessing damages and the many factors that the Parties, not always in agreement, stated should be taken into account. This leads to an award of damages, which is the Tribunal's judgement of what is appropriate in this case. In some circumstances, in the calculations, a fixed percentage or dollar amount is expressed. In others it is not. In all circumstances, the result is based on the Tribunal's appreciation of the evidence and its interpretation of the applicable law.

Usually disputing parties tender expert accounting evidence on the calculation of damages. In *Myers*, the tribunal found the parties' accounting experts useful, but felt compelled to perform its own analysis given the significant disparities in position between those experts. As it noted, the tribunal's role is to “exercise[s] its own judgement where judgemental decisions are required to be made.”

Proving damages in an investor-State arbitration is often a document-intensive endeavor. Responding parties typically challenge both the sufficiency of the evidence on damages as well as the conclusions to be drawn from that evidence. For example, the respondent in *Metalclad* challenged the sufficiency of the investor's supporting documentation, claiming that documentary proof was required for each expense claimed. The tribunal found that

"difficulties in verifying expense items due to incomplete files do not necessarily render the expenses claimed fundamentally erroneous," and it relied significantly on tax filings and independent audit documents to support the damage award.

2. Quantification of Damages

The object when quantifying damages is to ensure that the award wipes out the consequences of the illegal act and reestablishes the *status quo ante* to the extent possible. Where liability is based on illegal expropriation, Article 1110(2) directs the tribunal to assess damages equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. The tribunal has discretion to decide which valuation criteria best approximate fair market value in the circumstances. NAFTA provides no such direction for quantification of damages in relation to non-expropriation breaches. The few Chapter 11 cases to date that have awarded damages for breaches of obligations other than expropriation have taken a very fact-specific approach to the task. They have not elaborated generally applicable criteria. In *Metalclad*, the tribunal found liability [page "1135-19"](#) on the basis of both Articles 1105 and 1110. As a result, it approached quantification of damages from the perspective of Article 1110. The *Metalclad* tribunal considered using a discounted cash flow analysis to quantify the fair market value of the investment. However, ultimately it held that a discounted cash flow analysis was inappropriate because the landfill in question had never been operative and any award would be based on speculation about future profit. Instead, the tribunal assessed damages by referring to the investor's actual investment in the project.

In *Myers*, liability was based on breach of Articles 1102 and 1105. The tribunal stated that classifying whether damages were direct or indirect did not assist the exercise, and preferred to concentrate on whether the loss was actually caused by the breach and was not too remote. As it explained: "Where there is a breach of Chapter 11, and interference with the economic activity of an investment, the overall damage to the economic success of the investor arising from the measure adopted by the host state must be examined." The tribunal crafted a damages award that would take adequate account of the investment's potential to earn an income stream over the relevant time. It rejected quantification based on a return of money invested or a return on the investment because such an award would not make the claimant whole. The tribunal also rejected a claim for loss of opportunity, finding such a claim was too speculative and remote.

In *Feldman*, liability was based on a breach of Article 1102. The tribunal refused to value the investment as a going concern, both because it viewed this as an assessment tool for expropriation cases and because it was not satisfied that the evidence could establish accurately whether the investment was a going concern. Instead, the tribunal related the damage award to the actual breach found and calculated damages based on the value of rebates wrongly denied to the investor.

Finally, liability in *Pope & Talbot v. Canada* was based on breach of Article 1105. In awarding damages, the tribunal did not comment on the general theory of quantification, although it did state that claims under Articles 1116 and 1117 were not mutually exclusive and that an investor claiming loss or damage to its enterprise could also claim under Article 1116. Rather, the *Pope & Talbot* tribunal engaged in a very fact-based analysis of whether specific losses claimed arose from the breach found and whether particular items claimed were proved adequately.

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3. Loss of Profit

Historically, international tribunals have been cautious in awarding loss of profit, especially where the claim appears speculative. On the other hand, there are numerous examples of awards for loss of profit and it is certainly a recognized head of damage. Article 36(2) of the International Law Commission's Articles on State Responsibility expressly states that: "compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

The investors claimed loss of profit in *Metalclad*, *Myers*, *Feldman*, and *Pope & Talbot*. In none of these cases did the tribunal express concern about the availability of loss of profit from a principled standpoint, but each one found that an award of lost profit was not

warranted in the circumstances before them. For example, in *Metalclad* the tribunal ruled that “any award based on future profits would be wholly speculative.” In *Myers*, the tribunal commented on balancing claims for loss of profit with a realistic and rational assessment of likely future profitability. It commented:

The quantification of loss of future profits claims can present special challenges. On the one hand, a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote. On the other hand, fairness to the claimant requires that the court or tribunal should approach the task both realistically and rationally. The challenges become more acute in start-up situations where there is little or no relevant track record.

The *Myers* tribunal ultimately assessed damages based on a net income stream, which reflected future profitability by accounting for the investment’s “first mover advantage” in its market, the likelihood of success based on its past experience and the facts proved to the tribunal.

The *Archer Daniel Midland* tribunal agreed that lost profit was recoverable insofar as the claimants could prove it was neither speculative nor uncertain. Thus, the claimants had to present evidence establishing that the profits claimed were “probable or reasonably anticipated and not merely possible.”

[🔗 page "1135-21"](#)

4. Out-of-Pocket Expenses

Chapter 11 tribunals have addressed several specific out-of-pocket expense claims that are worth noting. In *Pope & Talbot* the tribunal refused to compensate for management time devoted to the claim because it was a fixed cost that would have been expended in any event. The *Pope* tribunal awarded damages for accounting and legal fees related to a quota verification review (the event giving rise to a finding of breach), for lobbying fees expended to counter the possibility of a reduction in export quota and for out-of-pocket expenses incurred at the hearing on interim measures. In *Myers*, out-of-pocket expenses were subsumed in the award for lost income streams.

5. Bundling Expenses

The investor in *Metalclad* claimed development costs for projects it operated in Mexico other than the investment at issue in the arbitration. These costs were claimed on the basis of bundling, an accounting concept whereby expenses related to different projects are aggregated and allocated to another project. The tribunal refused to award these expenses. It stated that it was not opposed to bundling in principle, but simply that bundling was not appropriate in this case.

6. Currency of Award

An award of damages is usually stated in the currency of the territory in which the loss was incurred or the currency used in the applicable contract. If multiple currencies are relevant to the facts at issue, the tribunal should hear argument on the currency in which the award ought to be expressed. In *Feldman*, the tribunal expressed the award in Mexican pesos because it was compensating Feldman for rebates that would have been paid by the government in Mexican currency. In *Myers*, the award was expressed in Canadian dollars because the lost income stream awarded was more closely connected with loss suffered in Canada than with the investor’s working currency in the United States. The *Pope* and *Metalclad* tribunals expressed their awards in U.S. dollars without addressing why that currency was most apt.

[🔗 page "1135-22"](#)

7. Summary of Damages and Costs Awarded in Chapter 11

The following chart summarizes the awards of damages and costs made by Chapter 11 tribunals to date.

Damages and Costs Awards in NAFTA Chapter 11 Cases

CASE	DAMAGES CLAIMED	DAMAGES AWARDED	COSTS AWARD
CANADA			
<i>Ethyl Corp. (U.S.) v. Canada</i> (UNCITRAL)	Statement of Claim, October 2, 1997, ¶ D: not less than US\$ 251,000,000, costs, interest and further relief	N/A – Case settled before arbitration on merits	N/A – Parties shared total arbitration cost of US\$ 255,258.21 equally (Order of Termination and Procedural Order, November 9, 1998)
<i>S. D. Myers, Inc. (U.S.) v. Canada</i> (UNCITRAL)	Statement of Claim, October 30, 1998, ¶¶ D: US\$ 20,000,000, costs to prevent breach, costs of proceedings, interest and further relief	Breach of Articles 1102 & 1105 Canada to pay investor CDN\$ 6,050,000 plus interest (Second Partial Award, October 21, 2002, ¶¶ 311)	Canada to pay investor CDN\$ 50,000 for arbitration costs and CDN\$ 500,000 for costs of legal representation, with interest (Final Award, December 30, 2002, ¶¶ 53–55)
<i>Pope & Talbot Inc. (U.S.) v. Canada</i> (UNCITRAL)	Statement of Claim, March 25, 1999, ¶ D: US\$ 407,552,200, costs, fees, expenses to oppose Softwood Lumber Agreement, interest, tax consequences, interim order and further relief	Breach of Article 1105 Canada to pay investor US\$ 461, 566 with interest (Award in Respect of Damages, May 31, 2002, ¶ 91)	Each party bears its own legal costs; parties each advanced US\$ 750,000 which is attributed to arbitral costs; Canada to pay investor US\$ 120,200 in respect of costs arising out of verification review episode and related to interim measures hearing (Award in Respect of Costs, November 26, 2002)
<i>United Parcel Serv. of Am. Inc. (U.S.) v. Canada</i> (UNCITRAL)	Statement of Claim, April 19, 1999, ¶ G: not less than US\$ 160,000,000, costs, fees, expenses, interest, tax consequences and further relief	No Liability	Each party bears its own costs and parties share equally arbitral costs of approximately US\$ 950,000 (Award on the Merits, June 11, 2007, ¶ 188)
UNITED STATES			

<i>Canfor Corp. v. Canada, Tembec v. United States & Terminal Forest Products Ltd v. United States Canfor Consolidation Award on Costs</i> (UNCITRAL)	Canfor Notice of Arbitration, July 9, 2002, ¶¶ 152, not less than USD\$ 250,000,000, costs, disbursements and interest; Tembec Notice of Arbitration, December 3, 2003, ¶¶ 117, not less than USD\$ 200,000,000, costs, fees and interest; Terminal Notice of Arbitration, March 31, 2004, ¶¶ 51-52, not less than USD\$ 9,000,000, costs, disbursements, tax consequences and interest;	No Jurisdiction except with respect to Byrd Amendment	Canfor, Terminal & U.S. bear own legal costs, Tembec bears cost of Article 1120 & 1126 arbitration with U.S. and pays U.S. legal fees, Joint Order on the Costs of Arbitration, July 19, 2007, ¶¶ XII(1)-(8)
<i>Canadian Cattlemen Claims – De Boer et al. (Can.) v. U.S.</i> (UNCITRAL)	Notices of Arbitration filed between March 16, 2005 and June 2, 2005 seeking damages between CDNS\$ 38,000 to CDNS\$ 95,000,000; total of approximately USD\$ 235,000,000, costs and fees	No Jurisdiction	Each party to bear its own costs and the claimants and respondent to each bear half of arbitration costs (Award on Jurisdiction, June 28, 2008, ¶¶ 229-232)
<i>The Loewen Group Inc. v. United States</i> (ICSID)	Notice of Arbitration, October 30, 1998, ¶¶ 186-187: not less than US\$ 725,000,000, interest, costs and further damages	No Liability	Each party to bear its own costs and to bear equally the expenses of the tribunal (Award, June 25, 2003, ¶ 240)
<i>Mondev Int'l Ltd v. United States</i> (ICSID)	Notice of Arbitration, September 1, 1999, ¶ 151: not less than US\$ 50,000,000, costs, interest and further relief	No Liability	Each party to bear its own costs and to bear equally the expenses of the tribunal and the ICSID Secretariat (Award, October 11, 2002, ¶ 160)
<i>Methanex Corp. (Can.) v. United States</i> (UNCITRAL)	Notice of Arbitration, December 3, 1999, US\$ 970,000,000, costs, attorney fees and taxes	No Liability	Investor pays respondent US\$ 2,989,423.76 for legal costs and pays all other costs of arbitration (Award, August 3, 2005, Part VI)

<i>ADF Group Inc. (Can.) v. United States</i> (ICSID)	Notice of Arbitration, July 19, 2000, ¶¶ 77: not less than US\$ 90,000,000, costs, interest, tax consequences, and further relief	No Liability	Each party to bear its own costs and to bear equally expenses of Members of the Tribunal and the ICSID Secretariat. (Award, January 9, 2003, ¶¶ 200)
MEXICO			
<i>Archer Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. Mexico</i> , (ICSID)	Request for Institution of Arbitral Proceedings, August 4, 2004, ¶¶ 82, not less than US\$ 100,000,000, costs, interest and tax consequences	Breach of Articles 1102 & 1106 Mexico to pay investors US\$ 33,510,091, plus interest (Award, November 21, 2007, correction not yet available)	Each party to bear own legal costs and share costs of arbitration (Award, November 21, 2007, correction not yet available, ¶¶ 304)
<i>Azinian (U.S.) v. Mexico</i> (ICSID)	Notice of Arbitration, March 10, 1997, ¶¶ 25: an amount exceeding US\$ 14,000,000, interest and costs	No Liability	Each party to bear its own costs and to bear equally the amounts paid to ICSID (Award, November 1, 1999, ¶¶ 127)
<i>Bayview Irrigation District et al. (U.S.) v. Mexico</i> (W. Bank), ARB(AF)/05/01	Notice of Arbitration, January 19, 2005, ¶¶ 77: US\$ 667,687,930, interest, costs, expenses and further relief	No Jurisdiction	Parties pay own costs and each pays half of tribunal costs
<i>Corn Products International v. Mexico</i> , (ICSID)	Request for Institution of Arbitral Proceedings, October 21, 2003,	Breach of Article 1102 Damages and costs to be determined	To be determined
<i>Feldman (U.S.) v. Mexico</i> (ICSID)	Notice of Arbitration, April 30, 1999, ¶¶ D: approx. 475 million MEX pesos (roughly US\$ 50,000,000), interest, inflation adjustment and further relief	Breach of Article 1102 Mexico to pay investor 9,464,627 MEX pesos plus interest (Award, December 16, 2002, ¶¶ 211) Tribunal corrected award to make it payable to enterprise rather than claimant (Correction and Interpretation of the Award, June 13, 2003)	Each party to bear its own legal fees and related costs, and to bear equally costs of arbitration billed by ICSID to be shared equally (Award, December 16, 2002, ¶¶ 213) Each party to bear its own legal fees; respondent to bear 75% of costs of the additional correction stage for ICSID costs and investor to pay 25% of these costs. (Correction and Interpretation of the Award, June 13, 2003)
<i>Fireman's Fund Insurance Co. (U.S.) v. Mexico</i> , (W. Bank)	Notice of Arbitration, October 30, 2001, ¶¶ 40	No Liability	Parties pay own costs and each pays tribunal costs in equal shares

<i>GAM Investments Inc. (U.S.) v. Mexico</i> (UNCITRAL)	Notice of Arbitration, April 9, 2002: not less than US\$ 55,016,808	No liability	No award of costs (Final Award, November 15, 2004, ¶ 136)
<i>Int'l Thunderbird Gaming Corp. (U.S.) v. Mexico</i> (UNCITRAL)	Notice of Arbitration August 1, 2002: not less than US\$ 100,000,000, costs, interest and tax consequences	No liability	Claimant to pay Mexico 3/4 of its costs of legal representation and assistance equaling US\$ 1,126,549.38; claimant to bear 3/4 of costs of arbitration (US\$ 126,313.02) (Arbitral Award, January 26, 2006, ¶¶ 210–222)
<i>Metalclad Corp. (U.S.) v. Mexico</i> (ICSID)	Notice of Arbitration, January 2, 1997, ¶ 4(e): damages of US\$ 43,125,000 plus value of enterprise	Breach of Articles 1105 & 1110 Mexico to pay investor US\$ 16,685,000 plus interest (Award, August 30, 1999, ¶ 131) Award varied on set aside proceeding to affirm finding of breach of Article 1110 only, with consequential changes in damage and interest award-settled between the parties thereafter for unknown amount	Each party to bear its own costs and fees, and half the advance payments to ICSID (Award, August 30, 2000, ¶ 130) 75% of statutory review costs awarded to Metalclad (<i>Mexico v. Metalclad Corp.</i> , 2001 BCSC 664, ¶ 137)
<i>Waste Mgmt, Inc. (U.S.) v. Mexico (I)</i> (ICSID)	Notice of Arbitration, September 29, 1998: approx. US\$ 60,000,000 plus interest	No liability	Investor to pay costs of arbitration proceedings and each disputing party to bear costs of its own defense (Award, June 2, 2000, p. 23)
<i>Waste Mgmt, Inc. (U.S.) v. Mexico (II)</i> (ICSID)	Notice of Arbitration, September 18, 2000: damages for fair market value of expropriated investment	No liability	Each party to bear its own costs and half the costs and expenses of the proceedings (Award, April 30, 2004, ¶ 185)

H. Restitution

Restitution of property seeks to re-establish the *status quo ante*, provided the return of property does not impose a disproportionate burden on the compensating party. Restitution is rarely ordered in international arbitration because of the difficulty in enforcing such an award.

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NAFTA Article 1135(1)(b) entitles a tribunal to order restitution of property but it must give the disputing Party the option of paying monetary damages and interest in lieu of restitution. Article 1135(2) (a) provides that where restitution is ordered for a claim made pursuant to Article 1117, the award must provide that restitution be made to the enterprise on whose behalf the claim was made.

Restitution has not yet been ordered in a Chapter 11 case. In *Metalclad*, the tribunal did not order restitution, but interestingly assumed that the investor receiving compensation would relinquish its title, claim and interest on the site at issue and that Mexico would have to pay to remediate the contaminated waste site. As a result, the tribunal set off an allowance for remediation in its award of damages. It is not clear from the judgment why the tribunal assumed the investor would give up the property or how the transfer of title would be effected. Ultimately the British Columbia Supreme Court upheld the finding of breach of Article 1110 and the award of damages for expropriation without commenting on this point.

I. Costs of Arbitration

1. Advance Deposits

UNCITRAL Arbitration Rule 41 allows the tribunal to ask the disputing parties for equal deposits as an advance on account of the fees and expenses of arbitrators and expenses related to expert advice or other assistance required by the tribunal. The tribunal may request supplementary deposits during the course of the hearing. After the award is made, the tribunal must render an accounting of the deposits received and return any unexpended balance. The tribunal in the consolidated softwood lumber arbitrations noted that Article 41 of the UNCITRAL Arbitration Rules contemplated “the principle that advances for the costs of arbitration by one party are to be balanced with the advances by the other party, and that such balancing may result into an entitlement of one party against the other.” Section 5 of the UNCITRAL Notes on Organizing Proceedings adds that it is useful to clarify how the money will be managed during the hearing if it is not administered by an institution.

Rule 28 of the ICSID Convention Arbitration Rules states that the tribunal can decide what portion of the costs of the proceedings each party will pay at any stage of the proceedings, unless otherwise agreed by the parties. The tribunal's decision on advance payment is without prejudice to its final disposition [page “1135-26” on costs. Advances are paid pursuant to Regulation 14 of the ICSID Administrative and Financial Regulations, which lists the direct costs of a proceeding. Regulation 14(3) addresses advance payments and contains the presumption that parties will share advance payments equally unless the parties agree or the tribunal orders otherwise. Article 28(1)(f) of the ICSID Arbitration (Additional Facility) Rules is similar to the ICSID Rule 28. Regulation 14 also applies to ICSID arbitrations under the Additional Facility Rules.

The usual practice in Chapter 11 arbitrations is for the disputing parties to pay their own costs and to contribute equally to the costs of the arbitrators and the institution during the hearing. These payments are without prejudice to final allocation of costs by the tribunal. During the arbitration, the arbitrators and the arbitral institution are usually paid from a fund to which the parties contribute equal advance payments. Disputing parties should discuss issues related to advance payments in their first procedural meeting, including the quantum of payment, how the money will be managed and how it will be accounted for.

Typically initial advance payments in NAFTA Chapter 11 proceedings have been in the range of US\$ 40,000 to US\$ 75,000 per party. In *Canfor v. United States*, the tribunal asked the parties to bear equally an initial payment of US\$ 300,000. The tribunal noted that a large advance was justified by the circumstances of that case, in particular “the significant amount in dispute, the complexity of the subject matter and the amount of time likely to be spent by the arbitrators.”

2. Costs of a Preliminary Motion

Rule 28 of the ICSID Convention Arbitration Rules allows the tribunal to award costs on part of the proceedings, for example on a preliminary motion. The ICSID Arbitration (Additional Facility) Rules and the UNCITRAL Arbitration Rules do not address the ability to award costs at a preliminary stage, but this authority seems implicit in the authority to award costs in the final award.

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NAFTA Chapter 11 tribunals to date have not usually made costs orders on preliminary motions and have left that assessment to the

final award. In most cases, the tribunal either will not comment on costs in the preliminary motion or will note that the conduct of the preliminary motion and the results achieved are factors to be considered in the subsequent assessment of costs in the final award.

Where the tribunal awards costs of a preliminary motion, it is often motivated by particular concern about the conduct of a party. For example, in *Ethyl v. Canada*, Canada brought a motion to strike the claim for want of jurisdiction. Among the issues raised was Ethyl's failure to comply with procedural preconditions to jurisdiction before the notice of arbitration was filed. The investor had submitted its notice of arbitration on April 14, 1997, in which it challenged legislation that had not yet been passed by the Parliament of Canada and was merely in the bill phase, awaiting third reading in the House of Commons. The legislation was passed and received Royal Assent on April 25, 1997. Canada claimed the investor had not complied with the Article 1120 requirement that six months elapse between the events giving rise to the claim and filing of the claim. Canada argued that there was no measure in effect at the relevant time and thus no measure capable of challenge until the bill became law. As a result, it argued that the investor had not complied with Articles 1119 to 1121. The tribunal found that the claimant could have complied with the conditions in Articles 1119 and 1120 of NAFTA but may have "jumped the gun" for tactical reasons. Thus, it concluded:

Had Ethyl first awaited Royal Assent to Bill C-29, and then bided its time another six months, the Tribunal would not have been required to deal with this issue. The Tribunal deems it appropriate to decide, therefore, that Claimant shall bear the costs of the proceedings on jurisdiction insofar as these issues are involved.

The claimant in *Ethyl* also failed to file its consent and waivers with the Notice of Arbitration, as required by Article 1121. While the tribunal did not see the significance of meeting these formalities under Article 1121, it held that the better practice was to file waivers and consents with the notice of arbitration and that the claimant would have obviated some of the motion had it done so. This also led the tribunal to order the investor to bear the costs of Canada and the tribunal attributable to the jurisdictional proceedings arising from NAFTA Articles 1119, 1120 and 1121. Thus, while the investor prevailed on the substance of the motions, it nonetheless bore the costs of arbitrating them.

In *Methanex*, after significant preliminary skirmishes between the parties which resulted in the dismissal of a large portion of Methanex's claim, the tribunal required the investor to file a fresh pleading so that it could make a definitive [page "1135-28"](#) ruling on jurisdiction. In the interim it advised the parties that, "[h]aving regard to the successive re-pleadings of Methanex's case and the relative failure and success of the USA's challenges on jurisdiction and admissibility, we shall invite submissions on whether and to what extent a reasonable apportionment should be made, whatever the eventual result of this case on the merits." Ultimately the *Methanex* tribunal joined all jurisdictional challenges to the merits of the dispute. It declined to make an order of costs on the basis of the preliminary motion but [page "1135-28a"](#) [page "1135-28b"](#) reminded the parties of its continued power to do so after the deliberation on the merits. It noted:

By virtue of Articles 38-40 of the UNCITRAL Arbitration Rules, the Tribunal has jurisdiction to award costs in its discretion; and the Tribunal's decision on jurisdictional and/or merits issues might be an important factor in the exercise of that discretion. In other words, the Tribunal is not dis-empowered from making an order for costs against Methanex (as a solvent claimant) if the Tribunal should decide eventually in favour of the USA's one or more jurisdictional challenges, i.e. that the Tribunal had no jurisdiction over the Disputing Parties' dispute.

An order for costs no matter what the outcome of the arbitration was made in *Pope & Talbot v. Canada*. In that case, a confidential draft letter from respondent's counsel to its client was sent inadvertently to the investor's counsel. The letter gave legal advice on a tribunal decision relating to production of documents for which executive privilege had been claimed. Upon receipt of the document, counsel for the investor forwarded it to a national newspaper and thereby made it public. The tribunal held that the behavior of counsel for the investor was "highly reprehensible" and either an intentional violation of the tribunal's procedural order on confidentiality or a

reckless disregard of that order. As a result, it ordered counsel for the investor to pay Canada \$10,000 as costs in relation to the motion on cabinet confidence. The tribunal expressly stated that counsel for the investor "will recognize that it is his conduct which has resulted in this direction being made against the Investor and, consequently, that he will voluntarily personally assume those costs." Counsel for investor was also directed to make the costs order public.

3. Costs in Chapter 11 Arbitrations

There is a vast amount of literature and numerous cases addressing the principles governing awards of costs in international arbitration. Nonetheless, costs awards are highly discretionary and there is little uniformity in the application of [page "1135-29"](#) the applicable principles and rules. In the NAFTA Chapter 11 context, another factor that may lead to lack of uniformity is the fact that the municipal laws of the NAFTA countries take fundamentally different approaches to awards of costs. In Canada and Mexico "costs follow the event," and hence the successful party has a reasonable expectation that it will receive an award of costs. On the other hand, the American rule generally provides that parties bear their own costs. In short, the likelihood of being awarded costs in an arbitration is difficult to predict in advance:

There is indeed an arbitral precedent to support nearly any approach a tribunal may wish to apply to its cost decision. Even cost awards rendered under the same arbitration rules sometimes vary fundamentally without any apparent reason. The bottom line is that it is impossible to predict with any satisfactory degree of certainty how the costs will be awarded.

Similarly, a former General Counsel of the World Bank came to the following conclusions:

some general conclusions can be reached. First, arbitrators are given broad discretion in allocating costs. Second, where one party loses overwhelmingly or has acted frivolously, in bad faith or otherwise irresponsibly, arbitrators are likely to award additional, sometimes full, costs to the other party. Third, otherwise, costs are usually shared equally. Fourth, there is no uniform pattern in the cases.

a. Applicable Arbitral Rules

The ICSID and UNCITRAL rules differ slightly in their approaches to costs. The ICSID Convention Rules and ICSID Arbitration (Additional Facility) Rules say little on the topic. Each allows the tribunal to obtain all necessary information to assess costs from the ICSID Secretariat and the disputing parties. Each requires the tribunal to include in its award "any decision of the Tribunal regarding the cost of the proceeding." Neither of these sets of rules defines recoverable expenses or establishes presumptions on, or prescribed approaches to, costs. In short, these rules give the tribunal complete discretion in the award of costs.

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The UNCITRAL Rules are more detailed. They provide as follows:


COSTS (Articles 38 to 40)

Article 38

1. The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
 - (b) The travel and other expenses incurred by the arbitrators;
 - (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.
3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

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Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.
4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

As can be seen, Article 38 of the UNCITRAL Arbitration Rules defines costs of the arbitration exhaustively, while Article 39 addresses one component of costs, the fees of the arbitrators. Article 40 of the UNCITRAL Rules distinguishes between (1) costs of the arbitration, with respect to which there is a presumption that the unsuccessful party will bear the costs unless the tribunal decides it is reasonable to apportion them otherwise, and (2) legal costs, where there is no presumption as to who will bear the costs and the tribunal decides costs taking into account the circumstances of the case.

Pope & Talbot v. Canada was the first NAFTA case to award costs under the UNCITRAL Arbitration Rules. That tribunal carefully noted the difference between costs of arbitration which, in principle, were to be borne by the unsuccessful party subject to the tribunal's power of apportionment, and legal costs, which were completely discretionary and to be awarded in accordance with the circumstances of the case. The *Myers* tribunal also noted the "subtle difference" of approach mandated by the UNCITRAL Rules, including the presumption that the successful party would get arbitration costs but no such presumption with respect to legal costs.

[🔗 page "1135-32"](#)

The majority of the tribunal in *International Thunderbird* did not share the view of the *Myers* tribunal on the distinction between Articles 40(1) and 40(2) of the UNCITRAL Arbitration Rules. In its view, Article 40(1) set forth "a rule with an exception to that rule," whereas Article 40(2) gave a tribunal unfettered discretion. In both cases, the tribunal viewed the rate of success the more objective benchmark for costs. Arbitrator Wälde disagreed on the majority's approach in a separate opinion, and endorsed the *Myers* tribunal's approach.

The tribunal in *Canadian Cattlemen Claims* drew a clear distinction between costs of the arbitration under Article 40(1) and costs of legal representation in Article 40(2), and stressed the discretionary nature of such awards based on what is reasonable in the circumstances of the case. In that case, each party was ordered to bear 50% of the costs of the arbitration and to bear its own costs of legal representation.

Arbitration costs include the fees and costs of the arbitrators, experts and assistants hired by the arbitrators for the purposes of the arbitration, and the fees and costs of the arbitral facilities. If the arbitration is administered by an arbitral institution, institutional costs are also part of the arbitration costs. Chapter 11 tribunals have held that arbitration costs include the daily attendance fees of reporters and copies of any transcripts provided to the tribunal, but not copies of transcript provided to either party. Cancellation charges for a hearing postponed because of the late delivery of documents by one party have not been recovered as arbitration costs.

Legal costs are essentially the costs of preparation and presentation of the case, including counsel fees, witness fees, and the like. Included in the costs of legal representation are costs incurred by experts hired by the parties. The *Myers* tribunal noted that there are no rigid rules applicable to recovery of legal costs and that the tribunal has wide discretion in determining these costs. However, such costs must be demonstrably reasonable to be awarded. The *Myers* tribunal also noted that in assessing the reasonableness of costs spent on counsel, a tribunal does not seek to question the fees the successful party actually paid, but rather what the unsuccessful party reasonably ought to pay in the circumstances.

b. Chapter 11 Costs Awards

Despite differences in the texts of the applicable arbitral rules, Chapter 11 tribunals constituted pursuant to the ICSID Additional Facility and UNCITRAL [🔗 page "1135-33"](#) Arbitration Rules have applied similar criteria in awarding costs. Essentially, they have

followed the 'costs follow the event' rule, but based on an assessment of relative success rather than simply on which party won the case. This approach has been tempered by recognition that Chapter 11 is a new and relatively untested process and hence that costs awards should be restrained in the early days of NAFTA. One can also see in these cases consideration of other factors that typically arise in international arbitration. These include:

- the size of the claim;
- the conduct of a party in the arbitration, especially if it caused extra cost;
- bad faith exhibited by a party; and
- the reasonableness of the cost incurred.

Consideration of all the factors noted above is evident in *Azinian v. Mexico*, the first Chapter 11 case addressing costs under Article 1135. The claim in *Azinian* was dismissed completely for lack of merit. The tribunal noted that this result would usually call for the unsuccessful party to bear the costs of the arbitration and to contribute to the respondent's reasonable costs of representation. Such an award would serve both as reparation and general dissuasion of non-meritorious claims. However, the tribunal decided not to award costs against the investor, with the result that each side paid its own expenditures and the amounts paid to ICSID were allocated equally. Four factors led the tribunal to this result: (1) NAFTA was a new and novel mechanism with unfamiliar causes of action; (2) the claimants presented their case professionally and efficiently; (3) the conduct of the respondent municipality in related domestic proceedings invited litigation to some extent; and (4) the most culpable of the investment's officers were the least likely to make good on the award, so that any award of costs would punish others who had little active role in the investment at any stage.

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In *Metalclad v. Mexico*, the tribunal found the respondent liable for breach of Articles 1105 and 1110. It also ordered the parties to bear their own costs and fees and share the costs of ICSID. The tribunal did not provide reasons for this conclusion on costs.

The tribunal in *Mondev v. United States* ordered that each party bear its own expenses and bear equally the costs of the tribunal and the ICSID Secretariat. Its reasoning was strikingly similar to that of the *Azinian* tribunal. Among the [page "1135-34a"](#) [page "1135-34b"](#) considerations it cited in coming to this conclusion were that: (1) no uniform practice had been established in NAFTA cases; (2) the scope and meaning of NAFTA was uncertain and of legitimate public interest; (3) the respondent won the proceeding overall but failed on many arguments it advanced; and (4) the tribunal had some sympathy with the investor because the city of Boston had avoided a freely entered into contractual commitment on technical grounds.

The *Pope & Talbot* award of costs also reflected the fact that the arbitration raised important and novel issues under NAFTA Chapter 11, as well as complex factual, legal, and procedural issues. However, the main influence on the award of costs in that case appears to have been the relative success of the parties. The tribunal reviewed the proceedings thoroughly, noting Canada's failure on preliminary motions, Canada's failure to produce documents for which cabinet confidence was claimed and Canada's failure to produce negotiating texts in a timely manner. On the other hand, the tribunal noted that the investor succeeded in establishing a breach of only one of four Articles pleaded and that the sum awarded was less than 2% of the sum claimed in the early stages of the arbitration and only 20% of the sum claimed in the damages stage. The tribunal also noted the investor's unsuccessful application to change the place of arbitration at a very late stage of the proceedings. It reasoned that "it is over simplistic to treat this case as one where the investor 'won' and therefore should recover costs, or where Canada 'really won' having regard to the very limited degree of success of the investor and should therefore recover costs." The tribunal assessed the overall success of each party as mixed and concluded that each party should bear its own legal costs. It also ordered the parties to share arbitral costs but for US\$ 120,000, which Canada was ordered to pay to indemnify the investor for a hearing related to the verification review episode, the event which led to the finding of liability under Article 1105.

In *Myers*, much like in *Pope*, the tribunal commented that success "is rarely an absolute commodity," and considered the mixed success of the parties on preliminary issues, on certain allegations of breach of NAFTA obligations, and in terms of the substantially


smaller recovery than originally claimed. As a result, the tribunal ordered Canada to pay arbitration costs of CDNS\$ 350,000 to the investor, which effectively meant that Canada would contribute three times as much as the investor toward the total amount deposited with the tribunal. The tribunal commented that this was a fair reflection of the relative success of the disputing parties in that arbitration. Additionally, Canada was ordered to pay CDNS\$ 500,000 in legal costs, again based on the tribunal's assessment of relative success, the reasonableness of the costs of legal representation and the practices of Chapter 11 and other tribunals.

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The *Feldman* tribunal also gave prominence to the relative success of the parties, noting that "both parties have partly won and partly lost, and the percentage of victory and loss did not have any measurable effect on the amount of costs." Accordingly, the tribunal ordered each party to pay half the arbitral costs and to bear its own legal costs. On a motion for correction of its award, the *Feldman* tribunal again applied the relative success criteria; it ordered the parties to bear their own legal costs of the correction application, the claimant to pay 25% of the arbitration costs and the respondent to pay 75% of the arbitration costs because the respondent raised two issues in the correction application, one that was disposed of easily and the other that required two submissions which were decided in favor of the claimant.

The parties in *ADF* were ordered to share arbitration costs and bear their own legal costs after the tribunal found no breach of Chapter 11. The case raised the application of Articles 1102, 1103, 1105, 1106 and the exceptions in Article 1108 to a "Buy America" Act procurement by the State of Virginia. The only reasons given by the tribunal for not awarding costs was that such an order was fair "[h]aving regard to the circumstances of this case, including the nature and complexity of the questions raised by the disputing parties." The approach of the *Loewen* tribunal was very close to that of the *ADF* tribunal. The *Loewen* claim was dismissed completely, although the tribunal expressed a fair degree of sympathy for the investor and scathing criticism of the Mississippi legal proceedings at issue in the case. The tribunal ordered each party to bear its own costs and to bear equally the costs of the tribunal and ICSID Secretariat on the basis that "difficult and novel questions of far-reaching importance for each party" were raised.

In *Waste Management I*, the tribunal dismissed the claim without reaching the merits due to the investor's failure to file a valid waiver. The tribunal awarded the respondent costs of the arbitration proceedings, but ordered each party to bear its own legal costs because there was no evidence of bad faith or recklessness on the investor's part. The investor subsequently recommenced its claim but lost on all grounds. In the second arbitration the tribunal ordered each party to bear its own costs and to share equally the costs of the tribunal. The tribunal noted that the parties conducted the proceedings efficiently, although it commented that it was unfortunate, although common, that there had been a significant number of interlocutory proceedings raised by both parties. The tribunal emphasized the discretionary nature of its award and eschewed any type of usual practice. It stated:

There is no rule in international arbitration that costs follow the event. Equally, however, the Tribunal does not accept that there is any practice in  page "1135-36" investment arbitration (as there may be, at least *de facto* in the International Court and in interstate arbitration) that each party should pay its own costs. In the end the question of costs is a matter within the discretion of the Tribunal, having regard both to the outcome of the proceedings and to other relevant factors.

In *GAMI Investments, Inc. v. Mexico*, the claim was dismissed but the tribunal made no award of costs and ordered the disputing parties to bear the fees and expenses of the tribunal equally. It explained its rationale as follows:

The claims fail. The Tribunal nevertheless finds it equitable that each side should bear its costs. There are two main reasons for not giving Mexico any recovery in this respect. The first is that Mexico raised an unsuccessful jurisdictional objection which became a major feature of the proceedings. Mexico insisted against GAMI's wishes that its objections be heard separately. The costs associated with that special hearing were significant. The second is that GAMI's

grievance must be considered as serious. It raised disquieting questions with respect to regulatory acts and omissions.

The tribunal in *Methanex v. United States* awarded the United States both the costs of the arbitration and its legal costs. The *Methanex* tribunal was constituted under the UNCITRAL Arbitration Rules, and carefully applied Articles 38 to 40 of those Rules in its determination as to costs. First, the Tribunal considered costs of the arbitration as defined by Articles 38 and 39 of the UNCITRAL Rules. It found that there was no compelling reason not to apply the presumption in Article 40(1) of the UNCITRAL Rules that the costs of the arbitration should be borne by the unsuccessful party. While *Methanex* had prevailed on some issues in the five year history of the arbitration, in the final result it had lost on both jurisdiction and merits. As a result, the tribunal saw no reason to apportion these costs between the parties. In this case, the total costs of the arbitration amounted to approximately US\$ 1.5 million and they were to be borne completely by *Methanex*. The tribunal next turned to legal costs of the disputing parties. It recognized that the practices of international tribunals on awards of legal costs varied widely. The approach favored by this tribunal was that the successful party be paid its reasonable legal costs by the unsuccessful party. Again, although the United States lost some issues over the course of the arbitration, these issues were of relatively minor significance. As a result, the tribunal saw no justification for apportioning responsibility for costs and it ordered *Methanex* to pay the reasonable legal costs of the United States. The tribunal assessed the amount claimed by the United States, US\$ 2,989,423.76, as its reasonable legal costs. In so doing, it noted that this appeared reasonable in the circumstances and was [page "1135-37"](#) certainly less than the US\$ 11–12 million in legal costs claimed by *Methanex*. Interestingly, the *Methanex* tribunal did not cite considerations such as the novelty of NAFTA or the complexity of the file as other Chapter 11 tribunals have done. Rather, it was guided solely by the results of the arbitration.

The majority of the tribunal in *International Thunderbird* felt strongly that the “loser pays” or “costs follow the event” rule should apply to international investment arbitration, except where it implicates access to justice. The majority further dismissed the four factors applied by the *Azinian* tribunal. In particular, it held that NAFTA and investment arbitration were no longer novel and hence this factor was no longer applicable.

Arbitrator Wälde issued a separate opinion with lengthy reasons dissenting from the costs award of the majority in *International Thunderbird*. Arbitrator Wälde viewed the decision to order the losing investor-claimant to pay most of the costs of the winning respondent State as a departure from established jurisprudence. As such, Arbitrator Wälde suggested that this deviation should be exceptionally justified and should have been the subject of an oral or written hearing.

The debate concerning the principles that ought to govern awards of costs in NAFTA Chapter 11 arbitrations was raised by the investor on the set-aside application in *International Thunderbird*. The investor argued that NAFTA arbitrations had established a principle that costs awards should go against the unsuccessful investor only in limited circumstances. The U.S. District Court for the District of Columbia rejected this argument and upheld the costs award of the majority of the tribunal. The District Court noted the wide discretion over costs and interest conferred by Article 40 of the UNCITRAL Arbitration Rules and rejected the proposition that NAFTA practice had modified the usual rules. It observed:

Undeterred by the rule's [Article 40 of the UNCITRAL Arbitration Rules] plain language, *Thunderbird* cites prior NAFTA and UNCITRAL arbitrations for the proposition that precedent from those arbitrations has narrowed the rule's wide scope. Nothing in those decisions, however, persuades the court that they have meaningfully narrowed the discretion granted in the rule. Even if *Thunderbird* had identified such precedent, its argument would still fail, as *Thunderbird* has not shown that the panel expressly recognised that precedent as controlling and nonetheless refused to apply it.

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In another case under the UNCITRAL Arbitration Rules, *UPS v. Canada*, the investor lost on the merits. However, the tribunal ordered the parties to bear the costs of the proceedings equally and to bear their own costs “given the substance and overall course of the proceedings.” The tribunal did not elaborate further on this

reference; however, it is a matter of record that the arbitration had lasted roughly seven years and that numerous interlocutory and jurisdictional issues were decided in favor of each disputing party over that period.

In *Bayview v. Mexico*, the case was dismissed in full on a jurisdictional objection. The tribunal ordered the parties to bear their own costs and share the tribunal costs, terming this “the normal practice.” In so doing, it referred particularly to the nature of the claims and the conduct of the parties:

The Tribunal has considered the question of the allocation of costs. The claims were not frivolous, and they were pursued in good faith and with all due expedition. The claims were, equally, defended in good faith and with due expedition. Both sides agreed to the separation of the jurisdictional issue, and this proved a sensible and economical step. The Tribunal does not consider that there is any reason to depart from the normal practice in such cases, according to which each Party shall bear its own costs, and the costs of the Tribunal shall be divided equally between the Parties.

The *Fireman's Fund* tribunal also ordered the parties to share tribunal costs equally and bear their own costs, despite the fact that Mexico had prevailed on both jurisdictional and merits grounds. In so doing the tribunal recognized that this was contrary to the principle set forth in *International Thunderbird*. However, it considered that such deviation was warranted in this instance. It explained as follows:

... the circumstances of the present case are such that the Tribunal believes that it is justified to deviate from that principle. The Preliminary Question was a close one and lost by Fireman's Fund on a technicality, while Fireman's Fund had respectable claims on the merits under Section A of Chapter Eleven of the NAFTA, over which, however, the Tribunal had no jurisdiction in this case except Article 1110 concerning expropriation.

The costs order in the consolidated softwood lumber arbitrations arose in a very complex fact situation. The tribunal commenced its analysis of costs by considering generally applicable principles. It noted the practice followed in some investment arbitrations of having the parties bear their own costs and sharing arbitration costs equally, but found that this was not a binding practice. [page "1135-38a"](#) Rather, the tribunal preferred the “more recent practice to apply ... the general principle of ‘costs follow the event,’ save for exceptional circumstances such as issues concerning access to justice.” It found that this more recent practice was especially compelling given the wording of Article 40(1) of the UNCITRAL Arbitration Rules, which expressly contemplated costs following the event by its express emphasis on success or lack thereof. Further, the tribunal held that where one of the disputing parties, Tembec, had unilaterally withdrawn from the Article 1126 consolidated proceedings, it could be seen as an unsuccessful party for purposes of Article 40 of the UNCITRAL Arbitration Rules, and hence it was subject to the rule of costs following the event. The tribunal therefore ordered that Tembec bear the costs of both the proceedings initiated under Article 1120 and the consolidated proceedings under Article 1126 as between Tembec and the United States. The other two claimants, Canfor and Terminal, were not required to pay costs because the Softwood Lumber Agreement of 2006 included a provision to the effect that costs would not be sought against these parties in the NAFTA Chapter 11 arbitrations.

In *Archer Daniels Midland v. Mexico*, the tribunal ordered the parties to bear their own legal costs and to share the arbitration costs equally, notwithstanding the fact that the investor had succeeded on two of its allegations of breach. In that case the relevant provision was Article 58 of the ICSID Arbitration (Additional Facility) Rules. In making this order the tribunal commented that the proceedings were expeditiously and efficiently conducted, and that both parties won and lost in part.

J. Interest

1. Eligibility for Award of Interest

In public international law, interest is increasingly viewed as an

integral part of compensation, to be awarded where necessary to make the wronged party whole again. As noted by Professor Crawford:

Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has [page "1135-38b"](#) no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

[page "1135-38c"](#) [page "1135-38d"](#)

Article 38 of the International Law Commission's Articles on State Responsibility codifies the modern position on interest:

Article 38 Interest

1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

NAFTA Article 1135 reflects international practice by allowing tribunals to award interest. Chapter 11 tribunals have endorsed this approach. The tribunal in *Metalclad* held that interest is an integral part of compensation and was clearly contemplated by NAFTA Article 1135. The *Pope* tribunal commented that both Article 1135 and international law as incorporated by Article 1131 called for an appropriate award of interest, including compounding, as one of the elements of compensation. The *Myers* tribunal cited no authority for the proposition but held simply that "there appears to be no good reason why the party that has been directed to pay an ascertained sum to the other in respect of costs should not pay interest on such sum."

2. Interest Rates, Eligible Period and Compounding

Article 1135 does not provide specific details such as the rate of interest, the commencement date for paying interest or whether simple or compound interest is due. These matters are left to the discretion of the awarding tribunal. Not surprisingly, one finds significant variation in the rates of interest and in the periods for which interest is awarded in arbitral awards. The general presumption in international arbitration is that interest runs from the time of default and accrues at a rate equivalent to a commonly used savings account rate in the currency in which payment of the award is to be made. Historically, international courts and tribunals were reluctant to award compound interest, although it has been awarded more frequently in recent years. NAFTA Chapter 11 tribunals [page "1135-39"](#) also demonstrate divergent approaches to the rate of interest and the relevant dates for which it is payable. On the other hand, most Chapter 11 awards have ordered compound rather than simple interest.

In *Metalclad*, the tribunal awarded interest at 6% per annum, compounded annually, without explaining the rationale for doing so. The tribunal did not explain how the rate was derived, other than to state that it was required to restore the claimant to a "reasonable approximation" of the position it would have been in had the wrongful act not taken place. The *Metalclad* tribunal applied the international principle that interest becomes an integral part of the compensation and therefore must start at the date on which the State's international responsibility is engaged. In this case, the tribunal selected from a variety of possible dates and found the most apt date was the date on which the construction permit was wrongfully refused to *Metalclad* by the respondent's municipality. The interest awarded ran from the date of the permit refusal to 45 days from the date of the award.

The *Pope* tribunal found that compounding was an applicable rule of international law and awarded 5% interest per annum, compounded quarterly, although it did not explain why it applied this rate. The starting date for interest in *Pope* was the date suggested by the investor, which was the date on which its losses commenced.

The *Feldman* tribunal awarded simple interest at the interest rate for Mexican Federal Government Treasury certificates or bonds with a maturity of 28 days, which interest would continue to accrue until the time payment was made. The tribunal ordered that interest be calculated according to the law of Mexico.

In *Myers* the tribunal awarded interest from the date of the Notice of Arbitration until the date of payment. The rate ordered was the Canadian prime rate plus 1%, compounded annually.

In *Archer Daniels Midland v. Mexico*, the tribunal noted that Article 1110(4) and 1110(5) provided guidance for calculating the applicable interest rate on damages awarded for breach of Articles 1102 and 1106. In particular, it agreed that interest should be awarded “at a commercially reasonable rate.” The tribunal also acknowledged that there was no uniform rule on whether interest should be simple or compound. However, it awarded simple interest, finding that simple [page "1135-40"](#) interest was more appropriate in a non-expropriation case where such interest compensated for an injury caused by the Respondent but where no property had been seized.

The following chart summarizes interest awards in NAFTA Chapter 11 cases to date.

Interest Awarded in NAFTA Chapter 11 Cases

CASE	INTEREST AWARD
<i>Pope & Talbot, Inc. v. Canada</i>	interest payable on US\$ 461,566 in damages from May 31, 2002 (date of final award) until payment in full, at 5 per cent per annum, compounded quarterly and <i>pro rata</i> within a quarter (Award in Respect of Damages, May 31, 2002, ¶¶ 91)
<i>Myers v. Canada</i>	interest payable on damages of CDN\$ 6,050,000 from the date of notice of arbitration until the date of payment of award, calculated at Canadian prime rate plus 1% and compounded annually (Second Partial Award, October 21, 2002, ¶¶ 312); interest payable on costs of CDN\$ 850,000 at Canadian prime rate plus 1 per cent, compounded annually from the date of the Final Award until the date on which payment is made (Final Award, December 30, 2002, ¶¶ 53–55)
<i>Metalclad Corp. v. United Mexican States</i>	Interest payable at 6 per cent compounded annually from date of wrongful denial of permit (December 5, 1995) until 45 days from date award rendered, following which interest to accrue on any unpaid award at 6 per cent compounded annually (Award, August 30, 2000, ¶¶ 128, 131)
<i>Metalclad Corp. v. United Mexican States</i>	Varied on set-aside proceedings by changing start date for interest to September 20, 1997 (date of breach that was affirmed on set-aside proceeding) and revising for consequential compounding effects (<i>United Mexican States v. Metalclad Corp.</i> , 2001 BCSC, May 2, 2001, ¶¶ 134–136; see also <i>United Mexican States v. Metalclad Corp.</i> , Supplementary Reasons for Judgment, October 31, 2001, 2001 BCSC 664)

<i>Feldman v. United Mexican States</i>	Pre-judgment simple interest on damages of 7,496,428.47 MEX pesos, calculated from date the rebate would have been paid to the date of award in accordance with interest rate paid on Federal Treasury Certificates or bonds issued by the Mexican Government with a maturity of 28 days; post-judgment interest to be calculated as simple interest for each month at a rate equivalent to the yield for the month of Mexican Federal Treasury Certificates with a maturity of 28 days (Award, December 16, 2002, ¶ 211)
<i>Archer Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. Mexico</i>	Interest on damages from the date the damage was calculated until the date of effective payment at the simple interest rate paid on U.S. Treasury Bills (Award, November 21, 2007, ¶¶ 294–300 (correction of Award not yet available))

K. No Punitive Damages

Article 1135 expressly prohibits awards of punitive damages. This clear direction is useful, and avoids the debate in international law as to whether and when punitive damages are available to remedy an international wrong.

[📄 page "1135-42"](#)

L. Payment to Enterprise

The negotiating texts for Article 1135 and the respective statements of interpretation of Canada and the United States do not explain why Article 1135(2) was included in Chapter 11. However, this provision prevents an individual claimant from recovering damages for a wrong to the enterprise to the prejudice of other owners of the enterprise or the enterprise itself. In a submission filed in *Pope & Talbot v. Canada* pursuant to Article 1128, the United States asserted a similar [📄 page "1135-42a"](#) [📄 page "1135-42b"](#) rationale, stating that Article 1135(2)(a) and (b) “prevents the investor from effectively stripping away a corporate asset – the claim – to the detriment of others with a legitimate interest in that asset, such as the enterprise’s creditors.”

No tribunal has discussed Article 1135(2), although in *Feldman* the tribunal corrected its award to include the language of Article 1135(2), stating that it was mandatory language which must be included where the claim is made pursuant to Article 1117(1). Similarly, the tribunal in *Metalclad* treated Article 1135(2) (b) and (c) as mandatory components of the award.

M. Post-Award Proceedings

One hallmark of a final award is that it is binding on the disputing parties and renders the tribunal *functus officio*. However, the applicable arbitral rules provide several specific exceptions that allow a tribunal to revisit the final award. These include interpretation, revision, correction, the making of additional awards and reconsideration.

1. Interpretation

Article 35 of the UNCITRAL Arbitration Rules allows either party to ask for an interpretation within 30 days of receipt of the award. The interpretation must be provided in writing within 45 days and forms part of the award. It is intended to be a clarification of an award whose language is ambiguous, and not a revision or explanation of the award. An UNCITRAL tribunal cannot charge additional fees for interpretation, correction or completion of its award under UNCITRAL Arbitration Rules 35 to 37.

Article 55 of the ICSID Arbitration (Additional Facility) Rules is similar to the UNCITRAL Rules: a party can apply for interpretation of an award within 45 days after the award. An interpretation forms part of the award and is final and binding. Section 50 of the ICSID Convention also authorizes a party to request an interpretation. Rules 50 and 51 of the ICSID Convention Arbitration Rules [📄 page](#)

"1135-43" establish the procedure for such an application. The interpretation is to be made by the tribunal rendering the award, or, if that tribunal is not available, by a newly constituted tribunal appointed in the same fashion as the original tribunal.


In *Myers v. Canada*, both parties asked the tribunal to correct or interpret parts of its decision on damages. The tribunal rejected two of the requests on the basis that it had not made an error as alleged. In one instance the tribunal found a typographical error and corrected it. In the final instance, the tribunal found the request was premature and provided the parties with informal guidelines to address their concern.

The investor in *Methanex* asked the tribunal to interpret four matters in a partial award that ordered Methanex to file a fresh pleading. The tribunal stressed that requests for interpretation were limited to clarification and "cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award." It declined the request because it was beyond the scope of an interpretation under Article 35 of the UNCITRAL Rules. However, the tribunal informally addressed certain points raised by Methanex in the hopes of assisting the disputing parties. In the award on the merits, the tribunal confirmed that the order in question was final and binding and gave no further interpretation.

The tribunal in *Feldman* refused a request for interpretation pursuant to Article 56 of the ICSID Arbitration (Additional Facility) Rules. The respondent had asked the tribunal to interpret the award to consider the application of NAFTA Article 2105, the NAFTA exception for disclosure of information, on its finding of liability under Article 1102. The tribunal denied the request on the basis that it was a new argument that had never been invoked during the proceedings and the respondent was effectively seeking a new decision. The Superior Court of Ontario subsequently refused to address arguments based on Article 2105 on the grounds that it had never been pleaded or relied upon in front of the tribunal.

2. Revision

Article 51 of the ICSID Convention allows a party to request revision of an award on the basis of discovery of a fact that would decisively affect the award, provided that fact was unknown when the award was rendered. The application must be made within 90 days of the award. ICSID Convention Rules 50 and 51 set out procedures for a revision application. An application for revision is "closely analogous" to a decision on interpretation. Article 1136 of NAFTA states that an award cannot be forced until 120 days after completion of revision or annulment proceedings. There have been no requests for revision of Chapter 11 awards.

 [page "1135-44"](#)

3. Correction

Article 36 of the UNCITRAL Arbitration Rules provides for correction of computation errors, clerical or typographical errors or other errors of a similar nature. Parties may request correction within 30 days of receipt of the award or alternatively, the tribunal may make corrections on its own initiative within 30 days of communicating the award. Any corrections made must be in writing and are final and binding on the parties. Requests for correction do not involve reconsideration of the tribunal's reasons for decision.

Article 56 of the ICSID Arbitration (Additional Facility) Rules is similar to the UNCITRAL Rules: a party can apply for correction of clerical, arithmetic or similar errors in an award within 45 days of the award being rendered. A correction forms part of the award and is final and binding. Article 49(2) of the ICSID Convention is to the same effect as Article 56 of the ICSID Arbitration (Additional Facility) Rules. Rule 49 of the ICSID Convention Arbitration Rules allows a party to request a supplementary decision or rectification on the basis of Article 49(2) of the Convention.

In *Waste Management Inc. v. Mexico*, Mexico made a request to the Secretary-General under Articles 56 and 57 of the ICSID Additional Facility Rules to correct errors in translation from English to Spanish in the tribunal's preliminary decision regarding the effect of previous proceedings. The ICSID declined to do so, noting that those Articles applied only to awards and that the request would be referred to the tribunal under Article 35, the provision for filling in gaps in the rules. Mexico replied to the Secretary-General that the decision should be treated as a final award. In reply, the Secretary-General replied that an award in the ICSID Convention and Rules, as well as under the Additional Facility, referred only to the final award and hence a

decision on the effect of prior proceedings in the same arbitration was not a final award subject to correction. The tribunal affirmed the Secretary-General's understanding, finding that no request for interpretation or correction under ICSID Additional Facility Article 56 or 57 could be raised before the tribunal, but that it had the power to give the necessary order at any time prior to the closure of the proceedings, either on its own motion or on the request of a party. In this case, the tribunal declined to issue such an order as it believed the decision was clear and there was no inaccuracy in the translation.

In *Feldman* the tribunal corrected its award pursuant to the ICSID Arbitration (Additional Facility) Rules. The tribunal agreed with the parties that it should have included the mandatory language of NAFTA Article 1135(2)(b) directing the proceeds of a claim made under Article 1117 to be paid to the enterprise making the claim and not to the individual investor, and corrected the award to include this language.

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4. Additional Award

Article 37 of the UNCITRAL Arbitration Rules allows a party to apply for an additional award on claims presented to the tribunal but not ruled upon. The tribunal may issue an additional award within 60 days after receipt of the request if warranted and if the award can be rectified without further hearings or evidence. Article 37 is intended to remedy inadvertent omissions from awards and not intentional omissions. Article 57 of the ICSID Arbitration (Additional Facility) Rules allows a party to request a supplementary decision within 45 days of the award to decide any question the tribunal omitted to decide in the award. The supplementary decision becomes part of the final award. Rule 49 of the ICSID Convention Arbitration Rules is a similar provision on additional awards.

In *Mexico v. Metalclad*, Mexico claimed the tribunal erred by failing to answer all the questions submitted to it. However, Mexico never pursued any of the post-hearing mechanisms available under the ICSID (Additional Facility) Arbitration Rules to correct this error. The court cited Mexico's failure to ask for an additional award under the arbitration rules as a further justification for not setting aside the tribunal award. It stated that a disputing party ought to pursue available post-hearing mechanisms under the applicable arbitration rules to correct alleged errors rather than saving these as grounds for a set-aside proceeding.

In *Loewen v. United States*, the respondent asked the tribunal to issue a supplementary award under the ICSID Arbitration (Additional Facility) Rules disposing of all of the claims in the case. The United States took the position that the operative part of the final award dismissed all claims made under Articles 1116 and 1117, but that the Award did not expressly cite its disposition of the individual investor's claim under Article 1116. On September 13, 2004, the tribunal reconfirmed its decision on the merits, finding that the Article 1116 claim had been addressed. Raymond Loewen moved to set aside the tribunal order. The United States opposed the motion to set aside on various grounds, including that the Loewen motion to vacate was not timely filed. According to the United States, the time for filing the set-aside application began to run when the tribunal issued its initial award in June 2003, and not after the supplementary decision pursuant to Article 57 of the ICSID Arbitration (Additional Facility) Rules was issued in September 2004. The investor has disagreed, claiming that the time [page "1135-46"](#) for commencing a set-aside application only began when the award was final, and that it was not final until the supplementary decision was issued. The U.S. District Court dismissed the set-aside application, finding that it was time-barred. The Court held that the award was final at the time it issued and that a request for a supplementary decision did not alter this fact.

5. Reconsideration

The applicable arbitration rules do not expressly allow a tribunal to reconsider its award once issued. It is debatable whether a tribunal has inherent power to reconsider an award. The Iran-United States Claims Tribunal suggested that it might have inherent power to reconsider awards based on fraud or perjury, however this proposition is questioned by some commentators. The issue has arisen in a Chapter 11 case as well. In *Methanex v. United States*, the investor asked for a reconsideration of two portions of the partial award dealing with the element of intent in national treatment cases. The investor noted that nothing in the UNCITRAL

Arbitration Rules precluded reconsideration of a preliminary jurisdictional ruling pursuant to the general powers of the tribunal to conduct the hearing given in Article 15 of the UNCITRAL Arbitration Rules. The tribunal listed the issue for oral argument in June 2004. In its written reasons on the merits, the tribunal held that the decision was final and binding and there was no basis for reconsideration.

III. Cross-References

- Article 1110 defines expropriation and the standard of compensation for expropriation in NAFTA.
- Article 1121 allows administrative tribunals or courts to grant extraordinary relief under the law of the disputing Party not involving the payment of damages.
- Article 1136 relates to finality and the enforcement of awards, and distinguishes between awards, interim awards, and final awards. Article 1136 provides for set aside of final awards, which should be contrasted with processes such as correction, interpretation, and requests for additional awards which a tribunal may entertain after rendering the final award. [D] page "1135-47"
- Article 1137(4) and Annex 1137.4 allow Canada or the United States or the investor in cases against those countries to make awards public. In cases against Mexico, the applicable arbitration rules govern publication of the award. See commentary under Article 1120 concerning confidentiality of proceedings and awards.

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See chart *infra* under "G. Monetary Damages – 7. Summary of Damages and Costs Awards" for details concerning quantum of damages and costs awarded.

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The tribunal in *Ethyl Corp (U.S.) v. Canada*, (UNCITRAL) ¶ 3 (Procedural Order) (June 25, 1998) ordered such a division of the case, although ultimately a separate hearing was held for jurisdictional objections and the case was settled before the merits phase; the tribunal in *S.D. Myers, Inc. (U.S.) v. Canada*, (UNCITRAL), ¶¶ 1–2 (Procedural Order No. 1) (May 28, 1999) ordered a first phase on liability and the principles on which damages would be awarded and a second phase on quantification of damages.

ADF Group Inc. (Can.) v. United States, ICSID (W. Bank) ARB(AF)/00/1, ¶ 13 (Minutes of the First Session of the Tribunal (Feb. 3, 2001) [hereinafter *ADF First Session*]; *Methanex Corp (Can.) v. United States*, (UNCITRAL) ¶¶ 86, 90 (Preliminary Award on Jurisdiction and Admissibility) (Aug. 7, 2002) [hereinafter *Methanex First Partial Award*], and at: 2 (Letter of Tribunal) (June 2, 2003) (noting that remaining U.S. objections to jurisdiction were so intertwined to factual issues that jurisdiction and merits issues should be heard in one phase, followed by damages phase); *United Parcel Svc. of Am. (U.S.) v. Canada*, (UNCITRAL), ¶ A. (Procedural Directions and Order of the Tribunal) (Apr. 4, 2003).

Ethyl Corp. (U.S.) v. Canada, (UNCITRAL) ¶ 96 (Award on Jurisdiction) (June 24, 1998); *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3 (Decision on Hearing of Respondent's Objection to Competence and Jurisdiction) (Jan. 5, 2001); *United Parcel Svc. of Am. (U.S.) v. Canada*, (UNCITRAL) ¶ 16 (Decision of the Tribunal on the Filing of a Statement of Defence) (Oct. 17, 2001); *GAM Invs. Inc. (U.S.) v. Mexico*, (UNCITRAL) ¶¶ 1, 6 (Procedural Order No. 2) (May 22, 2003); *Canfor Corp. (Can.) v. United States*, (UNCITRAL) ¶¶ 47–54 (Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of Proceedings) (Jan. 23, 2004).

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See commentary under Article 1136 for further discussion of the issue.

Attorney General of Canada v. S.D. Myers Inc., T-81-03 (Notice of Application) (Jan. 20, 2003) (Fed. Ct. Can) [hereinafter *Myers*

Application to F.C.C.].

S.D. Myers, Inc (U.S.) v. Canada, (UNCITRAL) ¶ 14 (Procedural Order No. 18) (Feb. 26, 2001). Arbitrator Schwartz filed a dissent in the first Partial Award and the Final Award; all references here are to the opinion of the majority.

Myers Application to F.C.C., *supra* note 43.

Attorney General of Canada v. S.D. Myers Inc., T-225-01, Order Consolidating T-225-01 and T-81-03, (Feb. 12, 2003) (Fed. Ct. Can.).

Attorney General of Canada v. S.D. Myers Inc., [2004] F.C. 38 (Jan. 13, 2004) (Fed. Ct. Can.). This issue did not arise in the set-aside proceedings in *Feldman* or *Metalclad* because a single award issued on liability and damages in those cases.

For comment on this rule see Baker & Davis, *supra* note 13, at 151-74.

See Schreuer, *supra* note 17, at 783-855; Lucy Reed et al, Guide to ICSID Arbitration 89-91 (2004).

Lew, *supra* note 12, at 644.

Articles 1110(2)-(6). See commentary under Article 1110 for discussion of compensation in expropriation cases.

In *CMS Gas Transmission Co. v. Argentina* the tribunal noted that BITs often do not provide a standard of compensation for obligations other than expropriation, and hence, that the tribunal had to exercise its discretion to identify the best standard for the breaches found. In that case, the tribunal found that the most apt assessment standard for breach of the minimum standard was fair market value because of the cumulative nature of the breaches. See *CMS Gas Transmission Co. (U.S.) v. Argentina*, ICSID (W. Bank) ARB/01/8 ¶¶ 409-410 (Award) (May 12, 2005).

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Feldman (U.S.) v. Mexico, ICSID (W. Bank) ARB(AF)/99/1, ¶¶ 194, 198 (Award) (Dec. 16, 2002) [hereinafter *Feldman Award*]. For a contrary view in a BIT arbitration see *CME Czech Republic, B.V. (Neth.) v. Czech Republic*, ¶ 616 (Partial Award) (Sept. 13, 2001). For discussion of the theoretical basis for a distinction between damages for expropriation as compared to damages for breaches of other obligations, see T.W. Wälde, *Presentation on ‘Damages’ Given During Appeals and Challenges to Investment Treaty Awards: Is It Time for an International Appellate System?* 7 May 2004, Geneva, 2 Transnat’l Dispute Mgmt. 2005.

Archer Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. Mexico, ICSID (W. Bank) ARB(AF)/04/05, ¶¶ 279, 283-284 (Award) (Nov. 21, 2007), Tribunal Correction of Award Rendered Jan. 8, 2008 but not yet public [hereinafter *ADM Award*].

Todd Weiler & Luis Miguel Diaz, *Causation and Damages in NAFTA Investor-State Arbitration*, in *NAFTA: Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 179, 180-184 (Todd Weiler ed., 2004).

Feldman Award, *supra* note 55, at ¶ 194.

United Parcel Serv. of Am. Inc. (U.S.) v. Canada, (UNCITRAL) ¶¶ 24-31, 36-38 (Award on the Merits) (June 11, 2007).

ADM Award, *supra* note 55a, at ¶¶ 270-274.

Myers Partial Award, *supra* note 54, at ¶ 309 and generally at ¶¶ 309-315. This language was also cited in the *Feldman Award*, *supra* note 55, at ¶¶ 195-197. See also, *ADM Award*, *supra* note 55a, at ¶¶ 277-279.

On State responsibility, see Ian Brownlie, *Principles of Public International Law* 420-430 (6th ed. 2003); Malcolm Shaw, *International Law* 694-752 (5th ed. 2003) and references cited therein.

Case Concerning the Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17, 47 cited with approval in *Metalclad Award*, *supra* note 53, at ¶ 122 and in the *S.D. Myers Partial Award*, *supra* note 54 at ¶¶ 311-313. See also *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, (Award) (Nov. 2, 1984); Weiler & Diaz, *supra* note 56, at 188-197.

James Crawford, *The International Law Commission’s Articles on State Responsibility* 201 (2002), and generally at 191-241.

Id. at 211-212.

ADM Award, *supra* note 55a, at ¶¶ 275–278.
Myers Partial Award, *supra* note 54, at ¶¶ 316–322.
Myers Second Award, *supra* note 54, at ¶¶ 140–145.
Feldman Award, *supra* note 55, at ¶ 194.
Pope & Talbot, Inc. (U.S.) v. Canada, (UNCITRAL) ¶ 80 (Award in Respect of Damages) (May 31, 2002) [hereinafter *Pope Damages Award*].
ADM Award, *supra* note 55a, at ¶ 282.
Metalclad Award, *supra* note 53, at ¶¶ 115, 125; *aff'd Mexico v. Metalclad Corp.*, ¶¶ 113–117 (Reasons for Judgment of the Honourable Mr. Justice Tsoe) (May 2, 2001), 2001 BCSC 664 [hereinafter *Metalclad Set-Aside*].
Myers Partial Award, *supra* note 54, at ¶ 316.
For discussion generally on monetary damages, see Crawford, *supra* note 61, at 218–230; Marjorie M. Whiteman, *Damages in International Law* (1943); John Yukio Gotanda, *Supplemental Damages in Private International Law* (1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 293–319 (1996). See also the commentary on compensation under Article 1110 of this book.
Myers Partial Award, *supra* note 54, at ¶ 316.
Myers Second Partial Award, *supra* note 54 at ¶ 142.
Id. at ¶ 175.
Metalclad Award, *supra* note 53, at ¶¶ 123–126.
Id. at ¶¶ 118–122. See discussion of damages awarded in this case under commentary on Article 1110.
Myers Second Partial Award, *supra* note 54, at ¶¶ 153–159.
Id. at ¶ 117.
Id. at ¶¶ 97–100. See also *id.* at ¶¶ 230–300 for the complex calculation of the value of the lost and delayed net income stream of the investment.
Id. at ¶¶ 161–162.
Feldman Award, *supra* note 55, at ¶¶ 198–201.
Id. at ¶¶ 202–206.
Pope Damages Award, *supra* note 66, at ¶ 80.
See *CME Czech Rep. B.V. (Neth.) v. Czech Republic*, (Final Award) (March 14, 2003) and *Autopista Concesionada de Venezuela, C.A. (U.S.) v. Venezuela*, ICSID (W. Bank) ARB/00/5, (Award) (Sept. 23, 2003) for discussions of recovery of lost profit. See also John Yukio Gotanda, *Recovering Lost Profits in International Disputes*, 36 *Georgetown J. Int'l L.* 61 (2004).
Crawford, *supra* note 61, at 218, 228–230 (collecting cases).
Feldman Award, *supra* note 55, at ¶¶ 199–201; *Pope Damages Award*, *supra* note 66 at ¶ 83–84; *Myers Second Partial Award*, *supra* note 54 at ¶ 152.
Metalclad Award, *supra* note 53, at ¶ 121.
Myers Second Partial Award, *supra* note 54 at ¶ 173.
Id. at ¶¶ 173–174, 176.
ADM Award, *supra* note 55a, at ¶¶ 285–286.
Pope Damages Award, *supra* note 66, at ¶¶ 81–82.
Id. at ¶¶ 85–88.
Myers Second Partial Award, *supra* note 54 at ¶ 163.
Metalclad Award, *supra* note 53, at ¶ 126; *Metalclad Set-Aside*, *supra* note 67, at ¶¶ 113–117.
Gotanda, *supra* note 69, at 128–133.
Redfern & Hunter, *supra* note 10, at 356.
Feldman Award, *supra* note 55, at ¶ 207.
Myers Second Partial Award, *supra* note 54, at ¶ 305.
Crawford, *supra* note 61, at 213–217; Redfern & Hunter, *supra* note 10, at 359–361; Weiler & Diaz, *supra* note 56, at 185–187, 192–194.
Metalclad Award, *supra* note 53, at ¶ 127.
Metalclad Set-Aside, *supra* note 67. For discussion of whether an investor compensated for expropriation must return the property see Noah D. Rubins, *Must the Victorious Investor-Claimant Relinquish Title to Expropriated Property?* 4 *J. World Inv.* 481 (2003).
UNCITRAL Arbitration Rules, Art. 41(1).
Id., Art. 41(2).
Id., Art. 41(5).
Canfor Corp. v. Canada, Tembec v. United States & Terminal Forest Products Ltd v. United States (Canfor Consolidation Award on Costs), (UNCITRAL) ¶ 177 (Joint Order on the Costs of Arbitration and the Termination of Certain Arbitral Proceedings) (Jul. 19, 2007).
Schreuer, *supra* note 17, at 1232–1238.
ICSID Arbitration (Additional Facility Rules), Art. 5.
See commentary under Article 1123 concerning arbitrator fees.
For example, initial advance payments were US\$ 50,000 in *Ethyl Corp. U.S. v. Canada*, (UNCITRAL) ¶ 4 (Procedural Order)

(Sept. 22, 1997); US\$ 40,000 in ADF, *ADF First Session*, *supra* note 37, at ¶¶ 5–6; US\$ 50,000 in *Methanex Corp. (Can.) v. United States*, (UNCITRAL) ¶ 14 (Minutes of First Procedural Meeting); US \$ 50,000 in *Clayton (U.S.) v. Canada*, (UNCITRAL) ¶ 14 (Procedural Order No. 1) (Apr. 9, 2009); US\$ 75,000 in *Grand River Enterprises Six Nations Ltd (Can.) v. United States*, (UNCITRAL) ¶ 6 (Minutes of the First Session of the Tribunal) (Mar. 31, 2005); \$ 50,000 in *Gallo (U.S.) v. Canada* (UNCITRAL) ¶ 26 (Procedural Order No. 1) (Jun. 4, 2008); US\$ 100,000 in *Chemtura (U.S.) v. Canada* (UNCITRAL) ¶ 15 (Procedural Order No. 1) (Jan. 21, 2008).

Canfor Corp (Can.) v. United States, (UNCITRAL) ¶¶ 3–4 (Procedural Order No. 3) (Nov. 13, 2003).

Schreuer, *supra* note 17, at 1228–1229; Reed et al, *supra* note 49, at 91–92.

In *Methanex v. United States*, the tribunal cited Articles 38 to 40 of the UNCITRAL Rules, apparently as authority to apportion costs of a preliminary proceeding after hearing from the parties. *Methanex First Partial Award*, *supra* note 37 at ¶¶ 170–171.

See Section I *infra* for text of relevant arbitral rules on costs.

Ethyl Award on Jurisdiction, *supra* note 38 at ¶¶ 74–96.

Id. at ¶ 88.

Id. at ¶ 96.

Methanex First Partial Award, *supra* note 37, at ¶ 171.

Methanex Corp. (Can.) v. United States, (UNCITRAL) 3 (Tribunal Letter to Parties) (June 2, 2003) The tribunal ultimately dismissed the claim on jurisdictional grounds and awarded costs to the United States, *Methanex Final Award*, *supra* note 14.

Pope & Talbot, Inc. (U.S.) v. Canada, (UNCITRAL) (Award of Costs Against Investors Counsel) (Sept. 27, 2000).

Id. at ¶ 6.

Id. at ¶¶ 7–13.

See, e.g., Micha Bühler, *Awarding Costs in International Commercial Arbitration: An Overview*, 22 ASA Bulletin 249 (2004); Noah D. Rubins, *The Allocation of Costs and Attorney's Fees in Investor-State Arbitration*, 18 ICSID Rev.–F.I.L.J. 10 (2003); John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 Mich. J. Int'l L. 1 (1999); Lester Nurick, *Costs in International Arbitrations*, 7 ICSID Rev.–Foreign Inv. L.J. 57 (1992); Murray L. Smith, *Costs in International Commercial Arbitration*, 56 APR Disp. Resol. J. 30 (2001); Baker & Davis, *supra* note 13, at 207–217; Charl Priem & Gillis J. Wetter, *Costs and their Allocation in International Commercial Arbitrations*, 2 Am. Rev. Int'l Arb. 249 (1991); Redfern & Hunter, *supra* note 10, at 396–400; Lew, *supra* note 12, at 652–657.

Gotanda, *supra* note 118, at 5–13; Rubins, *supra* note 118.

Bühler, *supra* note 118, at 249. See also redfern & hunter, *supra* note 10, at 397–399; Reed, et al, *supra* note 49, at 93.

Nurick, *supra* note 118, at 58.

ICSID Convention, Arts. 59–60; ICSID Convention Arbitration Rules, R. 28(2); ICSID Arbitration (Additional Facility) Rules, Art. 58(1).

ICSID Convention Arbitration Rules, R. 47(j); ICSID Arbitration (Additional Facility) Rules, Arts. 52(j), 58(2).

Nurick, *supra* note 118, at 59.

While the list in Article 38 appears prescriptive, some suggest it would encompass the same range of items as the broad discretionary category of “reasonable legal and other costs.” See Bühler, *supra* note 118, at 262.

Nurick, *supra* note 118, at 59.

Pope & Talbot Inc. (U.S.) v. Canada, (UNCITRAL) ¶ 5 (Award on Costs) (Nov. 26, 2002).

S. D. Myers, Inc. (U.S.) v. Canada, (UNCITRAL) ¶¶ 8–10 (Final Award concerning the apportionment of Costs) (Dec. 30, 2002) [hereinafter *Myers Costs Award*].

Int'l Thunderbird Gaming Corp. (U.S.) v. Mexico (UNCITRAL) ¶ 213 (Arbitral Award) (Jan. 26, 2006) [hereinafter *Thunderbird Award*].

Id., ¶ 125, (Separate Opinion of Arbitrator Wälde) [hereinafter *Thunderbird Award, Separate Opinion*].

Canadian Cattlemen Claims – De Boer et al. (Can.) v. United States, (UNCITRAL) ¶¶ 229–232 (Award on Jurisdiction) (Jan. 28, 2008).

Bühler, *supra* note 118, at 249.

Myers Costs Award, *supra* note 128, at ¶ 23.

Id. at ¶¶ 23–26.

Id. at ¶ 24.

Id. at ¶¶ 32–40.

Amco Asia Corp. v. Indonesia, ICSID (W. Bank) ARB/81/1, (Award) (Nov. 20, 1984); *Amco Asia Corp. v. Indonesia*, ICSID (W. Bank) ARB/81/1, (Decision of the ad hoc Committee setting aside the Award rendered on the merits) (May 16, 1986).

This should be contrasted with the conduct of the party which is

the subject of the arbitration. If this leads to a finding of liability, the aggrieved party is compensated by the award of damages and not by the award of costs *Myers Costs Award*, *supra* note 128, at ¶¶ 20, 43–47.

Benvenuti et Bonfant v. Congo, ICSID (W. Bank) ARB/77/2, (Award) (Aug. 8, 1980); *Société Ouest Africaine des Betons Industriels v. Sénégal*, ICSID (W. Bank) ARB/82/1, (Award) (Feb. 25, 1988); *Genin (U.S.) v. Estonia*, ICSID (W. Bank) ARB/99/2, ¶¶ 379–384 (Award) (June 25, 2001); *Generation Ukraine, Inc. (U.S.) v. Ukraine*, ICSID (W. Bank) ARB/00/9, ¶ 24 (Award) (Sept. 16, 2003); *Myers Costs Award*, *supra* note 128, at ¶¶ 25–26.

Maritime International Nominees Establishment (MINE) v. Guinea, ICSID (W. Bank) ARB/84/4, (Award) (Jan. 6, 1988), 3 Int'l Arb. Rep. No. 1, sec. A (1988), 14 Y.B. Com. Arb. 82 (1989); *Liberian Eastern Timber Corp. (LETCO) v. Liberia*, ICSID (W. Bank) ARB/83/2, (Award) (Mar. 31, 1986), (Rectification) (May 14, 1986), 26 I.L.M. 647 (1987).

Sylvania Technical Systems, Inc. v. Iran, 8 Iran-U.S. C.T.R. 298 (1985).

Azinian v. Mexico, ICSID (W. Bank) ARB/AF/97/2, ¶¶ 125–126 (Award) (Nov. 1, 1999).

Metalclad Award, *supra* note 53, at ¶ 130.

Mondev Int'l Ltd (Can.) v. United States, ICSID (W. Bank) ARB(AF)/99/2, ¶ 159 (Award) (Oct. 11, 2002).

Pope Costs Award, *supra* note 127, at ¶¶ 7–9.

Id. at ¶¶ 10–18.

Myers Costs Award, *supra* note 128, at ¶¶ 15–19.

Id. at ¶ 29.

Id. at ¶¶ 48–49.

Feldman Award, *supra* note 55 at ¶ 208, *Feldman (U.S.) v. United Mexican States*, ICSID (W. Bank) ARB(AF)/99/1, ¶ 15 (Correction and Interpretation of the Award) (June 13, 2003).

ADF Group Inc. (Can.) v. United States, ICSID (W. Bank) ARB(AF)/00/1, ¶ 200 (Award) (Jan. 9, 2003).

The Loewen Group Inc. (Can.) v. United States, ICSID (W. Bank) ARB(AF)/98/3, ¶¶ 240–241 (Award) (June 26, 2003).

Waste Mgmt Inc. (U.S.) v. Mexico, ICSID (W. Bank) ARB(AF)/98/2, ¶ 31 (Arbitral Award) (June 2, 2000).

Waste Management II Final Award, *supra* note 16 at ¶ 183.

GAMI Investments, Inc. (U.S.) v. Mexico, (UNCITRAL) ¶ 135 (Final Award) (Nov. 15, 2004).

Methanex Final Award, *supra* note 14, at Pt. V, ¶¶ 1–13.

Thunderbird Award *supra* note 128a, at ¶¶ 213–221.

Thunderbird Award, Separate Opinion, *supra* note 128b, at ¶¶ 124–147.

In re Arbitration between International Thunderbird Gaming Corp. (U.S.) v. United Mexican States, 473 F. Supp. 2d 800 (D. D. C. 2007).

United Parcel Serv. of Am. Inc. (U.S.) v. Canada, (UNCITRAL) ¶ 188 (Award on the Merits) (June 11, 2007).

Bayview Irrigation District et al. (U.S.) v. United Mexican States, (ICSID) (W. Bank) ARB(AF)/05/1, ¶ 125 (Award) (June 19, 2007).

Fireman's Fund Insurance Co. (U.S.) v. Mexico, ICSID (W. Bank) ARB(AF)/02/01, ¶¶ 220–221 (Award) (July 17, 2006).

Canfor Consolidation Award on Costs, *supra* note 101a.

Id. at ¶ 139.

Id. at ¶¶ 140–152.

Id. at ¶¶ 153–155.

ADM Award, *supra* note 55a, at ¶¶ 301–303.

Crawford, *supra* note 61, at 235–239. See also John Yukio Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int'l L. 40 (1996); Martin Hunter & Volker Triebel, *Awarding Interest in International Arbitration*, 6 J. Int'l Arb. 7 (1989); Paolo Cerina, *Interest as Damages in International Commercial Arbitration*, 4 Am. Rev. Int. Arb. 255 (1993); Redfern & Hunter, *supra* note 10, 392–396; *Asian Agricultural Products Ltd v. Sri Lanka*, ICSID (W. Bank) ARB/87/3, ¶ 114 (Award); Aldrich, *supra* note 69, at 474–478; *Iran v. United States* (Case A-19), 16 Iran-U.S. C.T.R. 285 (1987).

Crawford, *supra* note 61, at 237.

Id. at 235.

Metalclad Award, *supra* note 53 at ¶ 128 (Award). See also Weiler & Diaz, *supra* note 56, at 209–211.

Pope Damages Award, *supra* note 66 at ¶ 89.

Myers Costs Award, *supra* note 128, at ¶ 50.

Lew, *supra* note 12, at 656. See also Berger, *supra* note 12, at 621–632; Cerina, *supra* note 154, at 269–280.

Crawford, *supra* note 61, at 237; *British Claims in the Spanish Zone of Morocco*, 2 R.I.A.A. 615, 650 (1925); *Middle East Cement v. Egypt*, ICSID (W. Bank) ARB/99/6 (Award) (Apr. 12, 2002); Kenneth

I. Juster, *The Santa Elena Case: Two Steps Forward, Three Steps Back*, 10 Am. Rev. Int'l Arb. 371 (1999); Cerina, *supra* note 154, at 259–262; Natasha Affolder, *Awarding Compound Interest in International Arbitration*, 12 Am. Rev. Int'l Arb. 45 (2001); John Yukio Gotanda, *Compound Interest in International Disputes*, 34 Law & Pol'y Int'l Bus. 393 (2003); *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID (W. Bank) ARB/96/1, (Final Award) (Feb. 17, 2000); *Maffezini v. Spain*, ICSID (W. Bank) ARB/97/7, (Award) (Nov. 13, 2000).

Metalclad Award, *supra* note 53 at ¶ 128.

Id.

Id. In the set-aside proceedings the court remitted the issue of other possible breaches of Articles 1105 and 1110 that could have commenced earlier and thus triggered an earlier date for the calculation of interest. It ordered that interest commence at a later date as it set aside the portion of the award that had formed the starting point for the interest calculation; however, the case was resolved without returning to the tribunal on this question. *United Mexican States v. Metalclad Corp.*, ¶¶ 113–117 (Supplementary Reasons for Judgment of the Honourable Mr. Justice Tysoc) (Oct. 31, 2001), 2001 BCSC 664.

Pope Damages Award, *supra* note 66, at ¶ 90, n. 66.

Feldman Award, *supra* note 55, at ¶¶ 201–205.

Myers Second Partial Award, *supra* note 54 at ¶¶ 302–307;

Myers Costs award, *supra* note 128 at ¶¶ 50–52.

ADM Award, *supra* note 55a, at ¶¶ 294–300.

As no liability was found in *ADF, Loewen, Mondev, Azinian, Waste Management I and Waste Management II*, there was no award of interest and they are not noted on this chart.

Crawford, *supra* note 61, at 219; Shaw, *supra* note 59, at 718; John Yukio Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 Harv. Int'l. L. J. 59 (1997); Nina H.B. Jørgensen, *A Reappraisal of Punitive Damages in International Law*, [1997] Brit. Y.B. Int'l L. 247; M. Scott Donahey, *Punitive Damages in International Commercial Arbitration*, 10 J. Int'l. Arb. 67 (1993); *Velasquez-Rodriguez v. Honduras*, (Judgment on Compensation) (July 21, 1989), 95 I.L.R. 306 (1994) (Inter-Am. Ct H.R.).

Pope & Talbot, Inc. (U.S.) v. Canada (UNCITRAL) ¶ 7 n. 1 (Seventh Submission of the United States of America) (Nov. 6, 2001) (citing Eduardo Jimenez de Arechaga, *Diplomatic Protection of Shareholders in International Law*, 4 Phil. Int'l L. J. 71, 77, 78 (1965)). See also the commentary under Article 1117.

Feldman (U.S.) v. Mexico, ICSID (W. Bank) ARB(AF)/99/1, ¶¶ 12–14 (Correction and Interpretation of the Award) (June 13, 2003) [hereinafter *Feldman Correction Award*]. See the commentary under Articles 1116 and 1117 for a discussion of the difference between claims made by an investor on his own behalf and claims made by an investor on behalf of an enterprise.

Metalclad Award, *supra* note 53, at ¶ 129.

Redfern & Hunter, *supra* note 10, at 400–403. See also David D. Caron & Lucy F. Reed, *Post Award Proceedings Under the UNCITRAL Rules of Arbitration*, 11 Arb. Int'l 429 (1995); David A. R. Williams & Amy Buchanan, *Correction and Interpretation of Awards under Article 33 of the Model Law*, 4 Int. A.L.R. 119 (2001); Andrew N. Vollmer & Angela J. Bedford, *Post-Award Arbitral Proceedings*, 15 J. Int'l Arb. 37 (1998).

Caron & Reed, *supra* note 173, at 430–431. See also Baker & Davis, *supra* note 13, at 192–194.

UNCITRAL Arbitration Rules, Art. 40(4).

Schreuer, *supra* note 17, at 856–867; Reed et al, *supra* note 49, at 98.

S. D. Myers, Inc. (U.S.) v. Canada, (UNCITRAL), (Procedural Order No. 21) (Dec. 2, 2002).

Methanex Corp. (Can.) v. United States, (UNCITRAL), (Letter) (Sept. 25, 2002).

Methanex Final Award, *supra* note 14, at Part II, Ch. E, ¶ 30, and generally at ¶¶ 9–35.

Feldman Correction Award, *supra* note 171 at ¶¶ 9–11, *aff'd United Mexican States v. Feldman*, Docket No. C41169, ¶¶ 45–61 (Judgment on Appeal) (Jan. 11, 2005) (Ont. C.A.).

Mexico v. Feldman, Court File No. 03-CV-23500, ¶¶ 42–45 (hereinafter *Feldman Set-Aside Decision*) (Ont. Sup. Ct) (Dec. 3, 2003).

Schreuer, *supra* note 17, at 875, and generally at 868–880; Reed et al, *supra* note 49, at 98.

Caron & Reed, *supra* note 173, at 434–435. See also Baker & Davis, *supra* note 13, at 194–196.

Waste Management II Final Award, *supra* note 16, at ¶¶ 13–17. See commentary under sections B and C, *supra*, concerning final awards and post-hearing orders.

Feldman Correction Award, *supra* note 171 at ¶¶ 12–14.

Caron & Reed, *supra* note 173, at 439–450. See also Baker & Davis, *supra* note 13, at 196–199.

Schreuer, *supra* note 17, at 849–855.

Metalclad Set-Aside Decision, *supra* note 67, at ¶¶ 131–132.

The Loewen Group Inc. et al (Can.) v. United States, ICSID (W. Bank) ARB(AF)/98/3, (Request for Supplementary Decision) (Aug. 11, 2003). See Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 *Arb. Int.* 1 (2005), for a critique of the reasoning in this case.

The Loewen Group Inc. et al (Can.) v. United States, ICSID (W. Bank) ARB(AF)/98/3, 23 (Decision on Respondent's Request for a Supplementary Decision) (Sept. 13, 2004).

Raymond L. Loewen v. United States, 1:04-CV-02151 (RWR), (Motion to Vacate and Remand Arbitration Award) (D.D.C.) (Feb. 25, 2005).

Raymond L. Loewen v. United States, 1:04-CV-02151 (RWR), 1–2 (Opposition to Petitioner's Motion to Vacate and Remand Arbitration Award) (D.D.C.) (Mar. 25, 2005). See also commentary under Article 1136 on the *Loewen* set-aside application.

Raymond L. Loewen v. United States, 1:04-CV-02151, (Decision) (D.D.C.) (Oct. 1, 2005).

Caron & Reed, *supra* note 173, at 442–443. See also Baker & Davis, *supra* note 13, at 199–205.

Methanex Corp. (Can.) v. United States, (UNCITRAL) (Request for Reconsideration of Chapters J and K of the Partial Award) (Jan. 28, 2004).

Methanex Corp. (Can.) v. United States, (UNCITRAL) (Tribunal Letter to Disputing Parties) (Apr. 19, 2004).

Methanex Final Award, *supra* note 14, at Part II, Ch. E, ¶¶ 27–35.

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