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INVESTOR-STATE TRIBUNALS AND CONSTITUTIONAL COURTS: THE MEXICAN SWEETENERS SAGA

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ABSTRACT. *This article tackles the complex question of the relationship between international and domestic adjudicatory bodies. It does so by analyzing the debate between liberals and developmentalists over the effects of investor-state arbitration tribunals on domestic courts. For liberals, investor-state tribunals are a positive complement to domestic judicial institutions for their ability to "de-politicize" investment disputes, leading to economic policy stability that encourages foreign investment. For developmentalists, the same international alternatives reduce institutional quality by allowing powerful actors such as powerful corporations to skirt local judicial institutions. Through a comprehensive analysis of the negotiations of Chapter Eleven of NAFTA and the recent cases in the sweeteners conflict between Mexico and the United States, this article attempts to address how investor-state arbitration tribunals and constitutional courts interact and affect each other. The case study reveals two important lessons to this debate: i) scholars arguing against investor-state arbitration on the grounds of "circumvention" of domestic courts may do well to calibrate the debate of the use of remedies as one of added remedial possibilities in complex litigation; ii) those defending investor-state arbitration on the grounds of "de-politicization" of investment disputes may do well to consider the veto power wielded by international adjudicatory bodies that impact the judiciary and political systems of the host country.*

KEY WORDS: *Investor-state arbitration, international law, sweeteners, private international law/conflict of laws and Mexican Constitutional Court.*

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Resumen. *Este artículo aborda la compleja relación entre los órganos jurisdiccionales nacionales e internacionales. El artículo lo hace mediante el análisis del debate entre liberales y desarrollistas sobre los efectos de los tribunales de arbitraje inversionista-Estado en los tribunales nacionales. Para los liberales, los tribunales inversionista-Estado son un complemento positivo a las instituciones judiciales nacionales por su capacidad de "des-politizar" controversias relativas a inversiones, lo que conlleva a la estabilidad de la política económica que fomenta la inversión extranjera. Para los desarrollistas, las alternativas internacionales tienden a reducir la calidad institucional, ya que permiten a los actores poderosos evitar que las instituciones judiciales locales, apoyándose en la adjudicación supranacional. A través de un análisis exhaustivo de las negociaciones del capítulo XI del TLCAN y los casos recientes en el conflicto de edulcorantes entre México y los Estados Unidos, este artículo intenta abordar cómo los tribunales de arbitraje y los tribunales constitucionales interactúan y se influyen mutuamente. Este estudio de caso pone de manifiesto dos lecciones importantes al debate presentado: i) los académicos que argumentan en contra de arbitraje inversionista-Estado con base en la idea de "elusión" o "sustitución" de los tribunales nacionales pueden calibrar su crítica sobre el uso de los recursos como un debate de posibilidades adicionales de recuperación en el complejo campo de litigio estratégico, ii) los académicos que defienden el arbitraje inversionista-Estado sobre la base de "despolitización" de las controversias sobre inversiones pueden entender a los organismos internacionales decisorios como jugadores con poder de veto, capaces de afectar en la política judicial interna.*

Palabras clave: *Arbitraje inversionista-Estado, derecho internacional, endulcorantes, derecho internacional privado, Suprema Corte de Justicia de México.*

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I. Introduction

How do investor-state arbitration tribunals and constitutional courts interact and affect each other? On the one hand, constitutional courts, the branch of government tasked with final constitutional oversight, are typically separate and distinct from ordinary judiciary. Constitutional courts are considered fundamental to the political stability of their respective nations because they are, to a large extent, responsible for the social acceptance of the constitution and fundamental autochthonous norms and address the tensions between complex political structures and interests. Constitutional courts are by definition political. On the other hand, investor-State arbitration tribunals arguably help to "de-politicize" investment disputes by allowing individuals or corporations to proceed directly against a State in an international forum. In effect, investor-State arbitration allow States to increase economic policy stability for the sake of promoting foreign direct investment ("FDI"). Because investor-State arbitration is founded upon international law arguably it may remedies normally available in local courts.

Through an analysis of the Mexican sweeteners saga, four investor-State arbitration proceedings part of a larger, sensitive and politically charged economic conflict between two of the parties to the North American Free Trade Agreement ("NAFTA"), this paper aims to contribute to this ongoing debate through an empirical assessment of the relation between investor-State arbitration tribunals and the Mexican Supreme Court. To this effect, the article applies a case study method and describes the national and international proceedings brought by corporations arising from two important and controversial measures adopted by the Mexican Government in the sweeteners sector (sugar and high fructose corn syrup or HFCS): (i) an expropriation decree of half of the countries' sugar mills; and (ii) an openly discriminatory tax on the use of HFCS. Against this background, the article examines the relationship

between domestic and international adjudicatory bodies in politically sensitive contexts through administrative and constitutional law lenses.

Section 1 of this paper reviews the policy debate around international alternatives to adjudicatory bodies. It examines the provisions that deal most directly with the relationship between national courts and international tribunals in investment claims. The article follows by analyzing NAFTA's flexible, "investor-friendly" model of accession known as "no-U-turn" rule, a departure from other models contained in most international investment agreements ("IIAs"). It also discusses how some accession models may be bypassed —under specific conditions— by means of a Most-Favored-Nation ("MFN") clause.

Section 2 describes Mexico's record in Chapter Eleven proceedings and introduces the case study. Specifically, this section discusses the ways in which the Mexican Highest Court and Chapter Eleven arbitration tribunals analyzed the disputes around similar issues. The analysis shows some degree of "dialogue" between national and international adjudicators. Not only did Mexico's high court allow wider incorporation of international standards as part of the nation's constitutionally protected rights, but investor-state tribunals recognized the fundamental role of the Mexican Supreme Court of Justice.

In addition, the case study offers a nuanced recount of the relationship between political courts and investor-state arbitration and the ways in which supranational adjudicatory bodies may affect domestic politics by empowering and expanding remedies available to foreign investors. This has two important implications: (i) scholars who oppose investor-state arbitration on the grounds that they "circumvent" local courts should reconsider the debate regarding the use of remedies as one of added remedial possibilities in complex litigation strategies rather than fatal binary choices; and (ii) scholars who defend investor-state arbitration on the grounds of "de-politicization" should address the role of international adjudicatory bodies as players with veto power affecting local judicial and political interests. Based on such findings, Section 3 revisits the policy debate around the wide array of models that dispense with the local remedies rule and argues for a treaty-specific legal/institutional analysis to understand the effects and construct the rules of coordination between domestic and international adjudicatory bodies.

II. The New Debate about International Alternatives to Adjudicatory Bodies

International investment law has emerged from a proliferation of multilateral and bilateral investment agreements ("IIAs").[1] Many of these treaties

[1] K. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 Am. J. Int'l L. 621 (1998).

provide for investor-State arbitration as the means to settle disputes between investors and the host country.[2] The North American Free Trade Agreement's ("NAFTA") Investment Chapter (Chapter Eleven), is no exception; in fact, the NAFTA accord has arguably produced more academic commentary than any other IIA.[3]

The main purpose of IIAs is to protect and promote the flow of FDI. A chief concern that arose when the system for protection of FDI was developed was the need for effective mechanisms for resolving disputes with host governments.[4] Prior to the advent of investor-State arbitration, foreign investors had to: (i) resort to protection by their own governments (*e.g.,* diplomatic protection after all local remedies had been exhausted); (ii) adjudicate in the host nation, where effective rule of law sometimes faced serious challenges; or, (iii) absorb the costs of adverse government action through political risk insurance.[5]

To avoid these less desirable options for investors, IIAs typically grant the possibility of direct enforcement of international law against host governments.[6] To enable this system of private right of action, IIAs typically relax the local remedies rule of customary international law which requires parties to obtain a final decision from a nation's highest court before elevating a claim internationally.[7] Because the local remedies rule was used in the past

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[2] See UNCTAD Analysis of BITS, UNCTAD, BIT/DTT database *available at* http://www.unctadxi.org/templates/Page____1007.aspx (last visited November 18, 2011).

[3] *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, 702 [hereinafter NAFTA] Article 1120. Under Article 1120 of NAFTA, Investors may initiate an arbitration proceeding. Theoretically, the arbitration proceeding can be conducted under the following rules: A) ICSID Convention; B) Additional Facility Rules of ICSID; and C) UNCITRAL Arbitration Rules. Under the present ratification patterns of ICSID Convention, this cannot be applied to the disputes.

[4] I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, I ICSID Review, Foreign Investment Law Journal (1986). *See also* Robert B. Shanks, *Lessons in the Management of Political Risk: Infrastructure Projects (A Legal Perspective)*, in Managing International Political Risk 83, 93 (Theodore Moran ed., 1998).

[5] *See* generally, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

[6] *See* Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 B.Y.I.L. (2003) 151 at 170. The Court of Appeal for England and Wales also espoused the view that investors under both the NAFTA and bilateral investment treaties were asserting rights of their own rather than a mere procedural power to enforce the rights of their State, *See* Republic of Ecuador v. Occidental Exploration and Production Co. [2005] EWCA Civ 1116, [2006] QB 432 at paras. 14-22.

[7] *See* A. A. Cançado Trindade, *Exhaustion of Local Remedies in International Law Experiments Granting a Procedural Status to Individuals in the First Half of the Twentieth Century*, 24 Neth. Int'l L. Rev. 373, 391 (1977). *See* also Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?,* 102 AJIL (January 2008) 1 at 65-74.

to reduce the number and scope of international disputes, the relaxation of the rule opens the possibilities for multiple and (sometimes) simultaneous proceedings at both, the international and domestic levels.[8]

1. *The Debate: Liberals vs. Developmentalists*

The provisions for direct enforcement of international law by foreign investors against the host State have provoked a new debate about the impact on domestic institutions.[9]

Liberal scholars argue that investor-State arbitration has been a resounding success, as measured by the increase in investment and welfare gains. They claim that without the prospect of compulsory arbitration multi-national corporations may not sink substantial capital in host States since they could not withdraw or simply suspend delivery and write-off a small loss as might a trader in a long-term trading relationship if a dispute arises. Many liberal scholars see these mechanisms as necessary to ensure economic stability and prevent the State of the investor's nationality from intervening in the controversy between an investor and a host State, for instance by attempting to pressure the host State into some kind of settlement. In this sense, liberal scholars see investor-State arbitration as a *complement* to domestic judicial institutions for its ability to "de-politicize" investment disputes and effectively encourage foreign investment.[10]

In contrast, many development (and some legal) scholars argue that international adjudicatory bodies such as investor-state arbitration tribunals serve as a substitute for domestic institutions and a backlash to the institutional

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[8] J. H. Knox, *Horizontal Human Rights Law,* 102 AJIL 1-47 (2008). For an analysis of the new challenges of the internationalization of justice in the Mexican context, see Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, available http://biblio.juridicas.unam.mx/libros/7/3033/14.pdf (last accessed May 1, 2012) (analyzing the effects of the Mexican Constitutional reform of July of 2011 and the jurisprudential dialogue between Mexican courts and the Inter-American Court of Human Rights.)

[9] W. 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 (2000).

[10] *See* Thomas W. Walde, *The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. World Invest. & Trade 183, 185-86 (2005) (discussing BITs as part of a "culture of commitment"). Without trying to address this important debate, it is relevant to recognize validity to the notion that investor State arbitration, as another example of international legalization, has an ideological character. This phenomenon is salient in international economic law with the proliferation of judicial and quasi-judicial institutions. Thus, to some extent, this expansion attempts to separate the politics involved in law creation and adjudication, as a form of denying that the work of judges and arbitrators is also ideologically based, particularly when the stakes are high. In practice, international tribunals play a critical role in the development of international law.

development of courts in developing nations.[11] Several experts have expressed concerns about a model that seems to "circumvent"[12] or "bypass"[13] domestic courts.[14] Their views are that this substitution may have perverse and unintended effects on domestic institutions. For instance, in the words of International Court of Justice ("ICJ") Judge Bernardo Sepulveda, by removing from national jurisdiction claims that domestic courts should resolve themselves, investor-state arbitration "diminishes the validity of th[e] country's juridical order."[15] Other commentators have asserted that this "circumvention," among others, discourages domestic courts from improving,[16] and prevents them from deciding increasingly important matters.[17]

In recent years, this debate has been fomented with some quantitative evidence. For instance, based on the meta-analysis of several years of data on institutional quality produced by the World Banks, Chicago Law School Professor Tom Ginsburg has concluded that investment arbitration:

> […] is rooted in international, extra jurisdictional substitutes for domestic institutional quality. These substitutes […] have expanded even more rapidly than domestic investments in governance, and allow powerful actors to avoid local judicial institutions. Local judicial institutions, in turn, face insufficient incentives to compete with the global alternatives. In an era of global investment flows, powerful players can exit local jurisdictions with poor institutions. This means that developing countries can find themselves in a trap of low-quality institutions, wherein no political coalition can form to support institutional im-

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[11] Ginsburg, *International Substitutes for Domestic Institutions*, 25 International Review of Law & Economics 107, 107-123 (2005).

[12] Bernardo Sepulveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 Hous. J. Int'l L. 565, 581 (1997). Judge Sepulveda concluded at the time that: "Mexico's best option seems to be to avoid allowing an international arbitral judge to decide issues regarding the kind of treatment owed to a foreign investor. Mexico has its own juridical order capable of giving full satisfaction to the obligations contained in the NAFTA —including, of course, those in Chapter 11 […] The primacy of domestic laws and national courts is one of the necessary expressions of sovereignty."

[13] *See* Héctor Fix-Fierro & Sergio López-Ayllón, *The Impact Of Globalization on the Reform of the State and the Law in Latin America*, 19 Hous. J. Int'l L. 785 at 797 (1997) concluding that: "[…] from the economic point of view, a consequence of globalization is precisely the attempt to escape the authority of national institutions, including the court system. Thus, we witness a proliferation of dispute settlement mechanisms and institutions whose goal is to bypass the national court systems. Consequently, domestic courts are kept from deciding increasingly important matters, and this means a relative loss of power for them as national institutions."

[14] *Cfr.* W. S. Dodge, *Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven*, 52 DePaul L. Rev. (2002) 563 (arguing that review by international tribunals is not an effective way to correct trial errors, and Chapter 11 should be changed to require, or at least to encourage, the exhaustion of domestic appeals before resorting to NAFTA arbitration).

[15] Sepulveda, *supra* note 12, at 566.

[16] Ginsburg, *supra* note 11, at 108-109.

[17] Fix-Fierro & López-Ayllón, *supra* note 13, at 781.

> provement. Indeed, the presence of international alternatives to adjudicatory or regulatory bodies may reduce local institutional quality under certain conditions.[18]

As presented by professor Ginsburg, this debate is cast in binary terms, one of *complementarity* or *substitution* of adjudicative bodies. The policy implications are clear: if, on the one hand, investor-state arbitration complements domestic courts, the strategy of signing IIAs with private right of actions for investors may be viewed as a positive development in international law. If, on the other hand, evidence indicates circumvention and hence *substitution*, alternatives are needed to help adjudicate complex, politically-charged disputes in ways that can support the development of domestic institutions.

While this debate may be productive, it is not sufficiently nuanced. For instance, bringing an international claim against a sovereign is expensive and may limit or prevent future investment opportunities in the host country, and is therefore mostly used only as a mechanism of last resort after attempts to resolve the dispute within the local judicial system. In other cases, it may be futile to even attempt to resolve the dispute by making use of local judiciaries either because of lack of neutrality, expertise or simply because a strong precedent exists. More importantly, IIAs often have different accession models; some even require years of litigation in domestic courts before permitting international arbitration. Moreover, the corporate structures may give rise to multiple proceedings before different bodies for identical measures. This may raise questions of abuses of process and forum-shopping, or even worse, duplicative relief if suits in different *fora* proceed successfully, however, not necessarily claims of circumvention. A proper evaluation must depart from an understanding of the complex relationship between domestic and international tribunals and their rules of coordination. Whereas development scholars often take what I would call an external look at the investor-state arbitration regime, the inquiry of the relationship between domestic and international tribunals should be thought of as an internal legal/institutional analysis. This is largely missing in the literature.

My interest is in developing the insight that politically-charged cases often involve significant interactions between local judiciaries and international tribunals, even when not readily aparent. The startegic considerations of litigants, judges and arbitrators generate a fluid relationship between national and international adjudicative bodies not adequately addressed in this debate. In developing this notion, my goal is to explore how politically-charged cases are decided by constitutional courts when the same issues are also before investor-state arbitration tribunals. My broader interest is to explore different methodological approaches towards a better understanding of the relationships between national and supranational adjudication bodies and the effects each has on the other.

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[18] Ginsburg, *supra* note 11, at 108-109.

I'm interested in Mexico because it has a federal judicial review system for the protection of individual rights guaranteed under the Mexican Constitution, known as the *amparo*. The *amparo* proceeding allows petitioners to request certain remedies, including provisional measures, for violations of constitutional rights including property rights or claims of discrimination. An *amparo* may end up before the Mexican Supreme Court and can be brought in regard to, among others, any law or action by authorities that allegedly violates the Mexican Constitution (more recently also for violation of human rights treaties). In this sense, the court is distinct from the ordinary judiciary. Given the complexities of political life in Mexico, this court has addressed the tensions between old political structures and interests derived from Mexico's democratic transition. Most notably, after the victory of Vicente Fox in 2000, the first time in seventy-one years that the hegemonic PRI lost control of the executive branch, Mexico found itself with a divided government, and a deluge of constitutional cases revisited the political and structural organization of Mexico.

2. *Doctrine: National and International Proceedings in International Law*

Investment treaties contain different provisions that either directly or by implication dispense with the local remedies rule. These provisions take varied forms and significantly impact the relationship between domestic courts and international tribunals. This section first examines the origins of the requirement to exhaust local remedies as a condition for an international claim. Next, it briefly discusses some of the various forms that these provisions take in investment agreements. While the distinction of the different models may be blurred by the effects of MFN clauses in IIA, as explained below, to allow the importation of a more advantageous model to avoid local judicial institutions, specific conditions must first be satisfied. Finally, this section reviews NAFTA Article 1121 and the interpretation to this article by Chapter Eleven arbitration tribunals.

A. *Background on the Exhaustion of Local Remedies Rule*

The exhaustion of local remedies is an ancient principle of international law that precedes the modern nation-state. According to Borchard, it was applied to the practice of reprisals as early as the ninth century and was subsequently incorporated into the law of diplomatic protection, and confirmed repeatedly by international commissions.[19] Today, it is regarded as a proce-

[19] *See* E. Borchard, The Diplomatic Protection of Citizens Abroad, 14 (Banks Law Publishing, 1915). Borchard notes that: "[…] the exhaustion of local remedies does not mean that the decisions of local courts are binding on international tribunals. The doctrine of *res*

dural or jurisdictional pre-condition (rather than a substantive condition for finding a breach) for bringing a claim before an international tribunal.[20]

The International Court of Justice ("ICJ") has recognized this rule as part of customary international law. In the *Interhandel Case*, the ICJ pointed out that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."[21] This means that unless the injured alien has completely exhausted its appeals and has obtained a final decision from the highest court of the host State to which it has a right to resort, no government may be held accountable for its transgressions.

The principal premise of the local remedies rule is "that the host or respondent State must be given the opportunity of redressing the alleged injury" before it could be made responsible under international law.[22] Professors Louis Sohn and R. R. Baxter explained a number of other reasons for the existence of this procedural requirement for the presentation of international claims, including the often cited deference to the law of the State that affected the alien, even though that State may be responsible for some wrong to her. The authors also stressed the importance of: "[…] forcing the maximum number of cases involving aliens into municipal courts and their disposition under the watchful eyes of foreign governments should lead to a wider incorporation of international standards into municipal law, with consequent beneficial effects for the legal protection of aliens."[23]

The idea articulated by Professors Sohn and Baxter implicitly recognizes that international bodies may affect municipal courts and a preference of impartial protection of aliens by able municipal courts. In effect, the procedural

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judicata is also a well established principle in international law. However, it seems that at least the customary international law rule of *res judicata* extends only to the effect of the decision of one international tribunal on a subsequent international tribunal. The decisions of domestic courts, by contrast, have not been given *res judicata* effect by international tribunals."

[20] Some argue that the exhaustion of local remedies is also a substantive obligation. See discussion in Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence*, in NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Todd Weiler Ed. 2004). Bjorklund concludes that: "the *proceduralists* have won the debate. It is clear that acts outside denials of justice can form the basis for international claims and that state parties can waive the requirement of exhaustion of local remedies. Moreover, in the investment treaty context that fact is explicit —most treaties set forth a list of potential violations, such as a failure to provide national treatment or an expropriation not in accordance with international law. The 'procedure versus substance' distinction nevertheless continues to arise, in NAFTA cases and elsewhere."

[21] *Interhandel Case* (Switz. v. U.S.), 1959 ICJ 5, 27 (Mar. 21).

[22] C. F. Amerasinghe, Local Remedies in International Law 11 (Cambridge Studies in International and Comparative Law 1990).

[23] Louis B. Sohn and R. R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 1961, in F. V. García-Amador *et al.*, Recent Codification of the Law of State Responsibility for Injuries to Aliens, 1974, at 262 [hereinafter, Recent Codification].

requirement at issue also seeks to improve the standard of protection of aliens by exposing cases involving aliens in national courts.

The exhaustion of local remedies rule may be excused only in limited circumstances, such as when resorting to the remedy would have been manifestly ineffective or obviously futile.[24] As put by professor Amerasinghe "the test is obvious futility or manifest ineffectiveness, not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests."[25]

A treaty may, of course, dispense with the exhaustion of local remedy requirement. Many conventions and treaties, including a large number of IIAs, have done exactly that.[26] There is, however, some academic debate over how explicit the dispensation must be. In the *Case Concerning Elettronica Sicula SpA,* a chamber of the ICJ found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of words making clear an intention to do so."[27] The Iran-U.S. Claims tribunal, on the other hand, read the Iran-U.S. Claims Settlement Declaration as waiving the local remedies rule by implication.[28] As analyzed below, Chapter Eleven of NAFTA arguably can be read as making clear the Parties' intention to waive the local remedies rule.[29]

B. *Models to Dispense with the Local Remedies Rule*

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention) was a legal innovation that enabled a system of private right of action without the need of exhaustion of local remedies or diplomatic protection. Under Article 26 of the Convention, ICSID signatories maintain the right to require the prior exhaustion of local remedies, however, in the absence of an express requirement the State is deemed to have consented to such forum to the exclusion of any other remedy, including domestic courts. Commenting on the Convention, the then World Bank General Counsel stated that, "Recourse to arbitration and conciliation represented a development, and not a mere codification of existing international law."[30]

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[24] *Norwegian Loans Case* (France v. Norway), 1957 ICJ at 39-42 (separate opinion of Judge Lauterpacht).

[25] Amerasinghe, *supra* note 22, at 195.

[26] Recent codification, at 263.

[27] *Case Concerning Elettronica Sicula SpA (*ELSI) (U.S. v. Italy), ICJ Rep 15 (July 20, 1989).

[28] *American International Group, Inc. and The Islamic Republic of Iran*, Award No. 93-2-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. Cl. Trib. Rep. 96 (1983).

[29] Meg Kinnear, Andrea Bjorklund & John F.G. Hannaford, Investment Disputes Under Nafta: An Annotated Guide To Nafta Chapter 11 (Second Update, Kluwer Law ed., 2009) 12-Article 1121 [hereinafter Kinnear *et al.*].

[30] ICSID Secretariat, History of the ICSID Convention Vol. II-1, 21-23. The General

Based on Article 26 of the ICSID Convention, different investment treaties have given rise to different types of provisions that dispense, partially or entirely, with the local remedies requirement. Most IIAs provide for a "fork-in-the-road" approach.[31] Under this model, foreign investors are required to choose at the outset whether to litigate in local courts or arbitrate an international claim. Having made the election to seize domestic remedies, the investor is no longer permitted to raise the same contention before an investment arbitration tribunal.[32]

International agreements may contain provisions requiring investors to pursue national remedies (courts or administrative authorities) for some time before their claims can be submitted to investment arbitration.[33] Guatemala, for example, requires the "exhaustion of local administrative remedies"[34] as a condition of its consent to arbitration of international claims brought under the ICSID Convention.[35] Argentina, on the other hand, requires (in several IIAs) that investors submit their dispute to municipal courts for a period of time before commencing international arbitration proceedings.[36] In the former case, the absence of taking the dispute to the local administrative remedies may affect the jurisdiction of ICSID. In the latter case, if the investor fails to submit the dispute to municipal courts for the required period of time, the claim may not be within the competence of the tribunal.[37] In both cases, there will be an impediment to the consideration of the merits of the dispute.

Counsel's comments on Article II Section 1 of the Draft Convention in form of a Working Paper were distributed to the Executive Directors on March 12, 1962.

[31] Alejandro Escobar, *Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States*, 11 ICSID Review, Foreign Investment Law Journal 1 (Spring 1996), at 86.

[32] According to a commentator, this reflects a conscious policy to preclude an exhaustion requirement that in effect would permit "appeal" from national courts to an arbitral body. K.S. Gudgeon, "Arbitration Provisions of U.S. Bilateral Investment Treaties" in S. Rubin & R.W. Nelson eds., *International Investment Disputes: Avoidance and Settlement* (United States: West Publishing Company, 1985) American Society of International Law: Studies in Transnational Legal Policy No. 20 at 51.

[33] *See, e.g.*, BIT U.S. Argentina Article II(2)(c) of the Argentina-United States BIT.

[34] Information *available at* http://icsid.worldbank.org/ICSID/FrontServlet (last accessed November 28, 2011).

[35] Article 26 of the ICSID Convention specifically does away the local remedies rule "unless otherwise stated." *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 8, 1965, 17 U.S.T. 1270, 1298-99, 1357-64, 575 U.N.T.S. 160, 229-35 [hereinafter ICSID Convention] at Article 26.

[36] Article 8 of the unofficial English translation of a BIT between Italy and Argentina states, in paragraph 3, as follows: "3. If a dispute still exists between investors and a Contracting Party, after a period of 18 months have elapsed since notification of the initiation of the proceeding before the national courts indicated in paragraph 2, such dispute may be submitted to international arbitration."

[37] The ICSID Convention refers to the terms jurisdiction of the Centre and competence of the tribunal and not to the traditional (and theoretically complicated) distinction between ju-

Other agreements provide for a combination of different procedural rules that affect the local remedies rule. The new Germany-China Bilateral Investment Treaty requires:

> [f]irstly, the issue [to] undergo administrative review under Chinese domestic law and secondly, international arbitration proceedings may commence at the earliest three months from the start of this procedure […] However, if the case is brought (voluntarily) to a Chinese domestic court, the arbitration proceedings may commence only as long as the action can still be withdrawn unilaterally.[38]

Mexico is not a party to the ICSID Convention. NAFTA, however, provides for a more permissive model often referred to as a "no-U-turn" rule or waiver model. As will be explained with more detail in the next section, Chapter Eleven of NAFTA demands that investors waive their right to initiate or continue before any administrative tribunal or court under the law of any Party any further proceeding in relation with the measure involving the payment of damages.[39]

Independently of these models, recently, a number of investment claims have been brought invoking investment treaties that have not been concluded between the host State and home State of the investor. The treaties may contain different clauses of consent to arbitration and include different types of provisions that dispense with the local remedies requirement. In most of these cases, the investment claim has been filed relying on a treaty-based MFN clause to import the provisions that the host State has included in a treaty entered into with a third State. This has created some debate regarding the operation, application and limits of the provisions that dispense with the local remedies rule.[40]

The 1978 UN's International Law Commission ("ILC") draft articles on MFN clauses provide limited guidance on the question of importation of provision containing the consent to arbitration through an MFN clause. The ILC work concludes, in draft Article 4, that to be triggered the MFN treat-

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risdiction and admissibility. For a remarkable discussion on the topic see J. Paulsson, *Jurisdiction and Admissibility*, Global Reflections on International Law, Commerce and Dispute Resolution, November 2005. (For Jan Paulsson to understand whether a challenge pertains to jurisdiction or admissibility, "one should imagine that it succeeds: If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse. If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final" —footnote omitted.)

[38] Rudolf Braun & Pascal Schonard, *The New Germany-China Bilateral Investment Treaty*, 22 ICSID Review, Foreign Investment Law Journal (2007) at 276.

[39] NAFTA Article 1121.

[40] *See* Ch. Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 The Law and Practice of International Courts and Tribunals 1 (2005).

ment must have been accorded "in an agreed sphere of relations."[41] Under draft Article 9, a beneficiary State acquires under an MFN clause "only those rights which fall within the subject matter of the clause."[42] But, determining the subject matter of the clause is the very question underlined in the attempts to import a treaty to overcome the local remedies requirements. In other words, in its very essence the problem is a matter of treaty interpretation.

When it comes to treaty interpretation, international tribunals have maintained that MFN treatment may be claimed only following the *ejusdem generis* principle recognized in the ILC's work.[43] For example, early in the twentieth century, an Umpire under the British-Venezuela Mixed Claims Commission rejected access to the Commission on the basis of an MFN clause because the undertakings with respect to the administration of justice applied only to the "respective rights before the courts of justice established by the local laws of each nation."[44] In the decision, the Commissioner also noted:

> His Britannic Majesty's agent asserts that by virtue of Article IX of the treaty of 1835 between Venezuela and Great Britain the subjects of the high contracting parties shall, in the territory of the other nation, enjoy the same privileges, prerogatives, and rights as those of the most-favored nation. This is true, but said clause can only apply to the matters purposely designated in the article which contains this stipulation, [however] said clause is not applicable to these mixed commissions, which are of a very extraordinary nature.[45]

In the *Case Concerning Rights of Nationals of the United States of America in Morocco*, the ICJ recognized in 1952 that "jurisdictional" rights may be established by the mechanism of an MFN clause. However, the jurisdictional right involved was not one of access to a particular dispute resolution system, but the right of a foreign government to exercise some extra-territorial powers. Four years later, the Commission of Arbitration deciding the *Ambatielos Claim* re-affirmed that "the most-favored-nation clause can only attract matters be-

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[41] *International Law Commission, Draft Articles on the Most-Favoured-Nation Clause*, U.N. Doc. A/33/10 (July 1978) [hereinafter ILC Draft Articles].

[42] *Id.*

[43] The *ejusdem generis* principle states that an MFN clause (a country that has been accorded MFN status may not be treated less advantageously than other country) can apply only to matters belonging to the same subject category as the treaty containing the MFN clause itself. *See, e.g., Siemens A.G. v. Argentina*, ICSID ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 99. *Cfr.*, *Salini Costruttori SpA & Italstrade SpA v. Jordan*, Decision on Jurisdiction, ICSID ARB/02/13, November 15, 2004, ¶ 66. (The tribunal in *Salini* expressed concern over the extension of the clause, and concluded that ICSID dispute settlement for contracts was not included in Article 3 of the Jordan-Italy BIT because it did not expressly include dispute settlement.)

[44] *Aroa Mines Case (on merits)* IX R.I.A.A., at 402-445, *available at* http://untreaty.un.org/cod/riaa/cases/vol_IX/402-445.pdf (last accessed November 28, 2011).

[45] *Id.*

longing to the same category of subject as that to which the clause itself relates" which could involve "the administration of justice."[46] However, this conclusion related to a context where each signatory State made explicit the substantive undertakings that commerce and navigation would not be impeded by denial of justice in domestic courts and the contracting Parties to the basic treaty had pledged their "intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favourable nation".[47] In both cases, the issue of access to arbitration *did not* arise.

In the ICSID context, the issue of treaty clause importation to avoid or to "cure" the failure to commence (or continue for some time) a claim in national courts before proceeding to investment arbitration arose for the first time in *Maffezini v. Kingdom of Spain.* In this case, Spain objected to the tribunal's jurisdiction because the investor had failed to submit the case to the domestic courts in Spain for a period of 18 months before bringing an investment claim as set forth in the Argentine-Spain BIT.[48] The tribunal agreed that the Claimant did not have to first submit their claims to domestic courts. The tribunal reached this finding without explaining why acceding to the eighteen-month period was less favorable *treatment* than direct access to arbitral proceedings. It also noted that for the importation to operate: "[…] the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters."[49]

Not all subsequent tribunals have followed the *Maffezini* analysis.[50] According to *Special Rapporteur* McRae and ICSID's Secretary-General Meg Kinnear,

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[46] *Ambatielos* (Greece v. U.K.), Award of 6 March 1956, 12 R. Int'l Arb. 83 (Commission of Arbitration) at 107 concluding: "[…] it cannot be said that the administration of justice, in so far as it is concerned with the protection of [the rights of traders], must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes 'all matters relating to commerce and navigation'."

[47] *Id.*

[48] *Emilio Agustín Maffezini v. Spain* (Case No. ARB/97/7), Decision on Jurisdiction of January 25, 2000 at 69.

[49] *Id.* at 56. As pointed out by Professor McRae in the current ILC work regarding MFN clauses: "the tribunal in Maffezini saw potential problems with their decision and sought to limit its scope with a number of exceptions. But the principle on which those exceptions are based is not made clear in the decision nor is it clear whether such exceptions are exclusive." *Report of the International Law Commission*, 60th Session, U.N. Doc. Supp. A/63/10 [hereinafter ILC 60th Session - 2008].

[50] *See* Meg Kinnear, A further update on Most-Favoured-Nation Treatment- in Search of a Constant Jurisprudence, Fordham J. Int'l L., 2009, concluding that: "The net result of [MFN] jurisprudence is that the early cases on the 18-month waiting period (Maffezini, Siemens, Gas Natural, Suez, AWG and National Grid) follow the Maffezini logic and use MFN to waive the waiting period. On the other hand, the two most recent cases (Wintershall and TSA) take a different tack, stressing the precise words of the applicable BIT and resulting in an outcome that

it is clear that a consistent interpretation of MFN provisions has not emerged, nor is it clear that a single theory can reconcile the MFN decisions importing dispute resolution clauses.[51] However, most Tribunals have agreed that to be imported, not only the subject of the dispute must overlap with an area covered by the MFN clause; it must be able to be characterized in the same terms as those protected by the clause. Since an MFN clause may be broad in scope and treatment can result in serious disadvantages, in some circumstances the importation of a treaty is permissible.

The decision in *Maffezini* has spawned similar claims and resulted in investors trying to pick and choose from amongst the benefits that third States investors receive from the other contracting party and States trying to craft MFN clauses in their IIAs that will not have broad-ranging consequences. The question, however, remains one of treaty interpretation and the inclusion of a MFN clause should not *per se* create a super-treaty provision that allows treaty shopping to exempt the requirements to use local judicial institutions (or others) before acceding to investor-state arbitration. Thus, whatever view one takes on *Maffezini* and on the decisions that do not follow its main finding like *Plama Consortium Ltd. v. Bulgaria*,[52] it remains that the dispensation of the local remedies rule through an MFN clause is not automatic and depends on the context of each case and the particular treaty.

C. *NAFTA's Waiver and Conditions Precedent to Submission of a Claim to Arbitration*

The NAFTA Parties did not explicitly dispense with the exhaustion of local remedies in the text of the Agreement. NAFTA Article 1121 subsections (1)(b) and (2)(b) require, as a condition precedent to bringing a claim, that the investor and/or the investor on behalf of the enterprise that is owned or controlled by investor comply with certain procedural requirements.[53] Specifically, these provisions require the disputing party (investor and/or enterprise) to:

> […] waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach [...] except for proceedings for injunctive, declaratory or

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is more consistent with the holding in Plama [which] held that 'the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed'."

[51] *Id. See also* ILC 60th Session – 2008.

[52] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 at 223 (concluding: "MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.)

[53] *See* NAFTA, Article 1121 subsections (1)(b) and (2)(b).

> other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[54]

In other words, the NAFTA model allows foreign investors to bring claims without first exhausting local remedies; in some circumstances, it even permits simultaneous or subsequent use of domestic and international fora. This model is a departure from the "fork-in-the-road" approach included in the initial draft of the *travaux préparatoires.* Such approach would have granted investors the right to initiate a claim "provided that the national or company concerned has not submitted the dispute for resolution" under the courts or administrative tribunals or accordance with any applicable previously agreed dispute settlement procedures.[55]

In fact, the history of the NAFTA negotiations suggests that the waiver model is a *compromise* between the three Parties to the treaty. On the one hand, the U.S. —consistent with its practice at that time— probably included the "fork-in-the-road" provision in NAFTA's first draft to ensure its nationals (often in the position of capital exporters) a mechanism outside the domestic jurisdiction of the State involved in the dispute. Canada and Mexico opposed this model for different reasons. In the draft of Jan. 16, 1992, Mexico suggested adding a provision that disputes under Chapter Eleven should "not be subject to the dispute settlement provisions" of NAFTA.[56] The draft of March 6, 1992 also included a paragraph expressing its preference for the "Domestic Judicial Enforcement of the Rights of Investors."[57] Canada, on the other hand, in the Jun. 4, 1992 draft, proposed the inclusion of a provision similar to the waiver to avoid the potential problem of litigating "substantially the same matters" in both the arbitration proceeding and in national courts and administrative tribunals.[58]

The net result of the negotiations was the incorporation of a "no-U-turn" rule that has given rise to questions of interpretation,[59] but that addressed

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[54] *Id.* The drafters anticipated one instance in which the waiver would not be required. "Only where a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply."

[55] NAFTA, *travaux préparatoires* of Dec. 1991 *available at* http://www.naftalaw.org/commission.htm (last accessed November 29, 2011).

[56] NAFTA, *travaux préparatoires* January 16, 1992 *available at* http://www.naftaclaims.com/Papers/02-January161992.pdf (last accessed December 5, 2011).

[57] NAFTA, *travaux préparatoires* March 6, 1992 *available at* http://www.naftaclaims.com/Papers/05-March061992.pdf (last accessed December 5, 2011). The suggested inclusion of Mexico read as follows: "MEX [Article : Domestic Judicial Enforcement of the Rights of Investors 1. Each Party shall provide investors of the other Parties access to an impartial judicial system with authority to enforce the rights of investors established under this Agreement.]"

[58] NAFTA, *travaux préparatoires* June 4, 1992 *available at* http://www.naftaclaims.com/Papers/11-June041992.pdf (last accessed December 5, 2011).

[59] See generally, W. 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; B.

three main issues raised by the Parties to the Agreement during the negotiations: (i) the importance of an impartial mechanism for the settlement of investment disputes; (ii) the recognition of the convenience of impartial domestic judicial systems with authority to enforce the rights of investors; and (iii) the preference of a system to avoid multiple litigation that could give rise to double redress for the same matter.

Even if one adopts the position that "it is not fruitful to try to infer too much from the unexplained [drafting] history,"[60] the Agreement's language is clear and does not discount subsequent or even concurrent or simultaneous uses of forums to challenge the same *measure.* The ordinary meaning of the relevant terms of Chapter Eleven are permissive; foreign investors can therefore seek damages, an injunction, or declaratory relief in domestic court or other dispute settlement procedures prior to bringing a NAFTA claim. This said, at any point within the three-year limitation (Articles 1116(2) and 1117(2)), the investor may choose to waive its right to initiate or continue any dispute settlement procedures with respect to the measure, "except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages,"[61] before domestic *administrative tribunals* or *courts* and bring a Chapter Eleven claim instead.

Interpreting these provisions, the tribunal in *International Thunderbird Gaming Corporation v. Mexico* maintained that:[62]

> In construing Article 1121 of NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.[63]

H. Oxman & W. S. Dodge, A*rbitration —NAFTA-Jurisdiction— Waiver of Right to Initiate or Continue Other Legal Proceedings-Effect of Pursuing Municipal Law Claims in Municipal Court*, 95 Am. J. Int'l L 186 (2001); J. 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*, 69 Fordham L. Rev. 2655 (2001).

[60] *Cattle Consolidated Canadian Claims v. United States*, NAFTA Chapter 11/UNCITRAL, Final Award.

[61] NAFTA Article 1121.

[62] Similar positions have been maintained by Canada and Mexico. Indeed its 1128 submission in the *Waste Management v. Mexico*, Canada expressed that "the purpose of NAFTA Article 1121 is to avoid a multiplication of proceedings, forum shopping and double jeopardy." Mexico, on the other hand, maintained as its litigation position in that same case that the waiver "of domestic damages claims" provided in Article 1121 of NAFTA was intended "as an absolute condition precedent for submission of a claim to arbitration." See *Waste Mgmt. Arbitration* documents *available at* http://www.naftaclaims.com/disputes_mexico_waste.htm (last accessed December 6, 2011).

[63] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006 ¶ 118 [hereinafter Thunderbird Award].

Contrary to what this finding suggests, there are several critical issues that should be taken into account in construing Article 1121. The first reason for the existence of this provision can be found in its title (*i.e.*, Condition Precedent to Submission of a Claim to Arbitration) and is to trigger the operation of the consent to arbitration established in the subsequent article (*i.e.*, Article 1122: Consent to Arbitration) as an impartial mechanism outside of the law of any Party. This is the *raison d'entre* of this provision and while at least one Tribunal interpreted this as a formal prerequisite to the formation of a valid agreement between the disputing parties,[64] both the tribunal in *Mondev International Ltd. v. United States* and *International Thunderbird Gaming Corporation v. Mexico* agreed that a failure to submit the waiver is a technicality that can be cured by the investor. The tribunal in *Mondev International Ltd. v. United States* concluded:

> It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be "conditions precedent" to submission of a claim to arbitration, and other procedures referred to in Chapter 11. Unless the condition is waived by the other Party, non-compliance with a condition precedent would seem to invalidate the submission, whereas a minor or technical failure to comply with some other condition set out in Chapter 11 might not have that effect, provided at any rate that the failure was promptly remedied. Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope (footnotes omitted).[65]

The second rationale is that held by most commentators and, probably, reflects Canada's concerns with avoiding simultaneous or concurrent remedies, including any type of dispute settlement procedures (*e.g.*, mediation, commercial arbitration, etc.) that can lead to double redress for the same *measure*. The focus here is on the term measure not only because NAFTA obligations extend to measures (*i.e.*, regulations, procedures, requirements, or practices taken by the State Parties), but also because a single measure can give rise to domestic or international adjudication based on different causes of action that may or may not give raise to monetary damages. In other words, the same facts can give rise to different legal claims. "The similarity

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[64] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 NAFTA Ch. 11 Arb. Trib. (Apr. 10, 2001) *available at* http://www.naftaclaims.com/disputes_canada_pope.htm (last accessed December 6, 2011).

[65] *See Mondev International Ltd. v. United States*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, http://www.state.gov/documents/organization/14442.pdf at ¶ 44. *See also* Thunderbird Award citing *Mondev* with approval ¶ 117. (The tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.)

of prayers for relief does not necessarily bespeak an identity of causes of action."[66]

Considering that under Mexican law the Agreement is a self-executing treaty and, therefore, also domestic law, Mexico requested the inclusion of Annex 1120.1. With this provision the possibility of two identical causes of action is avoided.[67] Furthermore, the tribunal in *Waste Management v. Mexico*, the case where this provision was analyzed more thoroughly after the claimant tendered a waiver with a peculiar language, read the focus of Article 1121 in the measure differently:

> For purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA […] In effect, it is possible to consider that proceedings instituted in a national forum may exist which *do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA*, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA[68] (emphasis added).

However, arbitrator Keith Highet in his dissent in this case pointed out that "domestic causes of action by definition differ from international causes of action, and a violation of domestic law will not always also be an international wrong."[69] Since two causes of action may originate proceedings under different jurisdiction (domestic or international),[70] a domestic proceeding challenging exactly the same measure could coexist simultaneously with an arbitration proceeding under NAFTA.[71]

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[66] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21 Award, July 30, 2009 at ¶ 62.

[67] NAFTA Article 1121.

[68] *Waste Mgmt. Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000, 40 ILM 56, 73 (2001) 847 ¶27 [hereinafter Waste Mgmt. 1 Award].

[69] Kinnear *et al.*, *supra* note 32, 1121 citing ¶ 19 of Waste Mgmt. Award.

[70] Article 27 of the Vienna Convention of the Law of Treaties and article 32 of the Article on State Responsibility are both cemented in the idea that national and international adjudication is exercised under different mandates. Article 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Article 32 states: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations." The ICJ in the *Elettronica Sicula S.p.A.* (ELSI) case, ICJ Rep. 1989, 15-121; ILM 28 (1089), 1109, reaffirmed this principle: "124. …[i]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise."

[71] *Cfr*. Waste Mgmt. 1 Award, *supra* note 68, at 101.

The two considerations explained above make sense from the text of Article 1121 subsections (1)(b) and (2)(b) of NAFTA. Indeed, the history of the negotiations discussed above shows how investor-state arbitration makes State parties to IIAs more prone to direct claims for compensation. However, the consent is not an unconditional access to arbitration or permission for double redress for the same allege improper conduct. Moreover, it does not result in the combination or amalgamation of domestic and international causes of action.

A fresh look into the second part of Article 1121 subsections (1)(b) and (2)(b), the history of the exhaustion of local remedies rule, and the *travaux préparatoires* of NAFTA reveal a third rationale to take into account in the construction of the rule at issue. This part sets forth —in general terms— that *certain* proceedings do not have to be waived or discontinued if arbitration is selected. This language probably reflects Mexico's preference for domestic judicial enforcement of the rights of investors to stimulate the use of the constitutional proceeding know as *amparo* by foreign investors. The waiver does not mandate claimants to relinquish: "[…] proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."[72]

This phrasing is also a reminder that the powers of international tribunals are far more limited than the powers of domestic courts and administrative tribunals. The key advantage received with arbitration is the recourse to a mechanism that is not an agency of the government against which it seeks compensation (which may only include monetary damages, restitution of property and applicable interest).[73] However, Tribunals under NAFTA have limited jurisdictional powers for other types of relief such as extraordinary, injunctive or declaratory, and, arguably, no way to force compliance with such types of orders.[74]

ILC *Special Rapporteurs* Sohn and Baxter recognized the beneficial effect of adjudicating the cases involving aliens in domestic courts in their remarkable work that gave origin to the Articles on State Responsibility. Likewise, the Mexican government, the only developing Party to NAFTA, expressed its preference for the domestic judicial enforcement of the rights established under the Agreement arguably to maintain the disposition of cases involving aliens in municipal courts. Thus, the second part of Article 1121 subsec-

[72] NAFTA Article 1121.

[73] NAFTA Article 1135.

[74] Article 1134 of NAFTA, which refers to Interim Measures of Protection, establishes the following: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation."

tions (1)(b) and (2)(b) may be read as an attempt to manage and set limits to the functions of domestic and international adjudicators. This provisions grant administrative tribunals or courts under the law of the disputing Party a broad range of coexistence, even when the challenged measure is the same.

For this reason, NAFTA offers foreign investors has a menu of strategic options to conduct proceedings in domestic and international forums, including: (i) it may seek damages (or declaratory or injunctive relief) in domestic courts on domestic law grounds and subsequently bring a claim for damages before a Chapter Eleven tribunal; (ii) in Mexico only, it may seek damages in a domestic court on NAFTA grounds, but will then be barred from bringing a claim before a Chapter Eleven tribunal; (iii) it may bring a claim for damages before a NAFTA tribunal directly, but must waive its right to initiate or continue claims for damages in domestic courts on domestic law grounds other than NAFTA and its right to initiate or continue claims for damages before other dispute settlement procedures; (iv) it may bring a claim for damages before a NAFTA tribunal and simultaneously or subsequently seek declaratory or injunctive relief in domestic courts on domestic law grounds; or (v) it may bring a claim for damages before a NAFTA tribunal, while the enterprise —which is not owned or controlled directly or indirectly— seeks relief in domestic courts.

Unlike other investment treaties, an investment claim cannot proceed on a contractual basis for the simple reason that the tribunal's jurisdiction must be founded on NAFTA. No so-called "umbrella clause" in the treaty which, under certain circumstances, may leverage a contractual claim as an investment claim. Therefore, arbitral tribunals under Chapter Eleven must determine whether a claim has an autonomous existence outside a contract.[75]

In a nutshell, while the exhaustion of local remedies is a traditional rule of customary international law, this may be dispensed with by the agreement between States. Different agreements have led to various models included in different IIAs where importation of a more beneficial model requires specific conditions to operate. One of these models is the NAFTA waiver which includes a "no-U-turn" rule that permits a menu of strategic options for simultaneous and/or subsequent uses of domestic and international for a under specific conditions.

D. *Local Remedies and Pragmatic Considerations before the Submission of a Claim Under NAFTA*

Without trying to exhaust this topic, foreign investors —at least under NAFTA Chapter Eleven— should be mindful of the possible consequences

[75] *Cfr.* Loewen, Opinion of Christopher Greenwood, Q.C. (Mar. 26, 2001), at ¶ 44. According to Professor Greenwood there is a plausible reading of NAFTA's article 1121 to waive local remedies for acts other than judicial acts. This does not exclude a claim for mistreatment of domestic court under the theory of denial of justice (commended by Article 1105).

of not accessing local remedies prior to arbitration. Arbitral tribunals, rightly or wrongly, may consider the use of local remedies as a factor that affects the *impact* of the breach in the interest protected by NAFTA. For example, for a claim for indirect expropriations such as regulatory takings protected under Article 1110 (Expropriation) to be meritorious, the taking or expropriation must be "a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof."[76] This means, as put by the decision in *Glamis v. United States*, that: "[…] the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact."[77]

The question of the severity of the harm inflicted by the measure in breach of the Agreement is —according to the tribunal in *Glamis v. United States*— part of the substantive standard of Article 1110. As such, the use of available remedies in domestic courts to mitigate the impact of the measure could be a determinant factor to the materialization of the substantive violation. In other words, if the degree of harm could have been affected by a relief available to the investor, the expropriation may not be an act attributable to the State. Of course, an important question (outside of the scope of this work) would be why, if at all, should the investor have the burden of trying to limit the impact and the extent of the efforts that the investor needs to show.

Another possibility is that Tribunals consider the availability of remedies in the assessment of costs. Since there is broad discretion under different arbitration rules (*e.g.*, ICSID Additional Facility and UNCITRAL) arbitral Tribunals may consider the options available in domestic courts when allocating the cost of the arbitration, especially when States are successful in the proceedings. Admittedly, the tendency under NAFTA has been to divide the expenses equally considering whether parties acted expeditiously and efficiently.

Finally, with respect to violations of Article 1105 (Minimum Standard of Treatment) in its modality of denial of justice, the availability to and use of local remedies could be relevant to the question whether this standard was complied with by the State. As the tribunal in *Loewen v. Unites States* stated: "decision[s] which can be challenge[d] through the judicial process does not amount to a denial of justice at the international level."[78]

In such cases, tribunals may consider that legitimate concerns exist that States will suffer from not having a chance to correct the wrong to the judicial

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[76] *Fireman's Fund Insurance Company v. Mexico* 15 ICSID Case No. ARB(AF)/02/01 at ¶.

[77] *Glamis Gold Ltd v. United States* (NAFTA/UNCITRAL) Final Award of June 6, 2009 at ¶ 356.

[78] *Loewen Group Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Final Award (June 26 2003), in 42 ILM 811(2003) at ¶ 159. This finding has been criticized by many scholars *e.g.*, Jan Paulsson, Denial of Justice in International Law (Cambridge University Press, 2005 at 306).

process. If that is the case, the local remedies rule would be treated as an element of the substantive standard, as the *Waste Management II v. Mexico* tribunal did by concluding that in some specific contexts the "local remedies rule is incorporated into the substantive standard" of the Agreement.[79]

While tribunals should resist the temptation of factoring in the local remedies rule in the analysis of a substantive violation of the treaty, investors and scholars should also take into account that this happens. In many cases tribunals consider the availability of remedies in assessing a breach of the standard, evaluating reparations or when allocating the costs of the proceedings. Likewise, the policy debate regarding the accession to investor-state arbitration should consider the different models of accession, the strategic options provided by the treaty and the context of their negotiation. Moreover, this debate should also acknowledge the circumstances under which investor-state tribunals may consider the availability of local judicial institutions and the potential consequences of not pursuing local remedies prior to bringing an international claim.

III. Case Study: Mexico and Sweeteners Sector

Since NAFTA went into effect, approximately sixty notices of intent to submit claims to arbitration against the three NAFTA Parties have been reported. Of these claims, Mexico has been the respondent in twelve cases. ICSID has registered ten cases conducted under the Arbitration (Additional Facility) Rules and has administrated two cases under the UNCITRAL model rules. There have not been any other reported proceedings against Mexico under NAFTA.

As illustrated in the following table all disputes against Mexico (with a notable exception) challenged: (i) a measure that —at some point— was reviewed by a Mexican court; or (ii) a judicial act itself. In *Bayview Irrigation Dist., et al. v. Mexico*, the sole case involving a measure not reviewed by a Mexican court, the claimants' investment in question was exclusively made in the United States. As a result, the tribunal sided with Mexico and dismissed the claim for lack of jurisdiction due to the territorial location of the investment.[80] Most notably, the tribunal gave full weight to the Mexican Constitution and applicable Mexican Law to establish that the claimants could have no property rights over waters in Mexican rivers.[81]

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[79] *Waste Management v. Mexico*, Award, 30 April 2004 ¶ 97.

[80] *Bayview Irrigation Dist. et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1 (Jan. 19, 2005), *available at* http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims_NOA-19-01-05.pdf (last visited December 6, 2011). The tribunal noted at ¶ 104, that: "[…] a salient characteristic [of Chapter Eleven] will be that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and that this law is created and applied by that State which is not the State of the investor's nationality."

[81] Bayview Award at ¶ 118.

FIGURE 1: CHAPTER ELEVEN CASES AGAINST MEXICO[82]

Case	*Measures adopted by*	*Economic/Business Sector*	*Domestic Courts*
1. METALCLAD CORP.	E	Services Waste-Disposal	Yes
2. ROBERT AZINIAN *ET AL.*	E & J	Services Waste-Disposal	Yes
3. MARVIN R. FELDMAN	E	Commercial Cigarette Export	Yes
4. WASTE MANAGEMENT I	E & J	Services Waste-Disposal	Yes
5. WASTE MANAGEMENT II	E & J	Services Waste-Disposal	Yes
6. FIREMAN'S FUND	E	Services Insurance	Yes
7. GAMI	E	Commercial Sweeteners Sector	Yes
8. THUNDERBIRD	E	Services Wager Games	Yes
9. CPI	L	Commercial Sweeteners Sector	Yes
10. ADM/TLIA	L	Commercial Sweeteners Sector	Yes
11. CARGILL	L & E	Commercial Sweeteners Sector	Yes
12. BAYVIEW *ET AL.*	E	Water Rights	No

It is notable that four of the twelve claims brought against Mexico are related to regulatory actions taken in the commercial sweeteners sector. In the following section, this paper discusses the cases brought in this sector.

1. *Background of NAFTA's Sweeteners Conflict*

On the eve of November 3, 1993, a day before President Clinton formally submitted the implementing legislation of NAFTA to the U.S. Congress for approval, two draft letters were produced (one in Spanish and one in English). The letters were initialed by the chief NAFTA negotiators from Mexico and the U.S., and contained NAFTA side-agreement on sweeteners.[83]

Disagreement regarding the content of the letters, combined with the maladministration of the sugar program in Mexico and the domestic politics in both countries, made the issue of market access and integration for sweeteners (HFCS and sugar) one of the two most contentious of NAFTA (the other is arguably the Softwood Lumber dispute). Some aspects of this conflict have tested all the dispute settlement mechanisms of NAFTA and the WTO, as well as the Mexican courts and agencies, including Mexico's and Canada's Supreme Courts.[84]

[82] In this figure: E=Executive / L=Legislative/ J=Judicial.

[83] H.R. 3450, 103rd Cong., 1st Sess. (1993) (enacted) (letters on file with author).

[84] After fifteen years, the status is as follows: the U.S. blocked the selection of NAFTA panelists (Chapter Twenty) to examine the legality of U.S. quotas on Mexican cane sugar under the side-letters, and Mexico imposed anti-dumping duties against U.S. H.F.C.S. that WTO and NAFTA panels condemned. Mexico also attempted some and approved other non-trade restrictions like labeling and import permit requirements against H.F.C.S. to counterattack

It is in this context that the Mexican Government adopted two measures purportedly aimed at protecting the Mexican sugar industry.[85] First, in September 2001, Mexico's then President Vicente Fox issued an expropriation decree ("the Decree"),[86] expropriating 27 of the country's 61 sugar mills. The Decree was reportedly issued to alleviate the crisis in the Mexican sugar sector and aimed at "avoiding the sector's collapse."[87]

Four months later, in January 2002, the Mexican Congress approved a tax on the use of HFCS on soft-drinks ("Tax").[88] By taxing the sale of soft-drinks or syrups made with HFCS, while exempting those made with Mexican sugar, the Tax openly discriminated against the HFCS producers and distributors in Mexico (almost exclusively U.S. investors).[89]

Not surprisingly, the Decree and the Tax were a significant source of litigation, both in Mexican courts and in NAFTA Chapter Eleven proceedings. Each tested the main provisions designed to protect investors, including the conditions under which a valid expropriation can occur in the case of the Decree, and the limits of discrimination based on nationality in the case of the Tax. The next section will analyze the different proceedings brought before domestic courts and investor-state arbitration challenging both measures.

2. *The Proceedings Against the Decree*

A. *Proceedings before the Mexican Supreme Court*

Following the expropriation, many sugar mill owners instituted *amparo* proceedings in Mexican courts.[90] Among them was Grupo Azucarero Mexicano,

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the rising consumption of H.F.C.S. in Mexico. Finally, in 2002 the Mexican Congress passed a 20 percent tax on soft drinks using sweeteners other than cane sugar. Three U.S. companies, in their capacities as U.S. investors, invoked the investor-state dispute mechanism of NAFTA. See Joost Pawelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 J. Int'l Eco. L. 1-10 (2006).

[85] There were other measures adopted, *i.e.* the AD duties, permit requirements and corn import restrictions but for purposes of this paper will not be discussed.

[86] *Decreto por el que se Expropian por Causa de Utilidad Pública, a Favor de la Nación, las Acciones, los Cupones y/o los Títulos Representativos del Capital o Partes Sociales de las Empresas Propietarias de 27 Ingenios Azucareros*, published in Diario Oficial de la Federación, Sept. 3, 2001 [hereinafter Decree]. *See also* USDA, Mexico Sugar: "Mexico Expropriated 27 Sugar Mills," 10 September 2001, at 1.

[87] *Id.* Decree *supra* note 81, at Considerations ¶¶ 3 and 6.

[88] *Ley de Impuesto Especial sobre Producción y Servicios* [L.I.E.P.S.] [Law on the Special Tax on Production and Services), Article 32 [D.O.], 1 de enero de 2002 (Mex.) [hereinafter Tax].

[89] Tax Articles 2, 3 and 8. The 20% tax on the soft-drink translated into an estimated tax burden for using H.F.C.S. of more than 400%, because the sweetener only amounts to approximately 5% of the final cost of the soft drink. *See* WTO Panel Report on Mexico – Measures on Soft Drinks and Other Beverages, WT/DS308/R, circulated on 7 October 2005.

[90] *Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados*

S.A. de C.V. ("GAM"), a Mexican holding company that indirectly owned several sugar mills. GAM succeeded in obtaining limited relief. The Court of Appeals annulled the expropriation of three out of the five seized mills of GAM and were returned to GAM by the government.[91]

Two related cases brought by different petitioners and domestic owners of sugar mills ended up on the Supreme Court docket.[92] In these two cases, the sugar mill owners (the petitioners) argued that the Decree was illegal because it breached Article 27 of the Mexican Constitution (Protection of Property Rights). The petitioners further contended that Mexico's Constitution and international obligations required that any investor affected by an expropriatory measure should be granted a hearing *prior* to the actual expropriation. As relief, the petitioners requested the invalidation of the Decree (*vis-à-vis* the petitioners) and the restitution of their sugar mills.[93]

The Supreme Court sided with the petitioners and invalidated the Decree. The court held that a consistent interpretation of Articles 14 (due process) and 27 (protection of private property) of Mexico's Constitution granted the right to a *prior hearing* to those affected by any expropriation.[94] While the Article 27, which constitutionally regulates expropriations, does not mention the need for a *prior hearing*, the Court read the additional requirement of prior hearing derives from Article 14 which relates to due process. This rather controversial reading, certainly at odds with the textual reading of Article 27 which clearly states that only the *amount of compensation offered* is subject to judicial review and not the decision to expropriate, was revisited by the Court in a different case years later.

Unidos Mexicanos [L.A.] [Amparo Law, Implementing Articles 103 and 107 of the Constitution of the United States of Mexico], as amended 17 de mayo de 2001 [D.O.] 10 de enero de 1936 (Mex.). An *amparo* may be brought in regard to: (1) any law or action by authorities that violates an individual right guaranteed under the Mexican Constitution or federal laws; (2) laws or federal official actions that violate or restrict the sovereignty of the states or that of state laws; or (3) official actions that invade the sphere of federal authority.

[91] GAM and its Mexican controlling shareholder, Mr. Juan Gallardo, challenged the constitutionality of Mexico's Expropriation Law and of the Expropriation Decree via an *amparo* proceeding. In seeking to annul the *Decree*, GAM contended, among other grounds, that the Mexican authorities did not prove the public purpose that the government claimed to justify the expropriation of GAM's mills. The decision over some of the several mills owned by GAM was settle. *See GAMI Investments, Inc v Mexico*, Final Award, *Ad hoc*—UNCITRAL Arbitration Rules; IIC 109 (2004), signed 15 November 2004 [hereinafter Gami Award].

[92] María Teresita Machado *et al.* AR 1132/2004, S.C.J.N. (pleno) and Fomento Azucarero Mexicano *et al.*, AR 1132/2004, S.C.J.N. (pleno) *available at* http://www.scjn.gob.mx (discussed below).

[93] *Id.*

[94] Alejandro Faya Rodríguez, *Major Expropriation Case Decided by the Mexican Supreme Court of Justice: The Due Process Requirement and its Correlation with International Treaties* available http://www.economia.gob.mx/pics/pages/1227_base/NAFTIRExpro (last accessed December 6, 2011). Mr. Faya argues that the Expropriation Law, as it stands, is not unconstitutional.

B. *NAFTA Chapter Eleven Proceeding*

On April 9, 2002, the minority shareholder of GAM, GAMI Investments Inc. ("GAMI") brought a claim under Chapter 11.[95] GAMI was a U.S. corporation that indirectly owned 14.18% of the shares of GAM, the Mexican holding company.[96] As a result, GAMI brought its claim under NAFTA Article 1116, as a U.S. investor on its own behalf (investor of a Party).[97]

GAMI argued that Mexico breached three NAFTA provisions.[98] First, GAMI contended that Mexico breached Article 1110 (Expropriation) when it indirectly expropriated GAMI's share value in GAM.[99] Second, it argued that Mexico breached Article 1105 (Minimum Standard of Treatment) due to Mexico's arbitrary implementation and application of its sugar regime.[100] Third, GAMI argued that Mexico breached Article 1102 (National Treatment) by treating GAMI and GAMI's investment in GAM less favorably than Mexican investors in the sector.[101]

As a consequence of the alleged NAFTA violations, GAMI requested the tribunal to award monetary damages and applicable interest, fees and expenses for not less than US$42 million.[102]

GAMI faced an initial difficulty in proving its case before the NAFTA tribunal. As the owner of five sugar mills, GAM had sought the restitution of three mills before the Mexican courts. During the NAFTA proceeding, the Mexican Court of Appeals rendered its decision annulling the Decree *vis-à-vis* GAM and ordering the restoration of three mills.[103] In light of the Mexican court judgment, Mexico unsuccessfully moved to dismiss the NAFTA proceeding. In the Award, the tribunal acknowledged GAMI's independent right of action under NAFTA and concluded that whether GAMI: "[…] has

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[95] *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL Case), Memorial, *at* http://www.economia.gob.mx/pics/pages/5500_base/VIII_GAMI_Investment_Co_20080603.pdf (last accessed December 6, 2011) [hereinafter GAMI, MEMORIAL].

[96] At the time of the expropriation, GAM indirectly owned several sugar mills.

[97] *See* NAFTA Article 1116. *See also* GAMI, MEMORIAL ¶ 11.

[98] GAMI, MEMORIAL ¶ 1.

[99] *Id* at ¶¶ 132-46. Interestingly, GAMI acknowledged that although Mexico did not formally seize GAMI's shares in GAM, Mexico's expropriation of these five mills rendered GAMI's investment in GAM virtually worthless because the five mills constituted substantially all of the productive assets of GAM, assets that account for virtually the entire value of GAMI's investment, depriving the investment of substantially all its value, constitutes an indirect expropriation or a measure tantamount to an expropriation of GAMI's shares in GAM.

[100] *Id.* at ¶¶ 74-107.

[101] *Id.* at ¶¶ 108-31.

[102] *Id.* at ¶¶ 149-50. (GAMI asks the tribunal to award compensation in an amount not less than US$27.8 Million, the value of GAMI's interest in GAM on 2 September 2001. In addition, GAMI requested interests on this sum compounded from 3 September 2001 until payment, plus attorneys' fees, expenses, and the costs of the arbitration proceedings.)

[103] GAMI AWARD at ¶ 8.

suffered something tantamount to expropriation [under the NAFTA was a question that] […] arises prior to any analysis of quantum [and] relates to the substantive determination of a breach […]."[104]

The tribunal also recognized that the Decree was likely inconsistent with the *norms* of NAFTA, "but a conduct inconsistent with the norms of NAFTA is only a breach of NAFTA if it affects interests protected by NAFTA".[105] Using this rationale, if the investor wanted to succeed in its expropriation claim internationally, it needed to show that Mexico's conduct impaired the value of GAMI's shareholding to such an extent that it must be deemed tantamount to expropriation.[106] Pursuant to this argument, the tribunal dismissed GAMI's claim; in its view, the investor had failed to prove the effects of the measure on the value of GAMI shares in GAM.[107] While noting that GAMI neglected to give any weight to the remedies available to GAM, the tribunal concluded that no evidence existed that GAM's value as an enterprise had been destroyed and impaired.[108] In its analysis the tribunal alluded to the concurrent proceedings and the unsynchronized but simultaneous resolution of them, adding that: "[t]he overwhelming *implausibility* of a simultaneous resolution of the problem by national and international jurisdictions impels consideration of the practically *certain* scenario of unsynchronized resolution."[109]

The NAFTA tribunal also rejected GAMI's claims under Articles 1102 and 1105. Since the main goal of this work is to analyze the relationship of the courts and the arbitral tribunals, this article will limit analysis to the treatment of the expropriation claim, which was also the focus of the Mexican Supreme Court.

Figure 2: Proceedings Against the Decree

Decree	*NAFTA Investment Arbitration Proceedings*	*Mexican Supreme Court Proceedings*
Parties	GAMI (minority shareholder of GAM)	Sugar Mill Owners (*e.g.,* GAM)
Applicable Law	NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation).	Mexican Constitution Articles 27 (Protection of Property), and 14 (Due Process of Law).
Relief Requested	Damages (US$42 Million)	Invalidation of the Decree and Restitution of Property
Outcome	Claims rejected by Tribunal	Decree invalidated by the Supreme Court for lack of hearing to petitioners

[104] *Id.* at ¶ 123.

[105] *Id.* at ¶ 129.

[106] *Id.* at ¶¶ 128-133.

[107] *Id.* The tribunal concluded at ¶ 133 that the "assessment of their effect on the value of GAMI's investment is a precondition to a finding that it was taken."

[108] *Id.* at ¶ 132.

[109] *Id.* at ¶ 119. Emphasis in original.

3. *The Tax Proceedings*

A. *Proceedings before the Mexican Supreme Court*

Several HFCS producers and distributors challenged the Tax in Mexican courts soon after it was enacted. Among them was CPIngredientes ("CPI Mexico"), the local subsidiary of Corn Products International ("CPI"), a U.S. company which would later bring one of the NAFTA claims discussed below.[110] Some soft-drink producers/distributors (*e.g.*, La Perla de la Paz) also instituted *amparo* proceedings in Mexico's federal courts.[111]

In their *amparo* petitions, the HFCS and soft-drink producers and distributors contested: (i) the discriminatory nature of the Tax under the principle of tax equity and proportionality contained in Article 31(IV) (Fiscal Contributions); and (ii) the monopolistic effects of Tax (in favor of the sugar industry) as a violation to Article 28 (Antitrust) of the Constitution. As relief, the petitioners requested the annulment of the Tax.

Three months after its enactment, President Vicente Fox issued a decree temporarily suspending the Tax, relying on a rarely applied provision of the Federal Tax Code (Codigo Fiscal Federal) under which taxes can be suspended to prevent damages to an economic sector. In a proceeding called *controversia constitucional*,[112] however, the Chamber of Deputies challenged the President's suspension decree before the Mexican Supreme Court. The Chamber of Deputies argued that in suspending the Tax, the Executive had exceeded its mandate in breach of the principle of separation of powers set forth in different Articles of the Constitution.[113] The Chamber of Deputies requested the invalidity of the suspension decree, and the consequent re-establishment of the Tax.

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[110] *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1), Claimant's Memorial *available at* http://www.economia.gob.mx/pics/pages/5500_base/II_Corn_Products_International_20080603.pdf (last accessed December 6, 2011) [hereinafter CPI Memorial] ¶ 73.

[111] Amparo in review 797/2002, La Perla de la Paz, S.A. de C.V., Feb. 7, 2003 (opinion unanimously by four votes); *see also* other petitioners Amparo in review 1029/2003, Embotelladora de Tampico, S.A. de C.V. and others, January 23, 2004 (unanimously by four votes); Amparo in review 505/2003, Supermercados Internacionales Heb, S.A. de C.V., Feb. 27, 2004 (unanimously by four votes); Amparo in review 2168/2003, Embotelladora Tarahumara, S.A. de C.V., Mar. 26, 2004 (five votes); Amparo in review 165/2004, Refresquera Internacional, S.A. de C.V., Mar. 26, 2004 (five votes). This amparos are the basis of Jurisprudencia 57/2004 from Supreme Court [hereinafter Jurisprudencia 57/2004].

[112] The *controversia constitucional* allows certain political actors (*e.g.*, 1/3 of Chamber of Deputies, Political Parties or Governors) to challenge directly to the Supreme Court among other measures, Presidential decrees on the grounds of a Constitutional breach.

[113] *See* Mexican Constitution, Articles 72, 73 and 89 available in English at http://www.ilstu.edu/class/hist263/docs/1917const.html (last accessed September 26, 2009).

For HFCS producers like CPI Mexico, the battle in the Mexican court proved to be unsuccessful. By placing the legal effect of the Tax on the soft-drink bottlers themselves, rather than on the HFCS producers and distributors (who were bearing the main economic burden), it was impossible for the latter to mount a successful challenge against the Tax in Mexican courts. The claims were thereby rejected by a Chamber of the Supreme Court for lack of legal standing because, under Mexican law in effect, only the individuals or entities directly affected by the Tax had legal standing before Mexican courts.[114]

In spite of this outcome, the *amparo* claims brought by the soft-drink distributors like La Perla de la Paz *et al.* were ultimately referred to the same Chamber of the Supreme Court that heard CPI Mexico's *amparo* suit. The Chamber ruled that "it was clear that the Tax established different standards of treatment."[115] However, the Court held that the Tax did not breach Mexican constitutional law because there was a valid reason for the different standard of treatment. In reaching its decision, the Court examined the motivations of the Congress and concluded that Congress "sought with [the Tax] to protect and not affect the domestic sugar industry, since many Mexicans depend on it to make a living."[116] According to the Court, because the discrimination was intentional on the part of Congress, it was consistent with the principle of fair taxation established in the Constitution![117]

In the *controversia constitucional* brought by the Chamber of Deputies, discussed above, the Supreme Court (in full) first held that the President was entitled to suspend taxes in specific cases.[118] However, the Court concluded that by suspending the Tax, the President had utterly disregarded Congress' "clear […] non-tax related purpose […]."[119] As a result, the Court ruled that by suspending the Tax, the President had disregard its extra-fiscal objective (*i.e.*, the protection of the domestic sugar industry) as reflected in the legislative record and thus exceeded the Constitutional authority of the Executive branch.[120]

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[114] Decision of the Supreme Court of 25 August 2004 in *Amparo en Revisión* 756/2004, *Arancia-Corn Products SA de CV* [hereinafter Supreme Court Decision, CPI Mexico].

[115] Jurisprudencia 57/2004 (Novena Época).

[116] *Id.*

[117] *Id.*

[118] *See* Sentencia relativa a la controversia constitucional 32/2002, promovida por la Cámara de Diputados del Congreso de la Unión, en contra del Titular del Poder Ejecutivo Federal, 17 de julio de 2002, at 36 [hereinafter Supreme Court Suspension Decision].

[119] The Supreme Court concluded that: "legislator's intent when extending the aforementioned tax to gasified waters, soft drinks, hydrating drinks and other taxed goods and activities, when they use fructose in their production rather than cane sugar, was that of protecting the sugar industry." Supreme Court Suspension Decision at ¶ 100.

[120] *Id.*

B. *The NAFTA Chapter Eleven Proceedings*

Four U.S. companies brought three investment claims under NAFTA: (i) CPI,[121] (ii) Archer Daniels Midland Company (ADM) jointly with Tate & Lyle Ingredients Americas, Inc. (TLIA),[122] and (iii) Cargill, Inc.[123] The four companies were producers and/or distributors of HFCS in Mexico. The claims were brought under Article 1116 as U.S. corporations (investor of a Party) that wholly own a Mexican company; and on behalf of an enterprise that the investor owns or controls directly or indirectly. Since Mexico's efforts to consolidate the separate claims into a single proceeding failed, the three cases were conducted and decided separately.[124]

The four different claimants argued that the Tax was inconsistent with Articles 1102 (National Treatment), 1106 (Performance Requirements), and 1110 (Expropriation) of the NAFTA. In addition, Cargill also claimed a violation to Articles 1103 (Most-Favored Nation Treatment) and 1105 (Minimum Standard of Treatment) as a consequence of a series of measures prior to the adoption of the Tax.[125] In total, the four claimants sought monetary damages and applicable interest, fees and expenses for not less than US$575 Million.[126]

In response, Mexico argued that the Tax was as a "legitimate countermeasure" adopted in response to a prior U.S. violation of the NAFTA.[127] The Mexican affirmative defense argued that the U.S. had breached NAFTA pro-

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[121] CPI MEMORIAL ON THE MERITS at ¶¶ 4-6.

[122] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) *available at* http://www.economia.gob.mx/pics/pages/5500_base/A_D_M_v4.pdf (last accessed October 6, 2009) [hereinafter ADM/TLIA MEMORIAL] ¶¶ 4-7.

[123] *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), *available at* http://www.economia.gob.mx/pics/pages/5500_base/IV_Cargill_Incorporated_20080605.pdf (last accessed October 6, 2009) [hereinafter CARGILL MEMORIAL] ¶¶ 4-5.

[124] *See* discussion in Yulia Andreeva, *Corn Products v. Mexico: First NAFTA (Non)-Consolidation Order,* 8 INT. A.L.R. N 78-81 (2006); Order of Consolidation *available at* http://ita.law.uvic.ca/documents/Corn_Archer_order_en.pdf (last accessed October 6, 2009).

[125] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), *available at* http://www.economia.gob.mx/pics/pages/5500_base/Cargill_notific_de_int_esp_20080604.pdf (last accessed October 7, 2009) [hereinafter CARGILL NOTICE].

[126] Amounts requested: CPI, US$350 Million; ADM/TLIA, US$100 Million; and Cargill, US$125 Million.

[127] In Mexico's view, the Tax was a temporary and proportionate countermeasure intended to return the Mexican market to the *status quo* before the NAFTA, pending resolution of the dispute. Mexico further asserted that its use of the Tax a countermeasure was a matter that precluded unlawfulness in its conduct, and hence, precluded Mexico's international responsibility. *Archer Daniels Midland Company v. United Mexican States* (Final Award) (Nov. 21, 2007) *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_En&caseId=C43 (last accessed December 6, 2011) [hereinafter ADM/TLIA FINAL AWARD] ¶ 106.

visions: (i) Chapter Three and the side-letters on sugar by denying market access for Mexico's sugar surplus to the U.S. market; and (ii) Chapter Twenty by frustrating the dispute settlement mechanism under such chapter by refusing to appoint an arbitrator in the State-to-State dispute.[128] Mexico also responded individually to each of the claims made by the different investors.

Unlike the domestic proceedings, where the Mexican courts dismissed the cases brought by HFCS producers for lack of standing, the three NAFTA tribunals found jurisdiction to hear the claims against the Tax. The three tribunals also held that Mexico had breached Article 1102 (National Treatment) and dismissed the claims under Article 1110 (Expropriation).[129] In addition, the ADM/TLIA and Cargill tribunals found the Tax to be in breach of Article 1106 (Performance Requirements).[130] The Cargill tribunal also found a breach of Article 1105 (Minimum Standard of Treatment) as consequence of the other related measures.[131]

Interestingly, in the process of assessing Mexico's defense, the Tribunals faced the question of whether the international law on countermeasures was applicable to claims under Chapter Eleven. The ADM/TLIA tribunal decided that, as a general matter, countermeasures may serve as a defense in this type of proceedings if certain conditions are met.[132] However, the tribunal concluded that the Tax was not a valid countermeasure because it had not been adopted to induce compliance by the United States with NAFTA.[133] It also found that the Tax did not meet the proportionality requirements for countermeasures under customary international law.[134] Conversely, the Tribunals in the claims brought by CPI and Cargill found that the doctrine of countermeasures, devised in the context of relations between States, is not

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[128] *Id.* ¶ 77. Mexico argued that by delaying the appointment of its panelists, the U.S. had prevented Mexico from submitting the dispute over sugar access to the Chapter 20 panel.

[129] ADM/TLIA Final Award ¶ 304. *Corn Products International, Inc. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/01 (NAFTA): Decision on Responsibility (redacted version) *available at* www.ita.org (last accessed June 6, 2009) [hereinafter CPI Decision on Responsibility] at ¶ 193; and *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA) -Award, 18 September 2009 [hereinafter Cargill Award] at ¶¶ 554, 558.

[130] *Id.*

[131] Cargill Award ¶ 556.

[132] ADM/TLIA Final Award ¶ 123. Mr. Arthur Rovine did not agree with this reasoning *See* Concurring Opinion Of Arthur W. Rovine on Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC783_En&caseId=C43 (last accessed December 7, 2011).

[133] ADM/TLIA Final Award ¶ 127. The tribunal also identified the following conditions for the imposition of countermeasures in this case: 1) a breach of the NAFTA; 2) that the Tax was enacted in response to the alleged U.S. breaches and was intended to induce compliance with the NAFTA obligations; 3) that the Tax was proportionate measure; 4) The Tax did not impair individual substantive rights of Claimants.

[134] ADM/TLIA Final Award ¶¶ 152-160.

applicable to investor-State claims under Chapter Eleven of NAFTA.[135] In light of the three decisions, the conferral of rights under Chapter Eleven of NAFTA can be viewed in two incompatible ways. First (adopted by the ADM/TLIA tribunal), as a species of "delegated espousal,"[136] and second (adopted by the CPI and Cargill Tribunals) as a species of "third-party contract beneficiaries" of the rights conferred by NAFTA.[137]

In all three decisions, the tribunals held that the Tax was discriminatory and in violation of Article 1102.[138] For the Tribunals, the discrimination was clearly based on nationality both in intent and effect. The tribunal in CPI's arbitration also added that "an intention to discriminate is not a requirement" to find a violation of Article 1102. Similar to the Cargill tribunal, it concluded that the countermeasure defense was in itself evidence of the discriminatory intent of the Tax.[139] The tribunal in ADM/TLIA looked more thoroughly at the Congressional activity prior to the adoption of the Tax to determine that the Tax was successful in its legislative goal of "afford[ing] protection to the production of cane sugar, which is in line with [other] measures taken by Mexico before the imposition of the Tax."[140]

NAFTA's national treatment provision focuses on discrimination based in nationality *vis-à-vis* other investors considered to be in like circumstances.[141] While the three Tribunals relied on the economic sector standard as comparator, the ADM/TLIA tribunal also determined that all circumstances in which the treatment was accorded are to be taken into account.[142] The Cargill tribunal dismissed the relevance of the economic circumstances because they were unrelated with the Tax allege rationale (to put pressure on the U.S. government).[143] Finally, the CPI tribunal, noting the fierce competition between sugar and HFCS and the crisis in the Mexican sugar sector, concluded that: "[d]iscrimination does not cease to be discrimination, nor to attract the international liability stemming there from, because it is undertaken

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[135] CPI Decision on Responsibility ¶¶ 170-8 and Cargill Award ¶ 429.

[136] Robert Anderson IV, *Ascertained in a Different Way: The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 Geo. Wash. L. Rev. 189, 243 (2001).

[137] Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working?* 59 Hastings L.J. 241, (2007) [hereinafter Bjorklund, Competition]. Also, Thomas Wälde, *Energy Charter Treaty-based Investment Arbitration - Controversial Issues*, CEPMLP, University of Dundee (2005) (discussing that under the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects investors have a right to bring claims against States). See also, Francisco González de Cossío, *Investment Protection Rights: Substantive or Procedural?,* 2 ICSID Review, Foreign Investment Law Journal (2011).

[138] ADM/TLIA Final Award ¶ 304; CPI Decision on Responsibility ¶ 193; Cargill Award ¶ 554.

[139] CPI Decision on Responsibility ¶¶ 135-43; Cargill Award ¶¶ 219-20.

[140] ADM/TLIA Final Award ¶ 212.

[141] *See* DiMascio & Joost Pauwelyn, *supra* note 6, at 89.

[142] ADM/TLIA Final Award ¶ 197.

[143] Cargill Award ¶¶ 211-14.

to achieve a laudable goal or because the achievement of that goal can be described as necessary."[144]

In short, the proceedings against the Tax can be summarized as shown in the following table:

FIGURE 3: PROCEEDINGS AGAINST THE TAX

TAX	*NAFTA INVESTMENT ARBITRATION PROCEEDINGS*	*MEXICAN SUPREME COURT PROCEEDINGS*
Parties	U.S. investors and their investments: (a) CPI (b) ADM/TLIA (c) Cargill	Different Class of Petitioners: (a) HFCS (*e.g.*, CPI Mexico) (b) Soft Drink Producers (*e.g.*, La Perla de la Paz) (c) Chamber of Deputies
Applicable Law	NAFTA Articles: (a) 1102 (National Treatment) (b) 1106 (Performance Requirements) (c) 1110 (Expropriation)	Mexican Constitution Articles: (a) 31(IV) (Fiscal Contributions) (b) 28 (Antitrust) (c) 72, 73 & 89 (Separation of Powers).
Relief Requested	Damages (US$550 Million between all Claimants)	Tax removal and invalidation of suspension decree
Outcome	Tax in breach of 1102 (ADM/TLIA, CPI and Cargill) Tax in breach of 1106 (ADM/TLIA and Cargill) Total awards: 170 Million (approx.).[145]	Tax maintained by Supreme Court because discrimination had an "extra-fiscal" objective.

4. *Investor-State Arbitration in a Politicized Context: Domestic Courts and International Tribunals?*

What lessons can the Mexican sweeteners saga tell us about the relationship between eminently political courts and international arbitration tribunals attempting to de-politicize investment disputes?

While the tensions between international and national remedies should not be downplayed, their relationship is more fluid than the binary story of cooperation or substitution often expressed in the debate between liberals

[144] CPI DECISION ON RESPONSIBILITY ¶ 142.

[145] Information available at http://amlawdaily.typepad.com/amlawdaily/2009/09/mayer-brown-scores-biggestever-nafta-award-in-mexican-sugar-case.html (last accessed December 7, 2011); Cargill US$77.3 Million, CPI US$58.4 Million (pending revision), and US$33.5 Million.

and developmentalists.[146] The complexities shown should encourage researchers not to transport the analysis of international private rights of action onto a model where the selection of investment arbitration means the abdication of national courts and *vice-versa*. Therefore, more theorizing is required, incorporating the understanding of the pragmatic and strategic use of national courts and international tribunals, as well as the different functions and the limitations imposed by different jurisdictional mandates. This should invite a careful intra-legal/institutional analysis that acknowledges the different rules of coordination of specific treaty systems in their context, in particular the model of accession to investor-state arbitration. From this intra-legal/institutional perspective, the policy debate around the waiver of local remedies rule can be re-framed as an analysis of calibrated rules that create incentives in complex litigation scenarios, with the participation of an enlarged pool of veto players. This, I argue, avoids the unhelpful dichotomy in the debate between liberals and developmentalists (*i.e.,* domestic or international) and helps to formulate a more nuanced critique of the idea of de-politicization via international adjudicatory bodies by understanding the concurrent role of both domestic courts *and* international tribunals.

A. *Pragmatism, Fluidity and Restraint*

The sweeteners saga shows how advocating for the adjudication of claims of foreign investors exclusively in national courts based on the idea of "circumvention" of domestic judicial institutions obfuscates the complexity of investment conflicts and judicial politics. Even in well-developed court systems it is difficult to ask domestic courts to become islands of commendable independence and competence in highly politicized environments.[147] For example, in the cases brought against the Tax, the historic ties of the Mexican sugar sector, combined with the ambivalence of the U.S. government in the sweeteners sector due to the Mexico-U.S. conflict, certainly informed the Court's decision on the Tax. For the Mexican Supreme Court to make a decision without the lens of the larger diplomatic conflict would have meant ignoring a fundamental contextual aspect of the dispute, putting its legitimacy at risk at a key moment and inviting an overrule by political actors. These tensions certainly resulted in the inclusion of extremely formalistic and peripheral or incongruent considerations by the Court in the Tax decisions.[148] However,

[146] Ginsburg, *International Substitutes for Domestic Institutions*, *supra* note 11, at 120-123.

[147] *See, e.g., Raymond Loewen and The Loewen Group v. United States of America*, NAFTA/ICSID (AF) Tribunal, Case. No. ARB(AF)/98/3, Final Award, June 26, 2003, at ¶9. Loewen claimed, not without reason, that a trial court in Mississippi that decided based on extensive nationality-based, racial and class-based testimonies and comments in breach of article 1105.

[148] Supreme Court Suspension Decision at 37. (Reversing its own precedent which required taxes to have a revenue collection motive and not only an "extra-fiscal goal.")

the Court succeeded in avoiding a potentially disastrous clash between the legislative and the executive over constitutional powers by focusing on the veto power over taxation rather than the powers over foreign affairs or international commerce.

Equally valid is to say that judicial politics in high courts do not always are adverse to foreigners. Indeed, foreign investors might pay the price of their own subjective apprehensions about a domestic judicial system by resorting too quickly to use international tribunals. For example, when ruling on the validity of the Expropriation Decree, the Court limited the Executive branch's power in expropriation cases, taking a controversial reading of the Mexican Constitution. The court was preoccupied by the use of this powerful mechanism and lack of compliance with judicial orders by a former mayor of Mexico City and —at the time— a front runner in Mexico's Presidential race.[149] While GAMI benefited indirectly from this controversial decision (GAMI ultimately won back the expropriated mills), the cost of the unsuccessful case before an investment tribunal could have been, for the most part, avoided.[150]

Moreover, the contention that foreigners take advantage of international tribunals to the detriment of local institutional capacity is not readily supported by the case study. Such contention, as illustrated by the case study fails to recognize the different factors involved in complex litigation and adjudicative decision-making. In most NAFTA cases, including those involving the sweeteners sector, the same investor (or its local enterprise) pursued domestic remedies before submitting a claim under Chapter Eleven without being required to do so by NAFTA. In the international claims brought against

[149] The reasons for this limitation were clearly expressed in the decisions concerning the expropriating mills. Indeed, the Court admitted that the main problems with compliance with court decision by the Executive branch involved expropriation cases. The timing (6 months before the 2006 Mexican Presidential elections) and some of the arguments made clear that the decision of requiring "prior hearing" the Court attempted to tie the hands to the populist agenda of Mr. López Obrador former mayor of Mexico City and —at the time— front runner in Mexico's Presidential race. *See supra* note 92, at ¶ 102 (changing a long-standing precedent, introducing the prior hearing requirement for conducting valid expropriations and ruled in favor of the owners of expropriated property).

[150] On February 20, 2004 the disputing parties in *GAMI v. Mexico* were informed of the decision that annulled the expropriation of three mills. Given that the Decree was adopted in September 3, 2001, this final decision of the Mexican Court was issued within the 3 year limits to bring a NAFTA claim. For example, in *G.G.S. Howland v. Mexico*, reprinted in J. B. Moore, History and Digest of International Arbitrations to which the United States Has Been a Party (6 vols., Washington, DC: US Government Printing Office, 1898) p. 3227, the Claimants were able to prosecute their international claim notwithstanding an ostensibly favorable Mexican Supreme Court judgment restituting to them a significant quantity of wax which had been wrongfully seized by customs officials. In the international proceeding, the Mexican commissioners argued that the Mexican judgment had finally disposed of the merits of the case. The umpire disagreed and ordered compensation for damages and costs. In the same manner sense, *GAMI* could have waited the Court's decision and either bring a claim against the compensation as a violation of 1105 or its original claim within the 3 year period.

the Tax, the investors forcefully pursued local options prior to bringing the NAFTA claims.[151] While the Decree was being challenged in Mexican courts by several owners of the expropriated mills, GAMI adjudicated the investment claim before an arbitral tribunal.

Arguments exist both in favor of and against extending strategic options to foreign investors by granting direct remedies against states. However, another lesson of the case study is that whatever we think is the right answer to such extension, a distinction remains between the possibilities of national and international decision-makers. This distinction is informed by the respective jurisdictions and mandates, and does not prevent judges and arbitrators from recognizing the existence and some commonalties in their functions.[152] This means that arbitrators may give respectful (or intrusive) consideration to domestic courts as an expression of national law.[153] In *GAMI v. Mexico*, for example, the arbitral tribunal recognized the Supreme Court as a "source of congruent application of national law and the government agencies as guardians of the legitimate goals of policy."[154] Moreover, while referring to the decision that ruled on the expropriation as a matter of Mexican law, the tribunal deferred to the decision of the Court as an authoritative expression of national law.[155] Furthermore, in the *ADM/TLIA v. Mexico* case arising out of the Tax, the tribunal relied on the Supreme Court's decision on the constitutional controversy as evidence of the Mexican Congress' protectionist intent, arguably the main issue of the investment claim.[156]

Conversely, constitutional courts may use international law language and international tribunals' decisions in justifying their findings. For example, in revoking the Decree the Mexican Supreme Court also attempted to unify Mexico's expropriation case law with international law as developed by investor-state arbitration practice. Notably, when ruling on this issue, the Su-

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[151] As discussed in section 2, HFCS producers like CPI Mexico tried, but could not mount a successful challenge in local courts, among others, because the Tax was designed to leave them without legal standing. *See supra* note 109, Supreme Court Decision, CPI Mexico.

[152] *See, e.g., Metalclad v. Mexico*. In such cases whether denial of a construction permit violated the NAFTA Article 1105 depended in part on whether the municipality had authority under Mexican law over hazardous waste matters. In *Azinian v. Mexico*, by contrast, the question of whether a municipality had grounds under Mexican law to repudiate a concession contract had been adjudicated by the Mexican courts, and the tribunal was able to rely on their decisions in rejecting the investor's expropriation claim.

[153] A. M. Slaughter, *Focus: Emerging Fora for International Litigation (Part 2)-A Global Community of Courts*, 44 Harv. Int'l L. J. 191 at 219 ("A global community of courts, animated largely by persuasive authority, personal contacts, and peripatetic litigants, is a more realistic and desirable goal"). For a survey of how the NAFTA offers an opportunity for harmonization of laws in North America, *see* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 Ariz. J. Int'l & Comp. L. 401, 409-414 (1995).

[154] Gami Award at ¶ 41.

[155] *Id.* at ¶ 8.

[156] ADM/TLIA Award at ¶ 146.

preme Court looked at NAFTA and international law to conclude that the requirement of a prior hearing in expropriation: "[…] is also consistent with the principle of non-discrimination for reasons of nationality […] which, as applied to this case, would have led the authorities to grant the national companies, the same conditions provided for foreigners in NAFTA […].[157]

Finally, the interactions between national and international adjudicatory bodies may also work to signal to the domestic legal community the existence of problems in the congruence, transparency and effectiveness of domestic institutions; it may even encourage systematic reforms. For example, in *GAMI v. Mexico*, the tribunal rendered a sharp critique of the administration of the sugar program and the mills expropriation conducted by the Mexican Government.[158] In *CPI v. Mexico*, the formalistic system in Mexico led the tribunal to diplomatically criticize the approach taken by the Mexican courts in rejecting cases brought by the HFCS producers for lack of legal standing.[159] In the years after these cases, the Mexican sugar program was amended[160] and several efforts followed to expand the accessibility, scope and effectiveness of the *amparo* proceedings in Mexico.[161]

These repeated, respectful and coordinated interactions between the Mexican Supreme Court and NAFTA tribunals do not mean that an international system of private right of standing is problem-free. However, a careful analysis of the cases brought under NAFTA shows that the "circumvention" argument made most often by the developmentalists is in fact debatable. Moreover, the case study supports a degree of "dialogue" between domestic and international adjudicatory bodies that requires further analysis and theorizing.[162] Arguably, the outcome observed is animated by adjudicative pragmatism, fluidity and restraint not captured by the debate as framed by devel-

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[157] This is not a sound finding of the Mexican Supreme Court. Although the IIAs signed by Mexico, and also the NAFTA were not the subject-matter of the dispute involving the Decree, the Supreme Court suggested that holding that there was no need of "prior hearing" could lead to the unconstitutionality of such treaties, because they would be granting preferential rights to foreigners over nationals; this based on the incorrect assumption that a due process requirement set forth in the NAFTA, included the Governments' obligation to grant prior hearing to investors in expropriation cases. María Teresita Machado *et al.* AR 1132/2004, S.C.J.N. (pleno) and Fomento Azucarero Mexicano et al., AR 1132/2004, S.C.J.N. (pleno) at http://www.scjn.gob.mx (last accessed June 26, 2009).

[158] Gami Award at ¶ 98.

[159] CPI Award on Liability at ¶ 119 "it would be the triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of sweeteners, precluded it from amounting" to a violation of the NAFTA.

[160] *Ley de Desarrollo Sustentable de la Caña de Azúcar* [L.D.S.C.A.] [Law on the Sustainable Development of Sugarcane] [D.O.] 22 de agosto de 2005 (Mex.).

[161] *See* A Forthcoming Rights Revolution in Mexico? Available in http://www.comparativeconstitutions.org/2011/06/forthcoming-rights-revolution-in-mexico.html (last accessed June 26, 2011).

[162] Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harvard International Law

opmentalists. As I explain below, the debate not only ignores the importance of the rules of coordination between national and international adjudicators but the strategic actions of litigators and the effects of judicial politics and how the choices of theses actors are structured by the institutional setting in which they are made.

B. *Polity and International Adjudicatory Bodies*

There is general agreement in contemporary political science and legal academicians that "institutions matter". However, consensus breaks down when analysis focuses on the outcomes of specific institutional structures. The debate between liberals and developmentalists over the relationship and effects of investor-state tribunals exemplifies this lack of agreement. For liberals, investor-state tribunals (and international adjudicatory bodies in general) are a positive complement to domestic judicial institutions for their ability to "de-politicize" investment disputes, leading to economic policy stability that encourages foreign investment. For developmentalists, the same international alternatives reduce institutional quality because they allow powerful actors to avoid local judicial institutions by relying on supranational adjudication.

The main insight the sweeteners saga brings to this debate is that to explain the relationship between national and international adjudicatory bodies, a proper analysis should address how these supranational bodies affect and disrupt the domestic polity around property rights protection, taxation and business regulation, due process, international affairs etc. This often means understanding the strategic considerations of courts, acting in politicized environments and interested in seeing their decisions stand and not being overruled by political actors. It can also mean understanding that judges can act strategically in the sense that their choices depend on their perceptions about the choices of other actors. Further, it means understanding the strategic decisions of litigants and how their choices and the choices of decision makers are structured by the institutional setting in which they are made. Thus, while the developmentalists' critique misses the point of analyzing investor-state arbitration without acknowledging or over-simplifying the institutional setting with respect to models of accession to international adjudication as well as the litigants' strategic processes, the liberals defense oversimplifies the idea of de-politicization in investment disputes, adamantly defending IIAs without addressing the different ways in which investor-state arbitration actually affects judicial politics around specific normative issues by expanding corrective options to foreign investors.

It is perhaps the lack of that conversation that forms the center of tensions existing among policy analysts, developmental specialists and political science

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Journal 191 (2003). For a similar conclusion in the Mexican context, see Ferrer Mac-Gregor, *supra* note 8, at 425 (referring to "*Diálogo Jurisprudencial*" *[Jurisprudential dialogue]*).

and law academicians on the convenience of supranational adjudication. The complex methodological question at the heart of analyzing this issue involves making sense of many variables, different preferences on outcomes and choices and the strategies available to the actors involved. As identified by Helfer and Slaughter, effective supranational adjudication includes making sense of the autonomous domestic institutions and their responsiveness to different interests.[163]

By looking at the parallel proceedings addressing the same measures through the eyes of both a constitution court and investor-state arbitration tribunals, this work captures the complexity of that endeavor and the importance of conceptualizing international tribunals through administrative and constitutional law lenses. It also shows how the power of international tribunals goes beyond their decisions, or their ability to encourage dialogue, but in their ability to disrupt strategic interactions between different institutions, including local judiciaries, when they exert jurisdiction over claims. This is a delicate task that international tribunals play, especially when analyzing blurred zones of discretion. Accordingly, adventurist arbitrators going beyond the proper scope of their jurisdiction in a sensitive case may disturb the polity, beyond the delegated authority and generate a backlash against supranational adjudication. For example, the decision of the tribunal in the *Cargill v. Mexico* proceeding to compensate for losses suffered by the investor in its capacity as producer and exporter of its product into Mexico will likely trigger this backlash.[164] This decision seems to go beyond the jurisdictional authority of investor-state tribunals and expands the power of these supranational bodies dramatically into a delicate terrain of international trade, an area usually reserved to inter-state relations.[165]

How then can this conversation be enabled by inter-disciplinary academia? One solution could be to complement statistical inference, regression analysis and case studies with rational choice models. Rational choice models have been influential in shaping our understanding of why states enter into investment treaties, but underutilized in analyzing how they affect judicial and institutional politics. To understand ways in which different institutions affect policy outcomes and strategic decisions, centuries ago constitutional writers introduced the concept of veto players. The veto player concept stems from the idea of "checks and balances" in classic constitutional texts of the eighteen and nineteen century.[166] Prior analyses relying on veto player models

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[163] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 278 (1997).

[164] Mexico v. Cargill, Incorporated, 2011 ONCA 622.

[165] Mexico v. Cargill, Incorporated, Factum of the Appellant, Court of Appeal File No. C52737. According to Mexico this decision will allow small investment to convert losses suffered by production facilities in one NAFTA country into losses suffered by the small investment in another NAFTA country.

[166] A veto player is an individual or collective actor whose agreement is required for a

provide some insight of how policy stability in certain areas leads to the inability of governments to change the *status quo*, even when such changes are necessary or desirable.[167]

Academicians should understand and explore the trade-offs created by supranational adjudication bodies. Investor-state arbitration may be effective to spawn economic policy stability, to animate investment decisions and to institutionalize diplomatic affairs. Yet, it may also effect in domestic institutions by delegating jurisdiction to and concentrating power in a limited pool of international experts in *international* dispute settlement. The case study illustrates the need to empirically assess these trade-offs and understand how by extending or limiting the reach of its delegated authority, by exercising or declining its competence and jurisdiction, by consolidating or splitting common claims, for example, investor-state tribunals act similarly to veto players affecting, among others, judicial politics around specific issue areas. In this context, if fostering a constructive dialogue between national and supranational decision-makers is a desirable outcome, the debate over the rules of coordination and access to investor-state arbitration seems to assume greater importance. Researches should include in this analysis the complexities of different models of accession, and the strategies that the models may spawn, aware of the institutional setting in which are made and the specific context of treaty negotiations.

IV. Revisiting the Debate of the Rules of Accession to Supranational Adjudication

In commemoration of Chapter Eleven's tenth birthday, Professor Bjorklund stated that "[a]s arbitrations multiply, the wisdom of having waived the local remedies rule will likely become over more questionable."[168] She considered the "blanket waiver with respect to an undefined class of prospective cases"[169] an unwise decision of the NAFTA governments. Consequently, Professor Bjorklund advocates "[r]estoring a local remedies rule that includes a reasonable, but strict time-frame for those remedies to ensue, or provides a reasonable tolling period of the statute of limitations, while still maintaining a right for an individual to bring a claim directly should those remedies fail, and argues that such a rule has the potential to balance the rights of investors against the rights of state parties."[170]

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change in policy. While investor state tribunals do not have powers to. See Lijphart, Patterns of Democracy (New Haven: Yale University Press, 1999).

[167] G. Tsebelis, *Decision Making in Political Systems: Veto. Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25.3 British Journal of Political Science 289-325 (1995).

[168] Bjorklund, *supra* note 20, at 285.

[169] *Id.*

[170] *Id.*

In spite of the skepticism towards NAFTA's "no-U-turn" model, the evidence presented here suggests that restoring the local remedies rule is not a pressing reform to Chapter Eleven of NAFTA. For Mexico, the least developed country of the three parties, the measures challenged before arbitral tribunals had been challenged also in domestic courts. Investor-state has been used as a remedy of last resort and cases did not multiply as predicted in spite of an "investor-friendly" model which gives foreign investors enough flexibility to bypass domestic courts.

What seems therefore counterintuitive is that NAFTA's "investor-friendly" model is compatible with an extensive use of local remedies, an outcome of special interest for development scholars. The reason may be that investor-state arbitration under NAFTA is well calibrated and supports the possibility of litigation strategies consisting in pursuing available remedies at both levels, domestic and international. The two different levels can indeed coexist under a model that focuses on proceedings with respect to a same *measure* as oppose to proceedings regarding a same *dispute*.[171] Moreover, allowing three years from the date when the investor should have discovered the breach and injury to bring a claim permits investors to seek remedies before domestic courts without statute of limitation concerns. Canadian investors, for example, took advantage of the three-year rule and filed suits in the U.S. federal courts challenging domestic law, and then subsequently alleged the same measure to be a violation of NAFTA.[172] Thus, the flexibility of bringing national claims without distressing a claim for damages under Chapter Eleven may facilitate the use of a national court during that three-year period. Moreover, by limiting the jurisdiction of an arbitral tribunal to damages resulting as a consequence of a breach of NAFTA, if the breach affects an interest protected by NAFTA itself, domestic courts' retain their broader jurisdictional mandate, an element of special interest to the parties involved in the negotiations of the Agreement.[173]

From a policy perspective, it is important to not treat lightly the debate over the forms of accession to investor-state arbitration. If the preferred outcome is the use of local remedies prior to the submission of international claims, policy-makers should excerpt some lessons from NAFTA or the trea-

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[171] *Cfr.* Ch. H. Brower, II, *Structure, Legitimacy, And Nafta's Investment Chapter*, 36 Vanderbilt Journal of Transnational Law 37 at ¶ 59: "[…] tribunals are overstepping their mandates by acceding to the extravagant claims […] Chapter 11 introduces a sort of constitutional indeterminacy by establishing no clear division of labor between tribunals, municipal courts, and the Free Trade Commission."

[172] Greg Anderson, *Can Someone Please Settle this Dispute? Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and the WTO,* 5 The World Economy, May 29, 2006 at 585-610.

[173] *Azinian, Davitian & Boca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, NAFTA Award of 1 November 1999.

ties that reproduce this model.[174] Scholars may compare and contrast with other models of accession such as fork-in-the-road or eighteen-months-rule, and how the different models affect the incentives to litigate cases in domestic courts. This admittedly requires greater understanding of the strategic considerations involved in litigation and the institutional settings involved.

From a doctrinal perspective, arbitral tribunals disappointed by the expansive use of investor-state arbitration without first addressing the dispute in domestic courts should be discouraged from improperly incorporating the local remedies rule into the substantive standard of the violation.[175] This approach is problematic because it would reinstate the local remedies rule that, in most cases, was waived by a state subject to certain specific conditions.[176] However, in analyzing the importation of a provision containing the consent to arbitration through an MFN clause, tribunals too should understand investor-state arbitration as a strategic option in dispute settlement in comparing the treatment. This option should be understood in its institutional context subject to specific conditions and as a product of negotiations of different interests and, in many occasions, calibrated to incentivize certain strategic decisions in complex, politically-charged litigation. Thus, it should not be presumed that this balance can be easily disrupted by an investor selecting at will from an assorted menu of options provided in other treaties, negotiated with other State parties and in other circumstances. Uncritically allowing investors to import the advantageous aspects of dispute settlement provisions denies the important and contextual facets of the specific models of accession to arbitration and its consequence for the dialogue between national and international institutions. Improperly importing even simply a time limit

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[174] The exception correspond to the cases brought under the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA). These cases are Railroad Development Corporation v. Republic of Guatemala (ICSID Case No. ARB/07/23); Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12); and Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, (ICSID Case No. ARB/09/17). Information *available at* http://icsid.worldbank.org/ICSID/FrontServlet. The model under CAFTA requires a similar version of the waiver to initiate or continue any proceeding with respect to any measure alleged to constitute a breach of CAFTA. *See* Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, Hein's No. KAV 7157 Article 10.18.

[175] *Parkerings-Compagniet AS v. The Republic of Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007. (In Parkerings v. Lithuania, the claimant argued that by repudiating an agreement for the management and operation of the public parking system of Vilnius City, the respondent expropriated claimant's investment. The tribunal decided that only if the investor was deprived, legally or practically, of the possibility to seek a remedy before the appropriate domestic court, could the tribunal decide whether the taking occurred. Since respondent showed no objective reason not to bring a case before a Lithuanian domestic court, the tribunal dismissed the claim.)

[176] Ch. Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 The Law and Practice of International Courts and Tribunals 1 (2005).

from one mechanism into the other may completely change the incentives of the litigants, expanding the power of international tribunals beyond their delegated authority.

Finally, investor-state tribunals have an important role but are granted limited jurisdiction. In this important role, tribunals have the potential of affecting judicial and institutional politics. The derogation of the local remedies rule via IIAs has added more pressure to cement our understanding of the rules that coordinate the interaction between national courts and international dispute settlement mechanisms. These rules, like the local remedies rule have important consequences to domestic institutions. Looking at this debate from a constitutional and administrative law perspective enables our understanding of supranational adjudicators as part of a transnational epistemic community acting as new veto players. These new veto players, in many cases, affect institution in charge of politically-charged matters such as constitutional courts.

V. Conclusions

The debate between liberal and developmentalist scholars over the effects of investor-state tribunals in domestic institutions is another attempt to systematize our understanding of the transformative goals and the developmental effects of international law. This debate evidences how international law must balance claims seeking respect for national institutions against the need for sustaining stability, neutrality and expertise in an increasingly globalized environment. Just as NAFTA Chapter Eleven has given scholars and practitioners the opportunity to explore this intricacy of international law, the Mexican sweeteners saga has given several possibilities to understand more deeply how international and domestic institutions interact and affect each other.

The question of the relationship between domestic courts and international tribunals is not only of academic interest; it has practical, doctrinal and policy implications. While statistical meta-analysis has an incredible value and potential for improving and render clarity to this debate, some quantitative research in international economic law may miss the complexities of law in action demonstrated in this article. Thus, empirical scholars should resist the temptation of taking seemingly similar international treaties without understanding the internal legal/institutional context. This is by no means a claim against well-crafted empirical research, but a call to complement quantitative research with careful case studies and rational choice models. Moreover, in understanding the balance between the developmental and transformative goals of international law, legal scholars could benefit from the constitutional and administrative law approaches to international law evidenced in this analysis.

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