CHAPTER 3

UNCITRAL'S WORK ON CONCURRENT PROCEEDINGS IN INVESTMENT ARBITRATION: OVERCOMING THE 'TREATY/CONTRACT CLAIMS' GAP

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I UNCITRAL'S ONGOING WORK ON CONCURRENT PROCEEDINGS

Over the last three years the United Nations Commission on International Trade Law (UNCITRAL) has been devoting significant attention to the issue of concurrent proceedings in international arbitration. In July 2013, at the Commission's forty-sixth session, it was suggested that the topic was 'increasingly important, particularly in the field of investment arbitration, and might warrant further consideration'.[1] The problem basically arises when one arbitration is initiated in relation to a certain dispute and at the same time related parties initiate parallel proceedings seeking, in whole or in part, the same relief.[2] The Commission believes that addressing this problem would help to promote a 'harmonized and consistent approach to arbitration'.[3]

The issue was discussed further at the organisation's next session (July 2014), with the Commission considering whether to mandate its Working Group II (Arbitration and Conciliation) to undertake work in the field of concurrent proceedings in investment treaty arbitration,[4] based on a note prepared by the

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1 United Nations, Official Records of the General Assembly, Sixty-eighth session, Supplement No 17 (A/68/17), para 131.

2 Ibid.

3 Ibid.

4 United Nations, Official Records of the General Assembly, Sixty-ninth session, Supplement No 17 (A/69/17), para 126.

Secretariat.[5] The note briefly introduced the practical issues raised by concurrent proceedings in investment arbitration and examined possible solutions. Parallel proceedings in commercial arbitration were not covered.[6] The Secretariat was requested to report to the Commission at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[7]

At UNCITRAL's forty-eighth session (July 2015), the Secretariat presented a note on concurrent proceedings in investment arbitration.[8] The purpose of the note was to outline the practical issues, the various options available to address them, and the possible form of any instrument to be developed. The note focused on concurrent proceedings in investment arbitration, leaving aside the specific problems of concurrent proceedings in commercial arbitration.[9]

As evidenced by a study published in 2007,[10] concurrent proceedings in investment disputes have become commonplace. Despite being an 'increasingly problematic issue in the field of investor-State disputes', the UNCITRAL's Secretariat recognises that it is difficult to condense it in a universal definition as there are different legal bases for determining whether multiple claims against the same state constitute 'concurrent proceedings'.[11] The following working definition was put forward in the Secretariat's 2014 note: 'situations where more than one claim

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5 United Nations General Assembly, United Nations Commission on International Trade Law, Forty-seventh session, Note by the Secretariat: Planned and Possible Future Work – Part II, Addendum: Possible Future Work in Arbitration – Concurrent Proceedings, document A/CN.9/816, at 6 ff.

6 During the discussion it was suggested that UNCITRAL should not 'limit its work to parallel proceedings arising in the context of investor-State arbitration, but rather, in light of the implication such work might have on other types of arbitration practice, to extend that work to commercial arbitration as well'. It was also said, however, that 'parallel proceedings in investment arbitrations, and those in commercial arbitrations, raised different issues and might need to be considered separately.' The Commission agreed that 'the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area', and that 'work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration' – United Nations, above n 4 at paras. 127 and 130.

7 Ibid at para 130.

8 United Nations General Assembly, United Nations Commission on International Trade Law, Forty-eight session, Note by the Secretariat: Concurrent Proceedings in Investment Arbitration, document A/CN.9/848.

9 Ibid at para 5.

10 Mark Friedman "Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration" in AJ van den Berg (ed.) *International Arbitration 2006: Back to Basics?* (Kluwer Law International, The Hague, 2007) 545-568. The author reviewed awards in seventy-eight completed cases administered by the International Centre for Settlement of Investment Disputes (ICSID) and found evidence of concurrent proceedings in forty-one percent of them.

11 United Nations General Assembly, above n 5 at 7 paras 3-4.

is filed against a State pursuant to an investment treaty, and where such claims involve substantially related parties, irrespective of their location, in relation to the same or substantially identical measure or measures taken by that same State.'[12]

Concurrent proceedings in investment arbitration are caused essentially by two factors. First, the proliferation of international courts and tribunals, which gives investors the possibility of submitting their claims to different fora.[13] As there are no clear, overarching rules on the distribution of jurisdiction among these different institutions, overlaps are frequent.[14] Depending on the nature of the alleged breached rights, foreign investors may seek redress in different proceedings.[15] The multiplicity of available tribunals not only encourages but almost compels investors to look for the forum which appears to be the most favourable.[16] Second, the distinction between the domestic and the international legal order is not always clear.[17] According to Kingsbury, 'perhaps the greatest problem associated with the growth in the jurisdiction and activities of international courts and tribunals is the connection between these bodies and national law and institutions, particularly national courts and tribunals.'[18] An aggrieved investor may seek compensation before different jurisdictions, based on diverse legal frameworks, even if the parallel claims are grounded on the exact same set of facts.

Concurrent proceedings are undesirable for different reasons. In the realm of investment arbitration, their existence may undermine confidence in the dispute settlement mechanism, possibly even breaching the principles of good faith and

12 Ibid at para 4. In the 2015 note the adopted concept is basically the same: 'situations where two or more investment-related claims against a State are, or can be, filed before different forums, and where such claims involve substantially related parties, irrespective of their location, in relation to the same measure or substantially identical measures taken by that State' – United Nations General Assembly, above n 8 at para 6. This approach is deliberately broad so as to encompass the variety of situations under which concurrent proceedings may arise in treaty-based arbitration – id.

13 Jan Ole Voss *Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff Publishers, Leiden and Boston, 2011) at 278-279.

14 See eg, Jonathan I Charney *Is International Law Threatened by Multiple International Tribunals?* (Brill Nijhoff, Leiden and Boston, 1998) at 101, 139 ff.

15 Zachary Douglas "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 British Yearbook of International Law 151 at 236-237.

16 Voss, above n 13 at 279.

17 Ibid.

18 Benedict Kingsbury "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem" (1999) 31 New York University Journal of International Law and Politics 679 at 694.

procedural fairness.[19] According to the UNCITRAL's Secretariat, concurrent proceedings may lead to the following criticisms against investor-state arbitration: first, where concurrent proceedings are brought, a state must defend several claims in relation to the same measure, with potentially the same economic damage at stake, leading to a duplication of efforts, additional costs, and procedural unfairness;[20] second, multiple claims give rise to a risk of multiple recovery of the same damage from the host state;[21] third, concurrent proceedings in relation to the same state measure may result in inconsistent or contradictory case law outcomes on issues of fact or law;[22] finally, the existence or even the risk of concurrent proceedings can hinder amicable settlement, create some dissatisfaction for users of investment arbitration and undermine predictability.[23]

The Secretariat identified as frequent circumstances leading to concurrent proceedings 'the complexity of multinational corporate structures', the 'structures of investments themselves', and the 'nature of contractual and treaty-based relationships between parties'.[24] Two situations are particularly highlighted: the existence of different instruments (contract claims and investment claims under investment treaties) and the existence of different actors (investor comprised of multiple entities with standing).[25]

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19 United Nations General Assembly, above n 5 at 8, paras 14-15.

20 Ibid at 8, para 16. See Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford University Press, Oxford, 2009), at 17.

21 United Nations General Assembly, above n 5 at 8, para 17. See Friedman, above n 10 at 545; Gabrielle Kaufmann-Kohler "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?" in E Gaillard (ed.) *Annulment of ICSID Awards: a Joint IAI-ASIL Conference* (Stämpfli, Bern, 2004) 189, at 203.

22 United Nations General Assembly, above n 5 at 8, para 18. See Friedman, above n 10 at 545; Kaufmann-Kohler, above n 21; Andrea K Bjorklund "Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is Not Working" (2007) 59 Hastings Law Journal 101, at 118-119.

23 United Nations General Assembly, above n 5 at 8, para 19.

24 Ibid at 7, para 5. The note also refers to concurrent proceedings arising from the initiation of proceedings by substantially different investors or under different investment treaties. However, these cases are not discussed further in the note – ibid at 7, para 6. The 2015 note, in a similar fashion, recognises that 'Investment disputes tend to be complex as they relate to claims arising under different legal instruments (such as investment treaties and contracts), they may involve separate and yet economically related entities, and they may be resolved through more than one forum (such as arbitral tribunals set-up under different treaties and domestic courts)' – United Nations General Assembly, above n 8 at para 6.

25 United Nations General Assembly, above n 5 at 8, paras. 7-13: United Nations General Assembly, above n 8, paras 7-12.

While concurrent proceedings may arise in different scenarios, the existence of an investment contract between the parties is the most likely reason for the generation of concurrent proceedings.[26] Van Harten examined investment treaty awards decided and publicly-available by cut-offs ranging from May 2010 to October 2012 and concluded that approximately two-thirds of the claims appeared to involve a contract that related to the dispute.[27] Indeed, investment treaty arbitration and contract-based adjudication are deeply related. Investment contracts are still commonplace. The existence of investment treaties did not render them obsolete, as treaties are not self-sufficient. In some instances investment contracts offer more adequate protection to the investor because they can be adjusted to the specific needs of the investment. Differently, investment treaties are much more general and vague, and in some cases might be unsuited to particular investment projects.[28] When there is a contract between foreign investor and host state, it creates its own set of rights and duties, the breach of which may give rise either to litigation before domestic courts or to international arbitration.[29] The propensity for jurisdiction overlap and, thus, concurrent proceedings, is obvious.

The UNCITRAL's Secretariat pays especial attention to this source of concurrent proceedings:[30]

> A number of different sources of law may confer rights upon investors and obligations on States. Contract and treaty obligations, for example, provide discrete bases for a substantive claim (with often different applicable substantive law), but a single measure from a host State can give rise to both a contract and a treaty claim.
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> The breach of a contract between an investor and a State may also serve as an indication that the treaty has been breached, and in some instances, umbrella clauses

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26 Voss, above n 13 at 283.

27 Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, Oxford, 2013) at 122-124.

28 Jason Webb Yackee "Do We Really Need BITS? Toward a Return to Contract in International Investment Law" (2008) 3 Asian Journal of WTO and International Health Law and Policy 121, at 133-134.

29 Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, Oxford, 2007) at 80.

30 United Nations General Assembly, above n 5 at 7, paras 7-8. The topic is also addressed in the 2015 note: 'A number of different sources of law may confer rights and obligations upon investors and States. Contracts and treaties provide discrete bases for substantive claims (with often different applicable law), and a single measure from a host State can give rise to both contractual and treaty-based claims. A contractual claim and a treaty-based claim arising from the same measure can be brought in different forums and under different substantive laws, even though the parties might be substantially the same and seeking substantially the same relief' – United Nations General Assembly, above n 8 at para 10.

> in investment treaties can premise a breach of a treaty on a contractual breach. However, the two are not necessarily co-dependent, and a contract claim and a treaty claim based on the same measure can be brought in different fora and under different substantive laws, even though the parties might be substantially the same and seeking substantially the same relief.

In order to address this problem, the Commission is pondering on the creation of model treaty provisions to be inserted in future investment treaties. One of the proposals currently under discussion is the creation of a model treaty provision on waiver inspired by article 1121 of the North American Free Trade Agreement (NAFTA).[31] This article discusses the possible advantages and drawbacks of such a solution.

II THE DELICATE DISTINCTION BETWEEN TREATY CLAIMS AND CONTRACT CLAIMS

Concurrent proceedings arising from the distinction between treaty claims and contract claims have become especially frequent. In many cases the disagreement between the parties stems from an investment that was effected by means of an investment contract, which frequently contains forum selection clauses that establish the competence of domestic courts to decide disputes arising from the interpretation and execution of the contract. The parallelism of claims is generated by the fact that the investment is covered by both the investment contract and the investment treaty, providing for different avenues for redress – domestic courts and international arbitral tribunals. Those different proceedings may, at least partly, concern the same governmental behaviour which the investor claims to be unlawful.

On some occasions aggrieved investors resort only to international arbitration, invoking the provisions of the applicable investment treaty. Host states typically try to resist arbitration contending that, by concluding the investment contract, the investor has opted for the jurisdiction of domestic courts instead of arbitration.[32] In this case the arbitral tribunal is required to clearly distinguish between claims that arise from the breach of a treaty (treaty claims) and claims based on the breach of a contract (contract claims) in order to define the exact scope of its jurisdiction.[33]

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31 North American Free Trade Agreement (opened for signature on 8 December 1992 <www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>.

32 Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair *The ICSID Convention: A Commentary* (2nd edition, Cambridge University Press, Cambridge 2009) at 370.

33 Gabrielle Kaufmann-Kohler "Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?" in LA Mistelis and JDM Lew (eds.) *Pervasive Problems in International Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2006) 257 at 262.

In other instances foreign investors decide to initiate proceedings before both domestic courts and international arbitral tribunals in the hope of maximising their chances of success.[34] In this scenario the distinction between contract claims and treaty claims is essential to identify the correct forum for the resolution of the dispute. The different claims are not only launched in different jurisdictions but they are also grounded on different sets of law – domestic law and international law. The relevance, if any, of local remedies is among the most important and controversial issues that remain unsettled in the relatively new field of investment arbitration.[35] The existence of concurrent proceedings may lead to abuse of process by investors, an effect that was obviously not foreseen by states when concluding investment treaties.[36]

Arbitration tribunals draw their jurisdiction from investment treaties, having the power to determine the responsibility of the host state according to the provisions of the applicable investment treaty and customary international law. In deciding on their jurisdiction, international tribunals are not bound by the traditional rules on *lis pendens* and *res judicata*.[37] The distinction between treaty claims and contract claims emerged in arbitral jurisprudence as a tool to solve jurisdictional conflicts between domestic courts and international tribunals, allowing the latter to affirm their jurisdiction.[38]

The Vivendi arbitration[39] is still the most important case on the relationship between treaty-based claims and contract-based claims.[40] In this investment dispute the underlying investment contract – a water concession agreement – contained a

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34 United Nations General Assembly, above n 8 at para 11.

35 George K Foster "Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration" (2011) 49 Columbia Journal of Transnational Law 201 at 204.

36 United Nations General Assembly, above n 8 at para 11.

37 Voss, above n 13 at 285; Friedman, above n 10 at 565; August Reinisch "The Issues Raised by Parallel Proceedings and Possible Solutions" in M Waibel et al (eds.) *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 113 at 121.

38 Inès El Hayek and Anne Gilles "The Multifaceted Settlement of International Investments Disputes: Thoughts about the Variety of Instruments Claiming Their Applicability to the Investment Dispute" (2014) ICSID Review 567 at 589.

39 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No ARB/97/3), award of 21 November 2000 (hereafter Vivendi I); decision on annulment of 3 July 2002 (hereafter Vivendi II).

40 Christoph Schreuer "Investment Treaty Arbitration and Jurisdiction over Contract Claims –The Vivendi I Case Considered" in T Weiler (ed.) *International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London, 2005) 281 at 281.

forum selection clause under which all disputes under the concession were to be submitted to the exclusive jurisdiction of the administrative tribunals of the host state. The foreign investors initiated arbitration proceedings alleging that their rights had been infringed. The tribunal held that it had jurisdiction over the claim as it was based on violations of the bilateral investment treaty. However, in dealing with the merits, the tribunal dismissed the claims because it found it impossible to separate potential contract breaches from treaty violations as they were closely linked.[41] The tribunal's award was partially annulled by an ad hoc committee who found that the arbitral tribunal had confused the legal issue of the categorisation of contractual and treaty claims. The committee held that a state 'may breach a treaty without breaching a contract, and vice versa' and that 'whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law (…).'[42] According to the ad hoc committee, where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.'[43] The committee decided to partially annul the award holding that the arbitral tribunal, in dismissing the claims, failed to decide whether or not the conduct in question amounted to a breach of the investment treaty.[44]

The award of the ad hoc committee in Vivendi II provides a useful and – despite the complexity of the question – apparently crystalline distinction between treaty claims and contract claims. Whether a state has breached an investment treaty or an investment contract are different legal questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of an investment treaty, by international law; in the case of a contract, by the proper law of the contract. Contracts and investment treaties are different legal instruments, with dissimilar legal natures, and concluded between different parties. Contract claims and treaty claims have dissimilar basis or 'causes of action' – as a result, a state may breach a treaty without violating the contract and vice-versa. Not all disputes regarding a contract can be submitted to investor-state arbitration – only those that, at the same time, constitute a breach of the investment treaty. In such cases the breach of the contract is caused by the host country acting in its sovereign capacity and not

41 See Vivendi I, above n 39 at paras 53-54 and 78-81.

42 See Vivendi II, above n 39 at paras 95-96.

43 Ibid at para 101.

44 Ibid at para 111.

just as a party to the contract. This sophisticated doctrinal distinction allows investment tribunals to circumvent the requirements of *lis pendens* and *res judicata* and to examine the case brought before them.[45]

III POSSIBLE SOLUTIONS: NAFTA'S WAIVER OF DOMESTIC PROCEEDINGS

The investment treaty regime which emerged over the last decades created a significant potential for concurrent proceedings without providing for the traditional tools to remedy or mitigate their effects.[46] The UNCITRAL recognises the importance of the problem and its Secretariat is discussing how to harmonise the approach of disputing parties, treaty drafters, and arbitral tribunals to the issue and reduce the negative impact of concurrent proceedings on the efficiency of investment arbitration. The problem has also been identified and discussed thoroughly by scholars and practitioners. Treaty drafters are also aware of the problem and have been devising mechanisms that prevent or at least mitigate the possibility of parallel litigation. These efforts resulted in the existence of a number of typical provisions that can be tested, implemented, and improved so as to achieve more effective results.

In the view of the UNCITRAL's Secretariat, the different options available include the development of a standard or guidance on the availability of the principles of *res judicata* or *lis pendens* in the field of investment arbitration;[47] the introduction of consolidation provisions in investment treaties or arbitration rules;[48] coordination and exchange of information among arbitral tribunals;[49] the inclusion in investment treaties of clear provisions on the definition of investor so as to reduce parallel proceedings in situations where related parties initiate proceedings under different treaties in relation to the same measure;[50] and the creation of model treaty

45 Hayek and Gilles, above n 38.

46 Voss, above n 13 at 290.

47 United Nations General Assembly, above n 5 at 9-10, paras. 21-26; id, above n 8 at paras. 23-28.

48 United Nations General Assembly, above n 5 at 10, paras. 27-29; id, above n 8 at para 16.

49 United Nations General Assembly, above n 5 at 10, paras. 30-31; id, above n 8, at para 21.

50 United Nations General Assembly, above n 5 at 11, paras. 32-34.

provisions on waiver, consolidation and limitation of forum selection[51]. The Secretariat notes that provisions aimed at addressing concurrent proceedings can be found mainly in recent investment treaties, and offers an annex containing an illustration of such provisions.[52]

The Commission is mulling the preparation of model treaty provisions to be inserted in future investment treaties. The goal is to achieve consistency in treaty provisions addressing concurrent proceedings by providing guidance to investors, states, arbitral tribunals and other relevant parties to the dispute.[53] One of the

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51 United Nations General Assembly, above n 8, para 16: 'It is noteworthy that treaty provisions on the matter reflect a variety of approaches, as follows.

- Limitations of investor's rights; Waiver of rights

(i) Providing the level of indirect ownership required for an investor to acquire standing under an investment treaty;

(ii) Prohibiting claims by investors where the company itself is pursuing a remedy in a different judicial forum;

(iii) Permitting a submission of a claim by an investor only if the investor and the local company withdraw any pending claim and waive their rights to seek remedy before other forums;

(iv) Limiting forum selection options to claims that have not yet been asserted elsewhere;

- Consolidation of proceedings

(v) Requiring claims to be consolidated under certain conditions, or providing certain mechanisms for consolidation; for instance, some investment treaties provide for the creation of a new arbitral tribunal when there is a request for consolidation; when the new arbitral tribunal assumes jurisdiction over all the claims, the initial tribunals lose their powers to decide on the claims submitted to them; if the consolidation is only partial, the initial tribunals may decide those claims over which the new arbitral tribunal does not assume jurisdiction; the new arbitral tribunal may order a stay of the initial arbitrations pending its decision;

- Arbitral tribunal to decline jurisdiction

(vi) Providing an obligation for the arbitral tribunal to decline its jurisdiction where an investor or a company fails to fulfil the requirements for the submission of claims or where a consolidation tribunal is established; and

- Stay of proceedings by arbitral tribunal

(vii) Providing an obligation for the arbitral tribunal to stay its proceedings or take into account in its decision the proceedings (and decisions) of other forums where a claim is being considered also by another forum.'

52 Ibid at 10 ff.

53 United Nations General Assembly, above n 8 at paras 17-18.

examples mentioned in the annex is article 1121 of the NAFTA.[54] Over the next pages we discuss the potential advantages and shortcomings of this solution.

One of the most relevant features of NAFTA's Chapter Eleven (investment) is the inclusion of a specific provision addressing the problem of concurrent domestic and international proceedings. Article 1221 (Conditions Precedent to Submission of a Claim to Arbitration) reads:

1. A disputing investor may submit a claim under Article 1116[55] to arbitration only if:

   (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

   (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.

2. A disputing investor may submit a claim under Article 1117[56] to arbitration only if both the investor and the enterprise:

   (a) consent to arbitration in accordance with the procedures set out in this Agreement; and

   (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement

54 The other provisions included in the annex are article 11.18 (Conditions and Limitations on Consent of Each Party) of the Australia-Republic of Korea FTA (signed on 8 April 2014); article 8.22 (Conditions Precedent to Submission of a Claim to Arbitration) of the Canada-Republic of Korea FTA (signed on 22 September 2014); article 21 (Conditions Precedent to Submission of a Claim to Arbitration) of the Canada-Mali BIT (signed on 28November 2014); article 21 (Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party) of the Japan-Uruguay BIT (signed on 26 January2015); article X.21 (Procedural and Other Requirements for the Submission of a Claim to Arbitration) of the draft EU-Canada Comprehensive Trade and Economic Agreement (CETA), as published on 26 September 2014; and article 9.20 (Conditions to the Submission of Claim to Arbitration) of the draft EU-Singapore FTA.

55 Article 1116 governs claims by an investor of a party on its own behalf.

56 Article 1117 regulates claims by an investor on behalf of an enterprise.

> procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, 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.
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> 3. 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.
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> 4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:
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> (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and
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> (b) Annex 1120.1(b) shall not apply.

Pursuant to this provision, as a condition for the jurisdiction of the investment tribunal the claimant must submit a waiver of the right to initiate or continue before domestic judiciaries (be it administrative tribunals or courts) any proceedings with respect to the measures alleged to be in breach of the NAFTA. In other words, claimants are required to forego local remedies once they have chosen the NAFTA dispute resolution mechanism. This requirement was intended to limit multiple and potentially duplicative decisions on the same issue.[57] The waiver prevents 'double-dipping' – situations where claimants maintain cases before two different forums simultaneously with regard to the same measures.[58] Naturally, the NAFTA parties foresaw the variety of unwelcome results that could results from the duplication of procedures, such as claimants obtaining double redress for the same conduct or measure,[59] and conflicting outcomes on the same issue (and thus legal uncertainty).[60]

An exception to the waiver requirement is opened for 'proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages'.

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57 Andrea K 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 Publishers, New York, 2004) 253 at 255.

58 Jacob S Lee "No 'Double-Dipping' Allowed: An Analysis of *Waste Management, Inc. v. United Mexican States* and the Article 1121 Waiver Requirement for Arbitration Under Chapter 11 of NAFTA" (2001) 69 Fordham Law Review 2655 at 2657.

59 Ibid at 2670. See *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL), award of 26 January 2006, para 118.

60 Lee, above n 58. See *International Thunderbird Gaming Corporation v The United Mexican States*, ibid at para 118.

Investors need not waive their right to seek these forms of relief in domestic courts. This exception follows from the fact that, pursuant to article 1135 of NAFTA (final award), arbitral tribunals are only empowered to issue awards for 'monetary damages and any applicable interest,' 'restitution of property,' and 'costs' related to arbitration. Because NAFTA tribunals are not capable of granting such relief, an investor may bring a NAFTA claim for damages and simultaneously or subsequently seek injunctive or declaratory relief in domestic court. Permitting investors to claim such rights before local courts complements, rather than replaces, arbitral proceedings.[61]

Article 1121, along with other provisions in the NAFTA, aims at avoiding the duplication of proceedings, maintaining procedural efficiency, and encouraging substantive coherence in the decision-making process.[62] As a foreign investor must waive its right 'to initiate or continue' domestic court proceedings 'with respect to the measure' that is alleged to be in breach of the other party's obligations, it may not present a claim before the arbitral tribunal based on the breach of the treaty or international law, and subsequently challenge the same measure in domestic courts on domestic law grounds.[63] However, this does not mean that 'claim splitting' is never possible. In fact, article 1121 does not prohibit a foreign investor from bringing a domestic court suit and, if unsuccessful, bring a subsequent NAFTA claim.[64] Differently from many investment treaties, NAFTA allows foreign investors to bring claims without prior exhaustion of local remedies and, in some circumstances, permits simultaneous or subsequent uses of domestic and international fora. This model, also known as the 'no-U-turn' model, is a departure from the 'fork-in-the-road' model which is common in many investment treaties.[65]

'Fork-in-the-road' provisions typically require foreign investors to choose up front which dispute resolution procedures to use and preclude the investor from thereafter re-litigating the dispute in a different forum.[66] The clause is triggered whenever the claim is based on the same facts, involves the same parties, and has the same cause

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61 Bjorklund, above n 57 at 261-262.

62 Sergio Puig and Meg Kinnear "NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration" (2010) 25 ICSID Review 225 at 256.

63 William S Dodge "National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter Eleven of NAFTA" (2000) 23 Hastings International and Comparative Law Review 357 at 371.

64 Ibid.

65 Ibid; Puig and Kinnear, above n 62 at 257; Bjorklund, above n 57 at 256.

66 McLachlan, Shore and Weiniger, above n 29 at 54-55; Schreuer, above n 40 at 301-302.

of action as another claim presented before a different court or tribunal.[67] Once the investor has decided to pursue the claim in a domestic court or an arbitration tribunal, there is no turning back – that investor will have no further recourse to the second choice forum.[68]

Differently, under the NAFTA regime foreign investors are allowed to seek not only an injunction, or declaratory relief – but even damages – in a domestic court or to pursue other dispute settlement procedures prior to bringing a NAFTA claim. However, articles 1116(2) and 1117(2) of the NAFTA set a three-year limitation period for investment claims. At any point within this period the investor may choose to waive its right to initiate or continue dispute settlement procedures before domestic administrative tribunals or courts with respect to the measure in dispute and bring a Chapter Eleven claim instead.[69] The investor is not obliged to make an irrevocable choice: the commencement of local court action does not alter the right to later pursue a NAFTA claim.[70] In a word, it is possible for investors to seek compensation for damages first in domestic courts, and subsequently before an investment tribunal.

The waiver model may encourage the use of domestic courts before commencing arbitration because it allows an investor to bring a claim up to three years after the date when the investor should have discovered the breach and injury, thus permitting investors to seek remedies before domestic courts for some time without limitation concerns.[71] On the other hand, article 1121 allows a foreign investor to initiate arbitral proceedings without exhausting its domestic remedies. Article 1121 certainly permits a foreign investor to seek damages, an injunction, or declaratory relief in domestic courts prior to bringing a NAFTA claim but does not require it to do so.[72] In other words, article 1221 requires a foreign investor to waive its domestic remedies rather than to exhaust them.[73]

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67 Emmanuel Gaillard "Introductory Note to International Centre for Settlement of Investment Disputes (ICSID): Azurix Corporation v The Argentine Republic" (2004) 43 International legal Materials 259 at 261.

68 Benjamin Klafter "International Commercial Arbitration as Appellate Review: NAFTA's Chapter 11, Exhaustion of Local Remedies and Res Judicata" (2006) 12 UC Davis Journal of International Law and Policy 409 at 414.

69 Dodge, above n 63 at 375-376.

70 Friedman, above n 10 at 562; Gaillard, above n 67.

71 Puig and Kinnear, above n 62 at 258.

72 Dodge, above n 63 at 375-376.

73 William S Dodge "Loewen v United States: Trials and Errors under NAFTA Chapter Eleven" (2002) 52 DePaul Law Review 563 at 567.

If the investor decides to seek compensation before domestic courts, there are further limitations that need to be taken into account. Annex 1120.1 of the NAFTA states that with respect to Mexico an investor may not raise its Chapter Eleven claims both before Mexican courts and before a NAFTA tribunal. In their implementing legislation, the United States and Canada provide that private parties may not raise violations of NAFTA in domestic courts at all. This represents a sort of 'forced claim splitting' – a foreign investor in the United States or Canada who wishes to challenge a measure as both a violation of domestic law and Chapter Eleven must raise its domestic law claims in domestic court and its NAFTA claims in international arbitration.[74] According to Dodge,[75] the combined application of article 1121, annex 1120.1, and the United States and Canada's implementing legislation appear to give a foreign investor with both domestic law and NAFTA claims the following options:

(1) seek damages (or declaratory or injunctive relief) in domestic courts on domestic law grounds and subsequently bring Chapter Eleven claim for damages before a NAFTA tribunal;

(2) in Mexico, seek damages (or declaratory or injunctive relief) in domestic courts on domestic law and NAFTA grounds; however, the investor will then be barred from bringing a Chapter Eleven claim before a NAFTA tribunal;

(3) bring a Chapter Eleven claim for damages before a NAFTA tribunal immediately; in this case the investor must waive its right to seek damages in domestic courts on domestic law grounds;

(4) bring a Chapter Eleven claim for damages before a NAFTA tribunal immediately and simultaneously or subsequently seek declaratory or injunctive relief in domestic courts on domestic law grounds.

The regime put forward by NAFTA's Chapter Eleven allows for the existence, in the aforementioned cases, of concurrent proceedings. There are, however, two factors that will probably discourage a foreign investor from making use of its domestic options. First, Chapter Eleven does not expressly toll its three-year statute of limitations while those mechanisms are being utilised. A foreign investor might therefore spend substantial time and resources pursuing its domestic options, only to be forced to abandon them or its potential Chapter Eleven claim if the process takes more than three years.[76] Second, a foreign investor who resorts to domestic proceedings runs the risk that a decision on those proceedings will be used against it

74 Dodge, above n 63 at 372.

75 Ibid.

76 Dodge, above n 73 at 568.

in a subsequent Chapter Eleven arbitration.[77] As a result, the foreign investor may be unwilling to risk prejudicing its Chapter Eleven claim by seeking redress in domestic courts.

IV OPEN QUESTIONS

Article 1121 of the NAFTA requires the investor to waive recourse to any domestic proceedings in respect of the challenged measure before gaining access to international arbitration. This provision would produce the same effect as a 'fork-in-the-road' clause if the key link was the same, ie, the 'dispute' as understood by traditional doctrine.[78] However, differently from 'fork-in-the-road provisions', waiver clauses do not relate to the 'dispute' before the arbitral tribunal but to 'proceedings with respect to the measure' that is alleged to be in violation of the NAFTA.[79] This kind of provision aims at avoiding concurrent proceedings regardless of the applicable law – international or domestic. As the waiver clause is based on a larger criterion than the 'fork-in-the-road' – the host state's disputed measure – it empowers the tribunal to examine any claims, regardless of their legal basis.[80] Thus, determining on which legal instrument (the investment treaty or the investment contract) the claim is based on becomes irrelevant.

The majority of the tribunal in *Waste Management, Inc v Mexico*[81] came to the conclusion that the distinction between treaty claims and claims under domestic law did not apply in the context of a NAFTA arbitration. In this case the foreign investor had submitted a waiver which referred to any proceedings with respect to the measures taken by the host state that were alleged to be a breach of NAFTA's Chapter Eleven and applicable rules of international law but explicitly should not apply to the violation of duties imposed by other sources of law, including the municipal law of Mexico.[82] In the tribunal's view, this waiver did not comply with article 1121. The tribunal held that 'when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damage. This is

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77 Ibid at 569.

78 See Antonio Crivellaro "Consolidation of Arbitral and Court Proceedings in Investment Disputes" (2005) 4 The Law and Practice of International Courts and Tribunals 371 at 397.

79 Christoph Schreuer "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration" (2005) 4 The Law and Practice of International Courts and Tribunals 1 at 12-13; Voss, above n 13 at 297.

80 Hayek and Gilles, above n 38 at 592.

81 *Waste Management Inc v United Mexican States* (ICSID Case No ARB(AF)/98/2), award of 2 June 2000.

82 Ibid. at para 4.

precisely what NAFTA Art. 1121 seeks to avoid.'[83] The Tribunal dismissed the claim for lack of jurisdiction with one dissenting opinion.

At first glimpse, NAFTA's 'no-U-turn model' seems to be an effective method of consolidating concurrent domestic and international proceedings based on the same dispute by circumventing the possible coincidence of treaty claims and contracts claims as understood traditionally by tribunals and scholars.[84] However, after closer examination one realises that claim splitting is still possible based on the treaty/contract claims distinction.

Pursuant to article 1131(1) of the NAFTA, the arbitral tribunal shall decide the issues in dispute in accordance with the agreement and applicable rules of international law. Therefore, a claim before a NAFTA tribunal may only be based on an alleged violation of a substantive breach of Chapter Eleven and customary international law.[85] NAFTA tribunals do not have jurisdiction over contract-based claims.[86] It is necessary therefore to distinguish between claims that are reserved to domestic courts (under municipal law) and claims that may be advanced before an international tribunal (as a breach of international law). Furthermore, as mentioned previously, courts in the United States and Canada are prohibited by NAFTA's implementing legislation from hearing claims based on NAFTA. To sum up, NAFTA tribunals do not have jurisdiction over cases that amount to purely contractual breaches, and local courts lack jurisdiction over breaches of the international law provisions contained in NAFTA's Chapter Eleven. This system seems to create a clear-cut distinction between the two types of claims but creates essentially two problems.

First, issues of domestic law are frequently intertwined with treaty claims.[87] When an arbitral tribunal is faced with an allegation of expropriation, for instance, it may have to determine whether the government had legitimate grounds to repudiate the contract under domestic law. However, as a foreign investor is required to waive its domestic proceedings before launching an arbitration, he may later find

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83 Ibid at para 27.

84 Voss, above n 13 at 297-298.

85 Schreuer, above n 40 at 309.

86 See *Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United American States* (ICSID Case No ARB(AF)/97/2), award of 1 November 1999, para 87; *Waste Management Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3), award of 30 April 2004, para 114.

87 William S Dodge "Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement" (2006) 39 Vanderbilt Journal of Transnational Law 1 at 18-19.

out that the local government's misconduct violated only domestic law and could only have been pursued in a domestic forum – which is now impossible.[88]

The second question has to do with the precise meaning and extent of 'measures' in the sense of article 1121. Does this concept cover the variety of governmental actions which normally underlie an investment dispute? It seems possible for the foreign investor to base its different claims on different 'measures' and thereby avoid its obligation to waive further proceedings. An adequate determination of how to solve this conflict has not yet occurred.[89] Since there is not a single forum with jurisdiction over both Chapter Eleven and contractual claims, investors may feel compelled to initiate proceedings simultaneously before the arbitral tribunal and local courts, exercising caution to clearly distinguish the 'measures' complained of in each proceeding – a breach of NAFTA's provisions, in the first case, a breach of contract law, in the second.

The jurisdiction of arbitral tribunals is limited to the specific category of disputes that the parties have agreed to submit to arbitration. An investment tribunal, which has jurisdiction over a certain dispute, cannot extend this jurisdiction to other categories or types of dispute between the parties. NAFTA tribunals have jurisdiction over claims that allege a breach of any provisions of the agreement. Pursuant to article 1131(1), the tribunal shall decide the issues in dispute in accordance with the agreement and applicable rules of international law. This means that NAFTA tribunals cannot analyse and apply domestic rules of contract law, even when their breach amounts to a breach of the investment treaty. However, there are cases where a breach of the investment contract simultaneously amounts to a breach of international law, specifically the applicable international investment treaty. It is possible, in fact, for the contents of treaty and contract rights to coincide. In such cases the breach of contractual provision might also be a violation of obligations stipulated in an international investment agreement.[90] While not every breach of contract by a state automatically amounts to a violation of international law, it does not follow that because a breach of contract is involved there cannot be a breach of international law. The standards are simply different.[91] While treaty and contract claims can still be distinguished by the sources of the rights, the content of those

88 Ibid at 19.

89 Voss, above n 13 at 298.

90 Yusuf Caliskan "Dispute Settlement in International Investment Law" in Y Aksar (ed) *Implementing International Economic Law: Through Dispute Settlement Mechanisms* (Brill, Leiden, 2011) 123 at 156.

91 Schreuer, above n 40 at 295.

rights can be identical.[92] Where an investment treaty is applicable – in this case, the NAFTA – it is necessary to examine whether a breach of contract violates the standards guaranteed by the NAFTA. International courts and tribunals have held repeatedly that measures by a state, affecting rights under a contract, may amount to an expropriation.[93]

The problem is that NAFTA's articles 1116 and 1117 limit the jurisdiction of arbitral tribunals to claims that the respondent party has breached an obligation under Chapter Eleven. NAFTA's jurisdictional clause covers only violations of the investment treaty's substantive standards. In other words, the agreement restricts consent to disputes involving its substantive provisions. Being limited in this fashion, the scope of the tribunal's jurisdiction does not extend to other types of dispute, namely contractual disputes. The specific wording of jurisdictional clauses is paramount not only for limiting the scope of the jurisdiction of the tribunal but also for the law to be applied by the tribunal.[94] According to article 1131(1), the tribunal shall decide the issues in dispute in accordance with the agreement and applicable rules of international law. This excludes the application of domestic law to contractual breaches. Since the investor is aware that the investment tribunal will only analyse breaches of international law – the investment agreement and customary international law – he may feel tempted to simultaneously pursue domestic proceedings – being careful to submit petitions based on different measures. The possibility of concurrent proceedings looms despite the existence of a waiver clause.

V SUGGESTIONS FOR A MODEL WAIVER CLAUSE

The traditional focus on 'identical disputes' and the emphasis on the distinction between 'treaty claims' and 'contract claims' favours the generation of concurrent proceedings. NAFTA's waiver clause follows a different approach. By focusing on identical 'measures' instead of identical 'disputes', it seems to circumvent the problems resulting from the distinction between treaty claims and contract claims. According to Voss, the only effective way to avoid the generation of concurrent proceedings before domestic courts and investment tribunals is to focus on the

92 Bernardo M Cremades and David Cairns "Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes" in S Kröll and N Horn (eds) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International, The Hague, 2004) 325 at 328.

93 See Schreuer, above n 40 at 296.

94 Eric De Brabandere *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (Cambridge University Press, Cambridge, 2014) at 134.

identity of the host state's measures instead of the identity of the dispute.[95] Provisions which rely on such a method have recently been included in several investment treaties and investment chapters of free trade agreements.[96] Its increasing use in investment treaties is very likely. An increased application of such provisions by arbitral tribunals will probably lead to a higher degree of legal certainty as regards the exact meaning of the concept of 'measure' within the sense of such investment treaties.[97]

However, this method does not solve the problem in definitive terms. As demonstrated above, issues of domestic law are frequently intertwined with treaty claims. Furthermore, claimants may feel compelled to initiate proceedings simultaneously before the arbitral tribunal and local courts, basing such claims on different 'measures', in the hope of maximising their chances of obtaining redress for the damages caused. In extreme cases, the NAFTA model and similar provisions may even lead to a situation where the investor, after pursuing domestic litigation, remains dissatisfied and decides to initiate international proceedings claiming that the domestic courts have committed a denial of justice or have otherwise violated international obligations.[98] This results in further litigation, running afoul of the principle of procedural economy and undermining the efficiency and credibility of the system.

The idea that treaty claims and contract claims are conceptually separate and subject to different standards is intellectually attractive. However, it does not seem practicable, and much less efficient, to assign them to different fora. While the causes of action may differ, domestic and international proceedings are essentially two aspects of the same dispute.[99] It makes more sense to have the entire dispute heard by one forum, preferably the one with the most comprehensive jurisdiction.

The NAFTA system is often perceived as more sophisticated than the common investment treaty regimes.[100] This regime offers a model that the UNCITRAL can build on, benefitting from a substantial body of jurisprudence and doctrine. This wealth of knowledge can inform the Commission about the advantages and drawbacks of waiver clauses in addressing the problem of concurrent proceedings,

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95 Voss, above n 13 at 301.

96 See, among others, article 26(2) b) of the United States Model Bilateral Investment Treaty 2004 and 2012; and articles 26(1)(e) and 26(2)(e) of 2004 Canada Model Bilateral Investment Treaty.

97 Voss, above n 13 at 301.

98 Schreuer, above n 79 at 12.

99 Ibid.

100 Voss, above n 13 at 296.

namely those originating from the distinction between treaty claims and contract claims. The Secretariat believes that investment treaty provisions on waiver provide a legal basis to address situations of concurrent proceedings. It also acknowledges that various complementary provisions could be used by states to address these matters in their investment treaties.[101] In order to maximize its efficiency, the model waiver clause should be coupled with a broad jurisdictional clause.

Some investment treaties contain a wide jurisdictional clause covering 'all disputes concerning investments' or 'any legal dispute concerning an investment'. The major part of modern investment treaties contains such broadly phrased dispute resolution clauses.[102] In such cases, it might be argued that the tribunal is competent even for pure contract claims. The exact scope of a broadly phrased jurisdictional clause is, however, highly debated among scholars, and the case law is not uniform.[103] In order to avoid doubts about the precise scope of the tribunal's mandate it is preferable to include a provision in the investment treaty extending the jurisdiction of the arbitral tribunal to cover 'investment contracts'.[104] In this case the investment tribunal has jurisdiction to settle contractual disputes because the treaty's dispute resolution clause specifically mentions such disputes. By its own terms, this type of clause encompasses disputes that go beyond the interpretation and application of the investment treaty itself. The explicit reference to investment contracts enables the investor to bring claims before an international arbitral tribunal for the alleged violation of rights which are not covered by the substantive provisions of the treaty but by the investment contract. The result is an international tribunal with the broadest jurisdiction possible: it is competent also for contract claims not necessarily amounting to a claim for violation of a treaty or another provision of international law. The distinction between contract claims and treaty claims does not mean that such claims must be presented in different forums. In fact, the concentration in one forum of all the claims regarding to the same facts is preferable

101 United Nations General Assembly, above n 8 at paras 17-18.

102 Voss, above n 13 at 67.

103 For a discussion, see Voss, above n 13 at 68 ff.

104 Article 24.1 (i) C) of the United States Model Bilateral Investment Treaty 2004 and 2012 specifies that claims concerning a breach of an investment agreement may be submitted to arbitration under the treaty. The same solution was adopted on articles 9.19.1 a) i) C) and 9.19.1 b) i) C) of the Trans-Pacific Partnership (TPP), signed on 4 February 2016. The legally verified text of the TPP was released on 26 January 2016 and can be accessed at <http://tpp.mfat.govt.nz/text>. The jurisdictional clause is coupled with a 'no-U-turn' provision clearly inspired on NAFTA article 1121.

as a matter of general policy.[105] This solution is more likely to contribute to avoiding concurrent proceedings.

During the discussion on how to avoid concurrent proceedings in international investment arbitration some delegations to the UNCITRAL observed that the issue 'was in such flux that developing a harmonized approach at the present time might be premature'.[106] Indeed, this is still a technically complex issue. There are different approaches to the problem and different methods that can be employed in order to avoid or at least minimise the possibility of investors seeking compensation for the same damages before different fora. The NAFTA waiver clause has been applied and tested for a reasonable amount of time that allows us to draw some conclusions about its efficacy and identify its major drawbacks. The efficiency of this type of provision can be enhanced by coupling the waiver clause with a provision that explicitly extends the jurisdiction of arbitral tribunals to 'investment contracts'. In order to provide efficient results, such a clause should be drafted in close cooperation with arbitral institutions active in the field of investment arbitration.[107] The investor-state arbitration caseload grows by the day. The UNCITRAL can surely benefit from the hands-on experience of institutions and practitioners in drafting a successful waiver model clause. If carefully crafted, this clause can provide valuable guidance to treaty drafters in their efforts to reduce the negative impact of concurrent proceedings arising from the traditional 'treaty/contract claims' gap on the efficiency of investment arbitration.

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105 Christoph Schreuer *The ICSID Convention: A Commentary* (Cambridge University Press, Cambridge, 2001) at 359.

106 United Nations General Assembly, above n 1 at para 131.

107 United Nations General Assembly, above n 5 at 8-9, para 20.