No "Double-Dipping" Allowed: An Analysis of Waste Management, Inc. v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA

Jacob S. Lee
NO "DOUBLE-DIPPING" ALLOWED:
AN ANALYSIS OF WASTE MANAGEMENT, INC.
v. UNITED MEXICAN STATES AND THE
ARTICLE 1121 WAIVER REQUIREMENT FOR
ARBITRATION UNDER CHAPTER 11 OF
NAFTA

Jacob S. Lee*

INTRODUCTION

The North American Free Trade Agreement ("NAFTA"), executed in 1992 by the United States, Canada, and Mexico, is a multifaceted instrument that contains many economic, political, and social attributes. Arguably, one of its most notable and innovative features is its framework for the resolution of investment disputes set forth in Chapter 11. Chapter 11 dispute resolution gives private

* J.D. Candidate, 2002, Fordham University School of Law. This is dedicated to my wife, Jannis, who teaches me the meaning of patience, sacrifice, and fortitude each day in her struggles to learn a new language, understand a new culture, and adopt a new lifestyle here in the United States. As always, I am grateful to Mom, Dad, Jason, Danny and my friends for their unwavering love and support and for serving as a constant reminder that while success in law school remains important, it is only secondary to the greater, lifelong pursuit of bettering oneself as a person. I would also like to thank Professor Victor Essien for his wonderful insight and guidance on this topic.

2. Some viewed the NAFTA as a prime opportunity and mechanism to promote employment and economic growth in each country by "maximizing trade and investment opportunities and enhancing the competitiveness of their firms in the global marketplace." Justine Daly, Has Mexico Croossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA, 25 St. Mary's L.J. 1147, 1152 (1994). But see Sharon D. Fitch, Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?, 22 Cal. W. Int'l L.J. 353, 377 (1992) (criticizing the NAFTA as embodying just the "latest attempt to exercise political hegemony over Mexico," which would ultimately result in a loss of Mexican national sovereignty).
3. NAFTA, supra note 1, ch. 11, art. 1115, 32 I.L.M. at 642. See David A. Gantz, Resolution of Investment Disputes Under the North American Free Trade Agreement, 10 Ariz. J. Int'l & Comp. L. 335, 335 (1993) ("Of the many remarkable achievements of the governments of Mexico, the United States and Canada in concluding the North
investors of each NAFTA Party the unprecedented right to directly access dispute settlement proceedings against host countries allegedly in breach of the NAFTA provisions. In so doing, Chapter 11 ensures investors doing business in the NAFTA States an efficient mechanism for the settlement of disputes based on international standards, thus reducing the need for investors to resort to the vast uncertainties of litigating in the local forums. Most significantly, the framework for dispute resolution under Chapter 11 marks the end of decades of political strife between the United States and Mexico in the arena of foreign investment policy.

Traditionally, the United States held suspicions and doubts about the political stability and soundness of the internal legal system of Mexico and emphasized international law principles when dealing
with developing countries in general. In contrast, Mexico adamantly practiced a general policy, common among developing countries, against entertaining any legal frameworks that presented even the slightest threat to its "full sovereignty" over the treatment of foreign investments located in its territories. By guaranteeing investors direct access to international forums for the resolution of disputes with the NAFTA States, Chapter 11 represents a revolutionary compromise between the two countries with regard to foreign investment.

Despite the many advantages afforded to investors who submit claims under the dispute resolution mechanism in Chapter 11, procedural difficulties accompany the actual feat of initiating NAFTA proceedings. Specifically, Article 1121 of NAFTA obligates any claimant under Chapter 11 to satisfy two conditions precedent before engaging in arbitration pursuant to Chapter 11. One of the conditions, which is the focus of this Note, requires the claimant to waive his or her 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" of NAFTA. In short, the Article 1121 waiver protects against claimants "double-dipping" and maintaining cases in two different forums simultaneously with respect to the same measures that allegedly caused them injuries.

While on its face, the waiver provision seems harmless and even favorable in serving a legitimate policy purpose against the
duplication of proceedings, a closer review of the provision reveals latent defects related to its application. Because Article 1121 functions as a condition precedent to NAFTA arbitration, an arbitral tribunal invoked under Chapter 11 necessarily would have to make a preliminary determination as to the sufficiency of any waiver submitted pursuant to the provision before allowing the claimant to proceed to the merits of his or her case. A problem arises, however, when the tribunal summarily decides on the validity of the waiver under Article 1121 without considering the merits of the claims made by the aggrieved investor. Many claims, while actionable under the local laws, may very well be determined later to fall short of constituting actionable claims under NAFTA. If the arbitral tribunal finds that such claims do not rise to the level of stating NAFTA causes of action, the investor would have no alternative recourse even in the local courts as to such claims, having already waived his or her rights to subsequent litigation under Article 1121. As such, the Article 1121 waiver essentially forces investors seeking to invoke NAFTA arbitration to bear significant opportunity costs in having to waive their rights prospectively as to subsequent local litigation of claims which they have no assurance will eventually be heard by the NAFTA tribunal.

A recent case on point, Waste Management, Inc. v. United Mexican States, provides a clear illustration of such dangers inherent in the application of the Article 1121 waiver. In Waste Management, a United States-based investor, Waste Management, Inc., raised claims against the United Mexican States under Article 1110, governing expropriation, and Article 1105, governing unequal and inequitable

13. NAFTA, supra note 1, ch. 11, art. 1121, 32 I.L.M. at 643.
14. See, e.g., Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 244-45 (Highet, Arb., dissenting) (arguing that measures of breach of contract did not constitute sufficient bases for a claim for expropriation under the NAFTA because they were merely creatures of local commercial law and not connected to international obligations); Azinian v. United Mexican States (U.S. v. Mex.), 14 ICSID Rev.: Foreign Investment L.J. 538, 564-65 (1999) (holding that damages incurred by the claimant resulting from breach of contract did not constitute grounds for a claim for expropriation under the NAFTA). For a full discussion on the substantive sufficiency of breaches of contract in stating legitimate claims for expropriation in general, see infra Part III.A.
15. 15 ICSID Rev.: Foreign Investment L.J. at 214.
16. NAFTA, supra note 1, ch. 11, art. 1110, 32 I.L.M. at 641-42. The term "expropriation" refers to an inappropriate “taking” by the host country of the property or investment of a citizen of another country. See Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987) (“A [S]tate is responsible under international law for injury resulting from: (1) a taking by the [S]tate of the property of a national of another [S]tate that (a) is not for a public purpose, or (b) is
treatment of investors in the host country. The underlying issues upon which the claims were based involved the alleged breaches of a concession agreement and a line of credit agreement made with Waste Management by certain Mexican entities. Before initiating the NAFTA arbitration, Waste Management had already begun pursuing these claims in the local forums. Without inquiring into the merits of Waste Management's claims under NAFTA, the arbitral majority ruled that Waste Management had a duty under Article 1121 to discontinue its local proceedings because they addressed the same measures alleged to be breaches of NAFTA. The majority, therefore, deemed Waste Management's refusal to discontinue its local proceedings to be conduct violating Article 1121. By its terms, the waiver drafted and tendered by Waste Management appeared to facilitate such conduct, and the majority rejected it as non-compliant discriminatory, or (c) is not accompanied by provision for just compensation . . . .”). Alternatively, “expropriation” has also been held to consist of a substantial “deprivation” by the host State of the investor’s interest in his or her investment or property. See infra notes 162-68 and accompanying text for further discussion of the term “expropriation” as interpreted and applied by various arbitral tribunals.

17. NAFTA, supra note 1, ch. 11, art. 1105, 32 I.L.M. at 639-40; Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 216-17.

18. A “traditional concession agreement” gave foreign investors “almost unrestricted rights” to extract, process, and market natural resources located in a designated area of land in the host country. Wolfgang Peter, Arbitration and Renegotiation of International Investment Agreements 7 (2d rev. and enlarged ed. 1995). In exchange for these rights, “[t]he host country received royalties on the volume of [resources exploited by the investors] and possibly indirect benefits through employment of its local labour force.” Id. at 20. More recently, joint-venture agreements have grown to replace these traditional concessions as the dominant form of investment tool where the host country actively functions as co-owner of the investment, thereby maintaining control over its natural resources from a political standpoint and safeguarding its interests from an economic standpoint. See id. at 20-21.

19. A “line of credit” agreement is made between a lender, typically a bank, and a borrower “whereby the [lender] agrees to lend . . . funds up to a previously agreed maximum amount,” which may be terminated if the financial status of the borrower deteriorates. Lewis E. Davids, Dictionary of Banking and Finance 129 (1978).


21. Id. at 235 (disregarding the merits of the claims submitted in evaluating the Article 1121 waiver since the waiver was a condition precedent to arbitration, and therefore, the issues surrounding the waiver were only preliminary in character).

22. See id. at 237.

23. See id. at 233-38.

24. The waiver submitted by Waste Management contained suspicious language seemingly constructed to allow Waste Management to engage in duplicate proceedings with regard to the same alleged acts of wrongdoing: “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 . . . .” Id. at 234. These qualifications would allow Waste Management to pursue concurrent proceedings with respect to the same set of facts so long as it claimed under different principles of law, which the majority perceived as a manifest attempt to sidestep Article 1121. See id. at 236-38.
with Article 1121.\textsuperscript{25} Such failure to satisfy the Article 1121 condition precedent to NAFTA arbitration thus warranted a jurisdictional bar against the tribunal further hearing the merits of Waste Management's case.\textsuperscript{26}

The lack of case precedent other than \textit{Waste Management} on the issue of the Article 1121 waiver makes it imperative to further analyze the waiver provision and highlight the pitfalls of effectuating waivers submitted under the provision as prerequisites for NAFTA jurisdiction. This Note presents an in-depth analysis of the provision against "double-dipping" as it was applied in \textit{Waste Management}. It further discusses how the provision should be applied in order to best preserve what the Chapter 11 dispute resolution mechanism attempts to accomplish as a whole—namely, to give investors in Mexico an "extra measure of comfort" in overseeing their properties and operations there\textsuperscript{27} by facilitating access to international arbitration.\textsuperscript{28}

Part I presents the historical background which precedes the execution of NAFTA itself and the birth of Chapter 11 dispute resolution. Part I then provides an overview of the key provisions related to dispute resolution under Chapter 11. Part II summarizes the pertinent portions of the majority's decision in \textit{Waste Management} and contrasts it with the opinion rendered by the dissenting arbitrator. Part III argues that the Article 1121 waiver, as applied in \textit{Waste Management}, presents significant opportunity costs for arbitrating under NAFTA because investors are stripped of their right to pursue alternative local litigation, even with respect to claims which in actuality do not amount to NAFTA claims. Specifically, the majority in \textit{Waste Management} disregarded the merits of Waste Management's claim under Chapter 11 for expropriation based on contractual breach despite the existence of substantial questions of fact. In addition, Part III proposes a more equitable method of applying the Article 1121 waiver that would minimize such opportunity costs and reconcile the adverse effects of \textit{Waste Management} with future cases in which the Article 1121 issue might arise. Instead of allowing waivers submitted under Article 1121 to take effect prospectively, the better approach would be to apply the waivers retrospectively after a factual determination is made verifying that the claims made in the arbitration do indeed constitute NAFTA claims. This Note concludes that in light of the policy objectives of Chapter 11 to assure investors impartial adjudication of disputes before an international tribunal, NAFTA arbitrators should reassess the proper application of Article

\begin{enumerate}
\item \textsuperscript{25} Id. at 238-39.
\item \textsuperscript{26} Id. at 239.
\item \textsuperscript{27} Gantz, \textit{supra} note 3, at 347.
\item \textsuperscript{28} See NAFTA, \textit{supra} note 1, ch. 11, art. 1115, 32 I.L.M. at 642 (stating that one of the express purposes of Chapter 11 dispute resolution is to assure investors of the NAFTA Parties "due process before an impartial tribunal").
\end{enumerate}
1121 and consider using the retrospective approach in order to best further those objectives.

I. OVERVIEW OF CHAPTER 11 DISPUTE RESOLUTION

An analysis of the historical differences between the United States and Mexico regarding the treatment of foreign investment is essential to appreciate fully the significance of and purposes behind the creation of the comprehensive dispute resolution mechanism in Chapter 11 of NAFTA. This part provides an historical overview of the respective ideological viewpoints taken by the United States and Mexico on issues regarding foreign investment dispute settlement, given their offsetting positions as industrialized State versus developing State. Following the historical discussion, this part outlines the key provisions in Chapter 11 of NAFTA, focusing particular attention on the Article 1121 waiver provision.

A. The Ideological Divide Between the United States and Mexico on the Treatment of Foreign Investment

1. The United States as Industrialized State and Capital-Exporter: Diplomatic Protection

At the end of the nineteenth century, developed countries initiated a movement to establish international standards to protect the investments of their nationals and firms abroad. Based on traditional rules for the protection of property, which in turn had "developed from the law of [S]tate responsibility of [sic] injury to aliens and alien property," such standards governed the "extent to which the host [S]tate [could] interfere with private property." Breach of the standards by the host country "provide[d] a legitimate basis for the exercise by the home State of the right of diplomatic protection" on behalf of its aggrieved citizen. The institution of diplomatic protection refers to the inherent power of a home government to intercede on behalf of its nationals or firms abroad to assert claims against the host country for injuries suffered to their person or properties located in the host country. More specifically,

29. Sandrino, supra note 8, at 265.
30. Id. at 265-66. Previously, the framework for international investment and capital flow relied almost exclusively on the various political and economic interests of developed and developing countries. Id. at 265. The need to establish international standards surfaced with the clashing interests of developed States, on the one hand, to provide enhanced protection for investments and property of their nationals abroad and the resistance of developing States, on the other hand, to any intervention in their affairs by foreign governments. See id. at 265-68.
31. Id. at 266 (quoting Samuel K.B. Asante, International Law and Foreign Investment: A Reappraisal, 37 Int'l & Comp. L.Q. 588, 590 (1988)).
diplomatic protection provides citizens abroad, whose person or property has suffered damages, an opportunity to appeal to their own government if satisfactory relief cannot be obtained through the remedial processes available in the host State.\textsuperscript{33}

As a major capital-exporter and source of foreign investment,\textsuperscript{34} the United States incorporated the policy of diplomatic protection into its negotiations with countries that would eventually host its investors. The United States asserted that an international minimum standard of compensation for injuries to foreign investors should be the controlling standard and that it had a right to take action on behalf of its citizens in an international tribunal.\textsuperscript{35} Not surprisingly, such efforts to implement diplomatic protection met vigorous resistance from less developed countries such as Mexico,\textsuperscript{36} which valued their sovereignty to freely establish any level of treatment toward foreigners and foreign investments.\textsuperscript{37} From the perspective of developing countries, the institution of diplomatic protection placed an oppressive burden upon them and subjected them to the abusive tactics of more powerful States, who wielded their strength over the weaker States to compel recoveries for incredulous claims without regard to their merits.\textsuperscript{38}

2. Mexico as Developing Country and Capital-Importer: Sovereignty Under the Calvo Doctrine

In response to the perceived threat to sovereignty that diplomatic protection posed to developing countries and its potential for abuse by stronger countries,\textsuperscript{39} Mexico joined many Latin American developing nations in adopting and incorporating into its law the "Calvo Doctrine."\textsuperscript{40} Named after Dr. Carlos Calvo, an Argentine

\textsuperscript{33} Id.
\textsuperscript{34} See Daly, supra note 2, at 1151, 1156 (associating NAFTA with the ideals of fully integrated economies and the free flow of capital and trade between the signatory States).
\textsuperscript{35} See id. at 1150-51. Indeed, all United States bilateral investment treaties contained provisions for binding international arbitration and the incorporation of international legal standards of compensation for injured investors. See Gantz, supra note 3, at 338-39.
\textsuperscript{36} Daly, supra note 2, at 1151.
\textsuperscript{37} See id. at 1162.
\textsuperscript{38} See id. at 1161-62. In some instances, the home states of foreign investors even went so far as to utilize armed intervention under the veil of diplomatic protection to force recovery from weaker nations on dubious claims made by its citizens. Id. at 1163. Examples of such events include the 1838 and 1861 French interventions in Mexico, the 1904 United States intervention in Santo Domingo, and the 1902-03 intervention in Venezuela by Germany, Great Britain, and Italy. Id. at 1163 n.83. A bit of irony lies in the fact that diplomatic protection was initially formed to shield foreign investors from the abuse and poor administration of local "justice" by citizens of the host country. See id. at 1163.
\textsuperscript{39} See supra note 38.
\textsuperscript{40} See Daly, supra note 2, at 1164-65. One commentator attributes the main cause of Mexico's restrictive stance on foreign investment to the rapidly growing
jurist who most articulately fought against the abuse of diplomatic protection, the doctrine sought to preserve the spirit of sovereignty among States by setting forth two "cardinal principles": (1) nonintervention among States and (2) denial of special status and enhanced treatment of foreigners above nationals. As one writer described the doctrine:

[S]overeign states, being free and independent, enjoy the right, on the basis of equality, to freedom from 'interference of any sort' . . . by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities.

Mexico became one of the leading supporters of the Calvo Doctrine, enacting a provision in its constitution that expressly "exclude[d] diplomatic protection under any circumstance." By operating under such constitutional principles and reserving to itself exclusive control over its economic and legal systems, Mexico calmed its fear of increasing foreign influence in its territory. Furthermore, Mexico attempted to inculcate the ideals of the Calvo Doctrine into its own negotiations with potential investor States, as the United States tried to do with diplomatic protection, by drafting agreements containing clauses that limited the maximum protection foreigners could seek to that accorded to Mexican nationals. Naturally, this led

presence of foreign-owned transnational corporations in Mexico during the late 1960s and 1970s, combined with negative views that developing countries held toward such corporations in general. See Sandrino, supra note 8, at 297. The notion that such corporations operated for Mexico's benefit by providing sources of technology, employment, and training dissipated by the 1970s and was replaced by the perception that the entities were "foreign intruders that sought personal profits without considering the social and economic needs of the host [S]tate." Id.

42. Id. at 19.
43. Daly, supra note 2, at 1164-65. The provision, which addresses the right of foreigners to acquire lands and waters in Mexico, states: "The State may grant the same right to foreigners, provided they agree . . . to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their Governments in matters relating thereto . . . ." Id. at 1165 n.94 (quoting Mex. Const. art. 27). Interestingly, this provision has not been held to vitiate in any way the Chapter 11 dispute resolution mechanism contained in the NAFTA, which would come about later and also take effect as the supreme law of Mexico upon Senate ratification of the treaty. See id. at 1160, 1188-89. The Mexican government made certain to eliminate any possibility for constitutional attacks against the NAFTA under its Law Regarding the Making of Treaties, which expressly acknowledges negotiations on dispute settlement provisions in international treaties and orders the enforcement and recognition of arbitral awards rendered under those treaties. Id. at 1188-89.

44. See Sandrino, supra note 8, at 284.
45. See supra text accompanying notes 34-35.
46. See Daly, supra note 2, at 1166-67. As a result of the Calvo Doctrine, numerous contracts between Latin American countries in general and other States emerged containing clauses that "barred international arbitration as a means of
to a long period of division between the United States and Mexico with regard to issues concerning the treatment of foreign investment and the settlement of investment disputes, which set the stage for a monumental breakthrough with the signing of NAFTA and adoption of Chapter 11.

3. Bridging the Historical Gap: Birth of NAFTA and Chapter 11 Dispute Resolution

Due in large part to Mexico's rising need for foreign capital and substantial changes in the legal and economic climates of Calvo Doctrine countries in general, the once seemingly impenetrable wall of sovereignty separating Mexico and the United States finally cracked in 1993 upon the adoption of NAFTA. In particular, a new framework for dispute resolution under Chapter 11 was created in keeping with the general purposes of NAFTA to "increase substantially investment opportunities in the territories of the Parties" and "create effective procedures ... for the resolution of disputes." The provisions of the framework effectively guaranteed individual investors of NAFTA Parties equal treatment "in accordance with the principle of international reciprocity and due process before an impartial tribunal," thus laying to rest those issues which had so sharply divided the United States and Mexico in the past.

From the standpoint of the United States, the risks and uncertainties that its investors faced in submitting claims in the local forums, which had previously warranted its strong adherence to the diplomatic protection regime, were no longer prevalent under the Chapter 11 framework. By allowing individual investors to directly invoke an international means of dispute resolution, Chapter 11 eliminated the need for potential investors to contemplate settling disputes." Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 Syracuse J. Int'l L. & Com. 1, 27 (1997).

47. See Price, supra note 6, at 736.
48. See Daly, supra note 2, at 1160, 1177 ("When economic realities outweigh the benefits of embracing a doctrinal stance, the true position of a [S]tate crystallizes.").
49. In addition to the need for the continued inflow of foreign investment, the birth of the NAFTA was facilitated by the transformation of many former Calvo Doctrine countries into "market economies with stable judiciaries, [where] the fear of abuse by more powerful states is no longer so prevalent." Id. at 1187.
50. NAFTA, supra note 1, ch. 1, art. 102, 32 I.L.M. at 297.
51. Id. ch. 11, art. 1115, 32 I.L.M. at 643.
52. See supra Parts I.A.1. and I.A.2.
53. See Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, NAFTA: L. & Bus. Rev. Am., Summer 1996, at 82, 115 (praising the framework provided in Chapter 11 by which investors could bypass the local courts and administrative systems and directly seek international arbitration against host countries as "enormously positive news").
54. Id.
undertaking the uncertain, confusing, and daunting task of dispute resolution in unfamiliar territory grounded in a different system of jurisprudence. Chapter 11 also quelled the United States’ fear that its citizens would be subject to national bias and partiality by the local judicial authority hearing their cases, resulting in unfair and inappropriate resolutions. Furthermore, Chapter 11 liberated investors from various other risks attendant to local adjudication of disputes, such as unpredictable methods of enforcement, different standards of confidentiality regarding matters in dispute, and significant expenses and time related to local court proceedings. In sum, the Chapter 11 dispute resolution mechanism established “predictability and certainty” for United States investors conducting business in Mexico by virtually neutralizing the requirement of local proceedings central to the Calvo Doctrine, thereby minimizing the

55. See Camp, Dispute Resolution, supra note 3, at 100 (describing the onerous task of investors having to deal with two different systems of civil justice in the United States and Mexico). In fact, litigating in Mexico, even from the perspective of its own citizens, is seen as a last resort only after all other means of negotiating a resolution over a dispute have failed. See id. A common saying in Mexico is: “A bad settlement is better than a good lawsuit.” Id. (internal quotes omitted).

56. See id. at 89. For example, Mexico imposes a limitation on the amount of damages recoverable in “a civil action, whereas [United States] law creates opportunities for unlimited damages, including punitive damages.” Id. Furthermore, “[t]he jury is not a part of adjudication of civil disputes in Mexico, whereas it is an integral part of the system in the United States.” Id. Instead, Mexican trials primarily consist of panels of judges who sift through documentary evidence and ask witnesses questions. Id. Mexico also places less emphasis on pre-trial discovery than does the United States. Id. On a more general level, Mexican jurisprudence relies mostly on a civil code system, whereas the United States places substantial weight on traditional common law standards. Jimmie V. Reyna et al., Practice Before U.S.-Mexico Binational Panels Under Chapter Nineteen of NAFTA: A Panel Discussion, 5 U.S.-Mex. L.J. 73, 73 (1997).

57. See Thompson, supra note 46, at 2 (noting the reluctance of international disputants to submit their claims before local courts for fear of “some type of ‘home court’ advantage” in favor of the local party, in addition to the already arduous challenge of arguing under local law and before a court that might lack expertise in international matters); cf. Hans Dolinar, New Perspectives of International Commercial Arbitration in Europe, 10 Ga. St. U. L. Rev. 519, 529 (1994) (discussing the initial fear of Eastern European countries of bias lurking in Western arbitral institutions, the diffusion of “which [later] led to a stronger acceptance in the East of Western arbitral institutions”).

58. Camp, Dispute Resolution, supra note 3, at 90.

59. Daly, supra note 2, at 1160.

60. Some experts have even said that the new investment provisions amounted to “a repudiation of the Calvo Doctrine.” Id. at 1180 (quoting Gary C. Hufbauer & Jeffrey J. Schott, NAFTA: An Assessment 82 (1993)). Moreover, investors in Mexico may breathe an added sigh of relief with the knowledge that the Mexican Constitution expressly mandates that international treaties such as the NAFTA supersede both federal and state law. See Margarita Treviño Balli & David S. Coale, Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?, 30 Tex. Int'l L.J. 535, 551 (1995) (summarizing article 133 of the Mexican Constitution).

Mexico’s apparent willingness to adopt the provisions of Chapter 11, which effectively nullify the Calvo Doctrine, has spurred a change in attitude about foreign
need for the United States to rely on traditional notions of diplomatic protection.  

From Mexico's standpoint, the promulgation of Chapter 11 provided a ready safeguard against the potential for industrialized States to institute diplomatic protection on behalf of their investors, which Mexico considered an attack on its sovereignty. Under the new dispute resolution framework, investors themselves had full standing to resolve disputes with the host country immediately in an international forum without having to appeal to their home governments to do so on their behalf. By granting private investors the right to claim directly against any breaching NAFTA Party in an international forum, Chapter 11 essentially rendered obsolete the principal function of diplomatic protection, which was to afford remedies to wronged investors who lacked the power to claim directly against the host country. Therefore, Mexico no longer had any cause to fear United States investors would resort to the traditional form of diplomatic protection instead of claiming damages under the Chapter 11 mechanism.
to rely on the Calvo Doctrine as an internal barrier against the institution of diplomatic protection. 66

B. Key Provisions of Chapter 11


The revolutionary framework for dispute resolution set forth in Chapter 11 represents a general intent on the part of NAFTA Parties to “increase substantially investment opportunities in the territories of the Parties” and “create effective procedures... for the resolution of disputes.” 67 The particular purpose behind Chapter 11 is to establish “a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.” 68 In essence, Chapter 11 guarantees foreign investors the right, previously nonexistent in Calvo Doctrine jurisdictions like Mexico, 69 to bypass the risk and uncertainty

66. See supra Part I.A.2.

One skeptic rejects the notion that Chapter 11’s assurances of international reciprocity and equal treatment really confer any benefit to Mexico at all since it is not a capital exporter like the United States, but is rather an important recipient of foreign capital. See Bernardo Sepúlveda Amor, International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction, 19 Hous. J. Int’l L. 565, 574 (1997). Claiming that such provisions under Chapter 11 amount to little more than a “straight jacket on national jurisdiction,” Amor criticizes the scheme as granting foreign investors privileged status over nationals, and thereby encouraging their lack of respect for Mexican jurisprudence. See id. at 588. He comments that a mere grant of guarantees would have little impact on attracting foreign capital into a country and, instead, lists his own factors for what would have an impact, none of which are related to dispute resolution: “1) political stability; 2) the existence of a rule of law; 3) favorable economic conditions of the host country; 4) a positive fiscal regime; 5) employment regulations; 6) communication and transportation infrastructure; 7) high profitability from investments; 8) free transfer of financial flows; and 9) a favorable ‘climate of investment.’” Id. at 589. Amor predicts that foreign investment would flow into Mexico so long as these factors are met. See id.

Another critic of the Chapter 11 dispute resolution mechanism takes a different approach. See Ganguly, supra note 63, at 114. Also based principally on ideals of national sovereignty, Ganguly suggests that investor-State dispute mechanisms such as the one in Chapter 11 can prevent host country legislatures from enacting laws in the interest of the national public. See id. at 119. By allowing outsiders to bypass completely the local legal systems and bring actions directly against host governments for measures in violation of the NAFTA, the dispute resolution mechanism indirectly gives investors the power to question national legislation without any form of checks and balances. See id. at 114, 120. Therefore, due to the threat of potential liability and unmanageable caseloads, host country governments would avoid legislating exclusively in the interest of the public for fear of inadvertently causing harm to outsiders. See id. at 119.

67. NAFTA, supra note 1, ch. 1, art. 102, 32 I.L.M. at 297.
68. Id. ch. 11, art. 1115, 32 I.L.M. at 642.
69. See supra Part I.A.2.
attendant to submitting claims in the local courts or administrative systems and directly invoke an international arbitration mechanism.\textsuperscript{70}

Articles 1116\textsuperscript{71} and 1117\textsuperscript{72} constitute the core of the framework for dispute resolution under Chapter 11. They collectively enable an investor on behalf of himself or herself, or on behalf of an enterprise that the investor controls or owns, to institute arbitration proceedings for damages resulting from a breach by a Party of the NAFTA provisions.\textsuperscript{73} The aggrieved investor may submit his or her claims to arbitration under the International Centre for the Settlement of Investment Disputes ("ICSID") Convention,\textsuperscript{74} the Additional Facility Rules of the ICSID,\textsuperscript{75} or the UNCITRAL Arbitration Rules.\textsuperscript{76} To encourage disputing parties to cooperate in tailoring an informal settlement prior to seeking arbitration,\textsuperscript{77} Chapter 11 requires the disputants to attempt "to settle a claim through consultation or negotiation."\textsuperscript{78} It also requires the claimant to deliver to the opposing party a notice of intent to submit a claim to arbitration at least ninety

\textsuperscript{70} Levin & Marin, supra note 53, at 115.
\textsuperscript{71} NAFTA, supra note 1, ch. 11, art. 1116, 32 I.L.M. at 642-43.
\textsuperscript{72} Id. ch. 11, art. 1117, 32 I.L.M. at 643.
\textsuperscript{73} See id. ch. 11, arts. 1116, 1117, 32 I.L.M. at 642-43. The limitation period during which an investor may bring a claim under Chapter 11 is capped at three years "from the date on which the investor [or the enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or the enterprise] has incurred loss or damage." Id.
\textsuperscript{74} In 1965 the United States and other nations drafted the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States in a continuing effort to improve standards for the treatment of foreign investment among member countries. Gantz, supra note 3, at 339. ICSID, an institution affiliated with the World Bank and located in Washington D.C., was organized under the Convention to serve primarily as secretariat for arbitration proceedings brought under the terms and conditions of the Convention. Id. at 339-40.
\textsuperscript{75} The Additional Facility Rules of ICSID, in essence, make it possible for even non-member states to the ICSID Convention to submit arbitration claims under the Convention as long as one of the parties (i.e., either the host country or the investor's country) to the dispute is a party to the Convention. See NAFTA, supra note 1, ch. 11, art. 1120, 32 I.L.M. at 643; Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules), art. 2, at http://www.worldbank.org/icsid/facility/3.htm (last visited Mar. 30, 2001). Because neither Canada nor Mexico is a contracting state to the ICSID Convention, disputes involving either one of the two Parties and a United States-based investor would have to be raised under the Additional Facility Rules or UNCITRAL Arbitration Rules. See, e.g., Waste Mgmt., Inc. v. United Mexican States (U.S. v. Mex.), 15 ICSID Rev.: Foreign Investment L.J. 214 (2000), available at http://www.worldbank.org/icsid/cases/awards.htm (involving a dispute raised between a United States-based investor and Mexico under the Additional Facility Rules); NAFTA Chapter 11 Arbitral Tribunal: Ethyl Corporation v. Government of Canada (Award on Jurisdiction), 38 I.L.M. 708 (UNCITRAL 1999) (adjudicating a dispute between a United States-based investor and Canada under the UNCITRAL Arbitration Rules).
\textsuperscript{76} NAFTA, supra note 1, ch. 11, art. 1120, 32 I.L.M. at 643.
\textsuperscript{77} Gantz, supra note 3, at 343.
\textsuperscript{78} NAFTA, supra note 1, ch. 11, art. 1118, 32 I.L.M. at 643.
days before the claim is actually submitted. With respect to the body of law governing NAFTA arbitration, Article 1131 provides that tribunals established under Chapter 11 "shall decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law.”

2. Article 1121 Waiver Provision

Supplementary to the core framework described above are two conditions precedent to the submission of claims to arbitration under Chapter 11, listed in Article 1121: 1) written consent of the investor (and its enterprise, if applicable) to arbitration in accordance with the provisions of NAFTA and 2) delivery by the investor (and its enterprise, if applicable) to the opposing Party of a written waiver of its "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” of NAFTA. The second condition precedent, plainly stated, prevents claimants from "double-dipping" in multiple legal forums with respect to the same measures alleged to have caused them injury. The NAFTA Parties drafted the waiver provision in order to protect against the possibility of aggrieved investors pursuing parallel proceedings on both the national level and at the international level under Chapter 11 of NAFTA, which could yield a host of unwelcome results. Some of

79. Id. ch. 11, art. 1119, 32 I.L.M. at 643.
80. Id. ch. 11, art. 1131, 32 I.L.M. at 645.
81. This requirement of consent substitutes for the consent normally required from disputants by ICSID as a prerequisite for its jurisdiction to hear claims under the Convention. See Gantz, supra note 3, at 344. Making consent a prerequisite for NAFTA arbitration indicates the intent of the NAFTA Parties to recognize the importance of “the autonomy of the will of the [disputing] parties” as the true controlling basis for a NAFTA arbitral tribunal's power to hear the matters in dispute. See Waste Mgmt., Inc. v. United Mexican States (U.S. v. Mex.), 15 ICSID Rev.: Foreign Investment L.J. 214, 227-28 (2000), available at http://www.worldbank.org/icsid/cases/awards.htm (“[i]t is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.”).

82. NAFTA, supra note 1, ch. 11, art. 1121, 32 I.L.M. at 643. An exception to the waiver condition precedent is made for “proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages.” Id. Since NAFTA arbitral tribunals only have the power to issue awards for “monetary damages and any applicable interest,” “restitution of property,” and “costs” related to arbitration, pursuant to Article 1135 governing final awards, investors need not waive their rights to seek these other forms of relief in domestic courts. See NAFTA, supra note 1, ch. 11, art. 1135, 32 I.L.M. at 646.

83. See Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 235-36 (describing the “imminent risk” that the NAFTA claimant would obtain double benefits if a provision such as Article 1121 were not present to preclude the claimant from pursuing concurrent proceedings with respect to legal issues derived from the same measures of transgression). In Mexico's case, an added protection was built into
those results would include claimants enjoying twice the benefits on their claim for damages,\textsuperscript{84} risk of conflicting outcomes on the same issue, and forum-shopping between the local and international levels.\textsuperscript{85}

Overall, the Chapter 11 provisions offer more comfort and promote a friendlier environment for NAFTA investors seeking to establish a local presence in Canada, the United States, or Mexico. Particularly with respect to the United States and Mexico, the Chapter 11 framework embodies an ideal compromise between two countries which for so long had maintained their allegiance to widely divergent principles of international investment in diplomatic protection\textsuperscript{86} and the Calvo Doctrine.\textsuperscript{87} One of the unfortunate realities that emanates from the introduction of such an unprecedented, innovative framework, however, is the emergence of new procedural issues, which have the potential for generating controversy and litigation without the added benefit of guiding precedent. Satisfaction of the Article 1121 waiver condition precedent, described above,\textsuperscript{88} is one such issue which, as the next part describes, has resulted in litigation leading to a questionable outcome.

\textsuperscript{84} Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 235-36.
\textsuperscript{85} Id. at 259-60 (Higbet, Arb., dissenting). Although in theory such a threat could arise, forum-shopping in practice does not seem likely to present too great a risk since the costs and inconvenience inherent in using the local forum as an alternative to the international forum would probably outweigh the benefits. See supra notes 53-61 and accompanying text.
\textsuperscript{86} See supra Part I.A.1.
\textsuperscript{87} See supra Part I.A.2.
\textsuperscript{88} See supra Part I.B.2.
II. CASE STUDY: ARTICLE 1121 WAIVER AS APPLIED IN WASTE MANAGEMENT, INC. V. UNITED MEXICAN STATES

Waste Management, Inc. v. United Mexican States provides an ideal starting point for analyzing issues related to the Article 1121 waiver, because it exemplifies from a practical perspective the manner in which an arbitral tribunal invoked under NAFTA would likely review a waiver submitted by a NAFTA claimant. This part summarizes the factual events giving rise to the Article 1121 waiver issues discussed in Waste Management and compares the respective positions of the majority and dissent in determining the validity of a waiver submitted pursuant to the provision.

A. Factual and Procedural Background

On September 29, 1998, Waste Management, Inc., acting on its own behalf and on behalf of its investment, Acaverde S.A. de C.V., filed a notice of arbitration proceedings against the Government of the United Mexican States in accordance with the Additional Facility Rules of ICSID. Waste Management claimed compensation for damages arising from breaches of Article 1105, which mandates fair and equitable treatment of the investments of foreign investors, and Article 1110, which provides against inappropriate expropriations, by State-owned entities—Banco Nacional De Obras Y Servicios Públicos, S.N.C. ("Banobras"), the Mexican State of Guerrero ("Guerrero"), and the City Council of Acapulco De Juárez ("Acapulco"). Certain events led to the claims made by Waste Management, including an alleged refusal by Acapulco to pay invoices.

89. 15 ICSID Rev.: Foreign Investment L.J. at 214.
90. Id.
91. See infra Part II.A.
92. See infra Part II.B and Part II.C.
93. Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 216. For an explanation of the Additional Facility Rules, see supra note 75.
94. The full provision sets up the minimum standard of treatment each Party must provide: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA, supra note 1, ch. 11, art. 1105, 32 I.L.M. at 639. This standard of treatment governs regardless of whether citizens of the host Party are extended the same treatment by that Party's government. Levin & Marin, supra note 53, at 85.
95. The provision states the general rule that "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment." NAFTA, supra note 1, ch. 11, art. 1110, 32 I.L.M. at 641. Exceptions to the general rule consist of expropriations done 1) for a public purpose; 2) on a non-discriminatory basis; 3) in accordance with due process of law and the provisions in Article 1105 for fair and equitable treatment; and 4) on payment of appropriate compensation. Id. For further discussion on expropriation claims in general, see infra notes 162-68 and accompanying text.
submitted by Acaverde under a concession agreement and Banobras' failure to make payments for the defaulting Acapulco as guarantor under a line of credit agreement.

To ensure that it properly complied with the waiver condition of Article 1121, Waste Management entered into a series of correspondence with ICSID concerning the contents of its written waiver, the final confirmed version of which states in pertinent part:

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.... 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.

Mexico protested in defense that the ICSID arbitral panel lacked jurisdiction to hear Waste Management's case because the waiver submitted by Waste Management failed to conform both in form and content to the terms meted out in Article 1121.

As evidence of Waste Management's noncompliance with the waiver provision, Mexico pointed to the fact that legal proceedings initiated by Acaverde in internal forums—two suits against Banobras and one proceeding against Acapulco—were still pending as of the date the present NAFTA claims were filed. Mexico asserted that Waste Management's local claims for breach of contract and nonpayment of invoices against the Mexican entities overlapped with its claims submitted in the NAFTA arbitration.

97. See supra note 18 for an explanation of "concession contract."
98. Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 222. See supra note 19 for a definition of "line of credit" agreement.
99. Id. at 220-21. (quoting letter of Sept. 29, 1999 from Waste Management to ICSID Secretary-General) (bold added in original)).
100. Id. at 222.
101. The first proceeding filed against Banobras was a mercantile action for Banobras's failure to fulfill its obligations as guarantor of Acapulco pursuant to a credit line agreement to make payments on behalf of Acapulco. Id. at 232-33. The second action against Banobras was for failure to pay certain invoices under the credit line agreement. Id. at 233. In its action against Acapulco, Acaverde claimed damages for nonpayment of services and breach of a series of obligations under a concession agreement. Id. None of the three proceedings ultimately resulted in a recovery for Acaverde. Id. at 232-33.
102. Id. at 222.
103. Id. Considering its disapproval of the apparent overlap in claims made by Waste Management in the Mexican forums and before the present NAFTA tribunal, Mexico's failure to assert its own automatic bar against parallel proceedings in Annex 1120.1, see supra note 83, seems puzzling. See id. at 269 (Hightet, Arb., dissenting).
Management contended that no such overlap in claims existed because it did not allege a NAFTA-related breach, Mexico was not a named party in such internal proceedings and, therefore, Waste Management had preserved the sanctity of its waiver. Waste Management insisted that its claims at the local level for breach of contract and nonpayment of invoices against Banobras and Acapulco differed in substance from those made under NAFTA for expropriation and unfair and inequitable treatment. The former were local commercial causes of action, which strictly arose under local law, whereas the latter pertained to international obligations on Mexico imposed by the specific provisions (i.e., Article 1110 and Article 1105) of NAFTA.

B. The Majority Opinion

The Waste Management tribunal prefaced its analysis by noting that, in general, questions concerning the fulfillment of conditions precedent to arbitration under NAFTA deserve the most rigid scrutiny since their fulfillment literally opens the door to NAFTA arbitration. With regard to the case at hand, the tribunal embarked on a detailed examination of the scope and content of a waiver required under the Article 1121 condition precedent to arbitration. The tribunal deemed it crucial to define the type of conduct prohibited by a valid waiver submitted under Article 1121. In so doing, the tribunal needed only to reiterate the express language of Article 1121, which proscribes the "initiation or continuation of proceedings under the law of either [State of the disputants] with

Perhaps Mexico doubted the applicability of Annex 1120.1 for some reason and wished to defer the questions regarding the alleged duplicate proceedings of Waste Management to the arbitral tribunal for an adjudication based on jurisdictional grounds under Article 1121. See id. (Higget, Arb., dissenting).

104. Id. at 222-23. Waste Management, in fact, expressed its intent directly to the Mexican government not to withdraw any of its ongoing proceedings in the domestic forums in a letter, dated as late as Feb. 10, 1999: "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. at 236.

105. See id. at 222-23.

106. See id. at 234.

107. See id. at 228. The tribunal stated:

"It is the understanding of this Tribunal that any analysis of the fulfillment of the prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 calls for the utmost attention, since fulfillment thereof opens the way, ipso facto, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to said international treaty.

Id.

108. See id. at 228-39.

109. See id. at 233-38.
respect to a measure allegedly breaching the provisions" of Chapter 11 of NAFTA.\textsuperscript{110}

With respect to the Waste Management case then, the majority tribunal focused on whether the waiver submitted by Waste Management permitted the conduct expressly prohibited by Article 1121 of maintaining concurrent proceedings, in which case the waiver would be invalid.\textsuperscript{111} Although the waiver in large part indicated Waste Management's intent to abdicate its rights to pursue local proceedings with respect to the same measures alleged to be breaches of NAFTA,\textsuperscript{112} the tribunal pointed to particular language that was suspect:

\begin{quote}
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.\textsuperscript{113}
\end{quote}

Such an interpretation of the waiver requirement, if enforced, would enable Waste Management to pursue local litigation freely alongside NAFTA litigation as long as it never expressly claimed violations of Chapter 11 of NAFTA in the local proceedings.\textsuperscript{114} Based on this understanding, Waste Management's claims for breach of contract and nonpayment of invoices against Banobras and Acapulco pending in the local forums would conform to Article 1121 since, as Waste Management contended, they were not derived from express provisions of NAFTA like expropriation and unfair and inequitable treatment.\textsuperscript{115}

In the majority's view, the threshold inquiry was not whether the claims made by Waste Management in the local forums differed from its claims in the present arbitration, but whether they arose from the same measures alleged to be breaches of NAFTA.\textsuperscript{116} According to the

\textsuperscript{110} See id. at 237.

\textsuperscript{111} See id. at 234-36.

\textsuperscript{112} See id. at 232.

\textsuperscript{113} Id. at 234.

\textsuperscript{114} See id. The tribunal stated:

Following this line of reasoning, the Claimant would have acted in accordance with the terms of its waiver since, in fact, [it] did not expressly invoke those provisions of NAFTA that it considered breached before other courts or tribunals, but instead . . . under Mexican legislation, instituted several claims for monetary compensation in respect of unpaid invoices and non-compliance with various obligations under a line of credit agreement and a Concession Agreement, considering such conduct "permissible" in light of its own interpretation of said waiver. This justification of its conduct is unsustainable . . . .

\textsuperscript{115} See supra notes 104-06 and accompanying text.

\textsuperscript{116} See Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 235.
tribunal, the dual claims merely represented different ways of stating the same cause of action. In the words of the tribunal:

It is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA.

In making its determination that the local actions of Waste Management looked to the same measures as those alleged in the present proceedings to be breaches of NAFTA, the majority saw no need to delve into the substantive similarities or dissimilarities of the dual claims. Such substantive questions belonged more properly to an analysis of the merits of each claim, which was not imperative for purposes of considering the application of the Article 1121 waiver because it constituted only a condition precedent to arbitration. 

The presence of the term "alleged" in Article 1121 indicated to the tribunal that "the elements of comparison to be used at the time of verifying compliance with the waiver are the presumed or supposed [as opposed to actual] violations of the NAFTA invoked by the Claimant and the actions effectively in progress before other courts or tribunals at that time." Therefore, the arbitral majority concluded that Waste Management’s continued pursuit of its local claims for breach of contract and nonpayment constituted conduct forbidden under Article 1121 since they arose from the same measures alleged to be breaches of NAFTA (i.e., expropriation and unfair and inequitable treatment). Moreover, since Waste Management’s waiver by its language would have approved of such conduct outside the breadth of Article 1121, the majority held that the waiver was invalid and, thus, that Waste Management was barred from arbitration altogether.

The majority tribunal also reached its conclusion to bar Waste Management from Chapter 11 arbitration based on policy grounds underlying the Article 1121 provision against "double-dipping." It reasoned that allowing Waste Management to proceed based on its waiver terms with coexisting claims in both the local forums and the NAFTA arbitration presented a threat of duplication of

117. See id.
118. Id. (emphasis added).
119. See id.
120. See id.
121. Id. (emphasis added).
122. See id. at 237.
123. See id. at 238-39.
124. See id. at 235-36.
The continuation of legal actions derived from the same measures, stated the majority, created "the imminent risk that the Claimant may obtain the double benefit in its claim for damages." The tribunal continued by noting "[t]his is precisely what NAFTA Article 1121 seeks to avoid." Thus, even from a public policy perspective Waste Management violated the spirit of the Article 1121 waiver condition by maintaining its claims against Banobras and Acapulco at the local level concurrently with its claims against Mexico in Chapter 11 arbitration.

C. The Dissenting Opinion

Following the decision of the majority arbitral panel to dismiss Waste Management's claims under NAFTA for lack of jurisdiction, Keith Hight, one of the arbitrators, issued a vigorous dissenting statement. Contrary to the majority's conclusion, Hight argued that the additional language contained in Waste Management's waiver did not substantively negate or alter the requirements of Article 1121 to abstain from duplication of proceedings with respect to the same measures of wrongdoing. The understanding expressed by Waste Management that its waiver did not "apply to any dispute settlement

---

125. See id. at 237.
126. Id. at 236.
127. Id.
128. See id. at 239-40.
129. Id.
130. Id. at 240.
131. Id. at 241 (Hight, Arb., dissenting).
132. See id. at 243 (Hight, Arb., dissenting). Incidentally, Hight also critiqued the manner in which the majority reached its conclusion that Waste Management's claims in the NAFTA arbitration should be barred under Article 1121 because they arose from the same “measures” as the claims pending in the local forums. See id. at 245-47 (Hight, Arb., dissenting). Hight voiced concern over the majority's failure to first address the implicit question of what the term “measures” within the meaning of Article 1121 exactly entails and cited for guidance Article 201 of the NAFTA, which states: “measure includes any law, regulation, procedure, requirement or practice.” Id. at 245-46 (Hight, Arb., dissenting) (quoting NAFTA, supra note 1, ch. 2, art. 201, 32 I.L.M. at 298). Hight argued that the word “measure,” as intended by the NAFTA Parties in Article 1121, manifested “a particular and limited kind of action or concept”—in essence, “a State act that is itself a breach of [the State's] obligations under NAFTA.” Id. at 246 (Hight, Arb., dissenting). Actions such as denial of payment under a letter of credit or cancellation of a concession contract were not the type of “measures” referred to in Article 1121, but mere local components of a “measure.” Id. (Hight, Arb., dissenting). Such components could only rise to the level of “measures” if combined with some additional acts committed by Mexico such as refusals to permit access to judicial review, other forms of denial of justice at international law or a governmental conspiracy to appropriate Waste Management’s concession. Id. at 246-47 (Hight, Arb., dissenting). Hight concluded, therefore, that such acts of breach of contract and nonpayment on invoices as alleged by Waste Management against Banobras and Acapulco could not have been covered by the term “measures” within the meaning intended in Article 1121 and as used by the majority. See id. at 246 (Hight, Arb., dissenting).
proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA"133 only reconfirmed the proper scope of Article 1121,134 which covered only those claims "imposed by other sources of law, that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of NAFTA."135 In drafting the provision, the Parties of NAFTA must have intended to draw a basic distinction "between the legal obligations of Mexico under Mexican law and the legal obligations of Mexico under its international treaty obligations imposed by NAFTA."136 Highet asserted that if such substantive distinctions were not made between NAFTA claims and non-NAFTA claims, it would necessarily follow that NAFTA arbitration would offer remedies even for issues of national law such as breach of contract, nonpayment of money, breach of warranty, labor and fair bargaining, sexual harassment and so forth.137 Highet stated, "It is inconceivable that any of these complaints had been intended, by the NAFTA State Party, to be resolved in NAFTA arbitrations."138 Therefore, Waste Management’s waiver was consistent in substance with the requirements of Article 1121.139

Furthermore, Highet determined that Waste Management did not engage in conduct forbidden by Article 1121 in maintaining concurrent proceedings at the local level and under NAFTA because it merely did so based on the terms of its tendered waiver.140 He reasoned that Waste Management’s local claims against Banobras and Acapulco for breach of contract and nonpayment of invoices differed in substance from its claims brought under NAFTA for expropriation and unfair and inequitable treatment.141 The former consisted of local commercial claims rightfully confined to the Mexican tribunals, whereas the latter consisted of claims based on specific provisions governing the international obligations of Mexico under Chapter 11 of NAFTA.142 Highet reasoned that in order for a duplication of proceedings to have occurred, Waste Management must have "essentially alleged the equivalent of a violation of Chapter Eleven" by alleging nationalization, expropriation, discriminatory conduct or some other complaint actionable under NAFTA.143 Therefore, Highet

133. Id. at 221.
134. See id. at 244 (Highet, Arb., dissenting).
135. Id. (Highet, Arb., dissenting) (citation omitted).
136. Id. (Highet, Arb., dissenting).
137. Id. (Highet, Arb., dissenting).
138. Id. (Highet, Arb., dissenting).
139. See id. at 243-44 (Highet, Arb., dissenting).
140. See id. at 253 (Highet, Arb., dissenting).
141. See id. (Highet, Arb., dissenting).
142. Id. (Highet, Arb., dissenting).
143. See id. at 261 (Highet, Arb., dissenting). Moreover, Highet provided additional evidence of the substantive differences between Waste Management’s local claims and its NAFTA claims. He reported that the amount in damages claimed by
charged the majority with reaching an errant conclusion that Waste Management should be barred from NAFTA arbitration due to its tender of a defective waiver which condoned conduct beyond the intended scope of Article 1121.\textsuperscript{144}

In sum, the disparate views expressed by the majority and dissent in Waste Management collectively offer a useful illustration of the intricate issues involved in the practical application of the Article 1121 waiver provision. Rather than representing a dispositive statement of law, the case demonstrates that such issues related to the waiver provision will likely form the basis for an abundance of legal controversy and debate. Given the integral nature of Article 1121 as a condition precedent to Chapter 11 arbitration,\textsuperscript{145} it is critical to conduct a thorough analysis of the views advanced in Waste Management in connection with Article 1121 and flesh out their strengths and weaknesses in light of the policies surrounding NAFTA as a whole.\textsuperscript{146} The next part engages in such an analysis and indeed reveals the existence of significant flaws in Waste Management that would lead to the wrong approach of applying the Article 1121 waiver, thereby causing significant harm to the unwary claimant.

III. A RETROSPECTIVE APPROACH TO APPLYING THE ARTICLE 1121 WAIVER

As demonstrated by the outcome in Waste Management, failure to submit a valid waiver conforming to the scope of Article 1121 may lead to such drastic consequences as a complete bar to Chapter 11 arbitration.\textsuperscript{147} However, tendering a waiver in total compliance with the requirements of Article 1121 may lead to an even more egregious result. By compelling claimants under NAFTA to prospectively relinquish their rights to any local adjudication of claims based on measures, which in actuality may not rise to the level of stating NAFTA claims, the Article 1121 waiver has the potential to spark substantial opportunity costs related to arbitrations under NAFTA. Whether a claimant bears the risks of incurring such costs depends on whether an arbitral tribunal, in determining the validity of a tendered waiver, takes into consideration or disregards the substantive merits of the claims brought by the claimant under NAFTA. In Waste Management, the majority chose to forgo an analysis on the merits of Waste Management in the Mexican courts was far below the amount sought in the NAFTA arbitration—specifically, by a margin of approximately 23%. \textit{Id.} at 255 n.29 (Highet, Arb., dissenting). Rough calculations of the amounts claimed indicate that Waste Management claimed approximately US$28,339,343 in the local forums, whereas the amount claimed in the NAFTA arbitration totaled about US$36,630,000, leaving a difference of some $8,290,657. \textit{Id.} (Highet, Arb., dissenting).

\textsuperscript{144} See \textit{id.} at 253 (Highet, Arb., dissenting).
\textsuperscript{145} See NAFTA, supra note 1, ch. 11, art. 1121, 32 I.L.M. at 643; Part I.B.2.
\textsuperscript{146} See supra Part I.A.3.
\textsuperscript{147} See Waste Mgmt., 15 ICSID Rev.: Foreign Investment L.J. at 239-40.
Waste Management’s claims for expropriation and unfair and inequitable treatment and did even not consider whether they rose to the level of stating NAFTA causes of action based on the underlying measures of breach of contract and nonpayment. The majority instead presumed that they were the equivalent of NAFTA claims and, upon comparison with Waste Management’s local claims, concluded that their coexistence constituted conduct prohibited by Article 1121 because they arose from the same measures. Hight, in his dissent, emphasized the existence of fundamental differences between NAFTA claims such as expropriation and unfair and inequitable treatment, and non-NAFTA claims such as breach of contract and nonpayment, and argued that concurrent proceedings based on such claims did not violate Article 1121 since they were substantively different.

This part analyzes the outcome in *Waste Management* and concludes that, although the majority was justified in its ultimate result of barring Waste Management from NAFTA arbitration, its reasoning in reaching such a result was faulty in that it promotes the problematic approach of applying the Article 1121 waiver prospectively. Rather than examining the validity of Article 1121 waivers based merely on presumptions, this part argues that the application of the waivers should turn on actual factual inquiries regarding the merits of the claims made under NAFTA. A retrospective approach would afford NAFTA claimants protection against preclusion from subsequent local litigation in the event that their claims are eventually deemed to be excluded from NAFTA jurisdiction due to substantive shortcomings.

**A. Identifying the Problems of the Prospective Approach: Analysis of *Waste Management*, Inc. v. United Mexican States**

The majority in *Waste Management* was justified in blocking Waste Management from further arbitrating under NAFTA. As the majority correctly stated, the alleged breaches of contract and nonpayment of invoices claimed by Waste Management at the local level against Banobras and Acapulco comprised the same measures of wrongdoing which formed the bases for its claims against Mexico under NAFTA for expropriation and unfair and inequitable treatment. Although Hight in his dissent contended that a fundamental difference exists between such claims as breach of contract and nonpayment, which are creatures of local commercial law, and claims for expropriation and inequitable treatment, which

149. *See supra* text accompanying note 123.
150. *See supra* notes 136-44 and accompanying text.
151. *See supra* text accompanying notes 123, 128.
152. *See supra* text accompanying notes 116-18.
organize from international obligations of Mexico under NAFTA,\textsuperscript{153} this rationale is problematic. Regardless of which body of law, Mexican commercial law or the provisions of NAFTA, gave rise to Waste Management’s claims in the local forums and in the NAFTA arbitration, the fact remains that the underlying bases for those claims originated from the same root. If two sets of claims, otherwise based on identical facts, were deemed substantively distinct just by virtue of having separate legal origins, any crafty claimant would be able to avoid preclusion under Article 1121 by carefully articulating his or her grievances according to the legal principles recognized in each forum. For example, an action for the tort of conversion of property arising under the laws of Mexico could readily be transformed into a claim for expropriation\textsuperscript{154} under NAFTA without triggering Article 1121 preclusion because they arise from different bodies of law and, therefore under Hight’s rationale, would be treated as substantively distinct. This would undermine the essential function of Article 1121 to prevent claimants from pursuing double remedies based on the same facts.\textsuperscript{155} Thus, the majority rightly found that the coexistence of Waste Management’s local claims and its NAFTA claims amounted to conduct prohibited by Article 1121 because they arose from the same alleged measures of wrongdoing.\textsuperscript{156}

However justified the majority was in concluding that Waste Management’s duplicate claims constituted conduct violating Article 1121, its line of reasoning in arriving at such a result is suspect and exposes the dangers of applying the Article 1121 waiver prospectively. One of the key issues the majority addressed in analyzing the validity of the Article 1121 waiver tendered by Waste Management was whether to explore the merits of Waste Management’s claims under NAFTA.\textsuperscript{157} The majority elected to ignore the substantive merits of Waste Management’s claims for expropriation and unfair and inequitable treatment since the issue of the Article 1121 waiver pertained only to a jurisdictional condition precedent to NAFTA arbitration as contrasted from the actual heart of the arbitration itself.\textsuperscript{158} According to the majority, the relevant point of comparison in determining if Waste Management’s dual proceedings constituted conduct prohibited by Article 1121 was “the presumed or supposed [as opposed to actual] violations of NAFTA invoked by the Claimant and

\textsuperscript{153} See supra notes 140-44 and accompanying text.
\textsuperscript{154} Recall that the term “expropriation” in general has been equated with the concept of a “taking” or appropriation by the host country of an investor’s investment or property. See supra note 16. For further analysis on the term “expropriation” as used by various arbitral panels in general, see also infra notes 162-68 and accompanying text.
\textsuperscript{155} See supra text accompanying notes 124-28.
\textsuperscript{156} See supra text accompanying notes 123, 128.
\textsuperscript{157} See supra text accompanying notes 119-21.
\textsuperscript{158} See supra text accompanying notes 119-21.
the actions effectively in progress before other courts or tribunals at that time.\textsuperscript{159}

Under this line of reasoning, the only way Waste Management could have proceeded with NAFTA arbitration would have been to effectively waive its rights to maintain its local proceedings even without the assurance that its NAFTA claims would be actionable on their merits. That is, Waste Management would have had to tender a waiver under Article 1121 that would have taken effect prospectively against all subsequent local litigation irrespective of whether its NAFTA claims eventually failed to state a NAFTA cause of action. Under this approach, a party in the position of Waste Management must bear the significant risk of having no alternative means of recourse in the event its NAFTA claims did fail, since the waiver had already taken effect before the merits of the party's NAFTA claims were considered. Of course, on the contrary, the party's NAFTA claims may very well turn out to have legitimate status under NAFTA, in which case the prospective application of the Article 1121 waiver would not cause any harm. Nevertheless, until the tribunal determines in one way or another the legitimacy of the party's NAFTA claims, the risk of such harm would still linger and cause the party much unrest, especially since the issue of what constitutes an actionable NAFTA claim is often unsettled, as shown below.

Taking, for instance, the claim for expropriation made by Waste Management, it is far from clear, much less a presumable fact,\textsuperscript{160} whether the threshold for such a claim under NAFTA would be satisfied by alleging measures of breach of contract by Banobras and Acapulco.\textsuperscript{161} In fact, the meaning of the term "expropriation," whether as intended in NAFTA or as used in other international jurisdictions, is still the subject of much controversy and debate.\textsuperscript{162} This is due in large part to the lack of guidance provided in NAFTA on the meaning of "expropriation,"\textsuperscript{163} and the scarcity of judicial or arbitral authority on the question of defining "expropriation" in general.\textsuperscript{164}

Some tribunals treat the concept of expropriation as the equivalent of a taking or appropriation by the State of property owned by a

---


\textsuperscript{160} See supra notes 119-21 and accompanying text.

\textsuperscript{161} See supra notes 93-98 and accompanying text.

\textsuperscript{162} See Kevin Banks, NAFTA's Article 1110 - Can Regulation Be Expropriation?, 5 NAFTA: L. & Bus. Rev. Am. 499, 519 (1999) ("Nearly every scholar who has attempted to map the definition of 'indirect expropriation' or 'compensable takings' in international law has concluded that it is rife with ambiguity.").

\textsuperscript{163} See id. at 510.

\textsuperscript{164} See id. at 514.
foreigner. Under this view, an expropriation may take the form of a compulsory transfer of rights to the property of a foreigner by the State. Other tribunals define the term “expropriation” as a deprivation of interest in the property of a foreigner caused by the State. While the concept of “taking” embodies the actor’s point of view, requiring that something be affirmatively acquired by the State, “deprivation” appears to represent the opposite viewpoint of the aggrieved investor, requiring only that some property right has been impaired or lost. Depending on which definitional standard a given

165. See Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal 66 (1994) (“The synonymity of the terms ‘expropriation’ and ‘taking’... appears to have been understood in a number of awards and separate opinions.”); see also Eric N. Baklanoff, Expropriation of U.S. Investments in Cuba, Mexico, and Chile 2 (1975) (defining “expropriation” as the process by which a State appropriates a private property right of an individual in order to further a public purpose). Tribunals rely on decisions of the Iran-United States Claims Tribunal, which was responsible for overseeing the most abundant body of investor-State arbitration proceedings ever handled, as an important authority on the international law of expropriation. See Banks, supra note 162, at 514. The Tribunal’s prominence in this area can be traced back to the overthrow of the Shah of Iran in 1979, which was followed by a rapid proliferation of claims for compensation by investors of both the United States and Iran with regard to their properties respectively expropriated in each country. See id.


167. See Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, 67-71 (July 20) (analyzing the possibility of an expropriation where the Italian government caused a significant deprivation of the interest of a United States investor in its property by requisitioning its plant facilities which subsequently went bankrupt). But see Mouri, supra note 165, at 65-67 (criticizing as a mistake the view expressed in some opinions and awards rendered in arbitration that “expropriation” was synonymous with “deprivation”).

168. See Mouri, supra note 165, at 67. Whether understood to mean a “taking” or “deprivation” of property interests, the concept of “expropriation” is analogous to both a “compulsory sale,” often implemented in nineteenth-century England with respect to public utilities, and the American theory of eminent domain. See B. A. Wortley, Expropriation in Public International Law 2 (1959). While title to property acquired by the government in a “compulsory sale” may eventually revert to the owner upon the exercise of its right to repurchase after the property’s public function expires, title obtained over property seized under eminent domain is new and separate from the owner’s old title and therefore vests absolutely in the State. Id. With regard to both doctrines, owners of the seized properties nevertheless enjoyed certain protections against the abuse by States of such powers to “expropriate.” Id. The protections in the United States originated from Fourteenth Amendment constitutional provisions based on theories of fundamental rights to “due process” and, earlier, in the Fifth Amendment “takings” clause, which states that no “private property [shall] be taken for public use, without just compensation.” Samy Friedman, Expropriation in International Law 8 (1953) (quoting the Fifth Amendment of the U.S. Constitution); see also Wortley, supra, at 2 (citing the Fourteenth Amendment of the U.S. Constitution). In England, the Lands Clauses Consolidation Act of 1845, which created the aforementioned system of expropriation for public utility undertakings, provided important protections for the owner of the acquired property. Wortley, supra, at 2. This explains the presence of similar conditions and safeguards
tribunal applies, the merits of an expropriation claim could vary from case to case, leaving much room for confusion and speculation.

Equally as obscure is the issue of what kind of property or property rights could be subjected to expropriation; in particular, it is unclear whether measures of breach of contract may constitute a valid claim for expropriation, as the majority in *Waste Management* presumed. Some tribunals hold that property rights subject to expropriation by States include not only tangible and physical assets but also intangible interests in property such as contractual rights. In *Mobil Oil Iran Inc. v. Iran*, the alleged expropriation consisted of a law passed by Iran that virtually nullified a sale and purchase agreement on crude oil, revoking the rights of various multinational oil companies to purchase oil from the National Iranian Oil Company. The tribunal opined that a contractual right could qualify as an object of expropriation by a State. Similarly, in *Phillips Petroleum Co. Iran v. Iran*, the interests of the Claimant which were allegedly expropriated extended from the contractual right to explore and exploit oil resources in designated offshore areas pursuant to a (Joint Structure Agreement). In this respect the tribunal noted that “expropriation . . . gives rise under international law to liability for compensation . . . whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case.” Such reasoning lends support to the majority’s presumption in *Waste Management* that the alleged breach of contract measures committed by the Mexican entities would suffice to state a claim for expropriation.

As expected, however, not everyone so readily embraces the notion that breaches of contract constitute claims of expropriation. Even when the concept of property rights is extended to its widest limit, some scholars nonetheless exclude contractual rights from those groups of rights and objects which could be expropriated. While

against the abuse of expropriatory powers by States in the law governing the international arena, including the NAFTA, which requires such key elements as “public purpose,” “non-discriminatory basis,” “due process of law,” and “payment of compensation.” See NAFTA, supra note 1, ch. 11, art. 1110, 32 I.L.M. at 641 (provision on expropriation); see also Restatement (Third) of Foreign Relations Law § 712 (1987) (requiring that a “taking” be for a public purpose, be non-discriminatory, and be accompanied by just compensation).

171. *Id.* at 10.
172. *Id.* at 25. The tribunal, however, chose not to analyze the issue further since the act of expropriation alleged by the claimant was not the law passed by the Iranian government but a letter sent to the Mobil consortium by the National Iranian Oil Company that had no effect of affirmatively repudiating the agreement. *Id.* at 44.
174. *Id.* at 81.
175. *Id.* at 106.
176. *See Friedman, supra* note 168, at 148 (indicating that even when taking the
certain incorporeal rights with respect to "industrial, literary and artistic property" are subject to expropriation, contractual rights in themselves call for separate treatment and do not touch on the character of expropriation. Similar to Highet in Waste Management, those commentators who express this view argue that contracts have no place in international disputes due to the lack of rules regarding their form and legal effect in international law. Furthermore, the essential principle supporting a contract is that the parties mutually assented to their obligations and rights, and by virtue of entering into such an agreement, the foreigner has showcased its confidence in the State and its intent to submit to the national system of jurisprudence. In the case of expropriation, on the other hand, the State is imposing a unilateral measure on the foreigner in taking, or depriving the foreigner of, his rights to certain property without his consent.

One case in particular, Azinian v. United Mexican States, affirms this restrictive stance on contractual rights specifically in connection with expropriation under NAFTA. In Azinian, a group of United States investors in a Mexican corporate entity claimed damages for expropriation under Article 1110 of NAFTA, derived from the alleged breach of a concession contract by the City of Naucalpan in Mexico. The City Council annulled the concession contract, which term "property" subject to expropriation in its "widest sense," which might suggest an inclusion of intangible rights, there is still "the exception of contractual rights").

177. Id. 178. See id. at 156. This view does not foreclose the possibility, however, that certain countries may expressly provide in treaties the power of international tribunals to deal with contractual rights. As one commentator states: "But apart from express provisions of this kind, it would seem that a contract cannot directly form the basis of an international claim, which suffices to exclude it from the field of expropriation." Id.

179. See id.; cf. Levin & Marin, supra note 53, at 97 (stating that to plainly expand the term "expropriation" in Chapter 11 "to reach ordinary breaches of contract would be directly contrary to conventional international law"). Furthermore, in the context of the NAFTA, adopting the view that contractual breaches would constitute an expropriation would create an inherent danger by providing an additional basis by which investors, under the guise of the NAFTA, could freely challenge various measures and acts of a State, including legitimate ones. See Lawrence Herman, Ottawa Won Big in the NAFTA Decision Against Pope & Talbot, Globe & Mail, Jun. 30, 2000, at B11. This would jeopardize the credibility and soundness of the entire NAFTA framework. Id.

180. See Friedman, supra note 168, at 156-57. 181. Id. at 157. 182. (U.S. v. Mex.), 14 ICSID Rev.: Foreign Investment L.J. 538 (1999). 183. Id. at 559. The investors also claimed that by virtue of its municipality canceling the concession contract, Mexico failed to accord their "investments... treatment in accordance with international law, including fair and equitable treatment and full protection and security," NAFTA, supra note 1, ch. 11, art. 1105, 32 I.L.M. at 639, under Article 1105 of the NAFTA. Azinian, 14 ICSID Rev.: Foreign Investment L.J. at 559.

184. Azinian, 14 ICSID Rev.: Foreign Investment L.J. at 545. The value of the
pertained to waste disposal and collection in the city, due to the presence of some "irregularities" in connection with the conclusion and performance of the agreement. The annulment of the contract was later upheld in the courts of Mexico, leaving arbitration under NAFTA as the final means of recourse for the claimants. Although the Azinian tribunal did entertain the concept that a "confiscatory" breach or a breach that destroyed "contractual rights as an asset" could rise to the level of an expropriation by a State, it inevitably resorted to the general rule that "NAFTA does not allow investors to seek international arbitration for mere contractual breaches." The Court stated, "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."

As shown above, a substantial discrepancy exists with regard to the issue of contractual rights as included in property which could be

---

185. Id. at 541, 543.
186. Id. at 543. In particular, the Council expressed concern about the absence of a number of new front-load vehicles that were provided for in the contract. Id. at 542.
187. Id. at 543 (outlining the progression of unsuccessful legal challenges made against the annulment of the concession contract, starting with the initial proceedings brought before the State Administrative Tribunal, then before the Superior Chamber of the Administrative Tribunal, and, lastly, before the Federal Circuit Court).
188. See id. at 564-65. Indeed, certain United States writers have recognized an exception to their view that contracts should be excluded from the field of expropriation in the case of confiscatory breaches of contracts. Friedman, supra note 168, at 157. Certain breaches of contract, according to this view, are of such "gravity" that they rise to the level of expropriation, making the breaching State internationally accountable. Id. Most of the cases upon which the writers have relied in support of such an exception, however, deal with instances where no local remedy was available for breach of contract, or where a denial of justice against the application of the foreigner for relief was apparent without having to engage local channels. Id.
189. Azinian, 14 ICSID Rev.: Foreign Investment L.J. at 564 (emphasis added). At the very least, the tribunal considered it crucial to analyze more deeply whether in fact the breach of contract at issue was of such magnitude as to overcome this firmly established general rule. See id. at 565. It stated:

The words "confiscatory," "destroy contractual rights as an asset," or "repudiation" may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder—and that is not satisfactory for present purposes.

It is therefore necessary to examine whether the annulment of the Concession Contract may be considered to be an act of expropriation violating NAFTA Article 1110. . . . The question cannot be more central.

Id.
190. Id. at 564 (treating as problematic the claimants' fundamental complaint supporting their claim for expropriation "that they are the victims of a breach of the Concession Contract").
subject to expropriation, and still further ambiguity lies in determining the general scope of the term "expropriation." The view that a given arbitral tribunal chooses will most likely turn on its analysis of the facts and circumstances surrounding the merits of each case under review. As it currently stands, Waste Management requires NAFTA claimants to blindly waive their rights to subsequent local proceedings or to discontinue pending proceedings without the benefit of knowing which position the tribunal will take on the issue of whether breaches of contract constitute expropriations under NAFTA. This presents a great and unnecessary risk to the NAFTA claimant of being left without a remedy in the event the tribunal asserts the position that breaches of contract fall outside the scope of expropriation and, therefore, of NAFTA jurisdiction. The Waste Management tribunal should have clearly indicated how it would handle the merits of a claim such as expropriation based on contractual breaches before deciding on the validity of the Article 1121 waiver submitted by Waste Management. Therefore, to the extent it ignored completely the merits of Waste Management's NAFTA claims in its analysis of the Article 1121 waiver, the majority's reasoning in Waste Management was faulty and reveals some troublesome aspects about the prospective application of waivers.

191. See supra notes 169-90 and accompanying text.
192. See supra notes 162-68 and accompanying text.
193. For instance, the sufficiency of a breach of contract forming the basis of an expropriation claim might well depend on whether the government entity in breach was "motivated primarily by political or commercial considerations." Levin & Marin, supra note 53, at 98. A finding of such political motivation behind the cancellation of a contract might indicate a stronger case that the wrongful cancellation amounts to an expropriation for which the breaching State should be held responsible under the NAFTA. See id. Another consideration might be whether there is evidence showing bad faith on the part of the breaching State. See Restatement (Third) of the Foreign Relations Law of the United States § 712 cmt. h (stating that a State's repudiation of a contract is not a violation of the international law of expropriation if such repudiation was based on a "bona fide dispute" about the obligations under the contract). Cf. Banks, supra note 162, at 519 (exploring the possibility that a breach of contract has sufficient economic impact on the value of an investor's property to rise to the level of prompting a claim for expropriation).
194. See supra text accompanying notes 158-59.
195. Given the fact that Article 1121 precludes subsequent litigation on the same issues, an interesting question to ask would be what effects, if any, the provision would have in the reverse—namely, with regard to prior litigation on the same issues. William S. Dodge, National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA, 23 Hastings Int'l & Comp. L. Rev. 357, 376 (2000). Would Article 1121 also take effect retroactively to preclude claimants from raising those issues before a NAFTA tribunal which had already been decided in a national forum? See id. at 371. One scholar suggests that the answer is "no," but argues that Chapter 11 should not be interpreted as affirmatively "requiring a foreign investor to exhaust its local remedies before bringing a claim before an international tribunal," which would be reminiscent of the Calvo Doctrine as discussed in supra Part I.A.2. Dodge, supra, at 373-74, 383.
B. Mitigating the Opportunity Costs of Chapter 11 Arbitration: An Argument for Retrospective Application of Article 1121

Highet wrote in his dissent:

Indeed, it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim—but which nonetheless were not themselves NAFTA claims.\(^{196}\)

As Highet correctly indicates, the Article 1121 waiver has the potential to impose substantial opportunity costs on claimants for arbitrating under Chapter 11 of NAFTA. As shown in Waste Management, such opportunity costs are especially evident when the Article 1121 waiver is given effect prospectively,\(^{197}\) without any inquiry into the merits of the claims submitted in the NAFTA arbitration.\(^{198}\) According to this approach, investors must either run the risk that their claims might later be deemed to have questionable substantive validity under NAFTA and nevertheless preclude themselves from subsequent local litigation by submitting the waiver, or refrain from NAFTA arbitration altogether. Investors who choose to bear the risk are left at the mercy of tribunals who may later decide that their claims do not rise to the level of stating NAFTA causes of action, in which case they would have no alternative means of legal redress since their waivers have already taken effect. In borderline cases, where material questions of fact exist as to whether claims brought by investors in NAFTA arbitration actually do rise to the level of stating legitimate NAFTA causes of action, the risk of incurring such opportunity costs becomes imminent. This type of danger is already illustrated by the nature of the claims at issue in Waste Management for expropriation based on breaches of contract and the variety of ways a given tribunal might decide on the merits of such claims.\(^ {199}\)

Not only would such opportunity costs in themselves place an onerous burden upon participants in NAFTA arbitration, but they would also greatly offend the very purpose of Chapter 11 to assure

---


\(^{197}\) See id. at 229 (stating that the point at which the Article 1121 waiver of Waste Management took effect was upon its submission at the outset of the NAFTA proceedings).

\(^{198}\) See supra text accompanying notes 119-21.

\(^{199}\) See supra notes 160-94 and accompanying text.
investors "due process before an impartial tribunal." Chapter 11 would no longer function effectively to provide a safe harbor for aggrieved investors to resolve their claims free from the multitude of problems and risks often associated with local litigation. As discouraged investors, unwilling to bear such burdensome costs of NAFTA litigation, turn back to local forums with their attendant delays and uncertainties, remnants of the archaic Calvo Doctrine would again emerge, compromising the stable environment for investment generated by NAFTA as a whole.

To minimize the risk of potential NAFTA claimants incurring such extraordinary costs of engaging in NAFTA arbitration, the Article 1121 waiver should take effect not prospectively, but retrospectively. That is, the Article 1121 waiver should take effect only after a preliminary finding that the claims submitted by an aggrieved investor are indeed the substantive equivalent of NAFTA claims. This preliminary inquiry would not taint the policy rationale behind Article 1121 against duplication of proceedings, since the waiver would still function effectively to prevent an overlap of claims that are "not different in substance." More importantly, such an inquiry before the application of Article 1121 would neutralize the egregious opportunity costs mentioned earlier by protecting NAFTA claimants whose claims are later determined not to be actionable under NAFTA. Under this approach, such claimants would have preserved their rights to revert to the local forums with respect to those claims which did not fall within the purview of NAFTA, since the Article 1121 waiver would never have taken effect.

As seen in the previous section with regard to expropriation claims based on contractual rights, not all measures constitute NAFTA claims, and at the very least, their substantive similarities or dissimilarities may only be determined through extensive factual scrutiny. For instance, the Waste Management tribunal should have

200. NAFTA, supra note 1, ch. 11, art. 1115, 32 I.L.M. at 642.
201. See supra notes 53-61 and accompanying text.
202. See supra text accompanying note 70.
203. See supra Part I.A.2.
204. See supra notes 58-60 and accompanying text.
205. See supra text accompanying notes 124-27.
207. See supra notes 196-99 and accompanying text.
208. See supra notes 191-95 and accompanying text. Proponents of juridical economy might suggest that requiring extensive factual scrutiny before implementing Article 1121 would deprive the NAFTA arbitration process of one of its must valued attributes—expediency. See Doak Bishop, The United States' Perspective Toward International Arbitration With Latin American Parties, 8 Int'l L. Practicum 63, 67 (1995) (describing international arbitration as "generally quicker" than more conventional modes of litigation); Camp, Binding Arbitration, supra note 5, at 728-29 (emphasizing that, in addition to being "faster and more expeditious," arbitration also
reviewed those significant questions of fact which existed as to whether measures of breach of contract and nonpayment on invoices were substantively sufficient bases for expropriation and unfair and inequitable treatment claims under NAFTA. Only upon a positive finding would the Article 1121 waiver have taken effect to preclude Waste Management from participating in subsequent proceedings on the local level with respect to the measures at issue in NAFTA arbitration. Until such a determination is made by the tribunal, Waste Management’s proceedings pending in the local forums would have been preserved and not treated as violations of Article 1121. In such manner, the retrospective approach would alleviate, if not eliminate, any opportunity costs of investors seeking to arbitrate under NAFTA. Therefore, the retrospective approach, applying the Article 1121 waiver only after preliminary inquiries are made as to the substance of the claims submitted by a NAFTA claimant, should be adopted.

CONCLUSION

The signing of NAFTA represents a remarkable turning point in the course of dealings between the United States and Mexico, which for decades had advocated contrasting ideologies with regard to foreign investment policy under diplomatic protection and the Calvo Doctrine. How the two countries ever reached common ground with regard to the international standards set forth in NAFTA, and in particular, those provisions in Chapter 11 governing investments and the resolution of investment disputes, is truly a wonder, considering such a long history of conflict. By establishing a comprehensive dispute resolution mechanism based on international legal principles, Chapter 11 effectively puts to rest the doubts and suspicion which investors from the United States previously had with respect to the investment climate in Mexico. Operating under such notions as “international reciprocity and due process before an

offers parties the flexibility to draft arbitration clauses containing specific time restraints to which the arbitration proceedings must adhere). Admittedly, a rapid resolution of disputes is desirable in that parties may avoid substantial hindrances in conducting their ongoing businesses due to lagging court proceedings coupled with costly and time-consuming discovery. See Camp, Binding Arbitration, supra note 5, at 729. Nevertheless, sacrificing judicial expediency is a relatively small cost compared to the drastic price claimants would otherwise have to pay to pursue NAFTA arbitration in waiving their rights prospectively to alternative means of recovery even without the benefit of knowing whether their claims have factually sufficient bases for consideration under the NAFTA.

209. See supra note 95.
210. See supra note 94.
211. See supra notes 6-9 and accompanying text.
212. See supra note 6.
213. See supra Part I.A.1.
impartial tribunal," combined with giving individual investors the power to bring claims directly against host countries, Chapter 11 officially buries the ideals and practices that once existed under the Calvo Doctrine and diplomatic protection.

However, even such a comprehensive dispute resolution mechanism as the one in Chapter 11 would serve little use to an aggrieved investor if the process of accessing the mechanism entails the hurdling of latent pitfalls and assuming hidden opportunity costs. This Note highlights one such danger involved in submitting a claim under Chapter 11 by analyzing the Waste Management tribunal’s application and analysis of the Article 1121 waiver provision. The tribunal based its determination that Waste Management’s waiver was invalid on presumptions, rather than actual findings of fact, that Waste Management’s allegations of breach of contract were substantively sufficient to state a cause of action for expropriation under NAFTA. Such an approach of applying the Article 1121 waiver prospectively, without regard to the merits of the investor’s claims as violations of NAFTA, is problematic when considering that the general scope of such claims as expropriation, especially with respect to contractual rights, is marred with ambiguity. Even despite looming uncertainties as to whether their claims will constitute causes of action under NAFTA, investors are compelled from the outset under Article 1121 to waive their rights to any later recourse with respect to such claims. This creates enormous opportunity costs for those investors who wish to partake in the benefits of NAFTA arbitration. Surely, the NAFTA Parties could not have intended such a drastic result, which would also undoubtedly undermine the integrity of the Chapter 11 dispute resolution framework to assure investors “due process before an impartial tribunal.”

Instead of applying the waiver prospectively as was done in Waste Management, the better approach would be a retrospective application, where the waiver would only take effect after a preliminary inquiry is made establishing that the investor’s claims do amount to NAFTA claims in substance. Under such an approach, the investor’s rights to access local proceedings would be preserved in the event its claims made in NAFTA arbitration are found not to be

216. NAFTA, supra note 1, ch. 11, art. 1115, 32 I.L.M. at 642.
217. See id. ch. 11, arts. 1116, 1117, 32 I.L.M. at 642-43.
218. See supra Part I.A.3.
219. See supra text accompanying notes 196-204.
220. See supra Parts II.B, II.C.
221. See supra text accompanying notes 119-21.
222. See supra notes 169-90 and accompanying text.
223. See supra notes 162-68 and accompanying text.
224. See supra note 197.
225. See supra notes 196-204 and accompanying text.
226. NAFTA, supra note 1, ch. 11, art. 1115, 32 I.L.M. at 642.
actionable under NAFTA, since the Article 1121 waiver would never have taken effect. This would minimize, if not eliminate, such opportunity costs of investors who seek to engage in NAFTA arbitration. This Note therefore suggests an alternative method of applying Article 1121 to that forwarded in Waste Management in order to preserve most effectively the framework of Chapter 11 and NAFTA as a whole.