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**Waiver of Right to Other Proceedings
as a Condition to State's Consent
in Investor-State Arbitration**

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Professor Zachary Douglas QC

Małgorzata Judkiewicz

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**UNIVERSITÉ
DE GENÈVE**
FACULTÉ DE DROIT

THE
GRADUATE
INSTITUTE
GENEVA

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INSTITUT DE HAUTES
ÉTUDES INTERNATIONALES
ET DU DÉVELOPPEMENT
GRADUATE INSTITUTE
OF INTERNATIONAL AND
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Małgorzata Judkiewicz

Małgorzata Judkiewicz

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Abbreviations

BIT	Bilateral Investment Treaty
CAFTA-DR	Dominican Republic – Central America Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement negotiated between Canada and the European Union
EU	European Union
FIPA	Foreign Investment Promotion and Protection Agreement
FTA	Free Trade Agreement
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
NAFTA	North American Free Trade Agreement
TTIP	Transatlantic Trade and Investment Partnership negotiated between the EU and the US

1. Introduction

With today's proliferation of international investment agreements investors are given many opportunities to protect their investments and to bring claims against host States. Not only can they avail themselves of the protection available in the domestic law or in a contract with the State or state-owned entity, but they can also initiate disputes under relevant investment treaties. Elaborate corporate structuring may result in investors and their affiliated companies bringing multiple disputes under various investment treaties, even though each claim is based on the same actions of the State.

This can lead to conflicting decisions of different adjudicators as well as to a rise in costs for both parties. States intend to avoid such situations by including different procedural tools in the treaties, and conditioning their consent to investment treaty arbitration on certain behaviours of claimants.

One of tools used to avoid multiple proceedings is a waiver provision included in certain investment treaties. It obliges the investor, at the time of submitting a claim to investment treaty arbitration, to waive its right to any other proceedings in relation to the measure alleged to be a treaty breach. In case the claim is brought on behalf of a locally incorporated company, owned or controlled by the investor, the company's waiver is also required.

Unlike with a fork-in-the-road provision, in case of a waiver the investor may pursue domestic and other remedies before treaty arbitration. But in the moment it decides for the latter, there is no turning back. That is why a waiver is also referred to as a 'no U-turn'.

Waiver provisions are found in at least 78 international investment agreements, and their inclusion in several model BITs shows that the number may be rising. This paper is necessarily narrowed to an analysis of the waiver provisions in NAFTA, CAFTA-DR, the US Model BIT and the Canadian Model FIPA, and some BITs that were the basis of claims in cases mentioned herein. At the same time, the aim of this paper is to present a comprehensive study of all investment arbitration cases in the scope that they have dealt with a waiver, in case the Respondent objected to its validity. On the basis of the analysed case law, such issues as the content of the waiver, its timing, or the effects of its invalidity are tackled.

Chapter 2 describes how the same State measure may give rise to multiple proceedings arising under different legal bases, and why such multiplicity should be avoided. It then introduces a waiver provision as one of the tools for avoidance of parallel or multiple proceedings.

Chapter 3 is a proper analysis of the waiver's wording. Firstly, it explains the relationship between waiver of right to other proceedings and the requirement to exhaust local remedies, which used to be involved in cases of diplomatic protection, but is no longer a practice in investor-state dispute settlement. It then describes who is obliged to submit a waiver, to which proceedings the waiver refers, what the relevant timing of submitting a waiver is, and what the waiver's formal and material requirements are. Finally, special reservations added to waivers by some investors are analysed.

As a next step in the waiver's analysis, Chapter 4 focuses on the effects of an invalid waiver and whether such invalidity may be remedied. Finally, in Chapter 5, conclusions are drawn on the basis of the analysed case law.

Since the wording of waiver provisions found in different treaties is similar, interpretations made by some arbitral tribunals as well as those submitted by non-disputing States in case of NAFTA or CAFTA-DR proceedings may shed light on how a waiver should be interpreted and applied.

2. Waiver as a tool for avoidance of multiple proceedings

Investment treaties, such as BITs or FTAs with investment chapters, usually allow aggrieved investors to bring arbitration proceedings against the host State. The dispute settlement provisions in the treaties may contain varied conditions to the State's consent to arbitration. An example of such a provision is the waiver of right to any other proceedings, which an investor has to submit to be able to bring a claim to treaty arbitration. The wording of waiver may differ from treaty to treaty, but its substance stays the same.

This Chapter focuses on the waiver as a procedural tool to avoid multiple proceedings. Firstly, it deals with parallel and multiple proceedings in case of investor-state disputes. Secondly, it explains why such multiplicity is avoided, and what tools can be used in this respect. Finally, it introduces the waiver as one such instrument, and presents where it can be found.

A. Multiplicity of proceedings

The availability of many different dispute settlement mechanisms in relation to the same dispute may lead to parallel proceedings or re-litigation of the same case.¹ Investors may resort to local courts, they may have some other dispute settlement mechanisms negotiated in their contract with a State, and they may be also protected by an investment treaty and a dispute settlement mechanism contained therein. Proliferation of BITs has increased the number of fora in which investors may claim responsibility of the host State.² 'As contract and treaty rights can easily be intertwined, investors may attempt to exercise both simultaneously, giving rise to an unquestionable risk of duplicate proceedings.'³ In case of monist legal systems, where a ratified treaty becomes part of domestic law, a claimant 'could bring claims based explicitly on the treaty standards in multiple fora'⁴.

Additionally, an investor may seek protection under multiple BITs by using complicated corporate structuring of its investment. In such a scenario, there could be two parallel treaty arbitrations concerning the same State's actions, as happened in the *Lauder v Czech Republic*⁵

¹ A. Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration' in I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV, 2008) 114.

² B. Cremades, I. Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 *Arbitration International* 508.

³ *Ibid* 509.

⁴ Z. Douglas, *The International Law of Investment Claims* (CUP, New York 2009) 157.

⁵ *Ronald S. Lauder v The Czech Republic*, UNCITRAL.

and *CME v Czech Republic*⁶ cases. Mr Lauder brought a case under the Czech Republic-US BIT, while CME, in the parent company of which Mr Lauder was a majority shareholder, brought another one under the Czech Republic-Netherlands BIT. Both disputes concerned the ‘conduct of the same executive organ of the Czech Republic in relation to the same investment’⁷.

Sometimes, in case of overlapping disputes, some tribunals may be willing to stay their proceedings, while waiting for the decision made by another dispute settlement body.⁸ However, competing adjudicators typically ignore the parallel cases⁹, or refuse to stay their own proceedings¹⁰.

Parallel proceedings lead to waste of resources and conflicting decisions.¹¹ There can be divergent opinions of different tribunals in relation to the same facts, which was illustrated by cases against Argentina concerning the state of necessity.¹² Even in case of the same investment and State’s actions there are divergent outcomes possible, as happened in the already mentioned CME and Lauder cases.¹³

B. Instruments aiming at avoidance of multiple proceedings

A general tendency to avoid multiple proceedings is confirmed by a selection of instruments addressing multiple disputes between the same parties.¹⁴ Those instruments may be based on international or national law, such as *res judicata* and *lis pendens* doctrines, or they may be treaty-based, as in case of fork-in-the-road and waiver.¹⁵

⁶ *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL.

⁷ Douglas (n 4) 24.

⁸ As illustrated by the case *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6.

⁹ G. Cuniberti, ‘Parallel Litigation and Foreign Investment Dispute Settlement’ (2006) 21 ICSID Review 402.

¹⁰ Douglas (n 4) 390: Arbitrators refused the stay in cases *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 and *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.

¹¹ Cuniberti (n 9) 395; G. Kaufmann-Kohler, ‘Annulment of ICSID Awards in contract and Treaty Arbitrations: Are There Differences?’ in E. Gaillard, Y. Banifatemi (eds), *Annulment of ICSID Awards* (IAI Series on International Arbitration No. 1, 2004) 11; M. Waibel, A. Kaushal (eds) *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 115; J. Shookman, ‘Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis’ (2010) 27 Journal of International Arbitration 362.

¹² Waibel, Kaushal (n 11) 116.

¹³ *Ibid* 117.

¹⁴ G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M. M. Mbengue, ‘Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium held on 22 April 2006’ (2006) 21 ICSID Review 65.

¹⁵ *Ibid*, 66.

Lis pendens applies when two or more claims are pursued at the same time. In case of domestic court proceedings, when a claim is pending in one court, any other court will not entertain it, unless the first court seised declares itself without jurisdiction. The situation in international investment arbitration is different in that there is no organised system of adjudicative bodies which would be obliged to take each other into consideration. *Lis pendens* is only ‘supposed to apply to parallel proceedings before equally legitimate authorities’¹⁶.

Res judicata refers to subsequent cases, when the same claim is brought before an adjudicative body, even though it has already been decided. It prevents the same dispute from being relitigated.¹⁷

However, a problem with the application of the doctrines of *litis pendentis* and *rei judicatae* is the required strict identity of action between the two or more proceedings. The identity of action involves identity of the parties, of the subject matter and of the object of the proceedings.¹⁸ That is why these doctrines may not serve for the avoidance of multiple investor-state proceedings, where the State may be sued under a treaty, while a state agency may be sued under a contract, and both actions will relate to the same factual situation. There may also be multiplicity of the claimants, such as the locally incorporated company, and foreign controlling companies, depending on the corporate structuring of the investor and its investment.

Treaties contain various instruments aimed at avoiding multiplicity of actions, such as fork-in-the-road or waiver provisions.¹⁹ Fork-in-the-road is a provision the aim of which is to make the investor choose between the litigation of its claims in domestic courts of the host State and international arbitration. Once made, the choice is final.²⁰ Such clauses are common above all in the US BITs²¹, especially those signed before 2004.²²

For the fork-in-the-road to have effect, the dispute between the same parties has to be the same.²³ That is why not all court proceedings, in which the investor may appear, will be equivalent to the choice precluding international arbitration.²⁴ Fork-in-the-road would not be

¹⁶ Shookman (n 11) 363.

¹⁷ Cremades, Madalena (n 2) 519.

¹⁸ C. McLachlan, *Lis Pendens in International Litigation* (Hague Academy of International Law, Martinus Nijhoff Publishers, Leiden/Boston 2009) 112.

¹⁹ Kaufmann-Kohler (n 11) 10.

²⁰ C. Schreuer, ‘Travelling the BIT Route, of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 *Journal of World Investment & Trade* 239-240.

²¹ *Ibid* 240.

²² The US in its 2004 Model BIT abandoned a fork-in-the-road provision and replaced it with a waiver. See 8, below.

²³ Organization for Economic Cooperation and Development, ‘International Investment Perspectives: 2006 Edition’ (OECD 2006) 205.

²⁴ Schreuer (n 20) 240-241.

useful either to avoid two parallel arbitration proceedings, as the *CME* and *Lauder* cases, because the Claimants in both cases were different. Not to mention that the two disputes were based on two different BITs – in such a case a fork-in-the-road provision in one hypothetical BIT would not be binding on proceedings under another BIT.

Due to absence of party and cause of action identity the conditions for the operation of the fork-in-the-road provision cannot be found. This will be the case where the court dispute has been brought by the investor's locally incorporated company, while the BIT proceedings are initiated by the investor itself. Or when in the local proceedings the defendant is a state-owned company, even though its actions might be later attributed to the State in a BIT arbitration. Thus, a fork-in-the-road provision may easily be circumvented and the investor may still be allowed 'two bites at an apple'.

Another tool aimed at avoidance of multiple disputes and duplication of remedies is the waiver of right to other proceedings.²⁵ Unlike with a fork-in-the-road, in case of the waiver, the investor does not lose the right to international arbitration if it first submits the dispute to local courts. However, once it decides to go to treaty arbitration, it has to abandon and not to initiate new proceedings in any other fora. Thus, the arbitral tribunal does not 'have to contend with parallel proceedings'²⁶. The waiver is also known in the literature as the 'no U-turn'.²⁷ It fulfils the same aim as the fork-in-the-road, but in a more effective manner.²⁸

Since a waiver does not preclude multiple proceedings entirely – because investors may resort to courts prior to bringing a claim to treaty arbitration – it is considered to put more emphasis on encouraging resort to local remedies than on avoiding multiple proceedings at all.²⁹ The three year limitation period since the discovery of the breach under NAFTA would also confirm this, as it permits investors 'to seek remedies in domestic courts for some time without limitation concerns'³⁰.

²⁵ M. N. Kinnear, A. K. Bjorklund, J. F. G. Hannaford (eds), *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) 1121-11; K. P. Sauvant (ed), *Yearbook on International Investment Law and Policy, 2008-2009* (OUP, New York 2009) 46.

²⁶ McLachlan (n 18) 267.

²⁷ K. Yannaca-Small (ed), *Arbitration Under International Investment Agreements. A Guide to the Key Issues* (OUP, 2010) 29; S. Puig, M. Kinnear, 'NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration' (2010) 25 ICSID Review 230.

²⁸ Ibid.

²⁹ K. J. Vandeveld, *Bilateral Investment Treaties. History, Policy and Interpretation* (OUP, New York 2010) 767.

³⁰ Puig, Kinnear (n 27) 258.

C. Presence of a waiver provision in different treaties

The oldest international investment agreement in which the waiver can be found is NAFTA³¹. It is considered the most famous and successful regional arrangement concluded at the end of the 20th century.³² Its Chapter 11 covers Investment, and it provides for a dispute settlement mechanism between a Party and an investor from another Party.³³ NAFTA Article 1121 was drafted to manage jurisdictional conflicts³⁴, and to prevent the investor from bringing parallel proceedings.³⁵ It regulates both the claimant's consent and the waiver of right to other proceedings. The 'no-U-turn' concept was first proposed by Canada³⁶, and its wording kept changing during negotiations. The waiver provision for a claim brought by an investor on its own behalf is finally as follows:

A disputing investor may submit a claim under Article 1116 to arbitration only if [...] the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.³⁷

In case of an investor bringing a claim on behalf of its enterprise, i.e. under Article 1117, the waiver has to be submitted both by the investor and the enterprise.³⁸

CAFTA-DR is a free trade agreement negotiated since 2003 between Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the United States, joined in 2004 by the Dominican Republic. CAFTA-DR was signed in 2004 and entered into force on different dates for different states, in the years 2006 and 2007.³⁹ Its Chapter 10 is dedicated to Investment, and it also provides for ISDS. The waiver of the right to other proceedings is contained in Article

³¹ North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (17 December 1992) 32 ILM 289 (1993) (NAFTA).

³² J. W. Salacuse, *The Law of Investment Treaties* (OUP, New York 2010) 100.

³³ Section B – Settlement of Disputes between a Party and an Investor of Another Party.

³⁴ C. Brown, K. Miles, *Evolution in Investment Treaty Law and Arbitration* (CUP, New York 2011) 345.

³⁵ 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' (2000-2001) 69 *Fordham L. Rev.* 2669.

³⁶ Kinnear, Bjorklund, Hannaford (n 25) 1121-4.

³⁷ Article 1121(1)(b) of NAFTA.

³⁸ Article 1121(2)(b) of NAFTA.

³⁹ Organization of American States, Foreign Trade Information System, 'Central America – Dominican Republic – United States, Background and Negotiations' <http://www.sice.oas.org/TPD/USA_CAFTA/USA_CAFTA_e.ASP> accessed 28 July 2015.

10.18, titled ‘Conditions and Limitations on Consent of Each Party’. The fragment concerning the waiver itself is as follows:

2. No claim may be submitted to arbitration under this Section unless [...]
 - (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and
 - (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers
3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.⁴⁰

Similarly worded waiver provision appears in the Canadian Model FIPA and the US Model BIT. Canada 2004 Model FIPA contains the same provision as NAFTA.⁴¹ The same wording was retained in the revised version of the Model FIPA of 2012, though the annex on the standard waiver and consent form was abandoned.⁴² Also waiver in Mexico’s Model BIT⁴³ is worded in the same way as in NAFTA.

The USA traditionally included fork-in-the-road provisions in its BITs, instead of adopting the waiver solution found in NAFTA.⁴⁴ The situation changed with the introduction in 2004 of a new Model BIT. One of the novelties contained there was that submission of a claim to local remedies did not preclude submission of the same claim to later investor-state arbitration.⁴⁵ The only requirement when initiating investor-state proceedings is the discontinuance of any other pending proceedings in relation to the measure alleged to constitute a BIT breach.⁴⁶ In this way

⁴⁰ Article 10.18(2) and (3) of CAFTA-DR.

⁴¹ Kinnear, Bjorklund, Hannaford (n 25) 1121-12.

⁴² C. Titi, ‘The Evolving BIT: A Commentary on Canada’s Model Agreement’ (26 June 2013) available at <<https://www.iisd.org/itn/2013/06/26/the-evolving-bit-a-commentary-on-canadas-model-agreement/>> accessed 29 July 2015.

⁴³ Mexico’s Model BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2860>> accessed 29 July 2015.

⁴⁴ W. S. Dodge, ‘National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter Eleven of NAFTA’, (1999-2000) 23 *Hastings International & Comparative Law Review* 371.

⁴⁵ K. J. Vandeveld, *U.S. International Investment Agreements* (OUP, New York 2009) 106; K. J. Vandeveld, ‘A Comparison of the 2004 and 1994 US Model BITs’ (2009) 046 *Yearbook on International Investment Law and Policy* 2008–2009 312.

⁴⁶ 2004 US Model BIT, Article 26(2).

the Model BIT resigned from a fork-in-the-road and switched to a waiver provision. The Model BIT analysed in this thesis is the subsequent one, from 2012.

Since the waiver provision was included in the model investment treaties of the USA and Canada, it also appears in numerous treaties signed by each of these two States. It can be found in at least 78 international investment agreements, be it BITs or FTAs with investment chapter.⁴⁷

A waiver provision may be found in the text of CETA, a treaty negotiated between Canada and the EU, which is now in the process of discussion and approval by the EU and Canadian law makers.⁴⁸

A similar provision can be found in another recently negotiated agreement, the EU – Singapore FTA⁴⁹, under article titled Conditions to the Submission of Claim to Arbitration. A claimant that brings a claim to arbitration is obliged to withdraw any pending claims submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the FTA. The claimant also has to declare that it will not submit such a claim before a final award has been rendered.⁵⁰ In case of having submitted a claim to another international tribunal, it has to withdraw it and declare it will not submit such a claim in the future.⁵¹ The ‘claimant’ includes an investor and its locally established company.⁵²

Inclusion of a fork-in-the-road or a waiver provision in TTIP was mentioned by the EU Commissioner for Trade at a meeting of the International Trade Committee of the European Parliament, where she tackled the relationship between ISDS and domestic legal systems.⁵³ In a Concept paper that the European Commission presented in May 2015⁵⁴ it was confirmed that parallel claims should be prohibited, and the waiver provision was presented as a way to achieve such a result. Even though the European Parliament recommended replacing the ISDS system

⁴⁷ See Annex I.

⁴⁸ European Commission’s website <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> accessed 1 August 2015; the consolidated text is available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 1 August 2015; waiver is found in Article X.21: Procedural and Other Requirements for the Submission of a Claim to Arbitration.

⁴⁹ European Commission’s website <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/>> accessed 31 July 2015. The text of Chapter Nine Investment can be found at <http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf> accessed 31 July 2015.

⁵⁰ Article 9.17(1)(f).

⁵¹ Article 9.17(1)(g).

⁵² Article 9.17(2).

⁵³ European Union, ‘Speech by Cecilia Malmström, Commissioner for Trade at the Meeting of the International Trade Committee of the European Parliament’ (Brussels 18 March 2015) 4.

⁵⁴ C. Malmström’s Blog Post ‘Investments in TTIP and beyond - towards an International Investment Court’ <http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en> accessed 31 July 2015; the text of the Concept paper can be found here: <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 31 July 2015.

in the TTIP with a new system with publicly appointed, independent professional judges in public hearings and with an appellate mechanism⁵⁵, the final decision will be taken by the Commission. In case the ISDS system is adopted within the TTIP, a waiver provision may play an important role in avoidance of multiple proceedings.

⁵⁵ European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)), <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN>> accessed 31 July 2015.

3. Analysis of waiver provisions

This Chapter deals with the construction of waiver, by analysing the wording of relevant provisions found in NAFTA, CAFTA-DR, the 2004 Canadian Model FIPA, and the 2012 US Model BIT. When an award or a decision under analysis was made in a case brought on the basis of a different treaty, the wording of the pertinent provision is also analysed, to the extent required by a given subject.

This Chapter begins with an analysis in Section A of the relationship between the waiver of right to other proceedings and the requirement to exhaust local remedies, which generally is no longer a practice in ISDS. Section B deals with persons obliged to submit the waiver. Section C describes to which proceedings the waiver refers, mentioning as well the exception of proceedings for injunctive or declaratory relief sought in the host State's courts. Section D deals with the timing of the waiver. Finally, Section E explains the formal and material requirements to be fulfilled for the waiver to have effect. It also tackles the issue of the importance and effect of any reservations investors sometimes include in their waiver.

A. The waiver and the duty to exhaust local remedies

Exhaustion of local remedies is one of the requirements of diplomatic protection. The State of the injured person generally cannot exercise diplomatic protection until the person has exhausted the local ways of redress, as reflected in Article 14 of the Draft Articles on Diplomatic Protection⁵⁶. However, investment treaties usually grant investors direct rights against the host State, and therefore they differ from diplomatic protection, exercised on a state-to-state level. Settlement of disputes between an investor and the host State grants the investor direct access to arbitration.⁵⁷

Some treaties expressly exclude the need for exhaustion of local remedies, while others prescribe a time during which local remedies have to be pursued.⁵⁸ Some treaties, on the other hand, allow for bringing a claim to arbitration only after it had been decided by the host country's courts – this is an approach taken in Romanian BITs in the 1970s and in Chinese BITs.⁵⁹

⁵⁶ United Nations Draft Articles on Diplomatic Protection, 2006, available at <<http://www.refworld.org/docid/525417fc4.html>> accessed 5 July 2015.

⁵⁷ R. Dolzer, C. Schreuer, *Principles of International Investment Law* (OUP, Oxford 2012) 236.

⁵⁸ M. Sornarajah, *The International Law on Foreign Investment* (CUP, New York 2010) 322.

⁵⁹ Salacuse (n 32) 385.

In case of NAFTA, it is argued that the waiver provision in Article 1121 is ‘best read as waiving the local remedies rule as a procedural requirement’⁶⁰. Though its language does not explicitly mention waiver of local remedies, ‘the requirement that the investor “waive its right to initiate or continue” actions in local tribunals can only with difficulty be interpreted as other than an implicit waiver’⁶¹. Because the language of the waiver provision in the Canadian Model FIPA is comparable to NAFTA, it can be assumed that here as well the waiver serves as an implicit waiver of the exhaustion of local remedies rule.⁶²

Since the waiver provisions found in CAFTA-DR and the US Model BIT are also comparable to that in NAFTA, it is assumed that those treaties do not require exhaustion of local remedies or at least that they implicitly waive this requirement. A commentary on the US Model BIT confirms that while the ‘no U-turn’ provision encourages use of domestic remedies, it should not be confused with requiring the investor to exhaust local remedies.⁶³

Arbitral tribunals have considered that there is no need for the claimant to exhaust local remedies, if there is no express requirement of exhaustion in the investment treaty.⁶⁴ The Tribunal in *Waste Management v Mexico II*⁶⁵ case confirmed that ‘In common with almost all investment treaties, there is no requirement of exhaustion of local remedies’⁶⁶ in NAFTA.

The relationship between the rule of exhaustion of local remedies and the waiver of right to other proceedings was under scrutiny of various arbitral tribunals. In the *Marvin Feldman v Mexico*⁶⁷ case under NAFTA the Tribunal said that ‘in contrast to the local remedies rule, Article 1121(2)(b) gives preference to international arbitration rather than domestic judicial proceedings, provided that a waiver with regard to the latter is declared by the disputing investor’⁶⁸. The Tribunal further confirmed that Article 1121 is a special rule on the relationship between domestic and international proceedings, and a departure from the rule of exhaustion of local remedies.⁶⁹

⁶⁰ Dodge (n 44) 360.

⁶¹ A. Bjorklund, ‘Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence’ in T. Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational, New York 2004) 261.

⁶² C. Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP, Oxford 2013) 110.

⁶³ Ibid 829.

⁶⁴ Douglas (n 4) 29.

⁶⁵ *Waste Management, Inc. v United Mexican States II*, ICSID Case No. ARB(AF)/00/3.

⁶⁶ *Waste Management v Mexico II* (n 65) (Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings) [30]; similarly in the Award, where the Tribunal stated that the exhaustion of local remedies, as a procedural prerequisite for bringing an international claim, is dispensed with by NAFTA Chapter 11 (Award) [116].

⁶⁷ *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1.

⁶⁸ *Marvin Feldman v Mexico* (n 67) (Award) [73].

⁶⁹ Ibid.

Where the exhaustion of local remedies was directly at stake was in the *Loewen v USA*⁷⁰ case. A Canadian investor did not appeal the trial court judgment against its US partner, because it could not afford paying \$625 million of an appellate bond, which equalled 125% of the horrendously high damages awarded by the jury. The investor settled its case with the business partner, but brought a claim against the US under NAFTA, concerning denial of justice. Loewen tried to construe Article 1121 NAFTA as allowing it to bring such a claim without having exhausted the local remedies.⁷¹

The Respondent objected stating that the Mississippi court judgments complained of ‘cannot give rise to a breach of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system’⁷². Mexico, in its Non-Disputing Party’s submission under Article 1128 of NAFTA, agreed with the view of the US ‘that the operation of the legal system as a whole, not only the act of the inferior court in the instant case, must be examined before it can be said to be in breach of its international obligations’⁷³.

The Tribunal drew a distinction between the procedural rule of exhaustion of local remedies and the substantive rule of judicial finality. The latter requires a final and binding judgment before a State will be held responsible for the acts of its courts.⁷⁴ It was just too early for international responsibility of the USA to have arisen for a denial of justice claim, as Loewen had not used its right to appeal, and so not the whole judicial procedure was exhausted. Therefore, to assign a breach of international obligation to the State would amount to judge its local courts.

The Tribunal determined that Article 1121, although its precise purpose ‘is not altogether clear’⁷⁵, ‘involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act’⁷⁶.

Despite the fact that exhaustion of local remedies is generally not a requirement for access to investor-state dispute settlement offered in BITs⁷⁷, a situation which may require exhaustion of local remedies is when the claim is for denial of justice.⁷⁸ The principle is that a court decision

⁷⁰ *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3.

⁷¹ *Loewen v USA* (n 70) (Award) [145].

⁷² *Ibid* [41].

⁷³ *Loewen v USA* (n 70) (Mexico’s Article 1128 Submission) [15].

⁷⁴ C. Jones, ‘When Does the Waiver Provision in NAFTA Article 1121 Have Consequences? An Analysis of the Situation Considered, Yet Left Unresolved, in *Loewen Group, Inc. v United States*’ (2006) 15 *Currents Int’l Trade L.J.* 3.

⁷⁵ *Loewen v USA* (n 70) (Award) [161].

⁷⁶ *Ibid* [164].

⁷⁷ Vandeveld (n 45) 680.

⁷⁸ *Ibid*.

which can still be challenged in a higher instance does not amount to a denial of justice.⁷⁹ The claim against the state may only arise if the whole judicial process has been exhausted.

To conclude, the waiver of right to other proceedings can be treated as an implicit waiver of the requirement to exhaust local remedies. The only exception is in cases concerning denial of justice, where the whole domestic procedure has to be exhausted for a claim of denial of justice to arise.

B. Persons obliged to submit a waiver

NAFTA, CAFTA-DR, the US Model BIT and the Canadian Model FIPA stipulate that the investor is obliged to submit a waiver whenever it brings a claim to international arbitration. The situation between those treaties and models differs when an enterprise owned or controlled by the investor comes into play.

In NAFTA, when the investor brings the claim on its own behalf, but the claim is ‘for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly’, the waiver must be made by both the investor and the enterprise.⁸⁰ If the investor brings a claim on behalf of an enterprise, the waiver has to be made also by both the investor and the enterprise.⁸¹

Exactly the same solution is adopted in the Canadian Model FIPA – an investor and its enterprise are both obliged to submit a waiver when the case is brought by investor on its own behalf but regarding a loss in the enterprise⁸², and when it is brought by the investor on behalf of the enterprise⁸³.

As can be seen, NAFTA and the Canadian Model FIPA distinguish three situations:

1. an investor submitting a claim on its own behalf when it has incurred damage;
2. an investor submitting a claim on its own behalf when its enterprise has incurred damage;
3. an investor submitting a claim on behalf of the enterprise.

In the second and third cases the waiver has to be submitted both by the investor and the enterprise.

⁷⁹ C. McLachlan, L. Shore, M. Weiniger (eds), *International Investment Arbitration, Substantive Principles* (Oxford International Arbitration Series, OUP, New York 2007) 231.

⁸⁰ Article 1116 (Claim by an Investor of a Party on Its Own Behalf) together with Article 1121(1)(b) of the NAFTA.

⁸¹ Article 1117 (Claim by an Investor of a Party on Behalf of an Enterprise) together with Article 1121(2)(b) of the NAFTA.

⁸² Article 22 together with Article 26(1)(e) of the Model FIPA.

⁸³ Article 23 together with Article 26(2)(e) of the Model FIPA.

CAFTA-DR regulates the issue differently. It foresees two situations – under Article 10.16(1)(a) the claimant on its own behalf submits a claim that the respondent breached its obligation and the claimant has incurred loss or damage resulting out of it; it then submits a waiver⁸⁴. In the second scenario, under Article 10.16(1)(b) the claimant, on behalf of an enterprise which it owns or controls, can submit a claim that the respondent breached its obligations and, as a result, the enterprise has incurred loss or damage; then a waiver has to be submitted both by the claimant and the enterprise⁸⁵. Exactly the same approach as that of CAFTA-DR is present in the US Model BIT.⁸⁶

Under NAFTA and the Canadian Model FIPA, if the investor has been deprived of the control of its investment, it is not required to submit a waiver on behalf of the enterprise.⁸⁷ Such a solution is found there, because the waiver is required from the enterprise also when the claim is made by an investor on its own behalf, but it relates to a loss or damage to the enterprise. Consequently, the requirement for a waiver cannot be used by the Respondent State against the investor where the Respondent has deprived the investor of the control of the enterprise.⁸⁸

A similar provision is absent in CAFTA-DR and the US Model BIT, presumably because for claims made by investor on its own behalf a waiver from its enterprise is not required.

In the *TCW v Dominican Republic*⁸⁹ case, the Claimants drew the Tribunal's attention to the differences in wording between the NAFTA and CAFTA-DR waivers. In that dispute, the Respondent contested the validity of the waiver under Article 10.18 of CAFTA-DR, saying that TCW, through its affiliated companies, is pursuing other arbitrations based on the same facts and seeking the same relief.⁹⁰ While TCW brought a claim under CAFTA-DR, its parent company brought one under France-DR BIT, and its subsidiary under a concession agreement, violations of which were also invoked in the CAFTA-DR arbitration.⁹¹ This, in turn, was in violation of the waiver provision.

The position of the Claimants was that the other proceedings were brought by other claimants, who were not party to the CAFTA proceedings. The situation was thus different than

⁸⁴ Article 10.18(2)(b)(i) together with Article 10.16(1)(a) of CAFTA-DR.

⁸⁵ Article 10.18(2)(b)(ii) together with Article 10.16(1)(b) of CAFTA-DR.

⁸⁶ Article 24(1)(a) in conjunction with Article 26(2)(b)(i); and Article 24(1)(b) together with Article 26(2)(b)(ii).

⁸⁷ Article 1121(4) of NAFTA and Article 26(4) of the Canada Model FIPA.

⁸⁸ C. D. Eklun, 'A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes', (1994) 11 *Journal of International Arbitration* 143.

⁸⁹ *TCW Group, Inc and Dominican Energy Holdings, L.P. v The Dominican Republic*, UNCITRAL.

⁹⁰ *TCW v Dominican Republic* (n 89) (Respondent's Memorial on Jurisdiction) [18].

⁹¹ *Ibid.*

in the *Waste Management v Mexico I*⁹² and *RDC v Guatemala*⁹³ cases, upon which the Respondent relied. In those disputes the claim was brought by the investor and its investment, whereas here it was only the investor on its own behalf. Therefore, the fact that the investment was pursuing claims in different fora did not invalidate the waiver.⁹⁴

Also, the Claimants recalled the wording of Article 1116 of NAFTA, which obliges the investor to submit a waiver on behalf of its investment when the loss was made to the latter.⁹⁵ They contrasted it with the relevant provision in CAFTA-DR, namely Article 10.18(2), which requires the Claimants to waive only their own rights, when they submit a claim on their own behalf.

The wording of both treaties suggests that indeed there are differences as to who is obliged to submit a waiver. For the claimant to submit a claim only in its own name and have its affiliated companies pursue claims on different grounds would be in defiance of the purpose of the waiver provision. This might show that the broader wording of NAFTA waiver better serves its purpose. Unfortunately, the Tribunal did not have the chance to make an assessment of the waiver in that case, because the parties to the dispute settled.⁹⁶

Since the waiver has to be submitted by the investor, and – whenever the claim is made on behalf of an enterprise – also by the enterprise, the ‘complete economic investment unit’ is caught within the relevant provision’s purview *ratione personae*.⁹⁷

An interesting situation was faced by the Tribunal in the *EnCana v Ecuador*⁹⁸ case based on the Canada – Ecuador Agreement for the Promotion and Reciprocal Protection of Investments, concluded on 29 April 1996 (the BIT)⁹⁹. The dispute was brought by a Canadian company, EnCana, which alleged that Ecuador had violated the BIT by denying certain VAT relief to EnCana’s subsidiaries.¹⁰⁰ EnCana explained at the hearing that it did not bring the case on behalf of those subsidiaries, because they were Bermudan, not Ecuadorian corporations.¹⁰¹ The Tribunal found it anomalous that subsidiaries incorporated in a third state do not have to waive their right to other proceedings, while those incorporated in Ecuador would have to do it, but

⁹² *Waste Management, Inc. v United Mexican States I*, ICSID Case No. ARB(AF)/98/2.

⁹³ *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No. ARB/07/23.

⁹⁴ *TCW v Dominican Republic* (n 89) (Claimants’ Counter-Memorial on Jurisdiction) [77].

⁹⁵ *Ibid* [78].

⁹⁶ *TCW v Dominican Republic* (n 89) (Consent Award).

⁹⁷ McLachlan (n 18) 268; the author here referred to Article 1121 of the NAFTA, but the remark can also be used in relation to the other analysed treaties and model BITs.

⁹⁸ *EnCana Corporation v Republic of Ecuador*, LCIA Case No. UN 3481.

⁹⁹ Available at <<http://www.treaty-accord.gc.ca/text-texte.aspx?id=101522>> accessed 12 July 2015.

¹⁰⁰ *EnCana v Ecuador* (n 98) (Partial Award on Jurisdiction) [1].

¹⁰¹ *Ibid* [20].

that these were the terms of the BIT – the Bermudan companies were part of the broad definition of investment in Article I(g) of the BIT.¹⁰² The Tribunal considered that EnCana had acted in accordance with the terms of the BIT waiver provision.

The waiver in Article 1121 ‘would not prevent a claimant from a non-NAFTA state party from initiating an arbitration under a contract or BIT for a claim arising from a governmental “measure” that also gives rise to a NAFTA claim by another claimant from Canada, Mexico, or the USA’¹⁰³, because the investor can only waive the right to other proceedings in its own name, and can make its enterprise waive its right. It cannot oblige any other unrelated claimant to do the same. Arguably, since it cannot waive the right of its parent company, a waiver provision would not prevent such company from bringing a claim once the arbitral proceedings initiated by the investor have ended.

Each time the relevant treaty provisions have to be analysed to confirm which persons are obliged to submit a waiver. As a general rule it will be the investor, and – where it submits a claim on behalf of its enterprise – the enterprise. As mentioned, the NAFTA waiver provision is more encompassing than the one in CAFTA-DR, because it requires submission of a waiver by the enterprise also when the claim is brought only by the investor in its own name, but the damage was incurred by the enterprise.

C. Proceedings to which the waiver refers

This Section contains an analysis of the proceedings to which the waiver refers. Those can be any other proceedings brought by the investor or its controlled enterprise in any other forum, whenever they are brought in relation to the same measure as the one complained of in the treaty arbitration.

As mentioned by one of the tribunals, the waiver is not absolute.¹⁰⁴ Its wording confirms that it does not concern proceedings for injunctive, declaratory or other extraordinary relief, which do not involve payment of damages, and which are brought before an administrative tribunal or court of the Respondent. The reason of such an exclusion will be dealt with in this Section.

¹⁰² Ibid.

¹⁰³ P. Muchlinski, F. Ortino, C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford Handbooks Online, OUP, 2012) 1029.

¹⁰⁴ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (Award on Harmac Motion) [16].

i. Any other dispute settlement proceedings

The waiver in NAFTA, in its wording, refers to any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116¹⁰⁵ or Article 1117¹⁰⁶ (i.e. a breach of an international obligation under Section A of Chapter 11 of NAFTA), before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures. Similarly, the waiver in CAFTA-DR refers to any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16 (i.e. a breach of an international obligation under Section A of CAFTA-DR, a breach of an investment authorization or a breach of an investment agreement) before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures. A similar language as in NAFTA and CAFTA-DR is found in the Canadian and US Model BITs.

It can be summed up that, when bringing a claim to treaty arbitration, the investor or the investor and its enterprise, are obliged to waive the right to any other proceedings regarding the ‘measure’ complained of in the treaty arbitration. It is crucial to know what the measure is. In this respect, NAFTA and CAFTA-DR offer definitions of a ‘measure’. In case of both treaties a ‘measure includes any law, regulation, procedure, requirement, or practice’¹⁰⁷. The two Model BITs also provide the same definitions.¹⁰⁸

The Tribunal in the *Detroit v Canada*¹⁰⁹ case described a measure as a discrete, i.e. individual, act.¹¹⁰ It went on stating that if a State discriminates against an investor by ‘successively denying a license, imposing a special tax, and subsidizing a domestic competitor, these constitute separate measures, and need not all be pursued in one forum’¹¹¹.

In its Non-Disputing Party submission under Article 1128 of NAFTA in the *KBR v Mexico*¹¹² case, Canada stated that the long-standing position of the NAFTA Parties is that claimants act consistently with the submitted waiver by abstaining from initiating or continuing domestic proceedings with respect to a measure alleged to breach NAFTA.¹¹³

¹⁰⁵ For claims brought by an investor on its own behalf.

¹⁰⁶ For claims brought by an investor on behalf of an enterprise.

¹⁰⁷ NAFTA, Chapter 2 ‘General Definitions’, Article 201; CAFTA-DR, Chapter 2 ‘General Definitions’, Article 2.1.

¹⁰⁸ Canadian Model FIPA, Section A – Definitions, Article 1 Definitions; US Model BIT, Section A, Article 1: Definitions.

¹⁰⁹ *Detroit International Bridge Company v Government of Canada*, UNCITRAL, PCA Case No. 2012-25.

¹¹⁰ *Detroit v Canada* (n 109) (Award) [304].

¹¹¹ *Ibid.*

¹¹² *KBR, Inc. v United Mexican States*, ICSID Case No. UNCT/14/1.

¹¹³ *KBR v Mexico* (n 112) (Canada’s Article 1128 Submission) [5].

It is also important to distinguish between a measure and a claim. A single measure may give rise to different legal claims, before different courts or tribunals, and based on different legal grounds. For example, under NAFTA ‘a domestic proceeding could co-exist with an arbitration proceeding under NAFTA, where the aim of both proceedings is to challenge exactly the same measure’¹¹⁴. Here the ‘test is not on the juridical nature of the cause of action’, but on the measure giving rise to treaty proceedings.¹¹⁵ Since what is at stake is a measure, then the waiver encompasses both municipal and international claims.¹¹⁶

In case of a discriminatory licensing denial by the State there can arise different legal claims under the treaty and under domestic law – both claims relate to the same measure, even though there may be different causes of action under respective laws.¹¹⁷

The focus on measures instead of claims is not always maintained. The dissenter in the *Waste Management v Mexico I* case concentrated on the latter. In that case Waste Management brought NAFTA proceedings against Mexico for expropriation, and submitted a waiver under Article 1121. However, it made a caveat that the waiver does not apply to any dispute settlement proceedings involving allegations that the Respondent had violated duties imposed by other sources of law, including the municipal law of Mexico.¹¹⁸ At the time of submitting the waiver, there were two pending separate court proceedings initiated by the investor’s enterprise against a state-owned bank, Banobras, for a breach of credit line agreement. The third suit was filed after the date of the waiver by the enterprise against the City Council of Acapulco, claiming damages for breach of a series of obligations under the Concession Agreement.¹¹⁹

The Respondent raised objections to the validity of the waiver, both in relation to its form and content.¹²⁰ The Tribunal considered that the waiver was free of formal defects attributed to it by the Respondent.¹²¹ The majority of the Tribunal, however, found that the Claimant’s and its enterprise’s behaviour was not in compliance with the waiver requirements, because other proceedings were not discontinued, and new ones were initiated.¹²² Therefore, the majority

¹¹⁴ Brown, Miles (n 34) 346.

¹¹⁵ McLachlan, Shore, Weiniger (n 79) 108.

¹¹⁶ Ibid 109.

¹¹⁷ *Detroit v Canada* (n 109) (Award) [303].

¹¹⁸ *Waste Management v Mexico I* (n 92) (Award) [4], [5].

¹¹⁹ Ibid [25].

¹²⁰ Ibid [6].

¹²¹ Ibid [23].

¹²² Ibid [31].

arrived at the conclusion that the waiver was invalid and did not uphold its jurisdiction over the case.¹²³ The dissenter, however, concentrated on the claims, instead of measures.

According to the dissenting arbitrator, an analysis should have been made into whether the local claims were the same as the NAFTA claims, and also the damages sought in both cases could have been compared.¹²⁴ He considered that the claims advanced by Waste Management in the NAFTA proceedings differed from the claims asserted against a state-owned bank and the City Council in the local Mexican actions.¹²⁵ Non-payment under a letter of credit or cancellation of a concession contract, to which the court proceedings related, were governed by Mexican civil law, and not by NAFTA.¹²⁶ Since the claims were different, a waiver submitted by Waste Management should have been considered valid.

Such an approach leads to results contradicting the very purpose of waiver. To allow different claims brought in other fora in parallel to NAFTA proceedings would defeat the objective of having only treaty arbitration in relation to the measure at stake. Acapulco's alleged refusal to pay invoices under the Concession Agreement and Banobras's alleged refusal of payment of those invoices as guarantor for Acapulco are measures giving rise to local court proceedings. They are also measures giving rise to NAFTA arbitration, if they can be attributed to the State. To concentrate on differences of the claims would mean that exactly the same measures will be litigated in Mexican courts and arbitrated before a NAFTA Tribunal at the same time, a situation which the NAFTA Parties wanted to avoid.

The issue of measures and claims was also discussed by the Tribunal in the *RDC v Guatemala* case. In 1997 RDC won an international public bidding for the use of the infrastructure and other rail assets to provide railway services in Guatemala.¹²⁷ It was awarded a 50-year usufruct. Subsequently, FVG, a Guatemalan company owned in 82% by RDC, entered into a contract with the state-owned FEGUA. Through FVG, RDC agreed to make certain payments to FEGUA in return for the right to usufruct.

In 2005 FVG initiated two domestic arbitrations against FEGUA for breach of contract. In the meantime, the Guatemalan Attorney General issued an opinion according to which the usufruct was not in the interest of the country. The Government soon prepared a resolution to declare the usufruct of the rolling stock injurious to the interests of the State. The result of it,

¹²³ Ibid [31], [IV].

¹²⁴ *Waste Management v Mexico I* (n 92) (Dissenting Opinion) [31].

¹²⁵ Ibid [17].

¹²⁶ Ibid [15].

¹²⁷ *RDC v Guatemala* (n 93) (Decision on Objection to Jurisdiction) [6].

the so-called Lesivo Resolution, was adopted in 2006.¹²⁸ Around three months later the Guatemalan Government instituted proceedings against FVG in an administrative court. The Government sought to confirm the Lesivo Resolution, to seize the rolling stock, and to prohibit the general manager to leave the country. FVG intended to defend that action in order to preserve its contractual rights.

In the investment arbitration under CAFTA-DR that RDC brought on its own behalf and on behalf of its enterprise¹²⁹, RDC claimed that Guatemala breached its obligations by adopting the Lesivo Resolution, which constitutes an indirect expropriation under Article 10.7, violates National Treatment obligations under Article 10.3, and the minimum standard of treatment obligations under Article 10.5 of CAFTA-DR.¹³⁰ One of the Lesivo Resolution's aims, according to the Claimant, was to 'make it impossible for FVG to perform under its basic Usufruct'¹³¹.

The Respondent had three objections to the validity of the waiver submitted by RDC. The one relevant for the purposes of this Subsection was that the Claimant had not taken necessary action to give effect to the waiver. Guatemala meant two arbitrations that the investor's enterprise, FVG, initiated and maintained in Guatemala against FEGUA.¹³²

The Tribunal proceeded to compare whether the measures in the domestic arbitrations were those alleged to constitute a breach referred to in Article 10.16 of CAFTA-DR, and, if so, what was the effect on the validity of the waiver and the Tribunal's jurisdiction.¹³³

In the investment arbitration the alleged violation of the minimum standard of treatment under Article 10.5 CAFTA was related to the so-called Lesivo Resolution.¹³⁴ The measures at issue in the domestic arbitrations were related to this Resolution too. The Tribunal began an analysis whether this affected the validity of the whole waiver or only of some part of it.¹³⁵ Instead of concentrating on the measure, it focused on the meaning of the word 'claim' in Article 10.18.

The problem with the 'claim' is that, according to the Respondent, it refers to the whole action brought by an investor. According to the Claimant, however, 'a claim submitted to

¹²⁸ Ibid [12].

¹²⁹ Under both Article 10.16 and Article 10.17 of CAFTA-DR.

¹³⁰ *RDC v Guatemala* (n 93) (Notice of Intent of 13 March 2007) [18].

¹³¹ Ibid.

¹³² *RDC v Guatemala* (n 93) (Decision on Objection to Jurisdiction) [18].

¹³³ Ibid [48].

¹³⁴ Ibid [52].

¹³⁵ Ibid [62].

arbitration may contain multiple claims¹³⁶, and each of them should undergo the scrutiny separately. It follows that if there was an overlap between one of the claims and the local arbitrations, the waiver could still be effective in relation to the rest of the claims. The Tribunal sided with the latter view. It decided that the waivers submitted by the Claimant were ‘valid in respect of claims arising out of the Lesivo Resolution and the subsequent conduct of the Respondent pursuant to that resolution’¹³⁷.

However, the result of the Tribunal’s analysis might have been different, had it concentrated on the measures instead of on the claims. The two local arbitrations of FVG against FEGUA had been brought before the adoption of the Lesivo Resolution. They were brought because of alleged breaches of contracts, on the basis of the contractual dispute resolution clauses. The Lesivo Resolution may be perceived as a confirmation of actions previously undertaken against FVG, the aim of which was not to fulfil the contractual obligations. Therefore, even though the claims were different, it can be assumed that the measures at stake were the same. The Government’s actions, confirmed later by the Lesivo Resolution, could be deemed the measure at stake both in the local arbitrations and the CAFTA-DR proceedings.

To conclude the subject of this Subsection, any other dispute settlement proceedings refer to any litigation or arbitration fora, where the investor or its enterprise could resort on any legal basis, be it a treaty, contract or domestic law. Since any of the mentioned bases can provide for a different dispute settlement mechanism, an investor could simultaneously submit various disputes, invoking a different basis in each forum. That is the reason why the waiver has to be submitted in relation to the measures at stake, and not their legal basis. As the Tribunal in the *Thunderbird v Mexico*¹³⁸ case stated, the waiver ‘serves 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’¹³⁹.

ii. Exception made to proceedings not involving monetary damages at the courts and tribunals under the law of the Disputing Party

Article 1121 of NAFTA and Article 26 of the Canadian Model FIPA carve out of the waiver the ‘proceedings for injunctive, declaratory or other extraordinary relief, not involving the

¹³⁶ Ibid [66].

¹³⁷ Ibid [75]

¹³⁸ *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL.

¹³⁹ *Thunderbird v Mexico* (n 139) (Award) [118].

payment of damages, before an administrative tribunal or court under the law of the disputing Party'¹⁴⁰. CAFTA-DR and the US Model BIT stipulate that the waiver does not refer to

an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.¹⁴¹

The waiver provisions in the analysed treaties and model BITs 'respect the power of the local courts to grant injunctions and the like'¹⁴². Arbitral tribunals generally cannot order injunctive, declaratory or other extraordinary relief, and that is why these were carved out of the waiver contained in the analysed treaties and model BITs.¹⁴³ Permitting investors to preserve rights to such proceedings helps complementing arbitral proceedings.¹⁴⁴

The Tribunal in *Pope & Talbot v Canada* case described the waiver as not absolute, since it permits the investor 'to seek injunctive and similar relief from the courts and administrative bodies of the disputing NAFTA Party'¹⁴⁵. It also pointed out that the availability of such relief from a NAFTA Tribunal is limited under Article 1134.¹⁴⁶

In the *Canfor v USA*¹⁴⁷ case under NAFTA the Tribunal opined that Article 1121 is 'an express exception to the ordinary relief exclusively available from a Chapter 11 tribunal under Article 1135 (i.e. damages and restitution)'¹⁴⁸.

The proceedings for injunctive or declaratory relief are allowed at the court or tribunal under the law of the Respondent. This apparently obvious stipulation was misunderstood by the Claimant in the *Detroit v Canada* case. When Detroit submitted its first Notice of Arbitration with the First Waiver, it had an ongoing court proceeding against Canada in the USA, the so-

¹⁴⁰ NAFTA, Article 1121(1)(b) and Article 1121(2)(b); Canadian Model FIPA Article 26(1)(e) and Article 26(2)(e).

¹⁴¹ CAFTA-DR, Article 10.18(3); US Model BIT Article 26(3).

¹⁴² McLachlan (n 18) 268.

¹⁴³ Under NAFTA an investor cannot obtain a declaratory award. Pursuant to Article 1135, NAFTA tribunals may award only monetary damages, and any applicable interest, or restitution of property (in which case the Respondent may pay damages and interests in lieu of restitution). Exactly the same wording is found in Article 10.26(1) of CAFTA-DR, in Article 44 of the Canadian Model FIPA and in Article 34 of the US Model BIT.

¹⁴⁴ Kinnear, Bjorklund, Hannaford (n 25) 1121-13.

¹⁴⁵ *Pope & Talbot Inc. v Canada* (n 104) (Award on Harmac Motion) [16].

¹⁴⁶ *Pope & Talbot Inc. v Canada* (n 104) (Award on Harmac Motion) [16]; Article 1134 Interim Measures of Protection:

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.

¹⁴⁷ *Canfor Corporation v United States of America, Tembec Inc. et. al. v United States of America and Terminal Forest Products Ltd. v United States of America*, UNCITRAL

¹⁴⁸ *Canfor v USA* (n 147) (Decision of Preliminary Question, 6 June 2006) [238].

called Washington Litigation. The Claimant expressly carved out this litigation from its waiver, which made the Respondent have an objection to the validity of the waiver, given that the Washington Litigation involved the same measures as the NAFTA proceeding and included a request for damages.¹⁴⁹

The Tribunal made a 2-step analysis. First, it assessed whether the measures at stake in the Washington Litigation and NAFTA arbitration were the same¹⁵⁰, and it decided that they were.¹⁵¹ As a second step, the Tribunal assessed whether the Washington Litigation related only to injunctive, declaratory or extraordinary relief, not involving the payment of damages, before a court under the law of Canada.¹⁵² The Arbitrators found the invalidity of the waiver because the Washington Litigation did contain a request for ‘damages against Canada in an amount to be determined at trial’¹⁵³.

However, the Tribunal went on to analyse what would happen if the Washington Litigation did not involve request for damages, and it came to the conclusion that in any event it would still be deprived of jurisdiction. The reason was that the Washington Litigation was not a proceeding ‘before an administrative tribunal or court under the law of the Disputing Party’.¹⁵⁴ The Disputing Party was Canada, while the Washington Litigation was a proceeding against Canada brought in a third State. Therefore, even if it did not involve request for damages, it would still not qualify as an exception under Article 1121 of NAFTA.

The Claimant tried to argue that ‘under the law of the Disputing Party’ means the applicable law, while it does not contain any reference to the choice of forum.¹⁵⁵ The Tribunal clarified the issue by saying that the last part of Article 1121 ‘is intended to designate the adjudicative bodies operating under the domestic law of the disputing Party’¹⁵⁶, and that ‘the idea of using the applicable law to determine the competent court is implausible’¹⁵⁷.

Mexico, in its submission pursuant to Article 1128, said that Article 1121 prevents the Claimant from simultaneously commencing or continuing proceedings for damages in any other

¹⁴⁹ *Detroit v Canada* (n 109) (Award) [298].

¹⁵⁰ *Ibid* [300].

¹⁵¹ *Ibid* [312].

¹⁵² *Ibid* [313].

¹⁵³ *Ibid* [314].

¹⁵⁴ *Ibid* [315].

¹⁵⁵ *Ibid* [316].

¹⁵⁶ *Ibid* [317].

¹⁵⁷ *Ibid*.

fora, including the US domestic courts, based upon the measure alleged to be a breach of NAFTA.¹⁵⁸

In that case also the USA in its submission under Article 1128 of NAFTA stated:

The United States agrees with Canada and Mexico that the NAFTA Parties intended this exception to be limited to proceedings before an administrative tribunal or court constituted under the law of the disputing Party. This reading is consistent with the NAFTA's negotiating history.¹⁵⁹

The Tribunal concluded that the absence of a valid waiver precluded it from having jurisdiction in the case.¹⁶⁰

¹⁵⁸ *Detroit v Canada* (n 109) (Mexico's Article 1128 Submission) [4].

¹⁵⁹ *Detroit v Canada* (n 109) (USA's Article 1128 Submission) [7].

¹⁶⁰ *Detroit v Canada* (n 109) (Award) [320].

D. The relevant date of submitting a waiver

The waiver regulated under Article 1121 of NAFTA has to be submitted when the investor submits a claim to arbitration.¹⁶¹ The submission of a claim, in turn, is regulated by Article 1137 of NAFTA. In ICSID proceedings, the claim is submitted when the Request for Arbitration has been received by the Secretary-General; under ICSID Additional Facility Rules, when the notice of arbitration has been received by the Secretary-General; and in case of UNCITRAL proceedings, it is when the notice of arbitration is received by the disputing Party.¹⁶²

Such a waiver operates as of the day of filing the investment arbitration, precluding the pursuit of any other claims based on the same State's measure as the one complained of under NAFTA Chapter 11.¹⁶³ The Claimant has to discontinue any such ongoing proceedings and is not allowed to initiate new ones.

The Canadian Model FIPA in its Article 26(3) establishes that the waiver shall be included in the submission of a claim to arbitration. Time when a claim is submitted to arbitration is regulated under Article 46, where the possibilities are exactly the same as in Article 1137 of NAFTA.

The language of CAFTA-DR is more direct. In accordance with Article 10.18(2)(b), the waiver has to accompany the notice of arbitration. The latter encompasses both the notice of arbitration to be received by the Secretary-General in case of ICSID and ICSID Additional Facility proceedings, and the request for arbitration to be received by the Respondent in case of UNCITRAL Rules.¹⁶⁴

The 2012 US Model BIT also determines that the waiver should be submitted with the notice of arbitration. The notice of arbitration means the same documents as in case of CAFTA-DR, and additionally it encompasses a notice of or request for arbitration referred to under any arbitral institution or arbitral rules agreed on by the Claimant and the Respondent, to be received by the Respondent.¹⁶⁵

The comparison of the wording of NAFTA, CAFTA-DR and two Model BITs allows for a conclusion that CAFTA-DR and the US Model BIT determine that the waiver shall be included in the notice of (or request for) arbitration, while NAFTA and the Canadian Model BIT talk about submitting a waiver with the submission of a claim to arbitration, and then

¹⁶¹ Article 1121(3) of the NAFTA.

¹⁶² NAFTA Article 1137(1)(a), (b) and (c), respectively.

¹⁶³ McLachlan (n 18) 296-297.

¹⁶⁴ Article 10.16(4) of CAFTA-DR.

¹⁶⁵ Article 24(4) of the 2012 US Model BIT.

explain in different articles that a submission of a claim means the notice of (or request for) arbitration. Even though it seems obvious that the result is the same, the wording under NAFTA did cause problems in the *Ethyl Corp. v Canada*¹⁶⁶ case.

Ethyl Corp. brought its NAFTA proceedings against Canada under UNCITRAL Rules by submitting a Notice of Arbitration in April 1997. The investor submitted the waiver only in October 1997, together with its Statement of Claim.¹⁶⁷ Canada made an objection to the Tribunal's jurisdiction, because the Claimant had not met the waiver requirements at the time of filing the Notice of Arbitration.¹⁶⁸ The Tribunal stated the following about the waiver:

...Article 1121(3), instead of saying '[the waiver] shall be included in the submission of a claim to arbitration' – in itself a broadly encompassing concept – could have said 'shall be included with the Notice of Arbitration' if the drastically preclusive effect for which Canada argues truly were intended.¹⁶⁹

The Tribunal ignored that the term 'submission of a claim to arbitration' is explained in Article 1137 of NAFTA as a notice of arbitration in case of proceedings under UNICTRAL Rules. It also did not see any prejudice to Canada caused by submission of the waiver only in the Statement of Claim, and not in the Notice.¹⁷⁰ The objection concerning Article 1121 was thus rejected.¹⁷¹

The case law on the timing issue is divided. One line of reasoning of arbitral tribunals is a strict application of the requirement to submit a waiver with the submission instituting arbitral proceedings. Another approach is more relaxed and allows for remedying the failure of not submitting a valid waiver on time.

The oldest case in which a tribunal applied a strict approach is *Waste Management v Mexico I* with the Award rendered in the year 2000. The majority stated that in light of Articles 1121(3) and 1137(1)(b) of NAFTA, the submission of the waiver must take place in conjunction with submission of the notice of arbitration to the Secretary-General of ICSID.¹⁷² It is from this moment onwards that the Claimant is obliged to abstain from initiating or continuing any other proceedings with respect to the measure brought before a NAFTA tribunal.¹⁷³

¹⁶⁶ *Ethyl Corporation v Government of Canada*, UNCITRAL.

¹⁶⁷ *Ethyl Corp. v Canada* (n 166) (Award on Jurisdiction) [89].

¹⁶⁸ *Ibid* [43], [45].

¹⁶⁹ *Ibid* [91].

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid* [96]; for further analysis of the Tribunal's flexible approach to timing issues see 28-29, below.

¹⁷² *Waste Management v Mexico I* (n 92) (Award) [19].

¹⁷³ *Ibid*.

The strict approach was confirmed by the Tribunal in 2011 in the *Commerce Group v El Salvador*¹⁷⁴ case under CAFTA-DR. The waiver was determined to be invalid for other reasons than the time of its application.¹⁷⁵ Nevertheless, the Tribunal, as an initial matter, took into consideration whether the submission of the waiver was made in due course. It decided that the operative date for examining the waiver is the date the Notice of Arbitration was filed with ICSID.¹⁷⁶ The Parties also agreed with such an approach in their respective written submissions.¹⁷⁷

Also Costa Rica, in its Submission of a Non-Disputing Party, stated that the request for arbitration has to be accompanied by physically submitted waiver document, as well as by effective waiver, withdrawal or discontinuance of any other pending proceedings.¹⁷⁸ Nicaragua as well made a Submission of a Non-Disputing Party, and it said that the waiver has to be made together with the notice of arbitration and the Claimant has to comply with it afterwards.¹⁷⁹

A similar reasoning was applied in the *Detroit v Canada* case. In order to see whether it could uphold jurisdiction, the Tribunal proceeded to analyse whether the waiver was valid on the date the Claimant submitted its claim to arbitration, i.e. the date of the notice of arbitration.¹⁸⁰ At the date of submitting its First Notice of Arbitration together with the first Waiver, the Claimant had ongoing court proceedings in the USA, where the claims covered the same grounds as the measures at issue in NAFTA arbitration, and the exception concerning injunctive or declaratory relief did not apply.¹⁸¹ The Tribunal found that it had no jurisdiction because of the invalidity of the waiver¹⁸², assessed at the time of filing the Notice of Arbitration. Since the Award was made in 2015, it might show the current trend in assessing the timing requirement in the waiver provision.

A more relaxed and flexible approach was adopted as early as in 1998 in the already mentioned *Ethyl Corp. v Canada* case¹⁸³. The Tribunal analysed whether the ‘conditions to be met by the Investor must be fulfilled prior to or simultaneously with delivery of a Notice of

¹⁷⁴ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17.

¹⁷⁵ *Commerce Group v El Salvador* (n 174) (Award) [107].

¹⁷⁶ *Ibid* [96], [100].

¹⁷⁷ *Ibid* [96].

¹⁷⁸ *Commerce Group v El Salvador* (n 174) (Costa Rica’s Submission under Article 10.20(2) of CAFTA-DR) [3].

¹⁷⁹ *Commerce Group v El Salvador* (n 174) (Nicaragua’s Submission under Article 10.20(2) of CAFTA-DR) [7], [12].

¹⁸⁰ *Detroit v Canada* (n 109) (Award) [295].

¹⁸¹ *Ibid* [298], [310], [319].

¹⁸² *Ibid* [320].

¹⁸³ 27, above.

Arbitration in order for the Tribunal's jurisdiction to attach'¹⁸⁴. It decided that Canada's contention that 'conditions precedent' in the title of Article 1121 are a precondition to jurisdiction 'is not borne out by the text of Article 1121'¹⁸⁵, and that the 'Claimant's unexplained delay in complying with Article 1121 is not of significance for jurisdiction in this case'¹⁸⁶. The Tribunal rejected the objection based on Article 1121.¹⁸⁷

Interestingly, it stated that the Claimant should be responsible for the costs of the jurisdictional proceeding in the scope of this article – if Claimant had submitted the waiver in the Notice of Arbitration, which would have been a better practice, part of these proceedings would not have taken place.¹⁸⁸

The flexible approach was also taken by the Tribunal in the *Pope & Talbot* case. The issues there were the timing of the waiver and the three-year limitation period. The waiver was submitted with both the Notice of Arbitration and the Statement of Claim, but only by the Investor. The waiver of Harmac, the Investor's controlled enterprise, was not presented.¹⁸⁹

In the meantime there had been a merger between the investment, Pope & Talbot Ltd., and Harmac, and the new company, called Pope & Talbot Ltd., took over all the assets and liabilities of the former companies.¹⁹⁰ Only afterwards, on 10 January 2000, did the new company execute a waiver document, in response to the Tribunal's request.¹⁹¹ That waiver concerned also the business known before as Harmac.¹⁹²

Canada argued that the waiver could only be effective as of 10 January 2000, and that the claims concerning Harmac were time-barred, because the three-year limitation period from Article 1116 of NAFTA had passed.¹⁹³

The Tribunal considered that there is 'nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date'¹⁹⁴. The arbitrators reasoned that the requirement of submitting a waiver in the submission of a claim means that the waiver should have been effected before the Tribunal entertains the claim.¹⁹⁵ Since the

¹⁸⁴ *Ethyl Corp. v Canada* (n 166) (Award on Jurisdiction) [74].

¹⁸⁵ *Ibid* [91].

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid* [96].

¹⁸⁸ *Ibid* [92].

¹⁸⁹ *Pope & Talbot v Canada* (n 104) (Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record (the 'Harmac Motion')) [15].

¹⁹⁰ *Pope & Talbot v Canada* (n 104) (the 'Harmac Motion') [4].

¹⁹¹ *Ibid* [5].

¹⁹² *Ibid*.

¹⁹³ *Ibid* [9].

¹⁹⁴ *Ibid* [18].

¹⁹⁵ *Ibid*.

waiver was effected in the meantime and Harmac did not attempt to pursue other proceedings in relation to the measure, there was no prejudice against Canada.¹⁹⁶ This way the Tribunal refused Canada's motion to strike out paragraphs in the Statement of Claim relating to Harmac.¹⁹⁷

A flexible approach was also taken by the Tribunal in *Thunderbird v Mexico* case under NAFTA. The Claimant filed its Notice of Arbitration in August 2002, and a Particularized Statement of Claim in August 2003. It was only in the latter submission that the Claimant filed waivers for three companies it controlled. The Tribunal underlined that 'Article 1121 of NAFTA is concerned with conditions precedent to the submission of a claim to arbitration. One cannot therefore treat lightly the failure by a party to comply with those conditions'.¹⁹⁸

However, the Tribunal found that the waivers filed for the three companies were valid within the meaning of Article 1121, because the only problem involved was the untimeliness in their submission.¹⁹⁹ Filing them in the Particularized Statement of Claim remedied the failure of not submitting them before.²⁰⁰ The Tribunal considered that 'the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings'.²⁰¹ According to the Tribunal, a strict adherence to the time issue would mean an excessively technical interpretation of Article 1121, which should be avoided.²⁰²

The presented case law shows divergence in Tribunals' approach to the timing issue. However, the most recent cases, i.e. *Commerce Group v El Salvador* in which the Award was rendered in 2011, and *Detroit v Canada*, with the Award made in April 2015, showed a preference for the strict approach to the relevant date of submitting a waiver.

E. Content of the waiver

One of the first Tribunals to deal with the waiver issue, namely in the *Waste Management v Mexico I* case, distinguished between the formal and material requirements of the waiver.²⁰³

¹⁹⁶ Ibid.

¹⁹⁷ Ibid [22].

¹⁹⁸ *Thunderbird v Mexico* (n 139) (Award) [115].

¹⁹⁹ Ibid [115]-[116].

²⁰⁰ Ibid [117].

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ R. D. Bishop, W. W. Russell, 'Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement' (2002) 19 *Journal of International Arbitration* 516.

In that particular case the waiver satisfied only the formal but not the material requirement²⁰⁴, and was considered invalid.

In the light of this useful distinction, followed by other tribunals, this Section explains what the formal and material requirements are, and it then tackles special reservations which claimants sometimes include in their waivers.

i. Formal requirement

Pursuant to Article 1121(3) of NAFTA, ‘a consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration’. CAFTA-DR and the US Model BIT talk about a ‘written waiver’ accompanying the notice of arbitration²⁰⁵, which in practice has the same effect – it is in writing, and since it accompanies the notice of arbitration, it is submitted to the Respondent.

The 2004 Canadian Model FIPA stipulates in Article 26(3) that the waiver shall be included in the submission of a claim to arbitration, delivered to the Respondent, and made in the form provided in Annex C.26. By giving an example of what the waiver should look like, Canada avoids any possible doubts as to the form. The forms are added in annexes to recent BITs and other investment treaties signed by Canada, such as the FTA with Honduras signed in 2013²⁰⁶, the BIT with Jordan signed in 2009²⁰⁷, the FTA with Colombia signed in 2008²⁰⁸, the FTA with Peru signed in 2008²⁰⁹, or the BIT signed also with Peru in 2006²¹⁰. However, it has been already mentioned that in its revised Model FIPA from 2012 Canada did not include such annex.²¹¹

An interesting issue regarding the form of waiver arose in the *EnCana v Ecuador* case under Canada – Ecuador BIT. In its Notice of Arbitration EnCana waived its right to other proceedings pursuant to Article XIII(3)(b) of the BIT.²¹² The Respondent objected saying that the waiver

²⁰⁴ C. Brower, J. Sharp, ‘Multiple and Conflicting International Arbitral Awards’ (2003) 4 J Win 217.

²⁰⁵ Article 10.18(2)(b)(i) and (ii) of CAFTA-DR; Article 26(2)(b)(i) and (ii) of the US Model BIT.

²⁰⁶ Available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/index.aspx?lang=eng>> accessed 12 July 2015.

²⁰⁷ Available at <<http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176>> accessed 12 July 2015.

²⁰⁸ Available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng>> accessed 12 July 2015.

²⁰⁹ Available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng>> accessed 12 July 2015.

²¹⁰ Available at <<http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078>> accessed 12 July 2015.

²¹¹ Titi (n 42).

²¹² *EnCana v Ecuador* (n 98) (Decision on Jurisdiction) [9].

(and the consent) ‘cannot be validly given in the Notice of Arbitration itself, but must take the form of separate documents duly executed’²¹³.

The Tribunal made an analysis of the form both of the Investor’s consent to arbitration and its waiver. It said:

But there is an important difference between the two requirements in terms of their context. In the case of arbitration under the BIT the Notice of Arbitration is integral to the proceedings of the Tribunal. In the case of waiver of alternative remedies, the waiver has to be effective vis-à-vis the other court or tribunal concerned, and the case for a distinct, formally-executed document is stronger. Furthermore the waiver will continue to have effect even after the international arbitration is concluded. It is not temporary.²¹⁴

The Tribunal maintained that the Respondent had good grounds to seek the waiver in the form of a separate document, in case it needed to show it in the relevant forum, should the Claimant bring other proceedings, the right to which it had waived.²¹⁵ The Respondent did not claim that because of lack of a separate document the Tribunal’s jurisdiction is affected. It merely asked for a separate document, should the case proceed to the merits.²¹⁶

In its decision regarding the objection to the waiver, the Tribunal ordered the Claimant to serve on the Respondent ‘a waiver duly executed by the appropriate corporate officer of EnCana Corporation which complies with Article 13(3)(b) of the BIT’²¹⁷.

The Tribunal’s decision seems to place an additional formal requirement on the Claimant, which is obliged to submit the waiver as a duly authorized separate document. This does not stem from the wording of Article XIII(3)(b), which says that the investor may submit a dispute to arbitration only if:

b. the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned for in a dispute settlement procedure of any kind.

The quoted provision does not establish any form requirement, unlike the Canadian Model FIPA. The latter talks about including the waiver in the form provided for in Annex C.26 in the submission of a claim to arbitration, delivered to the Respondent. The BIT in question is also different than the US Model BIT or NAFTA and CAFTA-DR, which provide for a written form and submission together with the notice of arbitration.

²¹³ Ibid [10].

²¹⁴ Ibid [17].

²¹⁵ Ibid [18].

²¹⁶ Ibid [19].

²¹⁷ Ibid [21].

EnCana stated in its Notice of Arbitration that it waived its right to initiate or continue any other proceeding under Article XIII(3)(b) of the BIT. Therefore, it complied with formal requirements usually found in investment treaties, even though the BIT in question did not contain them. Demanding a submission of an additional document meant posing additional requirements that do not have a basis in the relevant treaty.

ii. Material requirement

The material requirement means the effective compliance with the waiver by discontinuing any ongoing proceedings and not initiating any others.

The first Tribunal to make a distinction between the formal and material requirements was the one in the *Waste Management v Mexico I* case, based on such a distinction made by the Respondent in its jurisdictional objections. Regarding the material requirement, an abdication of rights through a waiver entails certain behaviour of the Claimant as of the date of submitting the waiver.²¹⁸

The Tribunal analysed the behaviour of the Claimant and its enterprise with respect to other proceedings. As already mentioned²¹⁹, when Waste Management brought arbitration proceedings in its own name and on behalf of its enterprise, there were two ongoing court proceedings brought by the enterprise, and the third suit was filed afterwards. The Tribunal accepted the possibility that there might be simultaneous arbitration or court proceedings brought by the Claimant in different fora, which would not affect the validity of the waiver – this would be the case of proceedings brought in relation to measures different than those giving rise to the NAFTA case.²²⁰

At the same time, there are certain kinds of measures that can serve as a basis both for NAFTA and other proceedings. The Tribunal assessed that this was the case of the measures complained of before it and locally in the courts, namely the ‘non-compliance with the obligations of guarantor assumed under a line of credit agreement requiring [the state-owned bank] Banobras to defray invoices not paid by Acapulco city council, and non-compliance by Acapulco city council through its failure to pay said invoices’²²¹.

As well, the Claimants had no intention whatsoever of abandoning the court proceedings. Thus, the Tribunal found non-compliance with the material requirement of the waiver.

²¹⁸ *Waste Management v Mexico I* (n 92) (Award) [24].

²¹⁹ 19, above.

²²⁰ *Waste Management v Mexico I* (n 92) (Award) [27].

²²¹ *Ibid.*

Accordingly, the waiver was found to be invalid. Since a valid waiver is a condition precedent to submission of a claim to arbitration, with an invalid waiver the very jurisdiction of the Tribunal could not be upheld.²²²

An interesting point of view was presented by the Claimants in the *Commerce Group v El Salvador* case. The Respondent objected to the Tribunal's jurisdiction because the Claimants had not complied with the waiver, by 'allowing the extant court proceedings which they had initiated in El Salvador to continue'²²³. El Salvador argued that by not complying with the material requirement of the waiver, the Claimants did not meet 'their burden of perfecting Respondent's "conditional consent" to arbitrate under CAFTA'²²⁴.

The Claimants, however, maintained that the CAFTA-DR waiver 'does not require immediate discontinuance of domestic proceedings, but rather, allows Respondent to use Claimants' waiver to seek the discontinuance of domestic proceedings if it so desires'²²⁵. The Claimants also stated that they were not obliged to end 'the court proceedings after the start of the arbitration, arguing that events that occur after receipt of the Request by the Secretary-General are "irrelevant" and have no bearing on the Tribunal's jurisdiction'²²⁶.

The Tribunal did not agree with such a characterisation of the waiver as presented by the Claimants. If their approach was adopted, then the formal requirement would depend on the Claimants while the material requirement would be the Respondent's responsibility.²²⁷ The Tribunal could not agree with 'such a division of those requirements between the parties'²²⁸. Both should be the responsibility of the Claimant.

Since the Parties agreed that the formal requirement was fulfilled²²⁹, the Arbitrators proceeded to analyse whether the Claimants had fulfilled the material one. It was undisputed that the measures at stake in the CAFTA-DR arbitration and the local proceedings in El Salvador were the same.²³⁰ Therefore, the Claimants were 'under an obligation to discontinue those proceedings in order to give material effect to their formal waiver'²³¹. Since the Claimant

²²² Ibid [14], [31], [IV].

²²³ *Commerce Group v El Salvador* (n 174) (Award) [66].

²²⁴ Ibid [72].

²²⁵ Ibid [67].

²²⁶ Ibid [75].

²²⁷ Ibid [85].

²²⁸ Ibid [86].

²²⁹ Ibid [95].

²³⁰ Ibid [101].

²³¹ Ibid [102].

did not proceed to a discontinuance, it did not fulfil the material requirement. And as a result, the Tribunal could not uphold jurisdiction over the CAFTA-DR dispute.²³²

In the *Detroit v Canada* case, in its submission as a Non-Disputing Party under Article 1128 of NAFTA Mexico emphasized

that the waiver obligation must be given substantive meaning. If a Claimant acts inconsistently with its written waiver by continuing domestic proceedings, the claimant's conduct would demonstrate that the waiver has not actually been provided, and therefore that the conditions precedent for submission of a NAFTA claim have not been satisfied.²³³

Another example of how the material requirement was dealt with is the *Vannessa Ventures v Venezuela*²³⁴ case. The Respondent contested the validity of the waiver, saying that the Claimant's withdrawal of local court proceedings was made without prejudice, which tried to circumvent the BIT provisions, leaving open the possibility of refileing the same claims. The Respondent also held that the Claimant and its affiliated companies initiated new proceedings after the Request for Arbitration had been filed.²³⁵

The Claimant submitted that the withdrawal was appropriate under the Venezuelan law. The Tribunal had little problem with deciding on the withdrawal issue, thanks to the Venezuelan Supreme Court's statement that the waiver submitted in BIT arbitration clearly prevents 'Venezuelan courts from deciding claims regarding the Las Cristinas Project'²³⁶ (i.e. the mining concessions, which were at stake in the BIT arbitration). Thus, the Tribunal held that the waiver fulfilled the requirements of the BIT and rejected the Respondent's objection to the validity of the waiver.

However, the Tribunal did not deal with the issue of proceedings which, according to the Respondent, the Claimant initiated after the Request for Arbitration. It may be assumed that according to the Tribunal, the waiver should be used as a defence by the Respondent in any new proceedings, and that is the reason why the Tribunal did not grant much attention to the issue. Nevertheless, in order to assess the validity of a waiver, both form and material requirements have to be scrutinized.

Since apparently new proceedings were initiated after submitting the waiver, doubts arise as to the fulfilment of the material requirement. If a Claimant waives its right to initiate new proceedings and a month later does initiate them, then the waiver is devoid of substantive

²³² Ibid [115].

²³³ *Detroit v Canada* (n 109) (Mexico's Article 1128 Submission) [18].

²³⁴ *Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6.

²³⁵ *Vannessa Ventures v Venezuela* (n 235) (Decision on Jurisdiction) [3.4.2].

²³⁶ Ibid [3.4.4].

meaning. This, in turn, puts into question the consent of the Respondent to arbitrate. There is unfortunately too little information available in the Decision concerning the other proceedings, and a further analysis here is not possible.

It is worth mentioning an ongoing case regarding the alleged material incompliance with the submitted waiver, namely *Renco v Peru*²³⁷. The Respondent alleges that Renco has violated the waiver requirement and that the violation is ongoing, because one of Renco's subsidiaries is pursuing proceedings before the courts in Peru in relation to the measures at issue in the treaty arbitration. The Claimant denies that it is a treaty breach.²³⁸ It also maintains that Peru's request that the matter be decided as a preliminary issue was made too late and should be dismissed.²³⁹ The Tribunal, nevertheless, agreed to hear the waiver issue as a preliminary matter.²⁴⁰ This confirms the importance of the material requirement for the validity of the waiver, and, in turn, for the Tribunal's jurisdiction.

iii. Special reservations included in the waiver

In some cases the investors submitted waivers from which they expressly carved out certain ongoing or planned proceedings. This Subsection will deal with such additional special reservations, and their influence on the waiver's validity.

The oldest case with such an issue to appear is the *Waste Management v Mexico I*. Together with a notice of institution of arbitration proceedings, filed with the Secretary-General of ICSID, the Claimants submitted a waiver, pursuant to Article 1121 NAFTA. The waiver repeated the wording of the mentioned article, but with a caveat that it 'does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico'²⁴¹.

ICSID Counsel requested the Claimants to confirm that their additional statement complied with the waiver requirements under Article 1121 NAFTA. They responded that they did not intend to derogate from Article 1121, and that the provided waiver reflected their understanding of that provision.²⁴²

Due to a procedural defect, the notice of intent to arbitrate had to be resubmitted, this time to the duly designated body, i.e. the SECOFI Directorate-General for Foreign Investment.

²³⁷ *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1.

²³⁸ *Renco v Peru* (n 237) (Decision Regarding Respondent's Requests for Relief) [70].

²³⁹ *Ibid* [72].

²⁴⁰ *Ibid* [73].

²⁴¹ *Waste Management v Mexico I* (n 92) (Award) [4].

²⁴² *Ibid*.

Waste Management again lodged its notice of request for arbitration with ICSID. That notice contained a following waiver:

[...] Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.²⁴³

Mexico raised its objections to the validity of the waiver, both in its form and content.²⁴⁴ The outcome of the Tribunal's analysis was already described above – the formal requirement was deemed to be met, while there was no compliance with the material requirement.²⁴⁵ Here it is worth mentioning how the Tribunal analysed the additional reservation.

First of all, it explained that a waiver 'must be clear, explicit and categorical'²⁴⁶ – clear in 'all its terms with regard to abdication of given rights by the party proposing to make said waiver'²⁴⁷. After dealing with the timing issue and the formal and material requirements of the waiver, the Tribunal made some remarks regarding the additional reservation. It said that the full transcription of the content of Article 1121 NAFTA is 'sufficiently complete and clearly reflects the scope of the waiver'²⁴⁸. The Claimants decided to go beyond that wording by including additional interpretations, which 'have failed to translate as the effective abdication of rights mandated by the waiver'²⁴⁹.

The Tribunal did not base its opinion solely on the additional wording, but it made an analysis of the actual behaviour of the Claimants, as seen in the previous Section of this paper.²⁵⁰ In view of the behaviour and the text of the declaration of intent, the submitted waiver did not correspond with the requirement of Article 1121.²⁵¹ Therefore, the Respondent's objection was upheld and the waiver was found to be invalid. It is worth mentioning that since there was 'no evidence of recklessness or bad faith'²⁵² on the Claimants' part, the Tribunal did not make an award for legal costs incurred by the Respondent in the arbitration.

²⁴³ Ibid [5].

²⁴⁴ Ibid [6].

²⁴⁵ 33, above.

²⁴⁶ Ibid [18].

²⁴⁷ Ibid.

²⁴⁸ Ibid [31].

²⁴⁹ Ibid.

²⁵⁰ 33, above.

²⁵¹ *Waste Management v Mexico I* (n 92) (Award) [31].

²⁵² Ibid.

In the *RDC v Guatemala* case based on CAFTA-DR, one of the Respondent's objections relating to the waiver concerned the Claimant's additional reservation made by the Claimant. It was as follows:

[...] provided, however, that RDC, on its own behalf and on behalf of FVG, reserves the right to pursue any and all local remedies which the ICSID arbitration panel requires in order for RDC to avoid any contention by the Government of Guatemala that RDC has failed to exhaust local remedies.²⁵³

The reservation was included because when Guatemala had ratified the ICSID Convention it conditioned its consent to ICSID arbitration on the requirement of exhaustion of local remedies by investors.²⁵⁴

According to the Respondent, the mere insertion of such reservation repudiated the waiver, but the Arbitrators did not agree. The Tribunal stated that it did not possess such powers as to order the Claimant to pursue local remedies, and therefore the reservation was 'without any possible object and it does not deprive the Tribunal of jurisdiction'²⁵⁵.

Another example of an additional reservation can be found in the *Detroit v Canada* case. The Claimant intended to carve out from its waiver the already mentioned so-called Washington Litigation²⁵⁶, and worded the additional reservation as follows:

For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of the claims included in the Complaint filed on or about March 22, 2010, in the action titled *Detroit International Bridge Company et al. v. The Government of Canada et al.*, in the United States District Court for the District of Columbia.²⁵⁷

Because of Canada's objection, there were the second and third notices of arbitration, both accompanied by similar waivers, but because of the timing requirement, the Tribunal took into account only the first one.²⁵⁸ It did not automatically consider the waiver as invalid, but it proceeded to analyse the Washington Litigation.²⁵⁹ Only when it was clear that because of this court proceeding the First Waiver did not comply with Article 1121, did the Tribunal decide that the absence of a valid waiver prevented it from upholding jurisdiction. Therefore, it was the Claimant's behaviour that was of importance, and not the mere wording of the waiver.

²⁵³ *RDC v Guatemala* (n 93) (Decision on Objection to Jurisdiction CAFTA Article 10.20.5) [43].

²⁵⁴ C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff Publishers, Leiden, Boston 2012) 502.

²⁵⁵ *RDC v Guatemala* (n 93) (Decision on Objection to Jurisdiction CAFTA Article 10.20.5) [45].

²⁵⁶ 24, above.

²⁵⁷ *Detroit v Canada* (n 109) (Award) [54].

²⁵⁸ After deciding that the first waiver was invalid, the Tribunal also analysed if it could have been cured by subsequent waivers. The conclusion was negative, because Canada had objected from the beginning to the Tribunal's jurisdiction, and the second and third waivers could not retroactively cure the invalidity.

²⁵⁹ The results of this analysis can be found at 24, above.

An interesting reservation was included in the ongoing *KBR v Mexico* NAFTA case. Both the Claimant and its wholly-owned subsidiary submitted a waiver in which they explicitly stated that they do not waive their right to initiate or continue the existing proceedings under the New York or Panama Conventions to enforce the ICC Final Award in any State party to these conventions. They also intended not to waive their rights in the ongoing enforcement proceedings in the US District Court for the Southern District of New York under the Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, and the right to continue existing enforcement proceedings in Luxembourg.²⁶⁰

The mentioned ICC Final Award was rendered on the basis of an arbitration agreement between the investor's subsidiary and a state-owned oil and gas company. The ICC Arbitral Tribunal awarded damages to the subsidiary.²⁶¹ Interestingly, the Claimants maintain that the alleged breach of NAFTA by Mexico consists in the state-owned company and Mexican courts seeking and declaring annulment of the ICC Award.²⁶²

The Claimants argue that Article 1121 of NAFTA concerns only claims for damages, while enforcement proceedings are not for adjudication of claims for damages, but they are designed to enforce an existing arbitration award.²⁶³ The Respondent contends that even though the enforcement proceedings do not involve claims concerning Mexico's alleged breach of NAFTA, they still relate to the same measures as those at stake in the NAFTA arbitration.²⁶⁴

The third-party submissions made by the USA and Canada do not shed much light on the particular issue involved here, i.e. enforcement proceedings. The USA only describes the waiver requirements in general, and refers to its own third-party submission in another case.²⁶⁵ Canada provided an analysis of the Article 1121 waiver, but without any conclusive remarks on the enforcement proceedings.²⁶⁶

By agreement of the Parties, the Respondent's objection to the waiver will be decided as a preliminary question.²⁶⁷ It will be interesting to see how the Tribunal will assess the validity of the waiver in the light of the enforcement proceedings.

²⁶⁰ *KBR v Mexico* (Notice of Arbitration) [6].

²⁶¹ *KBR v Mexico* (Notice of Arbitration) [26], (Respondent's First Submission on Jurisdiction) [14].

²⁶² *KBR v Mexico* (Notice of Arbitration) [42].

²⁶³ *Ibid* [8].

²⁶⁴ *KBR v Mexico* (Respondent's First Submission on Jurisdiction) [66].

²⁶⁵ *KBR v Mexico* (USA's Article 1128 Submission).

²⁶⁶ *KBR v Mexico* (Canada's Article 1128 Submission).

²⁶⁷ *KBR v Mexico* (Procedural Order no. 1) [12.1].

To conclude on the issue of special reservations contained in the waiver, it may be assumed that it is the actual behaviour of the claimant that matters. The investor has to comply with the formal and material requirements, and any special reservation inserted in the waiver cannot change it. Nor can it in itself invalidate the waiver.

4. Effect of the waiver and of the non-compliance with the waiver

The description of the waiver provision and its elements made in Chapter 3 allows for a next step in the analysis. Chapter 4 will concentrate on how an invalid waiver affects the arbitral proceedings, and if it can be remedied. Section A deals with waiver and shows the divergent approaches of tribunals – some treat compliance with the waiver provision as a condition to the State’s consent, while others treat it as a mere formality. Section B shows whether remedying an invalid waiver is possible, and in which circumstances it may happen. Section C tackles the issue whether an investor may submit its claim to another forum once the treaty tribunal has declined its jurisdiction.

A. Waiver as a condition to the State’s consent or a technicality?

The majority of the Tribunal in *Waste Management v Mexico I* case considered the waiver as a jurisdictional requirement, and that is why it declined jurisdiction in view of an invalid waiver.²⁶⁸ The majority analysed the consent of the Parties, and it considered that only the fulfilment of the ‘prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 [...] opens the way, *ipso facto*, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to said international treaty’²⁶⁹. Since the waiver was invalid, there was no consent of the Parties, and, therefore, no jurisdiction of the Tribunal.

The dissenting arbitrator, however, was of the opinion that the Tribunal had jurisdiction because the waiver had been delivered. If the subsequent conduct of the Claimants showed that the purpose of waiver was frustrated, then it would be an issue of admissibility.²⁷⁰ The dissenter also suggested that the ongoing local court proceeding could be severed, for example because of its small value in comparison to claims brought before a NAFTA Tribunal. This way, the portion of the NAFTA claim brought to the local court would then be treated as inadmissible in the arbitration proceedings.²⁷¹ Finally, the dissenting arbitrator stated that the result obtained by the majority was too harsh, and could not have been the intention of the NAFTA Parties.²⁷²

The Tribunal in the *Mondev v USA*²⁷³ case drew a distinction between compliance with the conditions set out in Article 1121 of NAFTA and with other procedures referred to in

²⁶⁸ *Waste Management v Mexico I* (n 92) (Award) [IV].

²⁶⁹ *Ibid* [17].

²⁷⁰ *Waste Management v Mexico I* (n 92) (Dissenting Opinion) [59].

²⁷¹ *Ibid* [61].

²⁷² *Ibid* [63].

²⁷³ *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2.

Chapter 11. The former are conditions precedent to submission of a claim to arbitration, and non-compliance with them invalidates the submission.²⁷⁴ ‘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.’²⁷⁵

For the latter situation, the Tribunal referred to the *Ethyl Corp. v Canada* and *Pope & Talbot v Canada* cases, in which the failure consisted in late submission of the waiver document (while there were no other ongoing proceedings in relation to the measures complained of in the NAFTA arbitrations). The selection of cases as an example for such a distinction seems not fortunate, since the proper timing of the waiver is part of Article 1121, and as such is a condition precedent to submission of a claim.

In *Mondev v USA* there was another type of failure, consisting in the Claimant invoking Article 1116 instead of Article 1117 of NAFTA. In its Notice of Arbitration the Claimant invoked Article 1116, which concerns claims brought by investors on their own behalf, and it did not give the address of its enterprise. The USA objected to the Tribunal’s jurisdiction saying that alleged losses stemmed from a loss or damage to an enterprise, and the case should have been submitted under Article 1117, which is for claims by an investor on behalf of an enterprise.²⁷⁶ According to the Respondent, in the notice of intent, Mondev should have mentioned Article 1117 as well as it should have given the address of the owned enterprise (LPA), as required by Article 1119(a).²⁷⁷

The Tribunal decided that since the investor had submitted a waiver also on behalf of the enterprise²⁷⁸, and the initial lack of the address was not a material non-disclosure, Article 1121 was complied with. It said that the case may be treated as brought in the alternative under Article 1117.²⁷⁹ In the light of the facts of the case and the distinction drawn by the Tribunal, it can be assumed that the arbitrators considered compliance with Article 1121 as conditions to jurisdiction.

In the *Commerce Group v El Salvador* case the Tribunal declined jurisdiction because of an invalid waiver. In that case the Claimants did not comply with the material requirement, by not discontinuing other proceedings. The Tribunal said that the waiver contained in Article 10.18

²⁷⁴ *Mondev v USA* (n 273) (Award) [44].

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid* [45].

²⁷⁷ *Ibid* [49].

²⁷⁸ *Ibid* [12].

²⁷⁹ *Ibid* [86].

of CAFTA-DR was ‘required as a condition to Respondent’s consent to CAFTA’²⁸⁰. If the waiver is invalid, as it was in the case at hand, there is no consent. Therefore, the Tribunal declined jurisdiction over the dispute brought by the Parties under CAFTA-DR.²⁸¹

In its Non-Disputing Party’s submission, Costa Rica stated that the Claimant needs to comply with the formal and material requirements of the waiver.²⁸² According to Costa Rica, ‘States Party to the DR-CAFTA have not consented to the submission of claims to arbitration where there has been no compliance with the requirement of Article 10.18(2)(b)’²⁸³. The Claimant’s failure to comply with those requirements means that the Respondent does not consent to the submission of a claim to arbitration, and the Tribunal established cannot have jurisdiction over the case.²⁸⁴

In the same case, Nicaragua submitted that Article 10.18 of CAFTA-DR establishes conditions and limitations, which have to be fulfilled so that the Claimant may bring a claim to arbitration.²⁸⁵ The consent to ICSID arbitration is mentioned in Article 25 of the ICSID Convention, but it is Article 10.18 of CAFTA-DR that explains what this consent consists in.²⁸⁶ If an investor does not comply with the waiver requirements, or if it presents a waiver document, but later it does not effectively comply with what it stated, it cannot bring a claim to CAFTA-DR arbitration.²⁸⁷

The Tribunal in *Detroit v Canada* analysed the waiver under Article 1121 of NAFTA to determine whether it had jurisdiction.²⁸⁸ The behaviour of the Claimant resulted in a non-compliance with Article 1121. Accordingly, the absence of a valid waiver prevented the Tribunal from upholding jurisdiction.²⁸⁹ The dissenting opinion concerned the determination whether the NAFTA arbitration and the court proceedings addressed the ‘same measures’, whereas the dissenter did agree with the majority that the waiver is a jurisdictional requirement.²⁹⁰

²⁸⁰ *Commerce Group v El Salvador* (n 174) (Award) [115].

²⁸¹ *Ibid.*

²⁸² See 28, n 178.

²⁸³ *Commerce Group v El Salvador* (n 174) (Costa Rica’s submission under Article 10.20(2) of CAFTA-DR) [7].

²⁸⁴ *Ibid.*

²⁸⁵ *Commerce Group v El Salvador* (n 174) (Nicaragua’s submission under Article 10.20(2) of CAFTA-DR) [4].

²⁸⁶ *Ibid* [10]-[11].

²⁸⁷ *Ibid* [12].

²⁸⁸ *Detroit v Canada* (n 109) (Award) [295].

²⁸⁹ *Ibid* [320].

²⁹⁰ *Detroit v Canada* (n 109) (Separate Dissenting Jurisdictional Statement of Michael Chertoff) [1]-[2].

Also the USA in its Non-Disputing Party's submission maintained that without an effective waiver there is no consent of the Respondent necessary for the tribunal to assume jurisdiction.²⁹¹ The State understands Article 1121 as not only a written waiver, but actions consistent with such a waiver, by 'abstaining from initiating or continuing proceedings with respect to the measure alleged to constitute a NAFTA breach in another forum'²⁹². Therefore, if the Claimant continues other proceedings forbidden by Article 1121, it does not fulfil the waiver requirement, and the Tribunal does not have jurisdiction.²⁹³

Mexico in its submission in the *Detroit v Canada* case did not expressly state whether the waiver is a matter of jurisdiction or admissibility. However, it said that if the Claimant acts inconsistently with the given waiver, it demonstrates that it had actually not provided the waiver, and 'therefore that the conditions precedent for submission of a NAFTA claim have not been satisfied'²⁹⁴.

However, not all the tribunals have treated the waiver as a matter of jurisdiction. In the *Ethyl Corp. v Canada* case the Tribunal first drew a distinction between jurisdictional provisions, which limit the authority of the Tribunal, and procedural rules that must be satisfied by the Claimant, but the non-compliance with which does not result in the absence of jurisdiction, but merely causes a delay in proceedings.²⁹⁵

After hearing the Parties' characterization of the waiver, the Tribunal wondered about 'the reasons of the formalities prescribed by Article 1121'²⁹⁶ of NAFTA. It 'had little trouble deciding that Claimant's unexplained delay in complying with Article 1121 is not of significance for jurisdiction in this case'²⁹⁷. The Tribunal did not agree with Canada, which stated that 'Conditions Precedent' in Article 1121 are 'a precondition to jurisdiction, as opposed to a prerequisite to admissibility'²⁹⁸.

Mexico made a Non-Disputing Party submission²⁹⁹ concerning, *inter alia*, preconditions to initiating arbitration. It is not available online³⁰⁰, and the only insight is offered in the Award

²⁹¹ *Detroit v Canada* (n 109) (USA's Article 1128 Submission) [4].

²⁹² *Ibid* [5].

²⁹³ *Ibid*.

²⁹⁴ *Detroit v Canada* (n 109) (Mexico's Article 1128 Submission) [18].

²⁹⁵ *Ethyl Corp. v Canada* (n 166) (Award on Jurisdiction) [58].

²⁹⁶ *Ibid* [90].

²⁹⁷ *Ibid* [91].

²⁹⁸ *Ibid*.

²⁹⁹ Kinnear, Bjorklund, Hannaford (n 25) 1128-4c.

³⁰⁰ Archived materials from the case are available online, but the only file concerning Mexico's submission is the Tribunal's Procedural Order taking note of such submission. Available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng>> accessed 25 July 2015.

itself. Mexico was of the view that there is a special duty upon tribunals to ensure that claimants comply with the necessary requirements set out in Chapter 11, one of which is filing appropriate waivers at the proper time.³⁰¹

The Tribunal did not side with the Respondent and Mexico, and upheld its jurisdiction. It regarded the submission of the waiver as a mere formality³⁰², and its operative goal was ‘pursuit of efficiency’³⁰³. *Ethyl Corp.* was the first case brought under Chapter 11 of NAFTA.³⁰⁴ An explanation of the Tribunal’s relaxed approach may be no previous case law regarding the waiver issue.

In the *Pope & Talbot* case the Tribunal believed that ‘there would be no good reason to make the execution of the investor’s waiver a precondition of a valid claim for arbitration’³⁰⁵. It reached this conclusion on the basis of perceiving the non-compliance with the waiver as prejudicing the investor, not the State. The Tribunal understood Article 1121(1)(b) of NAFTA as providing investors with recourse to judicial or administrative injunctive relief even during the arbitration. Hence, if the investor does not submit a waiver, it causes prejudice to itself.³⁰⁶

The Tribunal also stated that bringing a claim to NAFTA arbitration may be taken as an implied waiver of the right to initiate other proceedings.³⁰⁷ Eventually, it said that, in any case, the waiver has to have been effected before the Tribunal entertains the claim,³⁰⁸ and that only a persisting non-compliance with procedural rules may lead to dismissal of the claim.³⁰⁹ It can be understood that the arbitrators treated the waiver under Article 1121 as an admissibility matter.³¹⁰

As a concluding remark, it is worth mentioning Article 26(5) of the Canadian Model FIPA, which states that ‘Failure to meet any of the conditions precedent provided for in paragraphs 1 through 3 shall nullify the consent of the Parties given in Article 28 [Consent to Arbitration]’. It was probably added to avoid conflicting jurisprudence whether incompliance with the submission of a valid waiver is an issue of jurisdiction or a mere procedural requirement, as happened in cases under NAFTA.³¹¹

³⁰¹ *Ethyl Corp. v Canada* (n 166) (Award on Jurisdiction) [48].

³⁰² Kinnear, Bjorklund, Hannaford (n 25) 1121-15.

³⁰³ C. Lévesque, ‘Investor-State Arbitration Under NAFTA Chapter 11: What Lies Beneath Jurisdictional Challenges’ (2002) 17 ICSID Review 348.

³⁰⁴ Kinnear, Bjorklund, Hannaford (n 25) 1121-14.

³⁰⁵ *Pope & Talbot v Canada* (n 104) (Award on Harmac Motion) [16].

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid* [18].

³⁰⁹ *Ibid* [58].

³¹⁰ Lévesque (n 303) 373.

³¹¹ Brown (n 62) 109.

B. A possibility of remedy?

The analysis of case law shows that the approach of tribunals to remedying a defective waiver differs, depending on whether they consider waiver as an issue of jurisdiction or not. In the former case, no retroactive remedy is available, with the only exception when the Respondent consents. In cases where the waiver was considered as an admissibility or merely procedural issue, it could be cured in the course of proceedings.

In *Pope & Talbot v Canada* the Tribunal accepted the waiver in relation to the controlled enterprise, even though it was submitted later than the Statement of Claim. The Arbitrators considered that the belatedly submitted waiver validated the claim commenced before.³¹²

The Respondent's consent given in the course of proceedings may change the Tribunal's approach to the validity of the waiver. In the *Methanex v USA*³¹³ case, the Claimant appended to its Notice of Arbitration a consent and waiver, and the latter was disputed by the Respondent. However, the issue was resolved by agreement at one of the hearings. Therefore, the Tribunal held that it was 'not required to rule on the issue of the waiver's validity; and it does not do so in this Award'³¹⁴.

A remedy of a defective waiver was allowed by the Tribunal in the *Thunderbird v Mexico* case. The Claimant failed to submit the relevant waivers in the Notice of Arbitration, but it then proceeded to 'remedy the failure by filing those waivers in the Particularised Statement of Claim'³¹⁵. The arbitrators considered that the requirement to include waiver in the submission of the claim is 'purely formal', and non-compliance with it cannot invalidate the submission of the claim if the failure is remedied at a later stage.³¹⁶ The Tribunal mentioned that it follows other tribunals in their view that Chapter 11 of NAFTA should not be construed in an excessively technical manner, but it made a reference only to one case, namely to *Mondev v USA*.³¹⁷

However, even though the Tribunal in the *Mondev v USA* case did present such a view, it was given in a different context. There the in-compliance of the waiver, according to the

³¹² *Pope & Talbot v Canada* (n 104) (Award on Harmac Motion) [18].

³¹³ *Methanex Corporation v. United States of America*, UNCITRAL.

³¹⁴ *Methanex v USA* (n 313) (Partial Award) [13], [93].

³¹⁵ *Thunderbird v Mexico* (n 139) (Award) [117].

³¹⁶ *Ibid.*

³¹⁷ *Ibid* n 5.

Respondent's objection, consisted in not mentioning Article 1117 NAFTA³¹⁸ and not giving the address of the enterprise.³¹⁹

In the *RDC v Guatemala* case the State made three objections regarding waiver, the first and third of which are of interest for the present Section. In the first, Guatemala maintained that the Investor had not shown that it had the authority to waive the right of its enterprise to pursue local arbitration.³²⁰ However, the Respondent later ceased to contest the waiver's validity on this basis, and the Tribunal did not proceed to analyse that particular objection.³²¹

The third objection of the Respondent pointed out that the Claimant, through its subsidiary, had initiated and maintained two arbitrations in Guatemala in relation to the same measures as the CAFTA-DR proceedings, thus not giving effect to the waiver.³²² The Claimant argued that such a situation may be remedied 'by terminating or abandoning the inconsistent behaviour'³²³. The Respondent seemed to agree – in the interest of efficiency – to the possibility of curing the deficiencies of the waiver, by the Claimant's dismissal with prejudice of the local arbitrations.³²⁴

However, in its next submission Guatemala held that its proposal had been mischaracterised by the Claimant, and it maintained that 'the Republic confirmed that it seeks dismissal for lack of jurisdiction but acknowledged that the Tribunal might, for efficiency purposes, seek to grant the Claimant an opportunity to cure its defective waiver'³²⁵.

Even though the Tribunal considered the Claimant's understanding of Guatemala's position as correct, it deemed obvious in the light of subsequent submissions and the hearing 'that the Respondent retracted this concession and there is no basis on which the Tribunal could hold that it was precluded from doing so'³²⁶. It also stated that it 'has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver'³²⁷, because it is a matter relating to the Respondent's consent.

³¹⁸ Article 1117 of the NAFTA concerns claims by an investor on behalf of an enterprise.

³¹⁹ 42, above.

³²⁰ *RDC v Guatemala* (n 93) (Decision on Objection to Jurisdiction CAFTA Article 10.20.5) [18].

³²¹ *Ibid* [42].

³²² *Ibid* [18].

³²³ *Ibid* [55].

³²⁴ *Ibid* [58].

³²⁵ *Ibid* [60].

³²⁶ *Ibid* [61].

³²⁷ *Ibid*.

C. Access to another forum

A question may arise as to the binding effect of a submitted waiver if the investment treaty case gets dismissed at an early stage, due to jurisdictional defects. A situation of that kind has taken place in the NAFTA context.

When the Tribunal in *Waste Management v Mexico I* found that the Claimants' behaviour was not in compliance with the waiver, and it declined jurisdiction over the dispute, the next step undertaken by Waste Management was to submit the claim for the second time before a new Tribunal. In the subsequent case, called *Waste Management v Mexico II*, the Respondent raised an argument that the Claimant could have only one opportunity to vindicate its NAFTA claim, because the election of forum under Article 1121 was irrevocable.³²⁸

However, the Tribunal upheld its jurisdiction because it did not find anything in the wording of Chapter 11 which would suggest that when the first proceeding produced no decision on the merits, a second proceeding could not be brought after removing a jurisdictional barrier.³²⁹ The Tribunal considered that since the investor had not complied with the conditions of Article 1121, in reality the dispute had not been submitted to arbitration under NAFTA.³³⁰ Further on the arbitrators held that 'a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute *res judicata* as to those merits'³³¹.

The same line of arguments might be used in case of bringing a claim to a different forum, after the investment treaty tribunal declined its jurisdiction. It might be argued that since there is no jurisdiction, there is no *res judicata*, and the waiver does not have an effect any longer. Unfortunately, there has been no cases found to confirm or reject such argument.

³²⁸ *Waste Management v Mexico II* (n 65) (Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings) [17].

³²⁹ *Ibid* [27].

³³⁰ *Ibid* [33].

³³¹ *Ibid* [43].

5. Conclusion

Waiver of right to other proceedings is generally considered a condition to a State's consent to investment treaty arbitration. Such conclusion is drawn on the basis of the analysed case law, in which invalid waivers were dealt with. Since the first such case in 1998 more States have had the opportunity to communicate what a waiver provision means to them. Not necessarily only in the capacity of respondents, but also as non-disputing parties. The submissions in the former capacity shed light on States perceiving the waiver provision as a condition to their consent to arbitration.

Also, the inclusion in the Canadian Model FIPA of the clarification that incompliance with the waiver nullifies the State's consent to arbitration leaves no doubt that waiver is a jurisdictional requirement. It is all the more important because Canada is the initiator of the waiver provision in NAFTA.

Recent case law confirms that this is a current prevailing approach. An invalid waiver means there is no consent to arbitration given by the Respondent. A retroactive remedy is possible only if the State consents. Otherwise, the jurisdiction should be declined, and the claim can be refiled with a valid waiver. Strict application of the waiver provision can help precluding investors from pursuing multiple redress for the damage caused by the same measure.

When an investor brings a claim under a treaty containing a waiver provision, it is always obliged to waive its right to other proceedings concerning the measure at stake in investment arbitration. In many cases the investor will also have to waive such right on behalf of its enterprise, but each case will depend on the exact wording of the treaty.

As has been seen in *EnCana v Ecuador* case, the waiver provision may not apply to affiliated companies incorporated in a third state, which may be able to pursue claims on the basis of a different treaty. Also, a waiver provision will most probably not preclude the investor's parent company from bringing a claim after the investor's arbitration has concluded. Or even at the same time, but under a different treaty, as in *TCW v Dominican Republic* case. However, should inventive investors and their affiliated companies try to seek elaborated ways for bringing multiple treaty arbitrations, a waiver provision will still substantively limit their options.

Waiver refers to any proceedings concerning the measure at stake in treaty arbitration, and this way is broader than a fork-in-the-road, which applies only to a given claim made under a given treaty. Wording of waivers in the analysed treaties is very broad, as it encompasses not only domestic courts, but any other dispute settlement procedures.

An investor willing to initiate investment treaty arbitration has to submit its waiver in a timely fashion. The date of submitting a valid waiver may have an impact on the limitation period of a given claim. When the relevant treaty stipulates such a period, and the waiver is found to be invalid, before a new waiver is submitted, the limitation period may have ended in the meantime. This issue was tackled in the *Pope & Talbot v Canada* case.

It might be said that a dismissal of a case as happened in *Waste Management v Mexico I* is of little practical effect, because the investor proceeded to refile its claim before a new tribunal. However, the claim's period of limitations might have expired in the meantime. Recent case law shows preference to the strict approach to the date of submitting a waiver.

As suggested by the *Waste Management v Mexico I* Tribunal, for a waiver to be valid, both formal and material requirements have to be fulfilled. The formal requirement, to be read in light of each treaty, means the submission of a waiver document. Usually it has to be done together with the notice of arbitration, and, this way, it has to be in writing. The fact that the waiver is not submitted as a separate, duly authorised document to be used by the respondent as a shield in other proceedings should not undermine the formal validity of the waiver.

Including a waiver in the notice is not enough. The investor, and its enterprise, when applicable, have to abide by the waiver by effectively discontinuing any other proceedings and not initiating new ones in relation to the same measure as alleged to be a treaty breach. This is the material requirement. If not complied with when the treaty arbitration is initiated, the tribunal should find invalidity of the waiver and, thus, decline jurisdiction because of the lack of State's consent. Should the claimant or the enterprise bring other proceedings after the treaty arbitration has ended, the respondent may invoke the submitted waiver as a defence in the new proceedings.

Case law shows that additional reservations made in the waiver are analysed by the tribunals from the point of view of claimants' actual behaviour. The mere wording would rather not deprive the tribunal of its jurisdiction, but in practice its presence confirms the actual intent of claimants to simultaneously pursue other proceedings. For the sake of clarity, it is enough to use the same wording as provided in the treaty's waiver provision. The analysed case law shows that the formal requirement is easier to comply with than the material.

Waiver is present in a rising number of treaties, and it may be expected to have an important role in avoidance of multiple proceedings brought in relation to the same actions of a State. The ongoing cases – *KBR v Mexico* and *Renco v Peru* – will show the current understanding of this provision. Especially the former case seems interesting, as the Tribunal will decide whether

enforcement proceedings have to be discontinued or are an exception to which the waiver does not refer.

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<i>Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador,</i> ICSID Case No. ARB/09/17	<i>Commerce Group v El Salvador</i>
<i>Detroit International Bridge Company v. Government of Canada,</i> UNCITRAL, PCA Case No. 2012-25	<i>Detroit v Canada</i>
<i>EnCana Corporation v. Republic of Ecuador,</i> LCIA Case No. UN 3481	<i>EnCana v Ecuador</i>
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<i>International Thunderbird Gaming Corporation v. Mexico,</i> UNCITRAL	<i>Thunderbird v Mexico</i>
<i>KBR Inc. v. Mexico,</i> ICSID Case No. UNCT/14/1	<i>KBR v Mexico</i>
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<i>The Renco Group, Inc. v. The Republic of Peru,</i> ICSID Case No. UNCT/13/1	<i>Renco v Peru</i>
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<i>Waste Management, Inc. v. United Mexican States,</i> ICSID Case No. ARB(AF)/98/2	<i>Waste Management v Mexico I</i>
<i>Waste Management, Inc. v. United Mexican States II,</i> ICSID Case No. ARB(AF)/00/3	<i>Waste Management v Mexico II</i>

Annex I

A list of BITs and FTAs containing a waiver provision. The list was compiled on the basis of information obtained from the search engine available at UNCTAD's Investment Policy Hub in the section dedicated to international investment agreements.³³²

No.	Type of IIA	Waiver provision
1	Japan – Uruguay BIT Signed 26/01/2015	Article 21 Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party
2	Canada – Côte d'Ivoire BIT Signed 30/11/2014	Article 21 Conditions Precedent to Submission of a Claim to Arbitration
3	Canada – Mali BIT Signed 28/11/2014	Article 21 Conditions Precedent to Submission of a Claim to Arbitration
4	Canada – Senegal BIT Signed 27/11/2014	Article 22 Conditions Precedent to Submission of a Claim to Arbitration
5	Canada – Republic of Korea FTA Signed 22/09/2014	Article 8.22 Conditions Precedent to Submission of a Claim to Arbitration
6	Canada – Serbia BIT Signed 01/09/2014	Article 22 Conditions Precedent to Submission of a Claim to Arbitration
7	Canada – Nigeria BIT Signed 06/05/2014	Article 22 Conditions Precedent to Submission of a Claim to Arbitration
8	Australia – Republic of Korea FTA Signed 08/04/2014	Article 11.18 Conditions and Limitations on Consent of Each Party
9	Canada – Cameroon BIT Signed 03/03/2014	Article 21 Conditions Precedent to Submission of a Claim to Arbitration
10	Canada – Honduras FTA Signed 05/11/2013 Entered into force 01/10/2014	Article 10.24 Conditions Precedent to Submission of a Claim to Arbitration
11	Guatemala – Trinidad and Tobago Signed 13/08/2013	Article 10 Settlement of Disputes between one Contracting Party and an Investor of the Other Contracting Party
12	Colombia – Singapore BIT Signed 12/07/2013	Artículo 13 Procedimiento Arbitral

³³² Available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT>.

13	Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation Signed 10/07/2013	Article 20 Consent to Submission of a Claim
14	Canada – Tanzania BIT Signed 17/05/2013 Entered into force 09/12/2013	Article 21 Conditions Precedent to Submission of a Claim to Arbitration
15	Benin – Canada BIT Signed 09/01/2013 Entered into force 12/05/2014	Article 24 Conditions Precedent to Submission of a Claim to Arbitration
16	China – Japan – Korea trilateral investment agreement Signed 13/05/2012 Entered into force 17/05/2014	Article 15 Settlement of Investment Disputes between a Contracting Party and an Investor of Another Contracting Party
17	Canada – Kuwait BIT Signed 26/09/2011 Entered into force 19/02/2014	Article 21 Conditions Precedent to Submission of a Claim to Arbitration
18	Colombia – Japan BIT Signed 12/09/2011	Article 29 Conditions and Limitations to the Consent and to the Claims
19	Korea – Peru FTA Signed 14/11/2010 Entered into force 01/08/2011	Article 9.16 Investor-State Dispute Settlement
20	Canada – Slovakia BIT Signed 20/07/2010 Entered into force 14/03/2012	Article X Settlement of Disputes between an Investor and the Host Contracting Party
21	Canada – Panama FTA Signed 14/05/2010 Entered into force 01/04/2013	Article 9.22 Conditions Precedent to Submission of a Claim to Arbitration
22	Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association Of Southeast Asian Nations Signed 15/08/2009 Entered into force 01/01/2010	Article 14 Investment Disputes between a Party and an Investor
23	Canada – Jordan BIT	Article 26

	Signed 28/06/2009 Entered into force 14/12/2009	Conditions Precedent to Submission of a Claim to Arbitration
24	Canada – Romania BIT Signed 08/05/2009 Entered into force 23/11/2011	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
25	Canada – Czech Republic BIT Signed 06/05/2009 Entered into force 22/01/2012	Article X Settlement of Disputes between an Investor and the Host Contracting Party
26	Canada – Latvia BIT Signed 05/05/2009 Entered into force 24/11/2011	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
27	Slovakia – Libya BIT Signed 20/02/2009	Article 8 Settlement of Disputes Between a Contracting Party and an Investor of the Other Contracting Party
28	Japan – Switzerland FTA Chapter 9 Investment Signed 19/02/2009 Entered into force 01/09/2009	Article 94 Settlement of Investment Disputes between an Investor and a Party
29	Canada – Colombia FTA Chapter Eight Investment Signed 21/11/2008 Entered into force 15/08/2011	Article 821 Conditions Precedent to Submission of a Claim to Arbitration
30	Mexico – Belarus BIT Signed 04/09/2008 Entered into force 27/08/2009	Article 13 Submission of a Claim
31	Australia – Chile FTA Chapter 10 Investment Signed 30/07/2008 Entered into force 06/03/2009	Article 10.18 Conditions and Limitations on Consent of each Party
32	Mexico – China BIT Signed 11/07/2008 Entered into force 06/06/2009	Article 13 Arbitration: Scope and Standing and Time Periods
33	Canada – Peru FTA Chapter Eight Investment Signed 29/05/2008 Entered into force 01/08/2009	Article 823 Conditions Precedent to Submission of a Claim to Arbitration

34	Rwanda – United States of America BIT Signed 19/02/2008 Entered into force 01/01/2012	Article 26 Conditions and Limitations on Consent of Each Party
35	Mexico – Slovakia BIT Signed 26/10/2007 Entered into force 08/04/2009	Article 13 Submission of a Claim
36	Korea – US FTA Chapter Eleven Investment 30/06/2007 Entered into force 15/03/2012	Article 11.18 Conditions and Limitations on Consent of Each Party
37	Panama – US FTA Chapter Ten Investment Signed 28/06/2007 Entered into force 31/10/2012	Article 10.18 Conditions and Limitations on Consent of Each Party
38	Mexico – India BIT Signed 21/05/2007 Entered into force 23/02/2008	Article 12 Notice of Intent, Consultation and Submission of a Claim to Arbitration
39	Chile – Japan Economic Partnership Agreement Signed 27/03/2007 Entered into force 03/09/2007	Article 91 Conditions and Limitations on Consent
40	Colombia – US FTA Chapter Ten Investment Signed 22/11/2006 Entered into force 15/05/2012	Article 10.18 Conditions and Limitations on Consent of Each Party
41	Canada – Peru BIT Signed 14/11/2006 Entered into force 20/06/2007	Article 26 Conditions Precedent to Submission of a Claim to Arbitration
42	Nicaragua – Taiwan FTA PART FOUR Investment, Services and Related Matters Chapter 10 Investment Signed 23/06/2006 Entered into force 01/01/2008	Article 10.18 Conditions and Limitations on Consent of Each Party
43	Mexico – United Kingdom BIT Signed 12/05/2006	Article 11 Submission of a Claim to Arbitration

	Entered into force 25/07/2007	
44	Peru – USA FTA Chapter Ten Investment Signed 12/04/2006 Entered into force 01/02/2009	Article 10.18 Conditions and Limitations on Consent of Each Party
45	Oman – USA FTA CHAPTER TEN INVESTMENT Signed 19/01/2006 Entered into force 01/01/2009	Article 10.17 Conditions and Limitations on Consent of Each Party
46	USA – Uruguay BIT Signed 04/11/2005 Entered into force 01/11/2006	Article 26 Conditions and Limitations on Consent of Each Party
47	BLEU (Belgium – Luxembourg Economic Union) – Peru BIT Signed 12/10/2005 Entered into force 12/09/2008	Article 11 Settlement of investment disputes
48	Australia – Mexico BIT Signed 23/08/2005 Entered into force 21/07/2007	Article 13 Arbitration: Scope and Standing and Time Periods
49	Iceland – Mexico BIT Signed 24/06/2005 Entered into force 28/04/2006	Article 10 Arbitration: Scope and Standing and Time Periods
50	Australia – Turkey BIT Signed 16/06/2005 Entered into force 29/06/2009	Article 13 Settlement of Disputes Between a Party and an Investor of the Other Party
51	Japan – Mexico Economic Partnership Agreement Investment Chapter Signed 17/09/2004 Entered into force 01/04/2005	Article 81 Conditions and Limitations on Consent of Each Party
52	CAFTA-DR Investment Chapter Signed 05/08/2004 Entered into force 01/01/2009	Article 10.18 Conditions and Limitations on Consent of Each Party
53	Morocco – US FTA Investment Chapter Signed 15/06/2004 Entered into force 01/01/2006	Article 10.17 Conditions and Limitations on Consent of Each Party
54	Panama – Taiwan FTA	Article 10.22

	Chapter 10 Investment Signed 21/08/2003 Entered into force 01/01/2004	Conditions Precedent to Submission of a Claim to Arbitration
55	Chile – US FTA Chapter Ten Investment Signed 06/06/2003 Entered into force 01/01/2004	Article 10.17 Conditions and Limitations on Consent of Each Party
56	Singapore – US FTA Chapter 15 Investment Signed 06/05/2003 Entered into force 01/01/2004	Article 15.17 Conditions and Limitations on Consent of Each Party
57	Chile – Korea FTA Chapter 10 Investment Signed 15/02/2003 Entered into force 01/04/2004	Article 10.25 Conditions Precedent to Submission of a Claim to Arbitration
58	Czech Republic – Mexico BIT Signed 04/04/2002 Entered into force 13/03/2004	ARTICLE 10 Arbitration: Scope and Standing and Time Periods
59	Republic of Korea – Mexico BIT Signed 14/11/2000 Entered into force 27/06/2002	Article 8 Arbitration: Scope and Standing and Time Periods
60	Mexico – Sweden BIT Signed 03/10/2000 Entered into force 01/07/2001	CHAPTER TWO Dispute Settlement Section I Settlement of Disputes Between a Contracting Party and an Investor of the Other Contracting Party
61	Canada – El Salvador BIT Signed 31/05/1999	Article XII Settlement of Disputes between an Investor and the Host Contracting Party
62	Canada – Costa Rica BIT Signed 18/03/1998 Entered into force 29/09/1999	Article XII Settlement of Disputes between an Investor and the Host Contracting Party
63	Canada – Uruguay BIT Signed 29/10/1997 Entered into force 02/06/1999	Article XII Settlement of Disputes between an Investor and the Host Contracting Party
64	Armenia – Canada BIT Signed 08/05/1997	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party

	Entered into force 29/03/1999	
65	Canada – Lebanon BIT Signed 11/04/1997 Entered into force 19/06/1999	Article XII Settlement of Disputes between an Investor and the Host Contracting Party
66	Canada – Croatia BIT Signed 03/02/1997 Entered into force 30/01/2001	Article XII Settlement of Disputes between an Investor and the Host Contracting Party
67	Canada – Thailand BIT Signed 17/01/1997 Entered into force 24/09/1998	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
68	Canada – Chile FTA Chapter G, Section I – Investment Signed 05/12/1996 Entered into force 05/07/1997	Article G-22 Conditions Precedent to Submission of a Claim to Arbitration
69	Canada – Egypt BIT Signed 13/11/1996 Entered into force 03/11/1997	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
70	Canada – Panama BIT Signed 12/09/1996 Entered into force 13/02/1998	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
71	Canada – Venezuela BIT Signed 01/07/1996 Entered into force 28/01/1998	Article XII Settlement of Disputes between an Investor and the Host Contracting Party
72	Barbados – Canada BIT Signed 29/05/1996 Entered into force 17/01/1997	Article XIII Settlement of Disputes between an investor and the Host Contracting Party
73	Canada – Ecuador BIT Signed 29/04/1996 Entered into force 06/06/1997	Article XIII Settlement or Disputes between an Investor and the Host Contracting Party
74	Canada – South Africa BIT Signed 27/11/1995	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
75	Canada – Philippines BIT Signed 10/11/1995 Entered into force 01/11/1996	Article XIII Settlement of Disputes Between an Investor and the Host Contracting Party
76	Canada – Trinidad and Tobago BIT Signed 11/09/1995 Entered into force 08/07/1996	Article XIII Settlement of Disputes between an Investor and the Host Contracting Party
77	Canada – Ukraine BIT	Article XIII

	Signed 24/10/1994 Entered into force 24/06/1995	Settlement of Disputes between an Investor and the Host Contracting Party
78	NAFTA Signed 1992 Entered into force in 1994	Article 1121 Conditions Precedent to Submission of a Claim to Arbitration
	Canada Model BIT	Article 26 Conditions Precedent to Submission of a Claim to Arbitration
	Mexico Model BIT	Article 11 Submission of a Claim
	US Model BIT	Article 26 Conditions and Limitations on Consent of Each Party