conduct or simply that the investor abstains from action? The wording of this article clearly sets forth the spirit and intent of the waiver, which proscribes the initiation or continuation of proceedings with respect to the measure that is alleged to be a breach to NAFTA. Therefore, no affirmative action per se is required on the part of the investor to terminate any procedure already commenced unless the proceeding already initiated specifically requires under applicable law that affirmative steps are taken to prevent continuation.

In effect, even though the provisions of Article 1121 are not express in requiring that an existing proceeding be withdrawn or suspended, it is precisely an element of a waiver that the right to initiate and the right to continue are relinquished.

The waiver relates to proceedings with respect to a "measure" alleged to be a breach to Article 1116 or 1117 of NAFTA. A measure under Article 201 " . . . includes any law, regulation, procedure, requirement or practice." Thus, if an action is taken by a state party to NAFTA that provokes a breach of an obligation under Section A of Chapter 11, then the investor may not initiate or continue in any proceedings before an administrative tribunal or court with respect to such measure.

The commitments made by Canada, Mexico, and the United States under NAFTA allowing investors to file arbitration proceedings against a state for breaches of rights under Section A of Chapter 11 were made on the condition that administrative or court proceedings with respect to the same measures would not be initiated or continued if the investor elected to pursue arbitration. Thus, these conditions precedent become a requisite to jurisdiction, as opposed to a prerequisite to admissibility. When are they required to be met? In the *Ethyl Corp. v. Canada* case,[7] the Tribunal concluded that jurisdiction was not absent due to the fact that Ethyl Corp. simply delayed submitting the consent until the statement of the claim was delivered rather than with its notice of arbitration required under Article 1119. Thus, a failure to include in the initial steps for claim submission a full consent to arbitration would not preclude a claim because in this case it would be a prerequisite to admissibility rather than a precondition to jurisdiction.

Since the three parties to NAFTA have consented to submit a claim to arbitration only to the extent that the conditions precedent under Article 1121 are met, failure to submit a written consent to arbitration and a written waiver required under Article 1121, which is complemented in the case of a waiver with a conduct where the investor abstains from initiating or continuing a domestic proceeding, would constitute a cause for absence of jurisdiction of the arbitral tribunal.

REMARKS BY WILLIAM S. DODGE[*]

I want to discuss the problems of control and appeal in Chapter 11 arbitration.[1] Systems of control are designed to ensure that dispute resolution works properly. Without an effective system of control, the powers of the decision makers become absolute, and this may discourage resort to the dispute resolution process.[2] Systems of appeal, by contrast, are concerned not just with maintaining the conditions necessary for dispute resolution to operate but also with obtaining the correct results in individual cases[3]—what in U.S. Supreme Court practice is called "mere error correction."

[7] Ethyl Corporation v. Canada, Jurisdiction, Award (NAFTA Ch. 11 Arb. Trib., June 24, 1998), *reprinted in* 38 ILM 708 (1999).

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[1] *See generally* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION (1992).

[2] *Id.* at 1–3.

[3] *Id.* at 8–9.

Chapter 11 has two systems of control. The first is Article 1136's provision for post-award challenges. If the arbitration is conducted under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules, the postaward challenge occurs in the courts of the country that served as the place of arbitration.[4] If an arbitration were to be conducted under the ICSID Convention, the Convention's procedures for revision or annulment would apply.[5] (This is not currently a possibility because it requires both the investor's country and the host country to be members of the ICSID Convention, and of the three NAFTA parties only the United States is a member.) If the application to a national court to revise, set aside, or annul the award is governed by the New York Convention[6] or the UNCITRAL Model Law,[7] review is limited to such issues as whether the tribunal was properly constituted or exceeded its jurisdiction and may not include a review of the merits. A second system of control is established by Article 1131 (2), which allows the three NAFTA parties to issue binding interpretations of Chapter 11's text.[8]

These two systems of control serve different purposes. The system of postaward challenges acts as a check on rogue tribunals. The interpretation process established in Article 1131, by contrast, could be used to increase the predictability of dispute resolution by explaining ambiguities in the text of Chapter 11 and resolving differences in interpretation between different tribunals.

Two examples of this latter control function spring to mind. The first concerns the interpretation of Article 1110, which reads, "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory *or take a measure tantamount to nationalization or expropriation of such an investment.*"[9] In three cases—*Metalclad,*[10] *Pope & Talbot,*[11] and *S.D. Myers*[12]—the question arose whether the parties had intended the phrase "tantamount to" to extend Article 1110 beyond the direct and indirect expropriation prohibited by customary international law. Each government took the position that Article 1110 was intended to codify the customary international law rules on expropriation and not to expand them, but they stated their positions in briefs and amicus briefs, leaving the decision of that question to the individual tribunals and risking inconsistent results.[13] This would have been a perfect opportunity for the governments to have exercised their option of issuing a binding interpretation of Article 1110's text under Article 1131 (2).

My second example involves an issue upon which Chapter 11 tribunals have not all agreed—the interpretation of Article 1121. The *Waste Management*[14] Tribunal interpreted

[4] NAFTA, *supra* note 1, Art. 1136(3) (b).

[5] *Id.* at (3) (a).

[6] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 38.

[7] UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

[8] A more indirect version of the same control mechanism exists under Article 1128, which permits NAFTA parties besides the respondent to "make written submissions to a Tribunal on a question of interpretation of this Agreement." *Id.*, Art. 1128. If all three parties' submissions showed agreement on a question of interpretation, this might constitute a "subsequent agreement between the parties regarding the interpretation of the treaty" under Article 31 (3) (a) of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331, *reprinted in* 8 ILM 679 (1969).

[9] *See* NAFTA, *supra* note 1, Art. 1110(1).

[10] Metalclad Corp. v. Mexico, Merits, Award (NAFTA Ch. 11 Arb. Trib., Aug. 30, 2000), *available at* <http://www.worldbank.org/icsid/cases/m.m-award-e.pdf>.

[11] Pope & Talbot, Inc. v. Canada Interim Award (NAFTA Ch. 11 Arb. Trib., June 26, 2000), *available at* <http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp>.

[12] S.D. Myers, Inc. v. Canada, Partial Award (NAFTA Ch. 11 Arb. Trib., Nov. 13, 2000), *available at* <http://www.appletonlaw.com/4b2myers.htm>.

[13] In the end, two of the tribunals agreed with the governments, while the third did not make its position clear.

[14] Waste Management, Inc. v. Mexico, Award (NAFTA Ch. 11 Arb. Trib., June 2, 2000), 15 ICSID REV. FOREIGN INVESTMENT L. J. 214 (2000), *available at* <http://www.worldbank.org/icsid/cases/waste_award.pdf>.

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Article 1121 strictly, requiring that a waiver of the right to bring suit in domestic court be clear and explicit and be submitted in conjunction with the submission of the claim to arbitration. The tribunals in *Ethyl*[15] and *Pope & Talbot*,[16] by contrast, interpreted Chapter 11's procedural requirements (including Article 1121) flexibly, suggesting that waivers may be implied and allowing claimants to submit them well after the submission of a claim.[17] I do not mean to suggest that the *Waste Management* Tribunal was wrong not to follow *Ethyl* and *Pope & Talbot*, for Chapter 11 rejects any system of binding precedent.[18] But these differences in interpretation create practical problems for future claimants and for the NAFTA governments. How is a future claimant to know when it must file its waiver under Article 1121? The NAFTA governments could increase predictability by using Article 1131(2) to resolve such differences in interpretation.

These two mechanisms of postaward challenges and Article 1131(2) interpretations are probably sufficient as systems of control (at least if they are utilized). But they do not provide a system of appeal to correct errors in individual cases. This stands in sharp contrast to dispute resolution under the WTO. When the Uruguay Round increased the effectiveness of the General Agreement on Tariffs and Trade (GATT) panel decisions by removing the requirement that they be adopted by consensus, it simultaneously created a check on the authority of individual panels by creating the WTO Appellate Body. Although the Appellate Body's review is limited to questions of law, its function is not just to maintain the coherence of GATT interpretations (a control function) but to correct errors in individual cases. Of course, appeals are expensive, but the ability to correct errors seems necessary given the importance of the national policies that are often the subject of complaints under GATT, in order to maintain political support for the dispute resolution process.

The same can be said for many of the policies that have been challenged under Chapter 11, from environmental regulations to the U.S. system of punitive damages. To the extent that postaward challenges in national courts escape the limits of the New York Convention and the UNCITRAL Model Law and permit review for manifest disregard of the law or clear error, the system of postaward challenges may begin to serve as a system of appeal. But such a system of appeal would be far from ideal in at least two respects. First, it is arguably too deferential to maintain political support for Chapter 11. To accomplish this, a system of appeal should perhaps be able to correct errors, even if they are not clear or manifest. Second, the current system of postaward challenges vests the power of review in national courts. Depending on the place of arbitration, a country's courts might be called upon to review an award rendered against their own government. This undermines the neutrality of the arbitral process or at the very least the appearance of neutrality. Something like the WTO Appellate Body would be preferable.

I suspect that the United States and Canadian drafters of Chapter 11 did not expect that their countries would be on the receiving end of so many NAFTA claims and that they might write parts of Chapter 11 differently if they were to draft it again today. My basic point is that it is not too late. Chapter 11 is a work in progress and, if it can be improved upon, both investors and host governments stand to benefit.

[15] Ethyl Corp. v. Canada, Jurisdiction, Award (NAFTA Ch. 11 Arb. Trib., June 24, 1999), *reprinted in* 38 ILM 708 (1999).

[16] Pope & Talbot, Inc. v. Canada, Award in Relation to Preliminary Motion by Government of Canada to Strike Paras. 34 and 103 of the Statement of Claim from the Record of Feb. 24, 2000, 23 HASTINGS INT'L & COMP. L. REV. 447 (2000).

[17] William S. Dodge, Case Report: Waste Management, Inc. v. Mexico, 95 AJIL 186, 190–91 (2001).

[18] NAFTA, *supra* note 1, Art. 1136(1) (stating that "an award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

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