

Arbitration—NAFTA—jurisdiction—waiver of right to initiate or continue other legal proceedings—effect of pursuing municipal law claims in municipal court

WASTE MANAGEMENT, INC. V. MEXICO. ICSID Case No. ARB(AF)/98/2. 15 ICSID REV. FOREIGN INVESTMENT L.J. 214 (2000), *obtainable from* <<http://www.worldbank.org/icsid/cases/awards.htm>>.

NAFTA Chapter 11 Arbitral Tribunal, June 2, 2000.

On September 29, 1998, Waste Management, Inc., submitted a claim to arbitration in connection with a concession agreement between its subsidiary, Acaverde S.A. de C.V. (Acaverde), and the City Council of Acapulco. Waste Management alleged that Mexico had breached the provisions of Chapter 11 of the North American Free Trade Agreement¹ (NAFTA) regarding expropriation and minimum standard of treatment. Along with its claim, Waste Management submitted a waiver of rights to initiate or continue other legal proceedings, which is required by NAFTA Article 1121. Waste Management expressed its understanding that the waiver did not apply to claims under Mexico's municipal law. After the waiver was filed, Acaverde continued to prosecute two suits against a state-owned bank and initiated an arbitral proceeding against the City Council of Acapulco for breaches of contract under Mexican law. The Arbitral Tribunal (Tribunal) held that Chapter 11 requires a claimant to waive other legal proceedings challenging any measure alleged to violate NAFTA, and that although Waste Management's waiver was formally sufficient, Acaverde's subsequent conduct rendered the waiver invalid. The Tribunal concluded that it therefore lacked jurisdiction.²

The concession agreement between Acaverde and the City Council of Acapulco was guaranteed by a state-owned bank, Banco Nacional de Obras y Servicios Públicos (Banobras). When Acapulco and Banobras failed to pay invoices for services under the agreement, Acaverde brought two suits against Banobras in Mexican court for breach of contract.³ Waste Management was evidently reluctant to give up these domestic remedies when it filed its Chapter 11 claim. The first waiver it submitted to the secretary-general of the International Centre for the Settlement of Investment Disputes (ICSID) on July 22, 1998, stated explicitly that "[t]his waiver does not apply . . . to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico."⁴ After some correspondence with ICSID, Waste Management sent a second waiver with the submission of its claim to arbitration on September 29, 1998.⁵ This waiver stated:

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 laws of Mexico.⁶

¹ North American Free Trade Agreement, Dec. 8–17, 1992, Can.-Mex.-U.S., ch. 11, *reprinted in* 32 ILM 605, 639–49 (1993) [hereinafter NAFTA].

² See Waste Management, Inc. v. Mexico, Award (NAFTA Ch. 11 Arb. Trib., June 2, 2000), 15 ICSID REV. FOREIGN INVESTMENT L.J. 214, 239 (2000) [hereinafter Award], *obtainable from* <<http://www.worldbank.org/icsid/cases/awards.htm>>. Bernardo M. Cremades (president) and Eduardo Siqueiros T. constituted the majority. The late Keith Hightet dissented. The online version of the Award, including the dissenting opinion, *id.* at 241–270 [hereinafter Hightet dissent], has the same pagination as the version at 15 ICSID REV. FOREIGN INVESTMENT L.J. 214.

³ See Award, *supra* note 2, at 232–33. The two suits were filed on January 31, 1997, and August 11, 1998. See *id.*

⁴ *Id.* at 219. This waiver was sent with Waste Management's notice of intent to submit a claim, which NAFTA Article 1119 requires a claimant to file at least 90 days prior to submitting a claim to arbitration. Waste Management was not required to file a waiver, however, until its claim was actually submitted to arbitration. See NAFTA, *supra* note 1, Art. 1121(3), 32 ILM at 643.

⁵ See Award, *supra* note 2, at 219–21. In section 5, the Award mistakenly refers to the claim as having been submitted in 1999 rather than 1998.

⁶ *Id.* at 221.

Acaverde continued to prosecute its two suits against Banobras and, on October 27, 1998, also initiated an arbitration against the City Council of Acapulco before the City of Mexico Chamber of Commerce Permanent Arbitration Committee claiming damages for non-payment of the invoices under Mexican law.⁷

The Tribunal began its analysis by reading Article 1121 to require a waiver strictly in accordance with its terms.⁸ The Tribunal reasoned that its jurisdiction depended on the consent of the parties to arbitration and that, because Mexico had consented under Article 1122 “to arbitration in accordance with the procedures set out in this Agreement,”⁹ fulfillment of Article 1121’s conditions precedent for arbitration required “the utmost attention.”¹⁰ “[A]ny waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which is at all dubious.”¹¹ Article 1121 (3) provides that the “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.”¹² The Tribunal characterized these formal requirements as *ad substantiam*, so that a waiver that failed to comply with them would “not exist as such.”¹³ The Tribunal concluded, however, that Waste Management’s waiver was free from such formal defects and rejected Mexico’s attempt to add an additional requirement of notarization to those set forth in Article 1121 (3).¹⁴

The Tribunal also rejected Mexico’s argument that the Tribunal was obliged “to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding,” noting that the Tribunal “lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one.”¹⁵ Critically, however, the Tribunal was willing to review Waste Management’s postwaiver conduct. The Tribunal reasoned that

the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued.

. . . Hence, in order for said intent to assume legal significance, it is not suffic[ient] for it to exist internally. Instead, it must be voiced or made manifest, in the case in point by means of a written text and specific conduct on the part of the waiving party in line with the declaration made.¹⁶

⁷ See *id.* at 232–33. Acaverde’s suits against Banobras were dismissed in January 1999, and its appeals were unsuccessful. Acaverde abandoned its arbitration against Acapulco on July 7, 1999. *Id.*

⁸ NAFTA Article 1121 (1), entitled “Conditions Precedent to Submission of a Claim to Arbitration,” provides in relevant part:

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

Article 1121 (2) requires the same waiver for claims under Article 1117 on behalf of an enterprise that the investor owns or controls.

⁹ NAFTA, *supra* note 1, Art. 1122(1), 32 ILM at 644.

¹⁰ Award, *supra* note 2, at 228; see *id.* at 227–28. The Arbitral Tribunal (Tribunal) also noted that Article 1121 provides for the submission of a claim “only if” the proper waiver is filed. See *id.* at 227.

¹¹ *Id.* at 229.

¹² NAFTA, *supra* note 1, Art. 1121 (3), 32 ILM at 643.

¹³ Award, *supra* note 2, at 230; see *id.* at 230–31. Consistent with this position, the Tribunal also concluded that “submission of the waiver must take place in conjunction with” the submission of the claim to arbitration. *Id.* at 229.

¹⁴ See *id.* at 231. This argument suggests that the reason Mexico did not use the waiver to seek dismissal of Acaverde’s two suits against Banobras was that the waiver, absent the requisite formalities, would not have been deemed sufficient in a Mexican court.

¹⁵ *Id.* at 227.

¹⁶ *Id.* at 231–32.

The Tribunal read Article 1121 to require Waste Management and Acaverde not simply to avoid invoking NAFTA in other fora, but to forgo domestic law claims based on the same measures.¹⁷

[T]he domestic proceedings initiated by ACAVERDE fall within the prohibition of NAFTA Art. 1121 in that they refer to measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions, namely non-compliance with the obligations of guarantor assumed under a line of credit agreement requiring BANOBRAS to defray invoices not paid by ACAPULCO city council, and non-compliance by ACAPULCO city council through its failure to pay said invoices.¹⁸

The Tribunal concluded that it could not “deem as valid the waiver tendered by the Claimant in its submission of the claim to arbitration, in view of its having been drawn up with additional interpretations, which have failed to translate as the effective abdication of rights mandated by the waiver,” and dismissed the claim for lack of jurisdiction.¹⁹

In dissent, the late Keith Highet disagreed with the Tribunal’s understanding of the word “measure” in Article 1121. While he acknowledged that NAFTA’s definition of “measure” is broad,²⁰ he argued that Article 1121 uses that word in a more limited sense.

The reference in Article 1121 is to a State act that is itself a breach of international obligations under NAFTA. Article 1121 cannot be read as applying to local components of such an act which are not themselves breaches of international obligations at the international treaty level and which would not be actionable under NAFTA.²¹

In Highet’s view, the purpose of Article 1121 was not to bar local remedies for related commercial claims, but to protect the NAFTA parties from “parallel actions in their own judicial systems that would raise NAFTA claims.”²² He read Article 1121 as providing “the same kind of protection” as Annex 1120.1, which bars investors from alleging a breach of Chapter 11 both in arbitration and before a Mexican court.²³ Highet also noted that “it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim.”²⁴ Because nonpayment of invoices is not itself a violation of Chapter 11,²⁵ he reasoned that Waste Management and Acaverde were not required to forgo alternative remedies under Mexican law for such nonpayment.

Highet’s position on the appropriateness of a Chapter 11 tribunal reviewing the claimant’s postwaiver conduct is not entirely clear. At one point in his dissent, he seemed to agree with the majority, stating that “[i]f the Article 1121 waiver had been intended to cover any and all concurrent legal activity, then clearly Claimant’s course of conduct in Mexico would be inconsistent with it and would vitiate the waiver.”²⁶ Later, however, he criticized the majority for

¹⁷ *See id.* at 233–38. The Tribunal assumed that the purpose of requiring such a waiver was to avoid the possibility that a claimant might recover twice for the same damages—once in a domestic forum and once before a Chapter 11 tribunal. *See id.* at 235–36.

¹⁸ *Id.* at 236.

¹⁹ *Id.* at 239.

²⁰ *See* Highet dissent, *supra* note 2, at 245–46; NAFTA, *supra* note 1, Art. 201, 32 ILM at 298 (“measure includes any law, regulation, procedure, requirement or practice”).

²¹ Highet dissent, *supra* note 2, at 246. In support of his narrow reading of Article 1121, Highet also observed that it requires a waiver not of all proceedings that somehow related to the measure alleged to breach NAFTA, but only of proceedings “with respect to” such a measure. “[A]s a legal matter, this means that the proceeding must primarily concern, or be addressed to, that measure.” *Id.* at 252.

²² *Id.* at 260.

²³ *Id.* at 258. *See* NAFTA, *supra* note 1, Annex 1120.1, 32 ILM at 648 (“an investor of another Party may not allege that Mexico has breached an obligation under [NAFTA] both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal”).

²⁴ Highet dissent, *supra* note 2, at 260.

²⁵ *See id.* at 247.

²⁶ *Id.* at 253.

“read[ing] into the text of Article 1121 the additional requirement that litigations subject to the waiver be affirmatively withdrawn.”²⁷ He noted that “[i]t is hard to find fault” with Waste Management’s argument “that, once the waiver had been prepared and delivered . . . , it was up to Respondent to use it as it saw fit.”²⁸ In the end, relying on the award on jurisdiction in *Ethyl Corporation v. Canada*,²⁹ Highet took the position that a claimant’s postwaiver conduct should be reviewed by a Chapter 11 tribunal, but as a matter of admissibility rather than jurisdiction.³⁰ The proper remedy for conduct inconsistent with the waiver, he suggested, would be to disallow that portion of the claim that had also been raised in the domestic proceedings, not to dismiss the entire claim for want of jurisdiction.³¹

* * * *

This case raises two specific questions concerning the proper relationship between national courts and Chapter 11 arbitration.³² First, as a precondition to bringing a claim before a Chapter 11 tribunal, is an investor required to waive its right to alternative legal proceedings only with respect to its NAFTA claims or also with respect to claims for damages³³ under domestic law? Second, who should monitor the claimant’s postwaiver conduct: the Chapter 11 tribunal or national courts?

On the first question, the Tribunal is clearly correct in concluding that Article 1121 requires a waiver of the right to seek damages in other fora for violations of both NAFTA and domestic law. The text of Article 1121 focuses not on whether the legal basis for the proceedings under NAFTA and domestic law is the same, but on whether the same measure is being challenged. It requires an investor to waive its “right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to *the measure* of the disputing Party that is alleged to be a breach [of NAFTA].”³⁴ Furthermore, Highet’s interpretation of Article 1121 as requiring a waiver only of claims based on NAFTA would make the waiver requirement redundant. As the dissent itself acknowledges, Annex 1120.1 already protects Mexico against an investor claiming violations of NAFTA both in domestic courts and before a Chapter 11 tribunal.³⁵ Canada and the United States enjoy similar protection because their implementing legislation effectively prohibits private parties from raising NAFTA violations in their courts at all.³⁶ It is also worth noting that the Tribunal’s interpretation of Article 1121 does not

²⁷ *Id.* at 256.

²⁸ *Id.* Highet also faulted the Tribunal for looking to Waste Management’s postwaiver litigation to eviscerate the waiver while ignoring its subsequent abandonment of those suits. *See id.* at 263 (“[E]ven if the substance of the Article 1121 waiver had been—as the majority of the Tribunal believes—eviscerated in 1998 or 1999, why was that substance not restored . . . later in 1999 or in January 2000?”). Acaverde abandoned its litigation against Banobras, however, only after exhausting its appeals. *See* Award, *supra* note 2, at 233. Acaverde did abandon the domestic arbitration against the City Council of Acapulco in July 1999, *see id.*, although the arbitral tribunal never formally declared the proceeding closed, *see id.* at 238.

²⁹ *Ethyl Corp. v. Canada, Jurisdiction*, Award (NAFTA Ch. 11 Arb. Trib., June 24, 1999), *reprinted in* 38 ILM 708 (1999) [hereinafter *Ethyl arbitration*]; *see* Alan C. Swan, Case Report: *Ethyl Corporation v. Canada*, 94 AJIL 159 (2000).

³⁰ *See* Highet dissent, *supra* note 2, at 264–68.

³¹ *See id.* at 267.

³² For a discussion of other questions concerning this relationship, *see* William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT’L & COMP. L. REV. 357 (2000).

³³ Article 1121 expressly permits a claimant to seek damages from a Chapter 11 tribunal and simultaneously or subsequently to seek declaratory or injunctive relief in domestic court—relief that Chapter 11 tribunals are not capable of granting. *See* NAFTA, *supra* note 1, Art. 1135, 32 ILM at 646.

³⁴ *Id.*, Art. 1121 (1), (2), 32 ILM at 643 (emphasis added).

³⁵ *See* Highet dissent, *supra* note 2, at 258.

³⁶ *See* North American Free Trade Agreement Implementation Act, 19 U.S.C. §3312(c) (2) (1994) (“No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political

require that an investor, contrary to what Highet suggests,³⁷ completely abandon its local remedies in order to pursue a Chapter 11 claim. An investor is free to pursue local remedies for up to three years before it submits a claim to NAFTA arbitration.³⁸

The Tribunal's conclusion that it ought to monitor the claimant's postwaiver conduct is more questionable. The text of Article 1121 simply requires that a waiver "shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration."³⁹ As Highet observed, it is hard to find fault with Waste Management's position that it was up to Mexico to raise the waiver as a defense in the other proceedings.⁴⁰ Moreover, the Tribunal's decision to dismiss for lack of jurisdiction may have little practical effect. Waste Management was free to refile its Chapter 11 claim within three years of the breach and resulting loss,⁴¹ and it did so on September 27, 2000.⁴²

By grafting onto Article 1121 a requirement that a claimant affirmatively discontinue other legal proceedings, the Tribunal seems to have departed from its position that a Chapter 11 tribunal must adhere strictly to NAFTA's text. This inconsistency, however, is ultimately less troubling than the inconsistency between *Waste Management* and other Chapter 11 awards, specifically those in *Ethyl Corp. v. Canada*⁴³ and *Pope & Talbot, Inc. v. Canada*.⁴⁴ Where the Tribunal in *Waste Management* stressed that compliance with Article 1121 required "the utmost attention"⁴⁵ and that a waiver that did not meet the formal requirements of Article 1121(3) would "not exist as such,"⁴⁶ the *Ethyl* tribunal expressly rejected any notion that Chapter 11's procedural requirements should be interpreted "strictly."⁴⁷ Where *Waste Management* held that "submission of the waiver must take place in conjunction with" the submission of the claim to arbitration,⁴⁸ both *Ethyl* and *Pope & Talbot* allowed claimants to submit waivers later.⁴⁹ Where *Waste Management* said that "any waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which

subdivision of a State on the ground that such action or inaction is inconsistent with [NAFTA]"); North American Free Trade Agreement Implementation Act, R.S.C., ch. 44, §6(2) (1993) (Can.) ("Subject to Section B of Chapter Eleven of the Agreement, no person has any cause of action and no proceeding of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.").

³⁷ See Highet dissent, *supra* note 2, at 260.

³⁸ Indeed, I have argued that Article 1121 is structured to encourage investors to pursue local remedies before resorting to Chapter 11. See Dodge, *supra* note 32, at 381–83. Of course, an investor who does pursue its domestic remedies before turning to Chapter 11 runs the risk that the Chapter 11 tribunal will treat the domestic decision as *res judicata*. See, e.g., Azinian v. Mexico, Merits, Award (NAFTA Ch. 11 Arb. Trib., Nov. 1, 1999), reprinted in 39 ILM 537 (2000), obtainable from <<http://www.worldbank.org/icsid/cases/awards.htm>>. For further discussion of *res judicata* in the context of Chapter 11, see Dodge, *supra* note 32, at 376–83.

³⁹ NAFTA, *supra* note 1, Art. 1121(3), 32 ILM at 643.

⁴⁰ See *supra* note 28 and accompanying text.

⁴¹ See NAFTA, *supra* note 1, Arts. 1116(2), 1117(2).

⁴² *U.S. Waste Control Firm Refiles Case Under NAFTA Investor-State Provisions*, 17 INT'L TRADE REP. 1528 (Oct. 5, 2000).

⁴³ *Ethyl arbitration*, *supra* note 29.

⁴⁴ *Pope & Talbot, Inc. v. Canada*, 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"] (NAFTA Ch. 11 Arb. Trib., Feb. 24, 2000), 23 HASTINGS INT'L & COMP. L. REV. 447 (2000) [hereinafter *Pope & Talbot Harmac motion*]. As of this writing, there has not been a final award in the *Pope & Talbot* case. There has been a series of interim awards, however, dealing with such issues as the scope of Chapter 11, the waiver requirement, performance requirements, expropriation, and the submission of new claims. Four of these awards (including the award on the *Harmac motion*) are reprinted in 23 HASTINGS INT'L & COMP. L. REV. at 431–93. The final award will be reported in a subsequent issue of the *Journal*.

⁴⁵ Award, *supra* note 2, at 228.

⁴⁶ *Id.* at 230.

⁴⁷ *Ethyl arbitration*, *supra* note 29, 38 ILM at 723.

⁴⁸ Award, *supra* note 2, at 229.

⁴⁹ See *Ethyl arbitration*, *supra* note 29, 38 ILM at 729 (allowing waiver to be submitted with statement of claim filed nearly six months after submission of the claim to arbitration); *Pope & Talbot Harmac motion*, *supra* note 44, at 452 (allowing waiver submitted nearly two years after the submission of a claim to have "retroactive effect").

is at all dubious,⁵⁰ *Ethyl* suggested and *Pope & Talbot* held that the necessary waiver could be implied from the act of submitting a claim to arbitration under Chapter 11.⁵¹ And where the *Ethyl* tribunal was apparently persuaded to read Chapter 11's procedural requirements flexibly to avoid the inefficiency of requiring the claimant to refile,⁵² the Tribunal in *Waste Management* either ignored this possibility or thought it irrelevant.⁵³

As a formal matter, the Tribunal in *Waste Management* was not bound to follow the awards in *Ethyl* and *Pope & Talbot*. NAFTA Article 1136 provides that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."⁵⁴ Nevertheless, these conflicting positions leave future Chapter 11 parties without adequate guidance and may discourage resort to a dispute resolution process that provides such inconsistent results.⁵⁵

The continuing problem is to provide a system of control for, and possibly a means of appeal from, Chapter 11 arbitrations.⁵⁶ Chapter 11 provides a limited system of *control* by giving NAFTA countries the authority under Article 1131(2) to issue binding interpretations of its text.⁵⁷ Canada, Mexico, and the United States ought to use this power to resolve differences in interpretation by different tribunals, thus providing guidance and predictability for future cases. But Chapter 11 does not provide any system of *appeal* to correct errors in individual cases, in sharp contrast with GATT 1994, which established an Appellate Body to review the legal determinations of individual WTO panels. The Chapter 11 negotiators seem to have assumed that Chapter 11 claims (at least against Canada and the United States) would be relatively infrequent and would not often challenge important national policies, so that appellate review would be an unnecessary and costly burden. Both of these assumptions, however, have proven to be incorrect. Each of the NAFTA parties has seen a number of claims filed against it—many of them challenging important policies ranging from environ-

⁵⁰ Award, *supra* note 2, at 229.

⁵¹ See *Ethyl* arbitration, *supra* note 29, 38 ILM at 729 (Article 1121 "seem[s] designed to memorialize *expressis verbis* what is normally the case in any event, namely, that the initiation of arbitration constitutes consent to arbitration by the initiator, whereby access to any court or other dispute settlement mechanism is precluded"); *Pope & Talbot* Harmac motion, *supra* note 44, at 451 ("the initiation of arbitral proceedings may be taken as a constructive waiver of the right to initiate other proceedings").

⁵² See *Ethyl* arbitration, *supra* note 29, 38 ILM at 728–29 ("It is not doubted that today Claimant could resubmit the very claim advanced here. . . . Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA.").

⁵³ See *supra* notes 41–42 and accompanying text.

⁵⁴ NAFTA, *supra* note 1, Art. 1136, 32 ILM at 646. The provision seems to be drawn from Article 59 of the Statute of the International Court of Justice, which is based on Article 59 of the Statute of the Permanent Court of International Justice. The Permanent Court interpreted Article 59 to reject a system of binding precedent. See *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 PCIJ (ser. A) No. 7, at 19 (May 25) ("The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States in other disputes.").

⁵⁵ Cf. Highet dissent, *supra* note 2, at 241 (noting that "the Award will be an important guidance to future potential NAFTA claimants").

⁵⁶ See W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 8–9 (1992) (distinguishing between control and appeal).

⁵⁷ See NAFTA, *supra* note 1, Art. 1131(2), 32 ILM at 645. Another system of control exists in the provisions for review by a court in the country where the award was rendered in a proceeding for annulment, *see id.* Art. 1136(3), 32 ILM at 646, and by a court in the country where enforcement is sought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 330 UNTS 38, or Inter-American Convention on International Commercial Arbitration (Inter-American Convention), Jan. 30, 1975, 14 ILM 336 (1975). See NAFTA, *supra* note 1, Art. 1136(6), 32 ILM at 646. For discussion of the New York Convention as a system of control, see REISMAN, *supra* note 56, at 109–20.

Even where an important domestic law or practice is found to violate NAFTA, a state should have no right to resist enforcement of a Chapter 11 award on public policy grounds under Article 5(2)(b) of the New York Convention or Article 5(2)(b) of the Inter-American Convention. The NAFTA parties have agreed to subject their domestic law to the disciplines of Chapter 11, which should preclude the parties from complaining that an award applying those constraints contravenes their public policy.

mental regulation⁵⁸ to the awarding of punitive damages.⁵⁹ If these trends continue, Canada, Mexico, and the United States might be well advised to consider amending Chapter 11 to provide for a system of appellate review.

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Sovereign immunity from suit—agreement between a local-government entity and a foreign state—distinction between public and private acts—waiver of immunity—effect of choice-of-law clause on immunity

LOCAL AUTHORITY OF VÄSTERÅS V. REPUBLIC OF ICELAND. Case No. 1999:112, Nytt Juridiskt Arkiv, Avd. I, Rättsfall från Högsta Domstolen (New Legal Archives, Part I, Cases Decided by the Supreme Court).

Högsta Domstolen (Supreme Court of Sweden), December 30, 1999.

Swedish courts, and particularly the Supreme Court (*Högsta Domstolen*), seldom find the opportunity to opine on the issue of a foreign state's immunity from suit.¹ One such uncommon occasion arose in December 1999 when the Supreme Court, on grounds of immunity from suit, affirmed the dismissal of an action brought by the Local Authority of Västerås (Local Authority)—one of Sweden's 289 town districts—against the Republic of Iceland for monies due under a contract.

The origin of the dispute is a contract (Contract) dated December 1, 1992, between the Icelandic Ministry of Education and Culture (Icelandic Ministry) and the Local Authority, which is responsible for schools in the Swedish town district of Västerås.² According to Article 3 of the Contract, the Local Authority undertakes to give flight-technician education to Icelandic students and to examine them at the end of their studies. The Icelandic Ministry agrees, according to the same article, to "defray any possible costs of educating Icelandic students that are not covered by the Swedish government according to the Agreement between the Nordic countries concerning education at the upper-secondary-school level." Article 7 of the Contract provides that disputes concerning the implementation of the Contract will be settled according to Swedish law.

The agreement referred to in the Contract is the Agreement on a Nordic Common Education at the Upper Secondary School Level (1992 Agreement),³ which had been signed by

⁵⁸ See, e.g., Ethyl arbitration, *supra* note 29, 38 ILM at 711 (noting Ethyl's claim that Canada's MMT Act violated Chapter 11 provisions on national treatment, performance requirements, and expropriation); *Metalclad Corp. v. Mexico*, Merits, Award (NAFTA Ch. 11 Arb. Trib., Aug. 30, 2000) <<http://www.pearcelaw.com/metalclad.html>> (holding that denial of claimant's right to operate a landfill on environmental grounds was a denial of fair and equitable treatment and an expropriation); Notice of Intent to Submit a Claim (July 2, 1999), *Methanex Corp. v. United States* (NAFTA Ch. 11 Arb. Trib.) <<http://www.methanex.com/investorcentre/mtbe/noticeofintent.pdf>> (alleging that California's decision to ban the gasoline additive MTBE is an expropriation and a denial of fair and equitable treatment). The *Metalclad* award will be reported in a subsequent issue of the *Journal*.

⁵⁹ See Notice of Claim (Oct. 30, 1998), *Loewen Group, Inc. v. United States* (NAFTA Ch. 11 Arb. Trib.) (on file with author) (claiming that punitive damages judgment constitutes *inter alia* an expropriation and a denial of justice).

¹ The total number of Supreme Court cases having any connection to state immunity is not more than ten. Half of these cases belong to the period before World War II.

² This contract (on file with author) is a revised version of a contract on the same subject concluded in May 1991. It is written in Swedish. Translations of the contract and of all other Swedish documents cited in this case report are by the author. This report uses *contract* for the Swedish word *avtal*, and *agreement* for the Swedish word *överenskommelse*. Both Swedish terms can, in principle, be used broadly to describe any sort of agreement. Although it is rather common to use *överenskommelse* for agreements between states, *avtal* is also used for international agreements, particularly those that have a rather limited subject matter. *Avtal* is almost always used to describe commercial contracts. The implications of these different words were not at issue in the case, and the use of *contract* in this report is not intended to resolve the underlying issue regarding the nature of the instrument.

³ SVERIGES INTERNATIONELLA ÖVERENSKOMMELSER [hereinafter SÖ] 1993:8. SÖ is the official collection of Sweden's international agreements.