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## Article 1121 - Conditions Precedent to Submission of a Claim to Arbitration

[Article 1121 Conditions Precedent to Submission of a Claim to Arbitration](#)

### I Negotiating Text

- The first negotiating draft contained a provision, proposed by the United States, that parties to an investment dispute choose which kind of dispute settlement to pursue:
  2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
    - a) to the courts or administrative tribunals of the Party that is a party to the dispute;
    - b) in accordance with any applicable previously-agreed dispute settlement procedures; or
    - c) in accordance with the terms of paragraph 3.
  - 3a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
    - i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention;
    - ii) to the Additional Facility of the Centre, if the Centre is not available;
    - iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or
    - iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
  - b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent. (1)
- On January 16, 1992, Mexico suggested adding a provision that "[d]isputes arising from the interpretation and application of this Chapter shall not be subject to the dispute settlement provisions of this Agreement." (2) The United States continued to suggested the fork-in-the road approach, reminiscent of the language found in U.S. BITs, which required a claimant to submit its dispute either to the courts or administrative tribunals of the defendant party, to other agreed-upon dispute settlement measures, or to binding arbitration. (3)
 

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- This state of affairs did not change until March 6, 1992, when Mexico agreed to have investment disputes submitted to State-to-State dispute resolution. (4) Mexico also suggested the addition of an article stating: "[e]ach Party shall provide investors of the other Parties access to an impartial judicial system with authority to enforce the rights of investors under this Agreement. (5)
- The U.S. proposal changed slightly in the draft of May 1, 1992. In paragraph 3 (previously paragraph 2), the choices a claimant had were limited to two: either it could submit the dispute for resolution "(a) to the courts or administrative tribunals of the Party that is a Party to the dispute," or "(b) in accordance with the terms of paragraph 4." (6) A sentence following this choice added: "[t]he choice made by the investor shall be exclusive." (7) Paragraph 4, the successor to the previous paragraph 3, was also amended slightly. First, it said that the investor could submit its dispute for binding arbitration under the paragraph so long as the investor had not submitted the dispute for resolution under paragraph 3(a) or (b) above. This was apparently a drafting error, insofar as paragraph 3(b) actually referred to dispute resolution under paragraph 4. (8) Second, the words "national or company" were replaced with "investor." Third, there were some minor simplifications to the wording: "the investor concerned may submit the dispute for settlement by binding arbitration." Finally, the fora an investor could utilize were limited to three: ICSID under the ICSID Convention; ICSID under the Arbitration (Additional Facility) Rules; and UNCITRAL. Yet a new provision was added, which stated that notwithstanding paragraphs 3 and 4, "the

investor and the Party to the dispute may mutually agree to arbitration in accordance with other arbitration rules or before another arbitration institution.” (9)

- Mexico's suggested provisions, which had remained unchanged since March 6, 1992, did not appear in the May 22, 1992, version. (10)
- In the June 4, 1992, text, a proposal by Canada first appeared. The proposed language contains the first mention of a claimant's obligation to waive its right to “initiate or continue” proceedings before another tribunal:

#### 4. Arbitration

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- (1) If an investment dispute cannot be settled by consultation and negotiation, the investor may, subject to paragraphs (2) and (4), submit the dispute for settlement by arbitration:
  - (a) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the ICSID Convention, provided that the disputing Party and the Party of the Investor are parties to that Convention;
  - (b) to the Additional Facility of the Centre, if the disputing party is not a Party to the ICSID Convention; or
  - (c) in accordance with the UNCITRAL Arbitration Rules.
- (2) The investor may submit the investment dispute to arbitration under subparagraph (1), on condition that the investor
  - (a) waive his rights to initiate or continue before any court or administrative tribunal of the disputing Party any proceedings in respect of a breach of the domestic law of that party and in which the matter at issue is substantially the same as the matter at issue in the arbitration proceeding;
  - (b) waive execution under the New York Convention of any arbitral award made in an arbitration proceeding initiated under subparagraph (1), except in a country that is both a Party to the New York Convention and a party to this Agreement; and
  - (c) agrees that the defending Party can establish an arbitral panel under paragraph 8 or 9. (11) [paragraph 8 had to do with an arbitral tribunal established under the auspices of the Free Trade Commission, while paragraph 9 had to do with a tribunal established by the International Chamber of Commerce].

Canada's proposal is of interest for several reasons. First, it introduced the “no-u-turn concept” subsequently found in Article 1121. The investor could attempt to obtain relief in the courts or administrative tribunals of the disputing Party, but could abandon that attempt to go to arbitration. Second, the subject-matter of the investor's waiver was fairly broad; the investor had to waive its rights to seek local relief when “the matter at issue is substantially the same as the matter at issue in the arbitration proceeding.” Third, the Parties would have limited the ability of the investor to seek enforcement of any arbitral award outside the courts of the three NAFTA Parties. Fourth, the defending Party would have retained the option to move any investor-State proceeding into the State-to-State process, which would then have exclusive jurisdiction over the matter. Fifth, the defending Party also retained the option to shift the process into a proceeding before a tribunal established under the auspices of the Free Trade Commission or the International Chamber of Commerce. The Parties thus retained more control over the proceedings than in the final version of Chapter 11.


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- On July 22, 1992, the U.S. proposed dispute settlement provision was numbered 2119. The substance of the provision did not change. (12)
- In the August 4, 1992, the dispute settlement provision said only “[SEE SUBGROUP TEXT].” (13)
- The next text, also dated August 4, contained substantially revised dispute settlement procedures. In a provision labeled “Article 2123: Fora for Resolving an Investment Dispute,” the text provided:
  1. If an investment dispute cannot be settled by consultation or negotiation, the investor may choose either to:
    - a) initiate proceedings under the domestic law of the disputing Party where the disputing Party has provided investors of another Party with a right of action under its domestic law for an alleged breach of this Chapter; or
    - b) submit the investment dispute to arbitration under Article 2125; (14)and the choice, once made by the investor, shall be exclusive.
  2. A Party shall not provide a right of action under its domestic law against any other Party for an alleged breach of this Agreement. (15)Article 2126 also contained applicable language:

By submitting the dispute to arbitration, the investor:

- a) consents to arbitration in accordance with the provisions of this part; and
- b) waives its right to initiate or continue before any administrative tribunal or court [under the domestic law] of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of this Chapter, except for proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party. (16)

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 There were two footnotes to this provision. One read: “[c]hoice between reference to administrative tribunal or court, on the one hand, or ‘under the domestic law’, on the other, to be made during scrubbing.” (17) The second footnote was much longer. It read:

The final drafting must make it clear that article 2122(1)(a) addresses a domestic cause of action under the NAFTA and article 2126(4)(b) addresses domestic law other than the NAFTA.

In the case of Mexico, it is agreed that an investor must elect, at the end of the administrative process, either to submit his dispute to arbitration under the NAFTA or initiate judicial proceedings or administrative tribunal proceedings under Mexican domestic law. If the investor is successful in amparo proceedings, he may then submit the issue of compensation to arbitration under the NAFTA or, if Mexico creates a cause of action for a violation of the NAFTA, submit the issue of compensation to a court. Placement of this exception will be subject to determination of placement of other exceptions currently in the Investment Chapter. See attached Mexican text. (18)

- Towards the end of the file titled INVEST.810, a further version appeared under the date August 9. It read:

1. If an investment [sic] dispute cannot be settled by consultation or negotiation, the investor may choose either of the following:

- (a) assertion of rights under domestic law:

The investor may initiate (or cause [sic] its investment to initiate) proceedings under the domestic law of the disputing Party, based on rights and obligations other than those established in this Chapter; or

- (b) assertion of rights under this Chapter:


The investor may either

- (i) submit the investment dispute to arbitration under Article 2125 on rights and obligations established in this Chapter, or
- (ii) initiate (or cause its investment to initiate) proceedings based on such rights and obligations under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party or their investments with a right of action under its domestic law for an alleged breach of this Chapter.

2. The choice of forum under paragraph 1, once made by the investor shall be exclusive, with the following exceptions:

[(a) simultaneous pursuit of extraordinary relief and damages in different fora:]

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 Submission of a dispute to arbitration under Article 2125 shall not preclude an investor from seeking, in an administrative tribunal or court of the disputing Party, injunctive, declaratory or other extraordinary relief based on rights and obligations other than those established in this Chapter. In such circumstances [sic], no determination of damages shall be made by the arbitration [sic] tribunal until the determination regarding such extraordinary relief has been made; and

(b) [sequential pursuit of extraordinary relief and damages in different fora:]

An investor that succeeds in obtaining final injunctive, declaratory or other extraordinary relief in an administrative tribunal or court of the disputing Party (based on rights and obligations in this Chapter or otherwise) may subsequently [sic] submit the issue of compensation to arbitration under Article 2125. (19)

This latter suggestion did not appear again, although it is likely the source for the exceptions for injunctive declaratory, or other extraordinary relief which ultimately appeared in the provision. Instead, the August 11 draft reverted to the previous draft texts that were divided between two articles. (20)

- The provision did not change in substance again, although it was renumbered several times, until September 4. Several drafts were dated September 4. In what was apparently the first September 4 draft (21) the provision was placed under the Article entitled

the first September 4 draft, (21) the provision was placed under the Article entitled “Consent to Arbitration” [now Article 1121] and read:

4. By submitting the dispute to arbitration, the investor:

- (a) consents to arbitration in accordance with the provisions of this Party; and
- (b) waives its and its investment's right to initiate or continue before any administrative tribunal or court [under the domestic law] of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of this Chapter, except for proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party.

(22)

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– The next draft, also labeled September 4, showed a provision nearly in its final form. It was labeled Article 1121 and entitled “Conditions Precedent to Submission of a Claim to Arbitration”. It provided that:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

- (a) the investor consents to arbitration in accordance with the provisions of this Section; and
- (b) both the investor and an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, waive their right to initiate or continue before any administrative tribunal or court under the domestic law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party.

Paragraph (2) was virtually identical, but it applied to provisions under Article 1117 and required that both the investor and the enterprise consent to arbitration and file the requisite waiver. Paragraph (3) stated “[a] consent and waiver required by this Article shall be in writing, shall be given to the disputing Party, and shall be included in the submission of a claim to arbitration.” (23) Article 1121(3) had reached its final form; the other provisions were still subject to minor changes before reaching that stage.

There were minor changes in the wording of the provision, with the reference to Chapter changed to Section and then to Subchapter, and then back again to Section, and the references to the provisions in Article 15 changing slightly in form but not in substance. (24)

- On October 2, 1992, the reference to Section was changed to Agreement, so that “the investor consents to arbitration in accordance with the procedures set out in this Agreement.” The references to Article 1115 were removed from the text, so that the waiver applied to “any proceedings with respect to the measure of the disputing party that is alleged to be a breach referred to in Article 1116 [or 1117].” (25) The section had reached its final form, except that there was no subparagraph 4.
- Subparagraph 4 was added in the December 17 draft. The provision had reached its final form.

## II Commentary


### A Introduction and Overview (26)

Article 1121 is entitled “Conditions Precedent to the Submission of a Claim to Arbitration.” It sets forth procedural steps an investor must take in order to submit a claim to arbitration. Though other articles deal with procedural issues, Article 1121 is the only article with the words “conditions precedent” in its title.

#### 1 Investor's Consent to Arbitration

Article 1121 provides the investor's consent to arbitration; while Article 1122 provides the State Party's consent to arbitration. In effect, NAFTA constitutes a standing offer by the State Parties to arbitrate, but only on the condition that the investor meet certain requirements. (27) Article 1121(1)(a) provides that an investor bringing a claim under Article 1116 must consent to arbitration “in accordance with the procedures set out in this agreement;” the same consent is found in Article 1121(2)(a) with respect to investors bringing a claim under Article 1117. Because arbitration is based on consent, Article 1121 is an indispensable complement to Article 1122; only if both disputing parties have consented can the tribunal exercise jurisdiction.

Article 1121(3) requires that the consent, and the accompanying waiver, be in writing, be delivered to the disputing Party, and be included in the submission of a claim to arbitration. Requiring that investor to deliver written consent satisfies the requirements of the ICSID, the

<sup>P 1121-9</sup> ICSID Arbitration (Additional Facility) Rules, and the New York Convention that arbitration agreements be in writing  to be enforceable. (28) The Inter-American Convention requires that there be an agreement, though it does not specify that the agreement be in writing. (29)


## 2 The Waiver Provisions

Chapter 11 permits investors to submit two main types of claims. The first type comprises those claims brought under Article 1116 by an investor of one Party, on its own behalf, for losses incurred because of a breach of a NAFTA obligation by another Party. Such losses may include injury to its interest in an enterprise that is both a juridical person of that other Party and controlled, directly or indirectly, by the investor. The second type of claim comprises those claims brought under Article 1117 by an investor of one Party on behalf of an enterprise that is owned or controlled, directly or indirectly, by that investor and is also a juridical person of another Party, when that other Party has breached one of its NAFTA obligations. (30)

Article 1121(1)(b) sets forth the waiver requirements for claims brought under Article 1116, and Article 1121(2)(b) sets forth the waiver requirements for claims brought under Article 1117. The investor must waive the right “to initiate or continue before any administrative tribunal or court under the law of any Party local remedies with respect to the measure of the disputing Party that is alleged to be a breach.” There are certain exceptions for injunctive, declaratory, or other extraordinary relief that does not involve the payment of damages. This kind of relief would not be available from the arbitral tribunal.

In cases involving damage to an investor's interest in an enterprise under Article 1116, or in cases involving damage directly to an enterprise under Article 1117, both the investor and the enterprise must submit the waiver required in Article 1121. Since the investor must control, directly or indirectly, the enterprise on whose behalf it is asserting a claim, it should be able to elicit such a waiver.

The Agreement further provides that the waiver be in writing, that it be delivered to the disputing Party, and that it be included in the submission of a claim to arbitration. (31)


Finally, the drafters anticipated one instance in which the waiver would not be required. “Only where a disputing party has deprived a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply.” The provision is quite reasonable; if a State has deprived an investor of control of an enterprise, requiring that investor to produce a waiver it is no longer in a position to procure would make access to arbitration difficult and subvert the operation of Chapter 11. (32) This provision has been invoked  in one Chapter 11 arbitration, but the argument did not form part of the decision. (33)

The reference to Annex 1120.1(b) raises interesting issues. The annex pertains only to Mexico, which conditioned the circumstances surrounding an investor's submission of a claim to arbitration in two instances. The first provision, Annex 1121.1(a), states that “an investor of another Party may not allege that Mexico has breached an obligation under [an actionable NAFTA provision] both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal.” (34) This reservation was necessary because under Mexican law treaties are self-executing and the provisions of NAFTA would become domestic law when Mexico ratified the treaty. Thus, Mexico's acceptance of its obligations under Chapter Eleven of NAFTA would, but for the reservation, allow identical causes of action, under the same international law provisions, in Mexican courts and NAFTA arbitration panels. By its reservation, Mexico has instead required an election of remedies – a “fork in the road” – for claims of violations of its NAFTA obligations. Thus, for example, an investor may claim that Mexico violated Article 1105 in Mexican courts or administrative tribunals, but it may not also make that claim in a NAFTA arbitration.

Annex 1120.1(b) is similar to Annex 1120.1(a), but relates to an enterprise that is owned or controlled, directly or indirectly, by an investor of another Party. It provides that when such an enterprise brings a claim for a violation of NAFTA in a Mexican court or administrative tribunal, an otherwise qualifying investor may not submit a claim to arbitration under Chapter 11: (35)

where an enterprise of Mexico ... alleges in proceedings before a Mexican court or administrative tribunal that Mexico has breached an obligation under (i) Section A or Article 1503(2) (State Enterprises), or (ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, the investor may not allege the breach in an arbitration under this Section. (36)

Article 1121(4)(b) provides that Annex 1120.1(b) does not apply when an investor has been deprived of control of an enterprise. This provision recognizes that an investor deprived of control of an enterprise in Mexico could face a special dilemma; it could not prevent an enterprise from pursuing a NAFTA-based remedy in local court, and thus should not be penalized for the potential duplication in claims in such a situation.

<sup>P 1121-11</sup> The purpose of the investor's waiver is to prevent a multiplicity of actions and duplication of remedies. Many BITs do this by forcing claimants to elect the  forum in which they will pursue relief when they learn of any breach. It should be noted that not all BITs prevent multiple concurrent proceedings. For example, the Australia-Czech Agreement of September 30, 1993, permits international arbitration “irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted.” (37)

The language in the Canadian Model FIPA is similar to that in Article 1121, and it contains the same waiver provisions. (38) Some slight changes in language make clear that an investor may submit a claim to arbitration “only if” certain procedural requirements are met. (39) The provision in the U.S. Model BIT has changed slightly more, although the substance remains similar. The investor and, if relevant, the enterprise, must submit a written waiver “of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach....” (40) The exception that permits recourse for extraordinary relief has been amended somewhat:

Notwithstanding [the waiver], the claimant ... and the claimant or the enterprise ... may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration. (41)

### 3 The Exhaustion of Local Remedies Rule

Article 1121 is the provision in NAFTA that arguably waives the local remedies rule. The local remedies rule is the principle of customary international law that requires an alien to exhaust local remedies in the host country before seeking diplomatic protection from his home State. Thus, one might say two waivers are at issue in Article 1121, the explicit one given by the investor and the implicit one given by the NAFTA Parties. There is some debate over whether the exhaustion of local remedies rules can be waived implicitly. In the *ELSI* case, the International Court of Justice addressed whether the Treaty of Friendship, Commerce, and Navigation between Italy and the United States waived the local remedies rule: “the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of words making clear an intention to do so.” (42) While it is true that the NAFTA countries did not waive the exhaustion of local remedies rule in ▲▼ so many words, one could read the words of Article 1121 as making clear their intention to do so.

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The language most relevant to exhaustion of local remedies appears in Article 1121(1)(b):

the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. (43)

A similar provision exists for claims brought under Article 1117 – in such cases both the investor and the enterprise must also:

waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or any other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, with the same exceptions for extraordinary relief noted above. (44)

Though the NAFTA language does not mention waiver of the local remedies rule, the requirement that the investor “waive its right to initiate or continue” actions in local tribunals can only with difficulty be interpreted as other than an implicit waiver. If an investor *must* not, after bringing a NAFTA case, initiate or continue to pursue its local remedy, it is likely that the State Party is not requiring the investor to exhaust local remedies before bringing its NAFTA claim. (45) The exceptions for injunctive, declaratory, and other extraordinary relief are also consistent with waiver of the exhaustion requirement; arbitral tribunals generally cannot order such relief, so permitting investors to preserve those rights complements, rather than replaces, arbitral proceedings.

Moreover, in a regime in which the local remedies rule has not been waived, it is the duty of the claimant to use local remedies effectively, insofar as they exist. (46) The claimant must not only avail himself of the remedies, he must do so in a reasonably competent manner. For example, the failure of a claimant to call certain evidence in domestic court might equate to a failure to exhaust ▲▼ local remedies. (47) The provision in Article 1121 that requires a claimant to waive his right to initiate or continue local remedies is difficult to reconcile with the international law requirement that it use such remedies effectively, unless it served as a waiver of the local remedies rule. Nonetheless, because there is no explicit waiver, the matter has been the matter of some controversy, as discussed in section D below.

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### B Claimants' Waiver of the Right to Initiate or Continue Relief in Other Fora

The cases that address the question of the claimants' waiver of their right to initiate or continue local remedies may be divided into two classes – those that take a formal view of the waiver decisions, e.g. *Waste Management v. Mexico* and *Methanex Corporation v. United States*, and those that take a less formal view of the requirement, e.g. *Ethyl Corporation v. Canada* and *Pope & Talbot, Inc. v. Canada*. (47a)

In *Ethyl Corporation v. Canada*, the first case brought under Chapter 11, Canada challenged the sufficiency of the claimant's waiver, which was not delivered with the Notice of Arbitration, but instead accompanied the Statement of Claim. (48) Delivering a Statement of Claim separately from and after the Notice of Arbitration is acceptable under the UNCITRAL Arbitration Rules (which governed the *Ethyl* case). (49) However, NAFTA Article 1137(1)(c) states that “[a] claim is submitted to arbitration under this Section when: ... (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing party.” Article 1121 states that a disputing investor may “submit a claim” only if it consents to arbitration in accordance with the procedures set forth in the Agreement and waives its rights to initiate or continue proceedings for local relief, and that the waiver should be included in the submission of the claim to arbitration. Canada thus argued that *Ethyl's* submission of the claim was invalid because it had not been accompanied by the requisite waiver.

The *Ethyl* tribunal began its discussion by declaring irrelevant the “restrictive” rule of treaty interpretation, which traditionally had provided that any waiver of sovereign prerogative should be construed strictly. (50) It noted that the doctrine of restrictive interpretation had been replaced by the Vienna Convention on the Law of Treaties, to which Canada was a Party and which the United States had acknowledged as setting forth customary international law with respect to treaty interpretation. (51) The tribunal thus announced it was applying Vienna Convention principles in its analysis, which required the tribunal to look at the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” (52) After noting that the basis for arbitration is the consent of the parties to the proceedings, the tribunal asked, with respect to the waiver: “[t]o what extent, if any, is Canada's consent to arbitration in Chapter 11 conditioned absolutely on the fulfillment of specified procedural requirements at a given time?” (53)

The answer to that question, the tribunal determined, did not affect the jurisdiction of the tribunal, but related at most to admissibility. While noting that the title to the article called submission of the required waivers a “condition precedent,” the tribunal added that the title did not say to what those waivers must be precedent. (54) The tribunal apparently ignored the rest of the language of the title of the article, which says they are “conditions precedent to the submission of a claim to arbitration,” though it had already noted the provision in NAFTA Article 1137(1)(c) that defines “submission of a claim to arbitration” as delivery of the Notice of Arbitration to the disputing party if the claim is proceeding under the UNCITRAL Rules. Instead, the tribunal focused on the language in the article itself, which states that the waivers “shall be included in the submission of a claim to arbitration,” and held that the article could have said the waivers “shall be included with the Notice of Arbitration” if the drastically preclusive effect for which Canada argues truly were intended.” (55) In practical terms, the tribunal also noted that Canada had not suffered prejudice by reason of the delay. (56)

Another reason for the *Ethyl* decision was apparently that the tribunal regarded submission of the waiver as a mere formality, since in the tribunal's view submission of the claim to arbitration would operate as a de facto waiver of rights:

The Tribunal has not gained any insight into the reasons for the formalities prescribed by Article 1121, which on their face seem designed to memorialize *expressis verbis* what is normally the case in any event, namely, that the initiation of arbitration constitutes consent to arbitration by the initiator, whereby access to any court or other dispute settlement mechanism is precluded (except as allowed ancillary to or in support of the arbitration. (57)

In *Pope & Talbot*, Canada had requested the tribunal to strike the claim insofar as it related to an enterprise controlled by Pope & Talbot, Inc. and called Harmac Pacific Inc. on the ground that Harmac had not submitted the waiver required by Article 1121(b) and (c). (58) When the Statement of Claim was filed on March 25, 1999, Harmac was still an independent company. (59) After Canada's motion was filed, Pope & Talbot Ltd. (Pope & Talbot, Inc.'s Canadian subsidiary) and Harmac merged to become one company. On January 10, 2000, the merged company, also called Pope & Talbot Ltd., executed a waiver under Article 1121(1)(b) (which, the tribunal noted, necessarily limited Pope & Talbot to an Article 1116 claim with respect to that company). (59) Canada argued that the waiver could not have retroactive effect, but could only be effective as of January 10. It further argued that, in such a case, the claim was time-barred under Article 1116(2) because Harmac must have known of the damage allegedly caused it by the measures in question prior to January 10, 1997, and that permitting the waiver to have retroactive effect would work substantial prejudice.

The *Pope & Talbot* tribunal rejected both of these arguments. First, it noted that because the claim was brought under Article 1116, the investor, rather than Harmac, needed to have had knowledge of the breach and knowledge that it had incurred loss or damage resulting from the breach. Second, it said that the claim was in the nature of an affirmative defense, putting on Canada the burden to prove that Pope & Talbot Inc. knew of the breach. Third, it found that Canada had shown that prior to January 10, 1997, Pope & Talbot knew only that a loss was likely to accrue in the future; since the company had not already incurred the loss, and the provision requires that the investor know that it “has incurred loss or damage,” the time-bar claim failed. (60) The *Pope & Talbot* tribunal also dismissed the idea that the claim was perfected only when the waiver was submitted. Relying on *Ethyl*, it too held that “consent to arbitration and the initiation of arbitral proceedings may be taken as a constructive waiver of the right to initiate other proceedings.” (61) It noted that the waiver, at least on the part of the investor, might even be considered unnecessary, except with respect to clearly reserving the right to request extraordinary relief in local courts. (62) The tribunal conceded that the waiver might play a

more important role with respect to an investment, rather than the investor, since the investment cannot file a Chapter 11 claim on its own behalf, but also dismissed that argument on grounds of constructive waiver. (63) If the investor (and the investment, presumably) failed to reserve the right to claim extraordinary relief, it would only prejudice itself; therefore “there would be no good reason to make the execution of the investor’s waiver a precondition of a valid claim for arbitration.” (64)

Finally, the tribunal rejected any idea that the waiver need have retroactive effect, stating that the language of the article requiring the waiver to be included in the submission of a claim to arbitration “does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made,” though the waiver should be given before the tribunal entertained the claim. (65)

P 1121-10 This decision is notable for several reasons. Not only did the tribunal fail to explain its decision in terms of the title to Article 1121 – “conditions precedent ▲▼ to the submission of a claim to arbitration” – but also it plainly contradicted that language in its holding. While one might read the requirements of the treaty to permit a claim to be consolidated with existing proceedings once a waiver with respect to any newly relevant entity is filed, the submission to arbitration for that portion of the claim would presumably date from the submission of the waiver. (66) Moreover, the tribunal’s apparent assumption that a claimant’s right to seek local remedies for damages would clearly be waived by the submission of a claim to arbitration is curious given the traditional rules with respect to a State Party’s waiver of the exhaustion of local remedies rule. Absent Article 1121, nothing in NAFTA would demonstrate that NAFTA Parties intended to waive the local remedies rule. Thus, without that article, the assumption on the submission of the claim to arbitration would be that the investor had already exhausted its remedies, not that it had constructively waived its right to those remedies. While the decision correctly presumes the intent of the State Parties to avoid multiple remedies, its reasoning fails to take into account the language of the treaty.

*Feldman v. Mexico* involved a challenge by a U.S. businessman to Mexico’s refusal to grant rebates on certain excise taxes charged to the Mexican company, CEMSA, he owned. The primary allegations in *Feldman* were that Mexico’s tax authorities had refused to honor the decision of the Mexican Supreme Court ordering them to pay rebates to CEMSA, which acts violated NAFTA because they discriminated against CEMSA and constituted an expropriation of its business. (67) The investor also had proceedings pending in local courts with respect to its right to tax rebates under a law that had been amended in 1998. That revised law was not part of the NAFTA claim, however, because the U.S. Department of the Treasury had refused to grant Feldman permission to pursue that NAFTA claim as required under NAFTA’s special provisions respecting challenges to tax measures. (68) Feldman did receive permission to pursue his challenges to acts relating to the previous law. (69)

P 1121-11 ▲▼

In *Feldman*, the investor provided the waivers required by Article 1121, which Mexico did not challenge in form. (70) Nevertheless, Mexico argued that the existence of the court action in which Feldman sought rebates under 1998 revised law demonstrated that Feldman had not abided by the terms of his waiver. Mexico argued that the court action constituted “proceedings with respect to the measure at issue” in the Chapter Eleven case, even though the law itself and acts taken pursuant to it did not form part of the NAFTA Chapter 11 claim. (71)

To add complexity to the issue, at the time of the NAFTA arbitration, other court proceedings were pending against a 1998 decision by the Mexican tax authorities to audit CEMSA, pursuant to which the authorities had attempted to retract the few months’ worth of excise tax rebates that actually had been paid to CEMSA. (72) Thus, Mexico also argued that the pending court proceedings would shed light on the legality or illegality of previous acts taken by Mexican authorities and on the requirements of the pre-1998 tax laws, and that the Mexican courts were the appropriate fora in which to decide those issues. (73) In the Chapter 11 arbitration, Feldman had not challenged either those court decisions or the audit, but had requested the tribunal to issue a “declaratory judgment” that the audit violated NAFTA.

The *Feldman* tribunal rejected Mexico’s arguments, primarily on the grounds that the Mexican courts would be interpreting and applying Mexican law, while the NAFTA tribunal was concerned with principles of international law. (74) This determination seems to beg the question of duplicity of proceedings, but is consistent with the tribunal’s determination that the waiver provision in Article 1121(2)(b) gives precedence to arbitral proceedings and was designed to make access to arbitration easier and speedier. (75) It appears from the facts in the record that the relief claimed in Mexican court proceedings may not have duplicated that requested in the NAFTA arbitration, but this is not entirely clear from the decision. (76) Because the acts of the Mexican courts themselves were not at issue, the validity of those decisions was not before the tribunal.

P 1121-12 Furthermore, the tribunal’s treatment of the “declaratory judgment” issue is somewhat perplexing, especially as it relates to waiver under Article 1121. ▲▼ Article 1121, while requiring investors to waive their right to pursue damages claims in municipal courts, also permits them to reserve their rights to pursue extraordinary relief, including declaratory judgments. Yet Feldman asked the NAFTA tribunal, rather than a municipal court, for declaratory relief after having filed his NAFTA Notice of Claim. The tribunal declared that there was no requirement to waive a claim for declaratory relief rather than damages, but noted its need to examine its authority to issue a declaratory judgment. (77) This conclusion suggests



that the tribunal was confused about the requirements of waiver under Article 1121. Moreover, the tribunal's decision about its authority to give a declaratory judgment did not address the most salient article. The tribunal found it "not necessarily inconsistent with NAFTA Chapter 11, Section B, in particular Articles 1116(1) and 1117(1)." (78) The tribunal apparently did not note Article 1135, which provides that the tribunal may award, separately or in combination, only "monetary damages and any applicable interest" or "restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution." The tribunal did not, however, issue a declaratory judgment, but determined it would consider the issue raised in that request as it pertained to the other claims before it. (79)

The decisions in *Waste Management v. Mexico* are the most thorough analyses to date of the claimant waiver requirements in Chapter 11. The successive tribunals convened in that case have both considered Article 1121's waiver requirements. In *Waste Management I*, the tribunal determined that the investor had not given an effective waiver and dismissed the claim for lack of jurisdiction. (80) The investor re-filed its claim, this time submitting an effective waiver, and Mexico objected on several grounds, including arguing that Articles 1120 and 1121 permitted an investor to file only one NAFTA claim. The second tribunal, *Waste Management II*, dismissed Mexico's objection.

In *Waste Management I*, the investor, a large North American waste disposal company, challenged the city council of Acapulco's refusals to pay the company's subsidiary, Acaverde S.A., under the concession contract it had signed with the company. (81) A Mexican bank, Banco Nacional de Obras y Servicios Públicos ("Banobras"), had guaranteed payment under the contract; should the city council of Acapulco not pay, the concessionaire was able to demand payment from Banobras.

Waste Management's first NAFTA claim was rejected by ICSID because the investor had not given to the operative division of the Mexican government the requisite notice of intent to arbitrate. (82) It re-filed its NAFTA claim, and supplied the following waiver:

Additionally, Claimants hereby waive their right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or other dispute settlement procedures, any proceedings with respect to the measures taken by Respondent that are alleged to be in breach of NAFTA Chapter Eleven and applicable rules of international law, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. *Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.* (83)

The wording of this last sentence, combined with the ambiguous language of the waiver accompanying the initial submission, prompted correspondence from ICSID's legal adviser, who requested clarification from Waste Management that this waiver "was applicable to any such dispute settlement proceedings in Mexico as might involve allegations of breaches of any obligations, imposed by other sources of law, which in substance were not different from those of a Party State under NAFTA Chapter XI." (84) Waste Management responded:

With respect to the inclusion in the Notice of Institution, of the waiver required by NAFTA Article 1121 and [Waste Management's] understanding of the scope of that required waiver, [Waste Management] hereby confirms that the waiver contained in the Notice of Institution applies to dispute settlement proceedings in Mexico involving allegations of breaches of any obligations, imposed by other sources of law, that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of the NAFTA.... With respect to [Waste Management's] efforts to resolve its dispute with Mexico outside of the remedies offered by NAFTA, there are no pending legal proceedings related to that dispute in which the Government of the United Mexican States is a named a [sic] party. (85)

Mexico disputed the adequacy of the waiver, contending that it was insufficient by its terms, and pointing to the existence of internal Mexican legal proceedings, including two suits against Banobras and one arbitration claim against the city council of Acapulco, as evidence of its insufficiency. (86) In response, Waste Management again attested to its good faith, "[w]hile WASTE MANAGEMENT did indeed express its 'understanding' of the scope of the waiver, WASTE MANAGEMENT has affirmed since it first provided the waiver that, whatever the waiver means under NAFTA, WASTE MANAGEMENT intended to give and has given it." (87)

Thus, taking stock of the facts, Waste Management had given a waiver that repeated the exact language of NAFTA, but included a proviso at the end reflecting its understanding that the waiver required it to abandon only those domestic proceedings in which it sought damages for violations of international law under NAFTA Chapter 11 and did not require it to abandon any domestic proceedings based on violations of domestic law. This explanation took no account of Annex 1120.1, whereby Mexico prevented investors from bringing claims based on violations of NAFTA in municipal courts. Indeed, this interpretation of the waiver's purpose would make Annex 1120.1 irrelevant. However, the investor also tried to cover its bases in the event its interpretation was wrong by stating that it meant the waiver to mean whatever it had to mean under NAFTA.

This "savings" provision proved inadequate in the eyes of the tribunal. On September 29, 1998, the date the claim (with the revised waiver) was submitted to ICSID and the date from which

the tribunal deemed that the waiver need be given effect by the investor, (88) Waste Management had local proceedings pending under Mexican law alleging breaches of contract by the city council of Acapulco in refusing to pay invoices submitted to it and by Banobras for having failed to fulfill its role as guarantor. The tribunal rejected Mexico's suggestion that the tribunal be responsible for ensuring that the investor made good on its waiver in every domestic proceeding in which it might be involved, noting that it lacked the jurisdiction necessary to do so, and suggesting that the burden fell on Mexico to plead the waiver in those other proceedings. (89) Nevertheless, the existence of those other proceedings significantly affected the tribunal's decision.

The tribunal read compliance with Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," as a prerequisite to the formation of a valid agreement between the disputing investor and the State Party involved and therefore requiring the utmost attention.

P 1121-790 It noted that a waiver need be ▲▼ clear, explicit, and categorical as it involves forfeiting or extinguishing existing legal rights. (91) It found Waste Management's waiver to be free of formal defects (in that it was presented in writing, delivered to the disputing party, and included in the submission), (92) but nevertheless questioned its adequacy as representative of Waste Management's intent to waive its right to initiate or continue domestic proceedings, which the tribunal found a necessary concomitant to the giving of a waiver. (93) The tribunal then proceeded to verify "the public manifestation of the declaration of intent that said Claimant expressed in the waiver referred to in NAFTA Article 1121." (94)

The tribunal determined that Acaverde (Waste Management's subsidiary) had pursued two different cases against Banobras in Mexican Courts into 1999, though both were filed before the company submitted the waiver, and that it had filed an arbitration against the city council of Acapulco in October 1998. (95) The tribunal thus found the company had both continued and initiated domestic proceedings even after it had filed its waiver. (96)

In so finding, the tribunal rejected Waste Management's arguments that it need only waive any right to pursue remedies alleging violations of international law as set forth in Chapter 11 of NAFTA. After acknowledging that in some instances it might be possible for proceedings to exist in a national forum that did not relate to those alleged in the NAFTA arbitration, the tribunal went on to find that, in *Waste Management*, the different claims founded on different legal bases challenged the same measure. To find an unacceptable duplicity in proceedings, the tribunal need have only "proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA." (97) Waste Management's conduct, as evidenced by the fact that "for more than 14 months, it systematically failed to comply with the actual agreement that the waiver of NAFTA Article 1121 requires from those parties seeking to submit a claim to arbitration ...," showed that it had presented the waiver "in accordance with its own interests." (98) The tribunal did not directly address one of Waste Management's claims – that because Mexico was not a named party in the proceedings in domestic courts,

P 1121-791 the maintenance of those suits did not violate ▲▼ the waiver. The tribunal did, however, note that Mexico was responsible for the actions of both Acapulco and Banobras. (99)

The Claimant's arbitrator, Keith Highet, dissented from the tribunal's decision. The dissent relied on the language in the waiver, including the written intent not to derogate from any required provisions, which did not have "a negative or diluting effect on its substance [that] would invalidate it." (100) He criticized the tribunal's examination of Waste Management's conduct to supplement the meaning of the waiver as expressed in its words. (101) He also expressed doubt that claims seeking Mexican remedies for Mexican wrongs could ever be the same as claims for NAFTA remedies for NAFTA wrongs, and relied particularly on the fact that international and domestic legal remedies are necessarily distinct. (102) On that basis, the dissenting arbitrator disagreed with the majority's finding that the government "measures" challenged by Acaverde in the Mexican tribunals overlapped with those alleged to be breaches of NAFTA. (103) He suggested that the language "with respect to" in the waiver was more narrow than "relating to" or "concerning," so that waiving the right to initiate or continue proceedings with respect to the measure at issue must mean a claim "directly address[es] that issue. (104) Thus, he found that the waiver required under Article 1121 was not intended to cover "any and all concurrent legal activity." (105) In particular, the dissent emphasized that the important thing is whether "the causes of action are different: local commercial claims in the Mexican tribunals, and international treaty claims before this tribunal." (106)

The dissent further argued that, once the waiver had been delivered, the government of Mexico should have used it to convince domestic tribunals to dismiss the cases pending before them in light of the Claimant's waiver of rights. (107) Had the NAFTA Parties wished, he suggested, the NAFTA Parties could have required the actual termination of domestic proceedings, rather than merely a waiver of the right to initiate or continue them. (108)

To read Article 1121 as requiring an active discontinuance of proceedings (either simultaneously or subsequently) as well as active delivery of the waiver is, in fact, to dilute the credibility or efficacy of the written waiver and is inconsistent with requiring its delivery in the first place. (109)

P 1121-792 ▲▼


The dissenting arbitrator also suggested that there should be an implied "grace period" after the submission of the waiver for a complainant actually to come into compliance with its terms, as it "would be absurd" to require NAFTA claimants to withdraw all pursuit of local

remedies simultaneously with the delivery of the waiver. (110)

The dissent suggested that Annex 1120.1 was included in NAFTA to give added insurance to Mexico that NAFTA claims not be pursued simultaneously in two tribunals, a precaution necessary given that NAFTA is automatically incorporated into Mexican domestic law. (111) He suggested that the purpose of Article 1121 was to preclude forum shopping only as to NAFTA claims, but not as to commercial claims that might one day form part of a NAFTA claim. (112) He did note that there could be rare cases in which the domestic claim and the NAFTA claim could essentially be viewed as the same – for example, the initiation of a takings claim in local court and an expropriation claim before a NAFTA tribunal. (113)

The dissent also suggested that, because the waiver was on its face adequate, the tribunal had impermissibly confused jurisdiction and admissibility; only defectiveness of the waiver itself could affect jurisdiction, which was not the case in this proceeding. (114) Thus, at most the claim was inadmissible. Treating the matter as one of admissibility would also lead to better case management; even if there were a case pending in Mexican court simultaneously, the tribunal could treat as inadmissible that portion of the claim before the tribunal that overlapped with the Mexican court proceedings, but remain seized of jurisdiction over the rest of the claim. (115)

Finally, the dissent suggested that Mexico's failure to use the waiver in local proceedings supported its contention that the waiver applied only to NAFTA breaches, and not to local causes of action based on the commercial code. (116) Furthermore, Mexico did not assert Annex 1120.1 as a bar before the tribunal, which the dissent viewed as evidence that Mexico did not believe that the Annex applied to contractual disputes. (117) The dissent pointed to Mexico's assertion that it would argue in the merits phase that a breach of contract does not in and of itself rise to the level of a breach of international law as suggesting that Mexico accepted the distinction between “national claims and international remedies.” (118)

P 1121-24 The dissent is correct that domestic causes of action by definition differ from international causes of action, and a violation of domestic law will not always  also be an international wrong. Thus, as noted by Arbitrator Hight, the tribunal in *Azinian v. Mexico* stated that:

*NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes. (119)*

Nevertheless, if the NAFTA claim is essentially that Mexico violated international law in the way it breached its contract with the investor, the potential for duplication in concurrent cases brought under domestic law and international law is unavoidable, and it seems quite clear that the same measure would be at issue in both cases. Such a reading is, moreover, consistent with the fact of NAFTA's requirement of a waiver – if international and domestic measures were always utterly distinct, no waiver would be necessary. Given likely overlap between claims and remedies, it is not unreasonable that investors often have to choose which redress to pursue – either local remedies or international remedies. Because of the three-year statute of limitations, selection of a local remedy may preclude seeking an international remedy.

In *Waste Management I*, the overlap between the domestic remedies sought and the international remedies sought was fairly clear. Yet one could imagine instances in which the overlap was small enough that concurrent proceedings would not necessarily involve the very same issue. The dissent rightly pointed to the potential for different claims based on similar or even the same facts. Some of these claims would not necessarily be barred by the invocation of Chapter 11 dispute settlement.

After the tribunal dismissed its case in *Waste Management I*, the investor re-filed its ICSID claim with the requisite waiver, this time unadorned with extra language. Its claim fell within the three-year statute of limitations of NAFTA. Mexico raised an objection to the re-filed case grounded in Article 1121, the language and intention of which it claimed permitted investors to have only one attempt at an international arbitration under Chapter 11. (120)

In fact, Article 1121 is silent with respect to the re-filing of cases. The *Waste Management II* tribunal agreed that the article's purpose was to prevent a multiplicity of proceedings and to achieve finality of decision. (121) Nevertheless, such a determination did not necessarily mean the investor could not file two consecutive Chapter 11 claims, and the tribunal declined to find in Article 1121 or elsewhere in Chapter 11 anything “which expressly or impliedly prohibits a second proceeding brought after the jurisdictional barrier has been removed.” (122)

P 1121-25 

The tribunal pointed out that by its terms, the waiver was apparently definitive with respect to local proceedings; thus, whatever the outcome of the NAFTA proceeding, local remedies would be barred to the investor once it had executed the waiver and delivered it to the disputing Party. (123) However, the tribunal noted that an argument could be made that the claim had not ever been “submitted” to arbitration since the proceeding had been dismissed on a technicality. (124) This point underlay the tribunal's determination that dismissal for failure to file an effective waiver would not require dismissal of the re-filed case. If the claim had not yet been “submitted” to arbitration because the jurisdiction of the tribunal did not attach, then there could be no question of barring the “second” proceeding as there had never been an initial case – “What Article 1120 contemplates is a submission of a claim for adjudication on the

merits.” (125) Furthermore, the tribunal noted that one of the purposes of Chapter 11 was to “create effective procedures... for the resolution of disputes,” a purpose likely to be defeated if the claimant were barred from having its claim on the merits heard in any tribunal, whether national or international. (126) The tribunal noted that there was no general rule in international law that withdrawal of a claim “amount[s] to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected there is in principle no objection to the Claimant State recommencing its action.” (127) The tribunal also determined, contrary to the arguments advanced by Mexico, that the initial decision in *Waste Management* was not a determination on the merits and therefore was not *res judicata* under principles of customary international law. (128)

Finally, the tribunal declined to extend any issue preclusion even to pronouncements on issues of substance when those pronouncements were made outside the context of a decision on the merits of the case. (129)

In *Mondev Int'l Ltd. v. United States*, the tribunal suggested that a distinction might be drawn between compliance with the conditions set out in Article 1121 due to their designation as “conditions precedent,” and the other procedural provisions of Chapter 11. It suggested that non-compliance with a condition precedent would seem to “invalidate the submission,” whereas a minor or technical failure to comply with some other condition might not have that effect. (130) The tribunal went on to note, however, that “Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.” (131) In *Mondev*, the claimant had only submitted a claim under Article 1116 in its notice of arbitration. The United States challenged the jurisdiction of the tribunal, alleging, *inter alia*, that *Mondev*'s claims were more properly put forward under Article 1117 because they stemmed from loss or damage to an enterprise, Lafayette Place Associates. The tribunal dismissed this objection, noting that *Mondev* had with its notice of arbitration submitted a waiver on behalf of Lafayette Place Associates. (132) The United States had not challenged the adequacy of the waiver, there was no evidence of prejudice, and so the *Mondev* tribunal would have been prepared to treat *Mondev*'s claim as having been brought under Article 1117 in the alternative. (133)

The issue of waiver rose in *Methanex Corp. v. United States*, but was dispensed with by agreement of the parties. (134) *Methanex* had filed a waiver with defects that could easily be cured. The parties agreed that *Methanex* should file a new waiver and that the tribunal, which had been convened under the UNCITRAL rules, should be reconvened as of the date of the waiver. The United States thereby preserved its jurisdictional objection to the defective waiver, but the arbitration was not unduly delayed. Since *Methanex* was well within the limitations period in its filings, the later date of constitution did not hurt it.

The issue of waiver rose again in *Methanex* in the decision on the merits. *Methanex* had challenged California's ban on the gasoline additive methyl tertiary-butyl ether (“MTBE”). *Methanex*'s claim preceded the California Air Resources Board's issuance of amended regulations on May 1, 2003. Those regulations put into place the ban on MTBE commencing December 31, 2003. (135) The United States challenged *Methanex*'s reliance on these regulations on the ground that they had not been included in the Second Amended Statement of Claim, and that the formal requirements of Article 1119, with respect to notice, and of Article 1121, with respect to waiver, had not been complied with. The *Methanex* tribunal agreed, and determined that *Methanex* could not rely on the regulations as a “measure” under Article 1101 of the NAFTA, although it could use the regulations as evidence of discriminatory intent. (136) The tribunal held that *Methanex* failed to meet the “essential requirements” for bringing a claim under Section B of Chapter 11. (137) *Methanex* had provided no waiver with respect to the 2003 regulations. The only waivers submitted, though they had been expressed in broad terms, were made in May 2001, and used the present tense:

In the Tribunal's view, these waivers could not legitimately be construed to cover a possible future claim in respect of future regulations still to be introduced by California in May 2003. To construe these past waivers otherwise, as *Methanex* contends, would introduce a large degree of uncertainty where absolute certainty, as to what the investor claimant was or was not waiving, is procedurally essential for both the investor and the NAFTA Respondent Party.

(138)

At issue in *International Thunderbird Gaming Corporation v. Mexico* was whether the waivers filed by *Thunderbird* to support its Article 1117 claims on behalf of several enterprises were adequate given the requirements of Article 1121. *Thunderbird* only presented the waivers in conjunction with its Statement of Claim, rather than concurrently with the submission of its claim to arbitration. The tribunal acknowledged that Article 1121 was entitled “conditions precedent” to the submission of a claim to arbitration and noted that one “should not treat lightly the failure by a party to comply with those conditions.” (138a) Nonetheless, the tribunal noted that *Thunderbird* had remedied their failure to file and cautioned that disregarding that subsequent filing would amount to an “over-formalistic” reading of Article 1121. (138b) It cited the decision in *Mondev v. United States* as supporting a conclusion that the requirements should be construed in an excessively technical manner. (138c) Finally, the tribunal concluded that the purpose of Article 1121 was to prevent a party from pursuing concurrent redress in national and international fora, which could give rise to legal uncertainty or to duplicative recovery; in this case the enterprises in question were not pursuing simultaneous remedies and

thus had effectively complied with the requirements set forth in Article 1121. (138d)

In *UPS v. Canada*, Canada argued that UPS's claim should fail as it had submitted its claim only under Article 1116 when it should have filed under Article 1117, since the damage it alleged had occurred to its Canadian investment rather than to itself. According to Canada, UPS had not submitted the requisite waiver from its investment as required under Article 1121(2), and thus had failed to meet the conditions precedent to arbitration. (138e) The UPS tribunal dismissed this argument, and suggested that the procedural requirements were only formalities:

We agree with UPS that the claims here are properly brought under article 1116 and agree as well that the distinction between claiming under article 1116 or article 1117, in the context of P 1121-21 this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. ... Moreover, in this context there is no substantial difference between the claims filed under article 1116 and under article 1117. Canada has not been deprived of any notice about the nature of the claim, and there is no reasonable question whether UPS Canada or UPS would consent to filing the particular claims. We would not, in these circumstances, require that UPS refile its complaint under article 1117 if there were the better basis for its claims. In the event, however, that is not a conclusion we need reach here. (138f)

Other investment agreements entered into by the United States and Canada contain language identical or very similar to Article 1121. Decisions in two recent cases shed more light on the waiver question.

*Vannessa Ventures v. Venezuela* is a case brought under the Canada – Venezuela FIPA. Vannessa Ventures had commenced several proceedings related to the measures at issue in the FIPA arbitration in Venezuelan courts prior to filing its claim at ICSID. Once it had decided to proceed under the FIPA, Vannessa withdrew its claims (filed a *disistimiento*) “without prejudice” in all but one of the cases brought in Venezuelan courts and filed the requisite waivers. (138g) Venezuela challenged the withdrawals as inadequate because they were not “with prejudice” and thus did not necessarily prevent Vannessa from returning to court in Venezuela. (138h) As far as the form of the withdrawals was concerned, the claimant's argument was that it had filed the *disistimiento* in the form chosen in order not to be deemed to have waived any rights before ICSID or in possible enforcement proceedings. (138i) The claimant also argued that the only case remaining in Venezuelan court related solely to a costs matter and was unrelated to the measures alleged to be a breach under the FIPA. (138j)

Expert testimony offered by the disputing parties conflicted as to the effect the withdrawals of the existing cases would have if Vannessa Ventures or one of its affiliated companies tried to return to Venezuelan courts. (138k) The tribunal concluded it did not have to decide that matter, however, because the Constitutional Chamber of the Supreme Court of Justice, before which the remaining case was pending, dismissed the remaining case before it. According to the Court, the case involved a costs assessment in a matter that was clearly related to the same measures at issue before the FIPA tribunal, and the waiver filed by Vannessa required it to dismiss the case. Thus, the FIPA tribunal could be satisfied, based on the decision by the Venezuelan Supreme Court, that the waiver would effectively prevent Vannessa from pursuing P 1121-21 related matters before Venezuelan courts while the FIPA arbitration was pending, and that 28 it therefore fulfilled the requirements of the treaty. (138l)

Article 10.18.2 of the Dominican Republic/Central American Free Trade Agreement (DR-CAFTA) is modeled after Article 1121, and its terms were at issue before a CAFTA tribunal in *Railroad Development Corporation v. Guatemala*. The respondent in that case challenged the adequacy of the waiver offered by the claimant on three grounds: first, that the claimant had not shown it had the authority to waive the rights of its subsidiary, FVG, which was pursuing local arbitrations in Guatemala; second, that the waiver expressly reserved the right to pursue local remedies; and third, that the claimant had not taken the steps necessary to give effect to the waiver, i.e. had not dismissed the pending arbitrations. (138m) The exhaustion issue is addressed in part C.3, below. Before the tribunal issued its decision, the respondent withdrew its argument about RDC's ability to file a waiver on behalf of its subsidiary. (138n) As for the adequacy of the waivers, the tribunal described the key question as whether the measures at issue in the domestic arbitrations were the same measures alleged to be a breach of DR-CAFTA. (138o) While there was no dispute that some of the measures challenged in the domestic arbitration were separate from the measures challenged in the DR-CAFTA proceedings, there was some overlap in the claims. (138p) The claimant also sought to distinguish the domestic proceedings on the grounds that the relief sought would come primarily in the form of performance, rather than damages. Yet they were not seeking injunctive relief, so the exclusion in Article 10.18.3 regarding injunctive relief did not apply, and the tribunal determined that it is “the fact that two domestic arbitration proceedings exist and overlap with this arbitration as determined by the Tribunal that triggers the defect in the waiver.” (138q)

The claimants also argued that the language respecting waivers in DR-CAFTA was less restrictive than that in NAFTA, and that they should be able to remedy the defect by terminating or abandoning the inconsistent behavior. Whereas Article 1121 is in a section entitled “Conditions Precedent to Submission of a Claim to Arbitration” and the waiver language says a claim may be submitted “only if” the investor (and the investment) meet certain conditions, DR-CAFTA's analogous section is entitled “Conditions and Limitations on the Consent of Each Party” and Article 10.18 says “No claim may be submitted to arbitration under this Section unless ...”. The tribunal was not convinced that the differences justified the

inferences suggested by the claimant, as the language in DR-CAFTA was quite clear that the requirements needed to be met before the Respondent's consent could be "perfected." (138r) P 1121-28f It thus followed the lead of the tribunal in *Waste Management I* in finding that that the mere filing of the waiver was insufficient to satisfy the conditions of the treaty; the party also had to act consistently with the waiver.

The next question was the effect of the defect – could the claimant cure its deficient waiver without re-filing the claim? The tribunal held that because the defective waiver invalidated the consent of the Respondent, it did not have jurisdiction to order the claimant to remedy it. (138s) The Respondent could have waived its objections to the deficiency or allowed it to be remedied, as the United States had done in the *Methanex* case, but did not. (138t)

The final question was whether the defective waiver required dismissal of the entire DR-CAFTA case, or whether it required dismissal only of those claims that were challenged in the domestic arbitrations as well as in the international tribunal. The tribunal concluded that only individual claims need be dismissed; the claim writ large could remain before the tribunal. The word "claim" has various meanings in the investment chapter of DR-CAFTA, but the tribunal was satisfied that "claim" in Article 10.18(1) was used, in reference to the limitations period, to refer to each individual claim that would not fall within the time bar. (138u) The word should be similarly construed with respect to subsequent uses within the same article, and its usage in paragraph 4 confirmed the usage of "claim" in an individual rather than collective sense. (138v) The tribunal declined to speculate whether the slightly different language in NAFTA Article 1121 would lead to a different result. (138w)

Guatemala subsequently sought clarification of the tribunal's decision, pronouncing itself "gravely concerned" and asking for details regarding precisely which claims should be considered excluded from the scope of the arbitration. The tribunal rejected Guatemala's request, holding that its prior decision had been neither vague nor internally inconsistent. (138x)

### C The Exhaustion of Local Remedies Rule

Early NAFTA tribunals assumed, without directly confronting this issue, that the State Parties to the treaty waived the "local remedies rule." (139) Such an assumption would be consistent with many of the BITs signed by the United States, Canada, and many other countries, which also include waivers of the local remedies rule, albeit sometimes using different language from that used in NAFTA Chapter Eleven. (140) P 1121-28d

In the early cases brought against them, the State Parties to NAFTA appeared to agree, often by negative implication, that it was their intent to waive the rule. The United States has successfully argued that the rule is inapplicable to cases in which the international wrong is based on a judicial act. (141) Mexico supported the U.S. position in that case, but has also unequivocally stated that the State Parties to NAFTA did not waive the local remedies rule. (142) The other Parties to the treaty have not gone as far: Canada has not publicly addressed the point, (143) and the United States has submitted that NAFTA may have "relaxed" the local remedies rule to an undetermined extent with respect to non-judicial international delicts, but has stopped short of stating that the rule has been waived. (144) Nonetheless, the United States has not raised the local remedies rule as a defense in the arbitrations brought against it.

P 1121-29

#### 1 History of the Exhaustion of Local Remedies Rule

Most scholars trace the local remedies rule to the practice of authorized reprisals prevalent as early as the thirteenth and fourteenth centuries, and present in isolated instances even earlier. (145) A sovereign would grant rights to private individuals to take reprisals in the event that a foreign sovereign had failed to do justice to them or one of their countrymen. (146) Initially reprisals were private acts of revenge undertaken without the fiat of the sovereign, but later they came to be public acts. Generally they occurred after a private individual had suffered a wrong in a foreign land, usually at the hands of a private party, and was unable to obtain justice locally. The public basis for the reprisal was generally viewed as the sovereign's failure to dispense justice, although whether his failure to prevent the initial wrong could also form a basis for reprisal was not entirely clear. (147) In fact, a relative of that doctrinal question – whether the failure to dispense justice is the only basis for an international claim – led to much controversy as the rule became associated with the law of diplomatic protection, addressed below. Though theoretically based on the sovereign acts, the authority to take reprisals was limited to recovering property sufficient to recompense the citizen for the original damage done by the private party. (148) Moreover, the reprisals were taken on the property of citizens of the sovereign, rather than against the sovereign himself. (149)

The rise of the nation-state gave rise to increasingly centralized governmental powers. The granting of private letters of marque dwindled, and reprisals on behalf of a nation's injured citizens were undertaken by government ships. (150) However, the individuals on whose behalf those acts were taken were required to exhaust their local remedies before the State would intervene. As dissatisfaction with the settlement of issues by force grew, so did the practice of espousal by diplomatic means. The requirement that a claimant exhaust local remedies before a claim could be elevated to the international plane – the "local remedies rule" – became part of the law of diplomatic protection. (151) Although most countries invoked it

consistently, some exceptions to the rule began to be recognized. For example, if local remedies could be shown to be futile or nonexistent, or if there had been a significant delay on the part of the State in which local redress was being sought, a claimant was excused from having failed to exhaust remedies. (152) Thus, in the *Finnish Ships* arbitration, the question was whether local remedies were futile when the disputed issue in the case was a factual determination of an English tribunal which neither the Court of Appeal nor the House of Lords had the authority to reverse, their reviewing authority being confined to errors of law. (153) In such a case, the arbitrator, Dr. Bagge, determined local remedies were indeed futile. (154)

The local remedies rule serves many important functions which tend to obscure its origin and continuing importance in the remediation of wrongs. (155) It may be seen as both a principle of comity between nations and as a conflict-of-laws rule. It recognizes the fact that individuals who enter a territory have subjected themselves to the laws and procedures of that territory. (156) It respects the sovereignty of a State by permitting that State to redress any wrong done to an alien in the State's territory before elevating the matter to an international plane and setting into motion the cumbersome process of espousal. It acts as a gate-keeping mechanism for a State, reducing the number of claims it must file on behalf of its citizens by limiting the number of lower-level disputes brought to the attention of the diplomatic authorities. Requiring an investor to pursue a case in local court may help to ensure that the investor has "standing" to pursue the claim. Moreover, local courts provide fora for the development and exploration of the factual issues behind a dispute, as well as for the crystallization of domestic legal claims. (157) It is used not only in the context of diplomatic protection but is a part of the European Convention on Human Rights. One commentator however, suggests that its primary use in the human rights context is to prevent a flood of complaints and that it should therefore be interpreted especially flexibly. (158)

P 1121-31

Most of the local remedies rule's functions are "procedural" in that they dictate steps that must be taken before a particular claim can be brought before an international tribunal. However, some commentators have argued that the rule contains a "substantive" component as well, such that no international claim exists until local remedies have been exhausted. Indeed, much of the debate (and the scholarship) about the rule in the early and middle parts of the twentieth century revolved around whether the rule was "substantive" or merely "procedural." This debate was intertwined with debates on State responsibility generally, and particularly whether and when state responsibility for various acts attached. Thus, although all agreed that the rule of exhaustion of local remedies was (and is) customary international law, what the rule actually comprises was still at issue. (159) If the rule was procedural merely, it governed admissibility and a State could waive it to permit a proceeding to go forward even in the absence of exhaustion of local remedies.

Those who held that exhaustion was "substantive" argued that, until local remedies were exhausted, there was no violation of international law that could serve as the basis for a claim. This view held currency in the early part of the century, but gradually lost force as scholars noted its ramifications. A fundamental criticism was that if the local remedies rule is substantive then every international claim must be based on a denial of justice – the failure of a nation's court system to grant effective remedies. A wrong committed by a governmental entity other than a court – an expropriation by the executive branch of government, for example – could therefore never form the basis for an international wrong. While a State Party could in such a case concede that exhaustion would be futile, or that local remedies were nonexistent, such a concession would simply equate to an acknowledgment of liability for having failed to provide proper remedies, but never to an admission that the underlying behavior failed to comport with international standards. Not only was this unsatisfactory from a normative point of view, it was inconsistent with international practice. Also, if exhaustion was substantive, the rule could never be waived – if no international wrong could lie until remedies were exhausted, an alien would have no basis for an international claim in the absence of exhaustion. (160)

The proceduralists have won the debate. It is clear that acts outside denials of justice can form the basis for international claims and that State Parties can waive the requirement of exhaustion of local remedies. Moreover, in the investment treaty context that fact is explicit – most treaties set forth a list of potential violations, such as a failure to provide national treatment or an expropriation not in accordance with international law. The "procedure versus substance" distinction nevertheless continues to arise, in NAFTA cases and elsewhere. This is particularly true in claims involving the acts of a court system, which implicate the customary international law principle of denial of justice.

P 1121-32

## 2 The Exhaustion of Local Remedies Rule in NAFTA Arbitrations

The *Feldman* tribunal was the first to address the operability of the local remedies rule. Mexico argued in *Feldman* that the "exhaustion of local remedies rule is applicable under NAFTA as in general under international law." (161) The *Feldman* tribunal, noting that the local remedies rule could be waived (thereby rejecting it as a substantive requirement for international responsibility to attach to a State), found the qualification under Article 1121 and Annex 1120.1 as effecting a waiver of the local remedies rule. The tribunal viewed it essentially as a conflict of laws provision that departed from the local remedies rule: "Therefore, in contrast to the local remedies rule, Article 1121(2)(b) gives preference to international arbitration rather than

domestic judicial proceedings, provided that a waiver with regard to the latter is declared by the disputing investor.” (162)

The *Feldman* tribunal arguably misread Annex 1120.1 in the way it found support in the provision for a waiver of the local remedies rule. It described the provision as “obviously preventing the disputing investor from instituting, then waiving domestic proceedings and, only thereafter resorting to arbitration, as provided under Article 1121(2)(b). (163) Later in the paragraph, however, the tribunal acknowledged that the provision only precludes an investor from alleging certain breaches of NAFTA in municipal court, without also recognizing that the preclusion undercuts, and even contradicts, its argument that Mexico gives a preference to municipal proceedings. (164)

In *Loewen*, a Canadian funeral home company challenged the acts of Mississippi judiciary on several grounds. The Canadian company claimed that the Mississippi trial court proceedings in which it had been a defendant had been infused with prejudice against the company by virtue of its Canadian pedigree and that the judge had impermissibly allowed racial issues to be brought into play. (165) It also claimed that the trial was riddled with errors that resulted in a jury award of compensatory and punitive damages so disproportionate to the amount sought as to result in a denial of justice under international law. (166) The award, which totaled US\$ 500 million, formed the basis for the supersedeas bond (125 percent of the award) required under Mississippi law to stay execution of the judgment pending appeal (a supersedeas bond differs from an appeal bond in that it stays execution of a judgment pending appeal, thus enabling a defendant to avoid losing its assets during any appeal, but is not a prerequisite for the filing of an appeal). Both the intermediate appellate court and the state supreme court declined to reduce the supersedeas bond of US\$ 625 million, although Mississippi law P 1121-39 provided that they could have done so for “good cause shown.” (167) The ▲▼ Loewen Group settled with the local funeral company to whom it had lost, in what it described as a coerced settlement due to the fact that the bond requirement effectively denied it access to the courts that could have corrected the errors. (168) While the company considered petitioning for *certiorari* to the U.S. Supreme Court prior to the settlement, it did not do so. (169)

The United States filed objections on competence and jurisdiction. One of the arguments it raised was that the Mississippi court acts could not form the basis of a violation of Article 1105 of NAFTA, which requires that Parties accord investments of investors “treatment in accordance with international law” because they were not final acts of the Mississippi court system. (170) The United States was not arguing for a return to the local remedies rule; rather, it distinguished international wrongs based on the acts of courts from those based on the acts of other government agencies. (171) Citing publicists and cases from the mixed claims commissions of the early part of the last century, the United States noted that the acts of courts have always been subject to special deference; moreover, because the judiciary acts as a whole, and inherent in the nature of a system with appellate review is the use of that review, a judicial act cannot give rise to a NAFTA claim unless and until it is the final act of a court of last resort. (172) The United States did not argue that a requirement of judicial finality would necessarily always require petitioning for *certiorari* to the Supreme Court in the U.S. system; it did provide expert testimony, however, that such review would likely have been forthcoming in *Loewen*, based on the due process issues that Loewen could have raised in its petition, and based on the remarkable similarity of the *Loewen* case to the *Pennzoil-Texaco* case, which had seemed to capture the interest of the Court. (173)

The *Loewen* tribunal issued a decision on competence and jurisdiction that joined most of the U.S. objections to the decision on the merits. The tribunal did not entirely dismiss the U.S. government's position, but it would be hard to not read its initial words on the subject as skeptical. The first reaction seemed to be that the United States was simply trying to resurrect the local remedies rule, but to apply it only when a court act was itself the subject of the claim. “There is support for the view that no distinction should be drawn between the principle of finality and the local remedies rule.” (174) The tribunal characterized the rule of judicial finality as “substantive” and “directed to the responsibility of the State for judicial acts.” (175) The tribunal noted that the modern view was that the conduct of any organ of the State could be considered an act of that State for purposes of liability under international law, and continued: “Viewed in this light, the rule of judicial finality is no different from the local P 1121-39 remedies rule. ▲▼ Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.” (176)

Nevertheless, the tribunal did not altogether dismiss the idea. It noted that the U.S. position with respect to the exact extent of the local remedies rule was unclear. It also suggested that Article 1121(2)(b) did no more than “curtail or restrict rights that a claimant would otherwise have,” (177) and noted that without the provision, the claimants would be able to pursue remedies simultaneously. The decision also suggested that the affirmative defense to waiver – that no remedies were available because of the supersedeas bond requirement – be dealt with at the merits and that whether any other remedy was available also wait for resolution at that time. (178)

The United States continued to press its claim with respect to finality of court decisions during the case on the merits. (179) Canada filed a submission under Article 1128, but did not opine on the issue. (180) Mexico also filed an 1128 submission that supported the U.S. government's position. “Mexico consistently had taken the position both in oral argument and in written submissions that the State's legal system as a whole must be examined to determine whether



there has been a breach of the NAFTA.” (181) Mexico's submission addressed at some length various twentieth-century practices with respect to the exhaustion of local remedies rule, with an emphasis on the need for any waiver to be explicit. (182) However, Mexico stopped short of saying that NAFTA did not waive the local remedies rule, but noted that any waiver was for damages relief only, and reiterated that such a waiver did not in any way change the requirement to establish a substantive basis for an international claim. (183) The upshot of Mexico's submission is unclear. While not advertent directly to it, Mexico left open an argument that claimants might need to seek injunctive relief in local courts if such relief would mitigate or affect the damages it sought in NAFTA. In such a case, an investor might well decide it would be more efficient to seek all forms of relief in local courts, rather than cope with simultaneous proceedings on similar issues. In *Feldman*, Mexico had explicitly argued that the NAFTA Parties had not waived the local remedies rule, even though it had not made any such argument in *Azinian*, the first case brought against it. In *Fireman's Fund*, Mexico did not invoke *Fireman's Fund's* failure to exhaust local remedies as grounds for dismissing the claim in the jurisdictional phase of the proceedings. (184)

P 1121-35

Given the skepticism with which the *Loewen* tribunal treated the distinction between the local remedies rule and the principle of judicial finality argued by the United States, the decision on the merits was somewhat surprising. The tribunal upheld the U.S. position with respect to finality. (185) Acknowledging that the question was to some extent intertwined with the local remedies rule, the tribunal nevertheless found that:

The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the *inchoate* breach of international law occasioned by the lower court decision. (186)

In a manner reminiscent of the substance/procedure distinction inherent in local remedies rule debates, the tribunal distinguished court acts from internationally wrongful acts of other branches of government, which latter acts might be attributable to the State before a claimant had recourse to a court, or when such recourse proved unavailing. (187) In the latter case, should a claimant want to base an international claim on the court's act in failing to provide redress, he would have to appeal the court's decision to the court of last resort before international responsibility for the judicial act would attach.

The *Loewen* Group had argued that it had no avenue for appeal because the bond requirement foreclosed access to the Mississippi courts and because the U.S. Supreme Court would have been unlikely to grant *certiorari* to hear the fact-laden issues on which the case rested. (188)

P 1121-37 The tribunal did not question the assumption that futility or unavailability of remedy, exceptions to the exhaustion of local remedies rule, applied to the doctrine of judicial finality. However, it determined that the *Loewen* Group had not carried its burden to demonstrate that it had no recourse, with particular reference to the possibility of filing for *certiorari* in the U.S. Supreme Court. (189)

Strictly speaking, the question of whether exhaustion of local remedies was waived by NAFTA was mooted by the tribunal's decision on finality. The *Loewen* tribunal nonetheless noted its view that Article 1121 likely did not dispense with the local remedies rule, though it stated that “the precise purpose of NAFTA Article 1121 is not altogether clear.” (190) In its decision on jurisdiction, the *Loewen* tribunal had stated “[s]uch an intention may, however, be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.” (191) While Article 1121 did not waive the local remedies rule by name, it is difficult to interpret its requirement that claimants forego their right “to initiate or continue” actions in local courts as meaning anything else.

Article 1121 was not directly addressed in the *Canfor* consolidation cases. In the context of its discussion of the purpose of NAFTA's consolidation provision, however, the tribunal observed that Article 1121 illustrated the NAFTA drafters' intention to avoid concurrent or parallel proceedings. (191a) In fact, the *Canfor* consolidation tribunal noted that the drafters of NAFTA were quite explicit when they provided for such a possibility, as when, for example, they acknowledged that the subject of a Chapter 11 claim could also be the subject of a Chapter 20 claim. (191b)

The *RDC v. Guatemala* case presented an interesting variation on the exhaustion of local remedies rule. DR-CAFTA's waiver requirement is very similar to that of NAFTA Chapter 11, including the requirement that a claimant waive its right to “initiate or continue” a proceeding with respect to the measure alleged to be a breach of the treaty. Yet Guatemala's consent to arbitration under the ICSID Convention contained a reservation requiring the exhaustion of local remedies before a dispute could be submitted to an ICSID tribunal. (191c) ICSID arbitration is one of the avenues open to an investor under DR-CAFTA when both the home State of the investor and the host State are party to the ICSID Convention. Thus, the claimants in *RDC* made their waivers subject to a qualification: “provided, however, that RDC on its own behalf and on behalf of FVG [RDC's affiliate], reserves the right to pursue any and all local remedies which the ICSID arbitration panel requires in order for RDC to avoid any contention

P 1121-39 by the Government of Guatemala that RDC has failed to exhaust local remedies...” (191d) Guatemala challenged the waivers as facially inadequate, although it has not challenged the jurisdiction of the tribunal based on any failure by claimants to exhaust local remedies. (191e) The tribunal disagreed that the qualification constituted any repudiation of the waivers.

Rather, it noted that it had no authority to order the claimants to pursue local remedies, and thus concluded the express reservation in the waivers was “without any possible object and does not deprive the Tribunal of jurisdiction.” (191f)

### III Cross-References

- Article 1105 governs the minimum standard of treatment in international law, which includes denial of justice and principles of judicial finality.
- Article 1116 permits an investor of a Party to bring a claim on its own behalf.
- Article 1117 permits an investor of a Party to bring a claim on behalf of an enterprise of another NAFTA Party so long as it owns or controls, directly or indirectly, that enterprise.
- Annex 1120.1 states that an investor of a Party may not allege that Mexico has breached its NAFTA obligations both in domestic proceedings in Mexico and in a NAFTA arbitration.
- Article 1122 governs the State Parties' consent to arbitration under Chapter 11.

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- 1) Investment (Dec. 16, 1991) 8, Art. XX07.
- 2) INVEST.116, Georgetown Composite (Jan. 16, 1992) 17, Art. 2108.
- 3) *Id.* at 17–18, Art. XX07.
- 4) INVESTMT.06M, Washington Composite (March 6, 1992) 18. The article refers to dispute resolution under Chapter 23, which is not identified more fully in the March 6 draft text; later iterations suggest that it was the State-to-State dispute settlement chapter.
- 5) *Id.*
- 6) INVEST.501, Chapultepec Composite (May 1, 1992) 18, Art. XX07(3).
- 7) *Id.*
- 8) *Id.* at 18, Art. XX07(4). The error was fixed in the next draft. INVEST.513, Toronto Composite (May 13, 1992) 24, Art. XX07(4).
- 9) INVEST.501, Chapultepec Composite (May 1, 1992) 18, Art. XX07(5).
- 10) INVEST.522, Washington Composite (May 22, 1992) 19–20.
- 11) INVEST.604, Virginia Composite (June 4, 1992) 19–20, Art. XX07(4). Paragraph 4 contained procedural limitations, including the requirement that six months have elapsed since the date on which the investment dispute arose and that no more than two years have passed since the investor first acquired, or should have acquired, knowledge of the breach. *Id.* at Art. XX07(4).
- 12) INVEST.722, Treasury Annex Composite (July 22, 1992) 28, Art. 2119.
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- 14) Article 2125 provided that disputes could be submitted under the ICSID Convention, if applicable, the Additional Facility Rules of ICSID, or the UNCITRAL Arbitration Rules. INVEST.810, Watergate Daily Update (Aug. 4, 1992) 16, Art. 2125.

- 15) INVEST.810, Watergate Daily Update (Aug. 4, 1992) 15, Art. 2123. Subsection 2 had footnote attached which provided “[t]he Lawyers’ Group will develop wording to make this provision generic and will decide where, outside the Investment Chapter, to place the provision.” *Id.* Art. 2123 n. 22.
- 16) *Id.* at Art. 2126(4).
- 17) *Id.* at Art. 2126(4) n. 23.
- 18) *Id.* at 2126(4) n. 24. This concern was ultimately resolved by Annex 1120.1.
- 19) INVEST.810, Watergate Daily Update (Aug. 4, 1992) 23, Art. 2123.
- 20) INVEST.811, Watergate Daily Update (Aug. 11, 1992) 15, Art. 2117; 16, Art. 2119(4).
- 21) INVEST1.904 is labeled September 4, 1992 (1:30) and on the U.S. website appears first. INVEST-F.904 is labeled September 4, 1992 (1:30 a.m.) and on the Canadian website appears first. The development of the provisions suggests that INVEST1.904 preceded the INVEST-F.904.
- 22) INVEST1.904 (Sept. 4, 1992) 13–14, Art. 1121(4). The provision contained the same two footnotes that had already been attached to the proposed text. See text accompanying notes 17–18, *supra*. There was one additional sentence, however, which read: “It must also be clear that ‘declaratory’ and ‘extraordinary relief’ do not include relief that involves the payment of damages.” INVEST1.904 (Sept. 4, 1992) 14, Art. 1121(4)(b) n. 2.
- 23) INVEST-F.904 (Sept. 4, 1992, 1:30 a.m.) 3–4, Art. 1121.
- 24) INVEST2.904 (Sept. 4, 1992) 14, Art. 1121; INVEST-F.906 (Sept. 6, 1992) 11–14, Art. 1121; INVEST.920 (Sept. 20, 1992) 11–14, Art. 1121.
- 25) INVEST.O02 (Oct. 2, 1992) 11–13–11–14, Art. 1121.
- 26) Portions of this commentary appeared previously in Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence*, in *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 253 (Todd Weiler ed., 2004).
- 27) See the commentary to Article 1122, which addresses the Party’s consent to arbitration. See also Andrea K. Bjorklund, *NAFTA Chapter 11: Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 *Chi. J. Intl L.* 183 (2001).
- 28) See the commentary under Article 1122 for further discussion of these requirements.
- 29) Inter-American Convention, Art I.
- 30) NAFTA Arts. 1116 and 1117.
- 31) *Id.* at Art. 1121(3).
- 32) For a discussion of some of the questions left open by the language of this provision, see Bjorklund, *supra* note 26, at 262.
- 33) *Azinian et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)97/2, 6–7 (Claimants’ Memorial) (Jan. 27, 1998); *Azinian et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)97/2, ¶ 24 (Statement of Claim) (March 10, 1997).
- 34) *Id.* at Annex 1120.1(a).
- 35) *Id.* at Annex 1120.1(b).
- 36) *Id.*
- 37) Australia–Czech Investment Promotion and Protection Agreement, Sept. 30, 1993, 1819 U.N.T.S. 456, cited in *Waste Management Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/00/3, ¶ 29 (Decision of the Tribunal Mexico’s Preliminary Objection Concerning the Previous Proceedings) (June 26, 2002) [hereinafter *Waste Management II Jurisdictional Award*].
- 38) 2003 Canadian Model FIPA, Art. 26(1)(e) & 26(2)(e).
- 39) *Id.* at Art. 26(1) & (2).
- 40) 2004 U.S. Model BIT, Art. 26(2)(b).
- 41) *Id.* at Art. 26(3).
- 42) *Case Concerning Elettronica Sicula SpA (U.S. v. Italy)*, 1989 I.C.J. Rep. 15 (July 20, 1989).
- 43) NAFTA Art. 1121(1).
- 44) NAFTA Art. 1121(2)(b).
- 45) William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter Eleven of NAFTA*, 23 *Hastings Intl & Comp. L Rev.* 357, 373–376 (2000) (concluding that Article 1121 waives the local remedies rule); Bjorklund, *supra* note 26, at 279.
- 46) David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 *Am. J. Intl L.* 389, 405–411 (1964).
- 47) *Ambatielos (Greece v. U.K.)*, 1959 I.C.J. 10 (19 May).
- 47a) The tribunal in *Merrill & Ring v. Canada* can be added to the class of those giving more than procedural effect to Articles 1118–1121: “The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties.” *Merrill & Ring Forestry L.P. (U.S.) v. Canada*, (UNCITRAL) ¶ 29 (Decision on a Motion to Add a New Party) (Jan. 31, 2008). The validity of an Article 1121 waiver was not at issue in the case.
- 48) *Ethyl Corp. (U.S.) v. Canada*, (UNCITRAL) ¶ 89 (Award on Jurisdiction) (June 24, 1998) [hereinafter *Ethyl Award*].
- 49) UNCITRAL Arbitration Rules, Art. 18.
- 50) *Ethyl Award*, *supra* note 48, at ¶ 55.
- 51) *Id.* at ¶ 52 & n. 18.
- 52) Vienna Convention on the Law of Treaties, Art. 31(1).
- 53) *Ethyl Award*, *supra* note 48, at ¶ 60. The other question the tribunal asked went directly to its jurisdiction: “is Ethyl’s claim within the types of claims that Canada has consented to in Chapter 11 to arbitration.” *Id.* The tribunal concluded that it was. *Id.* at ¶¶ 69–70.
- 54) *Id.* at ¶ 91.

- 55) *Id.* at ¶ 91. The tribunal did, however, hold the claimant responsible for the costs of the proceeding with respect to the waivers issue on the ground that submitting the waivers with the Notice of Arbitration would have been the better practice and would have avoided the need for the proceedings. *Id.* at ¶ 92.
- 56) *Id.* at ¶ 90.
- 57) *Id.*
- 58) *Pope & Talbot, Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 2 (Award on the Harmac Motion) (Feb. 24, 2000) [hereinafter *Pope & Talbot Harmac Award*].
- 59) *Id.* at ¶ 5.
- 60) *Id.* at ¶¶ 11–13.
- 61) *Id.* at ¶ 16.
- 62) *Id.*
- 63) *Id.* at ¶ 17.
- 64) *Id.* at ¶ 16.
- 65) *Id.* at ¶ 18.
- 66) See NAFTA Art. 1126 (permitting consolidation of claims). Article 1126 requires that a new tribunal be formed to hear consolidated claims and sets forth a particular process for the establishment of that body, but arguably assumes that the claims would be brought by different claimants. One might posit that in a case like *Pope & Talbot*, the same tribunal could be regarded as reconvened by the same parties, thus obviating the procedures required by Article 1126. Nevertheless, the waiver requirements would still apply. See *id.* at Art. 1126(6).
- 67) *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/99/1 (Notice of Arbitration) (April 30, 1999) [hereinafter *Feldman Notice of Arbitration*]. The procedural history is complex; this is a simplified version of the facts of the case.
- 68) All taxation measures are exempt from challenge under Chapter Eleven except claims for expropriation. NAFTA Art. 2103(1) & 2103(6). Before proceeding under Chapter Eleven on such an expropriation claim, however, the claimant must secure a determination from the appropriate authorities, who are senior officials in the Finance or Treasury Departments, that the measure is an expropriation. While not requiring official espousal, this provision introduces a gate-keeping function for this claim, in that it appears that *both* the tax authorities of the investor and of the State Party whose taxation measures are challenged must grant the investor permission to go forward. “The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time it gives notice under Article 1119....” NAFTA Art. 2103(6).
- 69) *Feldman Notice of Arbitration*, *supra* note 68, at 4.
- 70) *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/99/1, ¶ 76 (Award) (Dec. 16, 2002) [hereinafter *Feldman Award*].
- 71) *Feldman Award*, *supra* note 67, at ¶ 70.
- 72) *Id.* at ¶¶ 80–84.
- 73) *Id.* at ¶¶ 69–70.
- 74) *Id.* at ¶ 78.
- 75) *Id.* at ¶ 73.
- 76) At one point, the tribunal acknowledged that “[a]ny decision by this Arbitral Tribunal thereon is bound to have, under the terms of NAFTA Article 1136(1), a direct bearing upon any domestic litigation (pending or final) on the entitlement to tax rebates.” *Id.* at ¶ 88. While the tribunal was asked only to issue a declaratory judgment on the entitlement to tax rebates, not grant damages, the issue would nevertheless have an effect on the tribunal’s determination of whether the government’s actions constituted a creeping expropriation under Article 1110. *Id.* In fact, the tribunal determined that Mexico’s acts did not constitute an expropriation. *Id.* at ¶ 153.
- 77) *Id.* at ¶ 77.
- 78) *Id.* at ¶ 85.
- 79) *Id.* at ¶ 88.
- 80) *Waste Management Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)98/2 (Arbitral Award) (June 2, 2000) [hereinafter *Waste Management I Award*].
- 81) The claim was initially brought by U.S.A. Waste Services, Inc., the predecessor to Waste Management. Ownership changed early in the proceedings, and for clarity the claimant will be referred to as Waste Management throughout the discussion.
- 82) *Waste Management I award*, *supra* note 80, at ¶ 4.

- 83) *Waste Management I Award*, *supra* note 80, at ¶ 5 (emphasis added). In its initial submission to ICSID, Waste Management had submitted the following waiver:
- [a]dditionally, Claimants hereby waive their right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or other dispute settlement procedures, any proceedings with respect to the measures taken by Respondent that are alleged to be a breach of NAFTA Chapter Eleven and applicable rules of international law, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. *This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico.*
- Id.* at ¶ 4 (emphasis added). After receiving a request for clarification from counsel for ICSID, Waste Management responded that the language of the waiver reflected the language of the article. It further elaborated “Claimants also set forth their understanding of the scope of that required waiver. By setting forth this understanding, however, Claimants did not intend to derogate from the waiver required by NAFTA Article 1121.” *Id.*
- 84) *Id.* at ¶ 5.
- 85) *Id.*
- 86) *Id.* at ¶ 6.
- 87) *Id.*
- 88) *Id.* at ¶ 19.
- 89) *Id.* at ¶ 15.
- 90) *Id.* at ¶¶ 16–17.
- 91) *Id.* at ¶ 18.
- 92) The tribunal dismissed Mexico's argument that the statement of claim should be notarized. *Id.* at ¶ 23.
- 93) *Id.* at ¶¶ 23–24.
- 94) *Id.* at ¶ 25.
- 95) *Id.*
- 96) *Id.* at ¶ 27. There was no real factual dispute as to the issue; on February 10, 1999, counsel for Waste Management informed the Mexican Government's representative that “Regarding your request about the ongoing arbitration proceeding in Mexico, we do not believe that our client is required to suspend any proceedings in Mexico that it is otherwise entitled to institute.” *Id.*
- 97) *Id.* Waste Management admitted to limited overlap in its written presentations: “Claimant's allegations against Mexico in this NAFTA arbitration are based on five separate ‘measures’ constituting violations of NAFTA, only one of which relates to non-payment of contract.” *Id.* Though the Claimant admitted to only one overlap, the tribunal did not find that the other four causes of action were separate from the underlying dispute so as to put them outside the scope of the conduct required by the waiver.
- 98) *Id.* at ¶ 31(1).
- 99) *Id.* at ¶ 29.
- 100) *Waste Management Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/98/2, ¶¶ 5–7 (Dissenting opinion of Keith Highet) [hereinafter *Waste Management I Dissent*].
- 101) *Id.* at ¶ 6–7.
- 102) *Id.* at ¶¶ 7–8.
- 103) The dissent characterized the claims in front of the NAFTA tribunal as involving numerous additional elements as well as progressing on a “separate juridical plane.” *Id.* at ¶ 17.
- 104) *Id.* at ¶¶ 24–26.
- 105) *Id.* at ¶ 28.
- 106) *Id.*
- 107) *Id.* at ¶¶ 33–36.
- 108) *Id.* at ¶ 34.
- 109) *Id.* at ¶ 36.
- 110) *Id.* at ¶ 54.
- 111) *Id.* at ¶ 138.
- 112) *Id.* at ¶¶ 44–45.
- 113) *Id.* at ¶¶ 49.
- 114) *Id.* at ¶ 59.
- 115) *Id.* at ¶ 61.
- 116) *Id.* at ¶ 67.
- 117) *Id.* at ¶ 66. The dissent suggested that this constituted a tacit admission that Article 1121 would be similarly effective. *Id.* This argument hinges on accepting the dissent's explanation of the purpose of Article 1121, which it described as giving “added insurance” to Mexico not to have to face duplicative NAFTA claims.
- 118) *Id.* at ¶ 69.
- 119) *Id.* at ¶ 19 (quoting *Azinian et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/97/2, ¶ 97 (Award) (Nov. 1, 1999)).
- 120) *Waste Management II, Jurisdictional Award*, *supra* note 37, at ¶¶ 17 & 26.
- 121) *Id.* at ¶ 27.
- 122) *Id.*

- 123)** *Id.* at ¶ 31. While legally accurate, this hypothesis has not been tested; it is unclear whether a local tribunal, possibly skeptical of international proceedings, would necessarily bar an investor from local remedies, particularly in the event that the arbitral proceeding had been dismissed early on technical grounds. Moreover, an investor might be able to go to local court to compel arbitration. See Stephen M. Schwebel and J. Gillis Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 *Am. J. Int'l L.* 484, 496–97, 499 (1966) (noting possibility that a claimant may compel arbitration against a reluctant State if that State's laws governed the arbitral remedy itself). On the other hand, a Party might raise an estoppel argument against an investor who attempted to return to local fora.
- 124)** *Waste Management II Jurisdictional Award*, *supra* note 37, at ¶¶ 31–34.
- 125)** *Id.* at ¶ 34.
- 126)** *Id.* at ¶ 35.
- 127)** *Id.* at ¶ 36.
- 128)** *Id.* at ¶¶ 38–42.
- 129)** *Id.* at ¶ 43.
- 130)** *Mondev Int'l Ltd. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)99/2, ¶ 44 (Award) (Oct. 22, 2002) [hereinafter *Mondev Award*].
- 131)** *Id.*
- 132)** *Id.* at ¶ 85.
- 133)** *Id.* at ¶ 86. The tribunal dismissed the case on the merits; thus, its decision with respect to Mondev's ability to move forward with its alternative claim under Article 1117 was mooted.
- 134)** *Methanex Corp. (Can.) v. United States*, (UNCITRAL) ¶ 13 (Partial Award on Jurisdiction) (Aug. 7, 2002).
- 135)** *Methanex Corp. (Can.) v. United States*, (UNCITRAL) Part II, Ch. F., ¶¶ 11–12 (Final Award of the Tribunal on Jurisdiction and Merits) (Aug. 3, 2005).
- 136)** *Id.* at ¶¶ 19–20.
- 137)** *Id.* at ¶ 21.
- 138)** *Id.* at ¶ 25.
- 138a)** *International Thunderbird Gaming Corp. (U.S.) v. Mexico*, (UNCITRAL) ¶ 115 (Jan. 26, 2006).
- 138b)** *Id.* at ¶ 116.
- 138c)** *Id.* at ¶ 117.
- 138d)** *Id.* at ¶ 118.
- 138e)** *United Parcel Svc. of Am. Inc. (U.S.) v. Canada*, (UNCITRAL) ¶¶ 33–34 (Award on the Merits) (June 11, 2007).
- 138f)** *Id.* at ¶ 35.
- 138g)** *Vannessa Ventures Ltd. (Can.) v. Venezuela*, ICSID (W. Bank) ARB (AF/04/6) (Decision on Jurisdiction) (Aug. 22, 2008).
- 138h)** *Id.* at ¶ 3.4.2.
- 138i)** *Id.* at ¶ 3.4.3.
- 138j)** *Id.*
- 138k)** *Id.* at ¶ 3.4.4.
- 138l)** *Id.*
- 138m)** *Railroad Development Corporation (U.S.) v. Guatemala*, ICSID (W. Bank) ARB/07/23 (Decision on Objection to Jurisdiction: CAFTA Article 10.20.5) (Nov. 17, 2008).
- 138n)** *Id.* at ¶ 42.
- 138o)** *Id.* at ¶ 48.
- 138p)** *Id.* at ¶¶ 50–52.
- 138q)** *Id.* at ¶ 54.
- 138r)** *Id.* at ¶¶ 55–56.
- 138s)** *Id.* at ¶ 61.
- 138t)** *Id.*
- 138u)** *Id.* at ¶ 69.
- 138v)** *Id.* at ¶ 69.
- 138w)** *Id.* at ¶ 73.
- 138x)** *Railroad Development Corporation (U.S.) v. Guatemala*, ICSID (W. Bank) ARB/07/23, ¶ 12 (Decision on Clarification Request of the Decision on Jurisdiction) (Jan. 13, 2009).
- 139)** See, e.g., *Ethyl Award*, *supra* note 48, at ¶ 84 (discussing likely futility of the investor's having sought consultations under Article 1118 of the NAFTA and the futility exception to the exhaustion of local remedies rule, but not suggesting that Ethyl should have exhausted local remedies); *Feldman Award*, *supra* note 67, at ¶¶ 73–75; *Waste Management II Jurisdictional Award*, *supra* note 37, at ¶ 30 (noting in passing that “In common with almost all investment treaties, there is no requirement of exhaustion of local remedies.”) [hereinafter *Waste Management II*]; *Mondev Award*, *supra* note 130, at 32 (assuming local remedies need not be invoked for NAFTA case to commence); see also *Azinian et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF) 97/2, ¶ 86 (Award) (Nov. 1, 1999) (assuming that parties could or could not exhaust local remedies, but noting desirability of encouraging them to do so before resorting to international arbitration); *Dodge*, *supra* note 45, at 373–376.

- 140) See, e.g., 1994 U.S. Model BIT, Article VI(2), available in Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 247 (1995); Marian Nash (Leich), *U.S. Practice: Bilateral Investment Treaties*, 87 Am. J. Int'l. L. 433, 435 (1993) (exhaustion of local remedies not required in the U.S.–Argentine BIT). Agreement between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, September 12, 1996, Article XIII (3)(b), available at <www.sice.oas.org/bits/canpan1e.asp> (visited Aug. 2, 2003).
- 141) See *The Loewen Group Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)98/3, 49–56 (Memorial of the United States of America on Matters of Competence and Jurisdiction (Feb. 15, 2000) [hereinafter *Loewen U.S. Memorial on Jurisdiction*]; *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3, 107–117 (Counter-Memorial of the United States of America) (March 30, 2001) [hereinafter *Loewen U.S. Counter-Memorial*].
- 142) See *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3, 5–7 (Second Submission of the United Mexican States) (Nov. 9, 2001) [hereinafter *Loewen Second Article 1128 Submission of Mexico*]; *Feldman Award*, *supra* note 67, at ¶ 70 (Mexico had argued that the investor should have pursued its case locally until the measure became “final by pronouncement of the highest competent authority” and “the exhaustion of local remedies rule” is applicable in NAFTA as in general under international law). It appears that Mexico's position has evolved. Compare *Metalclad Corp. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/97/1 (Award) (Aug. 30, 2000) (tribunal award indicates that Mexico did not initially raise local remedies rule defense in case challenging municipal and provincial executive and legislative acts in which the investor had made one foray to a local court for redress); to *Loewen Second Article 1128 Submission of Mexico*, at 607 (asserting that Mexico at the *Metalclad* hearing and in its post-hearing submission had raised the argument that a “State's legal system as a whole must be examined to determine whether there has been a breach of the NAFTA”).
- 143) See, e.g., *Pope & Talbot, Inc. (U.S.) v. Canada*, (UNCITRAL) (Statement of Defence) (Oct. 8, 1999) (Canada raised numerous objections, but did not cite the local remedies rule); *S.D. Myers, Inc. (U.S.) v. Canada*, (UNCITRAL) ¶¶ 145–160 (Partial Award of Tribunal) (Nov. 13, 2000).
- 144) *The Loewen Group Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)98/3 ¶ 74 (Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction) (Jan. 5, 2001) (noting “Respondent's acknowledgment that the Article [1121] partially relaxes the local remedies rule”) [hereinafter *Loewen Decision on Jurisdiction*].
- 145) At least five books and numerous articles have been written on the rule of exhaustion of local remedies. Here we give only a short account of its development, placing in context its treatment in NAFTA. See, e.g., C.F. Amerasinghe, *Local Remedies in International Law* (1990); Jean Chappetz, *La Règle de l'Épuisement des Voies des Recours Internes* (1972); Thomas Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968); Castor H.P. Law, *The Local Remedies Rule in International Law* (1961); A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983); see also A.O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 Harv. Int'l L. J. 1 (1977); Mummery, *supra* note 46; A.A. Cançado Trindade, *Exhaustion of Local Remedies in International Law Experience Granting Procedural Status to Individuals in the First Half of the Twentieth Century*, 24 Neth. Int'l L. Rev. 373 (1977) (surveying several dispute settlement systems to conclude that the local remedies rule is not necessarily inherent in international agreements that grant individuals direct access to international tribunals).
- 146) Amerasinghe, *supra* note 145, at 11–17; see also Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 1, 2–3 (1982).
- 147) Amerasinghe, *supra* note 145, at 14.
- 148) *Id.* at 15.
- 149) *Id.* at 14–15.
- 150) *Id.* at 16.
- 151) *Id.* at 18.
- 152) See generally Mummery, *supra* note 46, at 395–405.
- 153) *Claim of Finnish Shipowners (Fin. v. Gr.)*, III R.I.A.A. 1479 (1934).
- 154) *Id.* at 1550.
- 155) Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 Am. J. Int'l L. 1, 6 (2003).
- 156) Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
- Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, in *Proceedings of the American Society of International Law* 20 (1910).
- 157) See, e.g., Ian Brownlie, *Principles of Public International Law* 497 (6th ed. 2003); Mummery, *supra* note 12, at 391.
- 158) Trindade, *supra* note 145, at 3–5.
- 159) *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6 (1959)



- 160) *Claim of Finnish Shipowners (Fin. v. Gr.)*, III R.I.A.A. 1479, 1053 (1934).
- 161) *Feldman Award*, *supra* note 67, at ¶ 70.
- 162) *Id.* at ¶ 73.
- 163) *Id.* at ¶ 75.
- 164) *Id.*
- 165) *Loewen Decision on Jurisdiction*, *supra* note 144, at ¶ 2.
- 166) *The Loewen Group Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB/AF/98/3, ¶ 39 (Award) (June 28, 2003) [hereinafter *Loewen Award*].
- 167) *Id.* at ¶¶ 6, 183.
- 168) *Loewen Decision on Jurisdiction*, *supra* note 144, at ¶ 5; *Loewen Award*, *supra* note 166, at ¶¶ 48–50.
- 169) *Loewen U.S. Memorial on Jurisdiction*, *supra* note 141, at 62–65; *Loewen Award*, *supra* note 166, at ¶¶ 200, 210–217.
- 170) *Loewen U.S. Memorial on Jurisdiction*, *supra* note 141, at 49–56.
- 171) *Id.* at 51 n. 30.
- 172) *Id.* at 49–56.
- 173) *Id.* at 54–67. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 16 n. 15 (1987).
- 174) *Loewen Decision on Jurisdiction*, *supra* note 144, at ¶ 66.
- 175) *Id.* at ¶ 68.
- 176) *Id.* at ¶¶ 70–71.
- 177) *Id.* at ¶ 74.
- 178) *Id.*
- 179) *Loewen U.S. Counter-Memorial*, *supra* note 141, at 107–117; *The Loewen Group Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)98/3, 86–96 (Rejoinder of the United States of America) (Aug. 27, 2001).
- 180) *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3 (Submission of the Government of Canada Pursuant to NAFTA Article 1128) (May 18, 2003).
- 181) *Loewen Second Article 1128 Submission of Mexico*, *supra* note 142, at 5–7.
- 182) *Id.* at 9–13.
- 183) *Id.* at 13–14.
- 184) *Fireman's Fund Ins. Co. (U.S.) v. Mexico*, ICISD (W. Bank) ARB(AF)/02/01 (Decision on the Preliminary Question) (July 17, 2003).
- 185) *Loewen Award*, *supra* note 166, at ¶¶ 142–156. Though the decision on the point was *obiter dicta*, insofar as the claim by The Loewen Group Inc. was concerned, it may not have been *obiter dicta* insofar as Ray Loewen's claim was concerned. Furthermore, it is likely to be of interest to scholars and international decisionmakers. See, e.g., Emmanuel Gaillard, *Centre International Pour Le Reglement Des Differends Relatifs Aux Investissements: Chronique des sentences arbitrales*, 131 J. Droit Int'l 213, 235 (2004) (noting the seductiveness of such a rule as a means of limiting responsibility); Noah Rubins, *Loewen v. United States: The Burial of an Investor State Arbitration Claim*, 21 Arb. Int'l 1, 16 n. 53 (2005) (noting that there is room for debate, but that the idea of judicial finality appears to be “solidly grounded in customary law”); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int'l L. 809, 852–858 (2005); Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Chattin v. Mexico and Loewen v. USA*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 669 (Todd Weiler ed., 2005). The tribunal disposed of the case by finding that when Loewen filed for corporate reorganization under Chapter 11 of the U.S. Bankruptcy Code, some years after bringing the NAFTA claim, it had failed to preserve the Canadian nationality of the claim. The tribunal held that this failure violated the continuous nationality rule, which it found requires a claim to be held by an entity of the same nationality at the time of the injury, at the time the claim is filed, and throughout the pendency of the claim. *Loewen Award*, *supra* note 166, at 225.
- 186) *Id.* at ¶ 156.
- 187) *Id.* at ¶ 148.
- 188) *Id.* at ¶¶ 207–210. The United States had also argued that Loewen should have filed to reorganize the company under Chapter 11 of the U.S. Bankruptcy Code when the appeal was pending, which would have stayed execution of the Mississippi jury award. The tribunal did not question that in some circumstances requiring a company to file for bankruptcy would be an available local remedy, and suggested that Loewen had failed to convince the tribunal that corporate reorganization was not an adequate remedy in this case.
- 189) *Id.* at ¶ 215.
- 190) *Id.* at ¶¶ 160–164.
- 191) *Loewen Decision on Jurisdiction*, *supra* note 144, at ¶ 71.
- 191a) *Canfor Corp. (Can.) v. United States, Tembec Inc. (Can.) v. United States & Terminal Forest Products Ltd. (Can.) v. United States*, (UNCITRAL) ¶ 237 (Decision on Preliminary Question) (June 6, 2006).
- 191b) *Id.* at ¶ 240.
- 191c) *RDC Decision on Jurisdiction*, *supra* note 138m, ¶¶ 22, 40
- 191d) *Id.* at ¶ 43.
- 191e) *Id.* at ¶ 44. Guatemala is not foreclosed from raising such a challenge in the future. *Id.*
- 191f) *Id.* at ¶ 45.

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