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William S. Dodge
UC Hastings College of the Law, dodgew@uchastings.edu

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National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA

BY WILLIAM S. DODGE*

Chapter Eleven of the North American Free Trade Agreement (NAFTA) marks an important development in the protection of foreign investors within North America, not just because of its substantive provisions, which clarify certain rules of customary international law, but because it allows foreign investors to bring claims directly against a host State in an international forum. Before

* Associate Professor, University of California, Hastings College of the Law. B.A., Yale 1986; J.D., Yale 1991. I would like to thank Ken Doroshow, Mary Kay Kane, Dan Price, and Don Wallace for comments on an earlier draft and Armand Roth for valuable research assistance. I should disclose that I was of counsel to the claimants in Azinian v. Mexico, 14 ICSID REV. FOR. INV. L.J. 535 (1999), one of the cases discussed below.


2. Article 1110, for example, resolves a longstanding disagreement between Mexico and the United States over the standard of compensation for expropriations. In a 1938 dispute over property expropriated by Mexico, U.S. Secretary of State Cordell Hull insisted that international law required "prompt, adequate and effective" compensation (the so-called "Hull formula"), whereas the Mexican Minister of Foreign Relations took the position that international law required only that foreign investors be treated no less favorably than Mexican nationals. See 3 GREEN H. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-65 (1942) (reprinting diplomatic correspondence). By providing for compensation "without delay," at "fair market value," in a G7 currency, and that is "freely transferable," see NAFTA Art. 1110(2)-(6), 32 I.L.M. at 641-42, Article 1110 adopts the U.S. position. See generally Tali Levy, Note, NAFTA's Provision for Compensation in the Event of Expropriation: Reassessment of the "Prompt, Adequate and Effective" Standard, 31 STAN. J. INT'L L. 423 (1995).

3. See NAFTA, Chapter 11, Section B, 32 I.L.M. at 642-47. Canada, Mexico, and the United States have each concluded Bilateral Investment Treaties with other countries that allow foreign investors to bring claims directly against the host State in an international forum, but there was no such treaty between any two of the parties.
NAFTA, an investor who had suffered an expropriation or other violation of customary international law could try to sue the host State in the courts of the investor's own country, where it might encounter such obstacles as foreign sovereign immunity⁴ or the act of state doctrine,⁵ or in the courts of the host State itself, where it might meet a hostile reception. Or the investor might seek to have its government espouse its claim against the host State before an international tribunal. The North American investor could not, however, bring its claim against Canada, Mexico, or the United States before an international tribunal directly.

Section B of Chapter Eleven changes this. It allows an investor from a NAFTA country to submit claims against the host State that the substantive provisions of Chapter Eleven⁶ have been violated to arbitration, either on behalf of itself ⁷ or on behalf of an enterprise that it owns or controls.⁸ The arbitration is conducted either under the Additional Facility Rules of ICSID or under the UNCTRAL Arbitration Rules.⁹ Chapter Eleven states that each of the NAFTA countries "shall provide for the enforcement of an award in its territory"¹⁰ and, subject to the procedural limitations contained in Article 1136, such awards are enforceable pursuant to the New York Convention¹¹ or the Inter-American Convention on International

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4. See, e.g., Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(3) (1994) (providing exception to foreign sovereign immunity for expropriations in violation of international law only where the property taken or property exchanged for such property is present in the United States).


6. These are contained in Chapter 11, Section A, 32 I.L.M. at 639-42. Section B also allows a foreign investor to bring a claim that the host State has violated Article 1502(3)(a) or 1503(2) dealing with the exercise of regulatory authority by state enterprises and monopolies.

7. NAFTA, Art. 1116, 32 I.L.M. at 642-43.

8. Id. Art. 1117, 32 I.L.M. at 643. The investor should first attempt to settle the claim through consultation or negotiation. Id. Art. 1118, 32 I.L.M. at 643.

9. Id. Art. 1120, 32 I.L.M. at 643. Article 1120 also provides for arbitration pursuant to the ICSID Convention itself, but only if both the host State and the national State of the investor are parties to the Convention. Since neither Mexico nor Canada is currently a party to the ICSID Convention, this option is not currently available.

10. Id. Art. 1136(4), 32 I.L.M. at 646.

Commercial Arbitration.  
These provisions for direct enforcement of Chapter Eleven by an investor against the host State raise questions about the relationship between national courts and international arbitration. First, is an investor required to exhaust its remedies in the courts of the host State prior to submitting its claims to arbitration under Chapter Eleven, thereby giving the host State an opportunity to correct any breach of NAFTA before elevating the dispute to the international plane? Second, assuming that the investor is not required to seek redress in the host State’s courts but chooses to do so, what effect does the decision of the host State’s courts have on a subsequent NAFTA arbitration? Does it bind the foreign investor as res judicata or is the foreign investor entitled to “two bites at the apple”? I submit that these two questions are properly considered together because the operation of one rule may affect the other. If, for example, a foreign investor were required to exhaust local remedies prior to bringing a Chapter Eleven claim and if the resulting decision were binding as res judicata, then the foreign investor would effectively be denied the opportunity to submit its claim to international arbitration, a result that would be plainly inconsistent with the purpose of Chapter Eleven.

The text of Chapter Eleven deals only obliquely with whether local remedies must be exhausted and does not address the res judicata effect of domestic decisions at all. However, one may also look to customary international law in addressing these questions, since Article 1131(1) provides that a NAFTA tribunal “shall decide the issues in dispute in accordance with this Agreement and

13. International decisions and commentators use the phrase “res judicata” to indicate both claim preclusion and issue preclusion (which U.S. lawyers refer to as “collateral estoppel”). See infra note 52 and accompanying text. Res judicata must be distinguished from the international law doctrine of estoppel under which a party’s conduct may preclude it from raising a particular argument. For further discussion of estoppel under customary international law, see D.W. Bowett, Estoppel Before International Tribunals and Its Relation to Acquiescence, 33 BRIT. Y.B. INT’L L. 176 (1957); I.C. MacGibbon, Estoppel in International Law, 7 INT’L & COMP. L.Q. 468 (1958).
14. See NAFTA, Art. 1115, 32 I.L.M. at 642 (“Section [B] establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.”).
applicable rules of international law,” 16 a phrase that includes rules of customary international law. 17 Thus, one may look to customary international law as a background against which to interpret the provisions of Chapter Eleven and as a source of law for filling any gaps left by that agreement.

In Part I of this article, I review the customary international law relating to the exhaustion of local remedies and the res judicata effect of domestic decisions on international tribunals. Customary international law requires the exhaustion of local remedies before a foreign investor’s claim may be brought before an international tribunal (a requirement frequently referred to as the “local remedies rule”), but holds that a domestic court’s decision is not res judicata for a subsequent international tribunal. It gives the foreign investor two “bites at the apple” but requires it to take the domestic bite first. Against this background, I turn in Part II to look at Chapter Eleven of NAFTA and at Article 1121 in particular. I argue that Article 1121, which (with certain exceptions) requires a foreign investor to waive its “right to initiate or continue [proceedings] before any administrative tribunal or court under the law of any Party” as a precondition to bringing a Chapter Eleven claim, is best read as waiving the local remedies rule as a procedural requirement. With respect to the effect of domestic court decisions, however, I argue that Chapter Eleven tribunals should adhere to the traditional rule that such decisions are not res judicata, though for reasons quite different from those that support the customary international law rule.

I. Customary International Law

It is appropriate to review the customary international law rules


concerning exhaustion of local remedies and the effect of domestic court decisions for two reasons. First, customary international law is relevant as the background against which Chapter Eleven must be interpreted and as a source of rules to fill any gaps left by the text.\textsuperscript{18} Second, a review of the customary international law rules may afford an opportunity to discern the policy considerations that lie behind those rules, considerations which may also be relevant to the interpretation of Chapter Eleven.

A. \textit{Exhaustion of Remedies Under Customary International Law}

The local remedies rule is much older than the modern nation-state.\textsuperscript{19} It was applied to the practice of reprisals as early as the ninth century, was subsequently incorporated into the law of diplomatic protection, and is today regarded as a condition of bringing a claim before an international tribunal.\textsuperscript{20} As the International Court of Justice stated in the \textit{Interhandel Case}, \textquotedblleft[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."\textsuperscript{21}

The "principal premise" of the local remedies rule is "that the host or respondent State must be given the opportunity of redressing the alleged injury."\textsuperscript{22} In part, the rule is simply "a reflection of the respect accorded the sovereignty of the host or respondent State,"\textsuperscript{23} but it also benefits the host State in a more tangible way by permitting the resolution of a dispute at a lower cost and with less

\begin{itemize}
  \item 18. \textit{See supra} notes 16-17 and accompanying text.
  \item 20. For a history of the local remedies rule, see \textit{id.} at 11-29.
  \item 22. AMERASINGHE, \textit{supra} note 19, at 97; \textit{see also id.} at 61-62 ("The rule that local remedies must be exhausted recognizes the defendant State's interests, by affording such State the opportunity to redress the wrong committed."); EDWIN M. BORCHARD, \textit{DIPLOMATIC PROTECTION OF CITIZENS ABROAD} 817 (1915) (listing as one reason for the rule that "the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion"); \textit{Interhandel Case}, 1959 I.C.J. at 27 ("Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.").
  \item 23. AMERASINGHE, \textit{supra} note 19, at 98; \textit{see also} BORCHARD, \textit{supra} note 22, at 817 ("[T]he right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice.").
\end{itemize}
publicity than an international adjudication. Although the interests of the host State are the primary force behind the local remedies rule, the rule may also serve the interests of the national State of the injured alien and the interests of international tribunals because "it relieve[s] national States of espousing claims that might be resolved at a lower level or which [are] unfounded and frivolous," and relieves "international tribunals from being excessively burdened with litigation."

There is some division of opinion on whether an injured alien must bring not just its domestic law claims but also its international claims before the domestic court. There is some authority that suggests that it must. In the *ELSI Case*, however, a Chamber of the International Court of Justice held that a U.S. investor had sufficiently exhausted its remedies in Italian courts by challenging the actions of the Italian government on domestic law grounds. "It is thus apparent that the substance of the claim brought to the adjudication of the Italian courts is essentially the claim which the United States now brings before this Chamber," the Chamber said, even though "[t]he arguments were different, because the municipal court was applying Italian law, whereas this Chamber applies international law..." Whatever the nature of the claims brought before the domestic courts, however, it is clear that the local remedies rule is not satisfied until the injured alien has completely exhausted its appeals and has obtained a final decision from the highest court of the host State to which it has a right to resort. Failure to exhaust local remedies may be excused only in limited circumstances, such as when resort to the remedy would be "obviously futile."

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25. *Id.* at 67.
26. *Id.* at 69.
27. *See* Finnish Ships Arbitration (Fin. v. U.K.), 3 R.I.A.A. 1479, 1502 (1934) ("[A]ll the contentsions of fact and propositions of law which are brought forward by the claimant government . . . must have been investigated and adjudicated upon by the municipal Courts"); Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 41-42 (July 6) (separate opinion of Judge Lauterpacht) (stating that French bondholders should have raised international law claims in Norwegian courts); AMERASINGHE, *supra* note 19, at 176 (the individual must raise at the local level any arguments which he raises at the international level).
30. AMERASINGHE, *supra* note 19, at 193-94; *see also* BORCHARD, *supra* note 22,
The rule requiring exhaustion of local remedies may, however, be waived by international agreement. What is less clear is just how explicit such a waiver must be. Article 26 of the ICSID Convention, for example, unambiguously provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

In other words, State parties to the ICSID Convention agree to the resolution of investment disputes by arbitration "to the exclusion" of domestic courts, unless the local remedies rule is expressly preserved. The 1994 U.S. Model Bilateral Investment Treaty is less explicit but similarly appears not to require exhaustion of local remedies by negative implication. Article IX(2) provides that the foreign investor must chose "one of the following alternatives:" (a) local courts, (b) previously agreed dispute-settlement procedures, or (c) international arbitration under ICSID, ICSID Additional Facility, or UNCITRAL rules. Exhaustion of local remedies cannot be required as a precondition to international arbitration under the Model Treaty because an investor's decision to go to domestic court would, under Article IX(2), bar it from bringing its claim before an arbitral


31. See Amerasinghe, supra note 19, at 251-75; see also ELSI Case, 1989 I.C.J. at 42 (expressing "no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply").


34. Article IX(3)(b) allows a foreign investor who has chosen international arbitration to seek injunctive relief from domestic courts to preserve its rights prior to or during the arbitral proceeding. Id. Art. IX(3)(b), reprintd in Comeaux & Kinsella, supra note 33, at 261. NAFTA Article 1121 contains a similar provision, which is discussed further below. See infra note 67 and accompanying text.
tribunal.\textsuperscript{35}

In \textit{American International Group, Inc. v. Islamic Republic of Iran},\textsuperscript{36} the Iran-U.S. Claims Tribunal read the Iran-U.S. Claims Settlement Declaration\textsuperscript{37} as waiving the local remedies rule by negative implication. Article II of the Declaration provided for the establishment of the Tribunal to decide claims by nationals of one country against the other, "whether or not filed with any court" but excluding "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts."\textsuperscript{38} Article VII further provided that "[c]laims referred to the arbitration tribunal shall ... be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."\textsuperscript{39} The Tribunal noted that the Claims Settlement Declaration set forth "the grounds for excluding claims from the Tribunal's jurisdiction, and a general reservation for cases within the domestic jurisdiction of one of the countries was not among those grounds."\textsuperscript{40} Thus, the Tribunal reasoned, "[t]he Algiers Declarations grant jurisdiction to this Tribunal notwithstanding that exhaustion of local remedies ... doctrines might otherwise be applicable."\textsuperscript{41}

In the \textit{ELSI Case},\textsuperscript{42} by contrast, a Chamber of the International Court of Justice concluded that the language of the Italy-U.S. Friendship, Commerce, and Navigation Treaty was not sufficient to waive the local remedies rule. Article XXVI of the FCN treaty provided:

\begin{quote}
Any dispute between the High Contracting Parties as to the
\end{quote}


\textsuperscript{38} \textit{Id.} at 9.

\textsuperscript{39} \textit{Id.} at 11.

\textsuperscript{40} \textit{American International Group}, 4 Iran-U.S. Cl. Trib. Rep. at 102.

\textsuperscript{41} \textit{Id.}

interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.\textsuperscript{43}

The United States argued that if the United States and Italy “had...intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, [they] would have used express words to that effect.”\textsuperscript{44} But the Chamber rejected this argument, finding itself “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”\textsuperscript{45}

Thus, it seems that simply providing for the settlement of disputes without any reference to domestic courts, as in the \textit{ELSI} case, is insufficient to waive the local remedies rule. However, a reference to domestic courts may be sufficient to waive the local remedies rule by negative implication if, for example, the treaty reserves only some disputes to domestic courts (like the Iran-U.S. Claims Settlement Declaration) or precludes a party who brings suit in domestic court from bringing its claim to international arbitration (like the 1994 U.S. Model Bilateral Investment Treaty).

\section*{B. Res Judicata Under Customary International Law}

The doctrine of \textit{res judicata} is also well established as a rule of customary international law. The Hague Permanent Court of Arbitration held in the \textit{Pious Fund Case}, “this rule [of res judicata] applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the compromis,”\textsuperscript{46} and, as Bin Cheng observes at the start of his comprehensive chapter on \textit{res judicata},\textsuperscript{47} “[t]here

\begin{thebibliography}{99}
\bibitem{44} \textit{ELSI Case}, 1989 I.C.J. at 42.
\bibitem{45} \textit{Id}.
\bibitem{46} Pious Fund of the Californias (Mex. v. U.S.), Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902); see also Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow, 1927 P.C.I.J. (ser. A) No. 11, at 27 (Dec. 16) (dissenting opinion of Judge Anzilloti).
\bibitem{47} See \textsc{Bin Cheng}, \textsc{General Principles of Law as Applied by}
seems little, if indeed any question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings. Under customary international law, the doctrine of res judicata requires that both the parties and the question at issue be the same. With respect to the second of these requirements, there is some authority suggesting that for res judicata to apply, both the "object" (petitum) and the "grounds" (causa petendi) of the two cases must be the same. This would suggest that a claimant could engage in claim splitting and avoid the res judicata effect of a prior award by seeking a different sort of relief or by raising new grounds in support of the same claim for relief. However, in practice, arbitral tribunals seem not to have allowed this sort of claim splitting and have barred claimants from raising closely related claims that they could have raised in an earlier arbitration. The customary international law doctrine of res judicata also includes what American lawyers think of as issue preclusion or collateral estoppel. Thus, "[e]very matter and

INTERNATIONAL COURTS AND TRIBUNALS 336-72 (1953).

48. Id. at 336; see also JACKSON H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 48-51 (1926).

49. Polish Postal Service in Danzig Case, 1925 P.C.I.J. (Ser. B) No. 11, at 30 (May 16) ("The doctrine of res judicata [applies when] not only the Parties but also the matter in dispute [are] the same"); In re S.S. Newchwang (Gr. Brit. v. U.S.), 16 AM. J. INT'L L. 323, 324 (1922) ("It is a well established rule of law that the doctrine of res judicata applies only where there is identity of the parties and of the question at issue."); Pious Fund Case, Hague Ct. Rep. (Scott) at 5 (applying the doctrine of res judicata where "there is not only identity of the parties to the suit, but also identity of the subject-matter").

50. See CHENG, supra note 47, at 340 ("The second element of identification, i.e., question at issue, has sometimes been subdivided into the object (petitum) and the grounds (causa petendi) of the case."); Chorzow Factory, 1927 P.C.I.J. (Ser. A) at 23 (dissenting opinion of Judge Anzilotti) ("[W]e have here the three traditional elements for identification, persona, petitum, causa petendi"); Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1952 (1941) ("The three traditional elements for identification [are]: parties, object, and cause . . . .")

51. See, e.g., Delgado Case, 3 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2196, 2199 (Span.-U.S. Claims Comm'n 1881); Danford Knowlton & Co. and Peter V. King & Co. Case, 3 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2194, 2195 (Span.-U.S. Claims Comm'n 1881); see also CHENG, supra note 47, at 344 ("Eadem res, in the maxim bis de eadem re non sit actio, should . . . be construed as the entire claim without regard to the fact whether the various and separate items therein contained have all been presented or not."). Cf. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action rose.").
point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its grounds and basis, is concluded by said judgment.\textsuperscript{52} 

However, the customary international law rule of \textit{res judicata} extends only to the effect of the decision of one \textit{international} tribunal on a subsequent international tribunal.\textsuperscript{53} The decisions of domestic courts, by contrast, have not been given \textit{res judicata} effect by international tribunals.\textsuperscript{54} As the tribunal in \textit{Amco v. Indonesia} wrote, "an international tribunal is not bound to follow the result of a national court."\textsuperscript{55} 

\begin{footnotesize}
\begin{enumerate}
\item Compagnie Générale de l’Orénoque (Franco-Venezuelan Mixed Claims Comm’n 1905), \textsc{Jackson H. Ralston & W.T.S. Doyle, Report of the French-Venezuelan Mixed Claims Commission of 1902, 244, 355} (1906); \textit{see also Pious Fund Case}, Hague Ct. Rep. (Scott) at 5 ("[A]ll the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and... they all serve to render precise the meaning and the bearing of the dispositif and to determine the points upon which there is \textit{res judicata} and which thereafter can not be put in question.").

\item The principle is accurately stated in the \textit{Trail Smelter Case}: "That the sanctity of \textit{res judicata} attaches to a final decision of an international tribunal is an essential and settled rule of international law." \textit{Trail Smelter Case} (U.S. v. Can.), 3 R.I.A.A. 1905, 1950 (1941) (emphasis added).

\item The \textit{res judicata} effect of international arbitral awards in domestic courts is governed by the New York Convention, which provides for the recognition of such awards. \textit{See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38}. The \textit{res judicata} effect of foreign court judgments in domestic courts, in the absence of a treaty, depends on domestic law. The majority of states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act, which affords foreign money judgments full faith and credit, in the same manner as the judgments of sister states. \textit{See Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263} (1986).

\item \textit{Amco v. Indonesia} (Award, Nov. 20, 1984), 1 ICSID Rep. 413, 460 (1993), \textit{sustained in relevant part}, \textit{Amco v. Indonesia} (Decision on the Application for Annulment, May 16, 1986), 1 ICSID Rep. 509, 526-27 (1993); \textit{see also Affaire des Chemins de Fer de Buzau-Nehoiasi} (Germ. v. Rom.), 3 R.I.A.A. 1827, 1836 (1939) ("C’est dans l’ordre interne seulement que l’autorité de la chose jugée par un tribunal national trouve son application."); \textit{In re S.S. Newchwang} (Gr. Brit. v. U.S.), 16 Am. J. Int’l L. 323, 324 (1922) ("[T]he decision of His Majesty’s Supreme Court is not in any sense \textit{res judicata} in this case, and... the findings of the Court as to the facts upon which liability depends are not binding upon this Tribunal"); \textit{The Orient} (U.S. v. Mex.), 3 J. Bassettt Moore, \textit{International Arbitrations to which the United States Has Been a Party} 3229, 3229-30 (1898) (decision of U.S. commissioners under Mar. 3, 1889 act of Congress) ("It is well settled that the decisions of a court, condemning the property of citizens of another country, are not conclusive evidence of the justice or legality of such condemnation."); \textit{Ian Brownlie, Principles of Public International Law} 52 (5th ed. 1998) ("There is no effect of \textit{res judicata} from the decision of a municipal court so far as an international jurisdiction is concerned ...."); \textit{Cheng}, supra note 47, at 337, n.6
\end{enumerate}
\end{footnotesize}
There are at least five reasons why customary international law has not made the decisions of domestic courts binding on international tribunals, and it is worth pausing to consider these reasons since they may have an impact on how the question of res judicata should be handled under Chapter Eleven. The first reason for denying res judicata effect to the decisions of domestic tribunals is that the parties to the two proceedings are not identical. As Ian Brownlie explains: "[A]lthough the subject-matter may be substantially the same, the parties will not be, and the issues will have a very different aspect. In the municipal court the legal person claiming is an individual or corporation: before an international tribunal the claimant will be a state exercising diplomatic protection."

Second, the question at issue in the two proceedings is often different. In the case of In re Newchwang, for example, the United States had sued a British company for damages resulting from the collision of a ship owned by that company and a U.S. naval vessel in a British court of admiralty. That court held that the British ship was "in no way to blame for the collision" and dismissed the suit. The British government then brought an arbitral claim on behalf of its company against the United States for damages from the collision, but the tribunal refused to give the court's decision res judicata effect. "The only matter before His Britannic Majesty's Supreme Court," the tribunal observed, "was the liability of the China Navigation Co., Ltd., as owners of the Newchwang, whereas the question submitted to this Tribunal is the liability of the United States Government as

(1953) ("a decision of municipal law does not constitute res judicata in international law"); ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 34-35 (1938) ("The conclusive force of a domestic judgment is expended in the process of creating a definitive legal relationship between a private plaintiff and defendant. It is congenitally impotent to modify the relationship which springs up between States when a rule of international law has been violated."). Cf. The Phare (Fr. v. Nicar.), 5 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 4870, 4871 (1898) (court of cassation award of July 19, 1880) (rejecting plea of res judicata on the ground that "it was the common intention of the two governments to invest the arbitral tribunal with all power and jurisdiction . . . independently of what was decided by the judicial authority of Nicaragua . . . ").

56. BROWNIE, supra note 55, at 52-53; see also Buzau-Nehoiasi Case, 3 R.I.A.A. at 1836 ("Les Parties aux procédures nationale et internationale sont différentes . . . ."); FREEMAN, supra note 55, at 35 ("[T]he parties to the international proceeding [are] different from the original litigants in the domestic action . . . .").

57. In re Newchwang 16 AM. J. INT'L L. at 324.
owners of the *Saturn*. Whatever, therefore, be the connection in fact between the two questions, they are not identical.\(^{58}\)

A third reason, relied upon by some authorities, is the supposed dualism of international and domestic law.\(^{59}\) In reality, this is just a more general way of saying that the issues in the two cases are different—i.e. that the domestic proceeding involved issues of domestic law, and the international proceeding issues of international law.\(^{60}\)

A fourth reason is the notion that domestic tribunals may not be sufficiently impartial in disputes between aliens and their own governments. As the tribunal wrote in *Amco v. Indonesia*:

> One of the reasons for instituting an international arbitration procedure is precisely that parties—rightly or wrongly—feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment were binding on an international tribunal such a procedure could be rendered meaningless.\(^{61}\)

This rationale is related to the principle that no one should be the judge in her own cause (*nemo debet esse judex in propria sua causa*), which Bin Cheng suggests might be sufficient reason to ignore a

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58. *Id.* The court further noted that in the British court "the burden of proof was on the *Saturn*, while before this Tribunal it is on the *Newchwang." *Id.*


60. *See*, e.g., *Freeman*, supra note 55, at 36 ("[T]he issues presented in the two proceedings are entirely different. The local judge is deciding questions of internal law which may or may not involve consideration of some rule of the law of nations. But when the case comes up for arbitration between two States the only point before the international tribunal is whether this conduct of a national court violated any international obligation incumbent upon the State.").

domestic judicial decision.\textsuperscript{62}

Finally (although I have seen the point made in none of the cases), the local remedies rule seemed to require a rule that declined to give \textit{res judicata} effect to the decisions of domestic courts, because if a claimant were required to exhaust local remedies and the decision of the local courts were then binding on a subsequent international tribunal, the claimant would be denied meaningful access to an international forum.\textsuperscript{63}

In short, it is well established under customary international law that a foreign investor is required to exhaust its remedies in domestic court before bringing its claim before an international tribunal, but that the decision of a domestic court is not binding on a subsequent international tribunal. Customary international law thus gives the injured alien two "bites at the apple," but requires that it take the domestic bite first.

\textbf{II. Chapter Eleven of NAFTA}

The provision of Chapter Eleven that deals most directly with the relationship between national courts and arbitral tribunals is Article 1121. Subsections(1)(b) and (2)(b) require, as a condition precedent to bringing a claim before a NAFTA tribunal, that the investor (and where applicable the injured enterprise that the investor owns or controls)

waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach... except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.\textsuperscript{64}

\textsuperscript{62} See CHENG, supra note 47, at 357. On nemo debet esse judex in propria sua causa, see generally id. at 279-89.

\textsuperscript{63} The U.S. Supreme Court has reached a similar conclusion in dealing with the preclusive effect of state administrative findings under the Age Discrimination in Employment Act, reasoning that the Act's requirement that state remedies be exhausted before filing a federal suit implied that the state administrative findings should not be given preclusive effect. See Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991).

\textsuperscript{64} NAFTA, Arts. 1121(1)(b) & 1121(2)(b).
There are several things to notice about this provision. First, it states that a foreign investor must waive its right "to initiate or continue" domestic court proceedings. Thus, it cannot bring a NAFTA claim and, if unsuccessful, bring a subsequent domestic court suit.

Second, Article 1121 does not seem to prohibit a foreign investor from reversing that order—in other words, it seems to permit a foreign investor to bring a domestic court suit and, if unsuccessful, bring a subsequent NAFTA claim. In this respect, Chapter Eleven represents a departure from U.S. bilateral investment treaties, which typically require foreign investors to choose at the outset which dispute resolution procedures to use and preclude a foreign investor who has brought suit in domestic court from subsequently bringing an arbitral claim.65

Third, in general, Article 1121 does not allow claim splitting, unless the domestic proceeding is brought first. A foreign investor must waive its right to go to domestic court "with respect to the measure;" it may not present its international law claims to a NAFTA tribunal and subsequently challenge the same measure in domestic court on domestic law grounds.66 However, fourth, there is a kind of claim splitting that is expressly permitted: a foreign investor may bring a NAFTA claim for damages and simultaneously or subsequently seek injunctive or declaratory relief in domestic court, relief that a NAFTA tribunal is not capable of granting.67

There is one further limitation on domestic court suits in Chapter


67. Article 1135 limits a Chapter Eleven tribunal to awarding damages, interest, restitution, and costs. NAFTA, Art. 1135, 32 I.L.M. at 646. Article 1134 allows the tribunal to order interim measures of protection, such as an order to preserve evidence, but does not allow the tribunal to attach property or enjoin a measure alleged to violate Chapter Eleven. Id. Art. 1134, 32 I.L.M. at 646. Article 1121's exception for injunctive, declaratory, or other extraordinary relief is similar to Article IX(3)(b) of the 1994 U.S. Model Bilateral Investment Treaty, although the latter is narrower, referring only to injunctive relief. See 1994 U.S. Model Bilateral Investment Treaty, Art. IX(3)(b), reprinted in COMEAUX & KINSELLA, supra note 33, at 261.
Eleven. Annex 1120.1 states that with respect to Mexico an investor may not raise its Chapter Eleven claims both before Mexican courts and before a NAFTA tribunal.68 This prohibition seems to apply even to suits brought prior to the Chapter Eleven claim69 and to suits for declaratory and injunctive relief permitted by Article 1121.70 The United States and Canada go even further. Their implementing legislation for NAFTA says that private parties may not raise violations of NAFTA in domestic courts at all.71 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 court72 and its NAFTA claims in arbitration.73

68. NAFTA, Annex 1120.1(a), 32 I.L.M. 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 . . . "). Subsection (b) further provides that an investor may not allege a breach of NAFTA in arbitration under Chapter Eleven if an enterprise that it owns or controls has alleged that breach in proceedings before a Mexican court or administrative tribunal. Id. Annex 1120.1(b), 32 I.L.M. at 648.

69. See supra note 65 and accompanying text.

70. See supra note 67 and accompanying text.

71. 19 U.S.C.A. § 3312(c)(2) (1993) ("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 subdivision of a State on the ground that such action or inaction is inconsistent with the [NAFTA] . . . "); North American Free Trade Agreement Implementation Act § 6(2), 1993 Consolidated Statutes of Canada, c. 44 ("Subject to Section B of Chapter Eleven of the Agreement, no person has any cause of action and no proceedings 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.").

72. Articles 1116 and 1117 allow foreign investors to submit to arbitration only violations of Chapter Eleven Section A. NAFTA, Arts. 1116-1117, 32 I.L.M. at 642-43. Thus, unless a violation of domestic law also constitutes a violation of Chapter Eleven (such as denial of national treatment, most-favored nation treatment, treatment in accordance with international law, or expropriation), the tribunal will lack jurisdiction over the domestic law claims. Cf. Freeman, supra note 55, at 317-22 (noting that States are not internationally responsible for ordinary errors of the courts in applying local law).

73. To the extent that the domestic legal system permits suits under customary international law, a foreign investor could presumably challenge the measure as a violation of customary international law (e.g. expropriation) in domestic court. A Canadian or Mexican investor's suit against the United States on such a theory would, however, likely be barred on grounds of sovereign immunity. See Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (Scalia, J.) (holding that Nicaraguan plaintiffs' damages suit against U.S. officials for violations of international law was barred by sovereign immunity).
Article 1121, Annex 1120.1, and the U.S. and Canadian implementing legislation thus appear to give a foreign investor with both domestic law and NAFTA claims a menu of options: (1) it can seek damages (or declaratory or injunctive relief) in domestic court on domestic law grounds and subsequently bring Chapter Eleven claim for damages before a NAFTA tribunal; (2) in Mexico, it can seek damages (or declaratory or injunctive relief) in domestic court on domestic law and NAFTA grounds, but will then be barred from bringing a Chapter Eleven claim before a NAFTA tribunal; (3) it can bring a Chapter Eleven claim for damages before a NAFTA tribunal immediately, but must waive its right to seek damages in domestic court on domestic law grounds; or (4) it can bring a Chapter Eleven claim for damages before a NAFTA tribunal immediately and simultaneously or subsequently seek declaratory or injunctive relief in domestic court on domestic law grounds. The next question is the extent to which the local remedies rule and the doctrine of res judicata might operate to limit those options.

A. Exhaustion of Remedies Under Chapter Eleven

As we have seen, customary international law required an injured alien to exhaust local remedies before either it or its government could bring a claim before an international tribunal, but this rule could be waived by international agreement.74 The question, then, is whether Chapter Eleven waives the local remedies rule.75

Chapter Eleven does not speak as clearly to this question as some other agreements do. It does not provide for the settlement of investment disputes by international arbitration "to the exclusion of any other remedy" or that a State wishing to require the exhaustion of local remedies must do so expressly, as Article 26 of the ICSID Convention does.76 Nor does it provide that a foreign investor who seeks relief in domestic courts is barred from bringing an

74. See supra notes 31-45 and accompanying text.

75. At least one author has concluded that it does not. See Steve Tidrick, Exhaustion of Local Remedies as a Prerequisite to NAFTA Claims Brought by Foreign Investors Against Nations (unpublished manuscript on file with the author). As this Article was going to press, the Chapter Eleven tribunal in Metalclad Corporation v. Mexico ruled that Chapter Eleven does not require the exhaustion of local remedies. See Metalclad Corp. v. Mexico at 31, n. 4 (Aug. 30, 2000) (on file with the author).

international arbitral claim, as the U.S. Model Bilateral Investment Treaties have.\textsuperscript{77} Indeed, Article 1121 seems to contemplate that a foreign investor is permitted to bring a domestic court suit before bringing a Chapter Eleven claim,\textsuperscript{78} so perhaps it should be required to do so.

However, as with the Iran-U.S. Claims Settlement Declaration, the express mention of domestic courts in Article 1121 without any express requirement of exhaustion suggests by negative implication that exhaustion is not required.\textsuperscript{79} Chapter Eleven is thus distinguishable from the U.S.-Italy Friendship, Commerce, and Navigation Treaty at issue in the \textit{ELSI Case}, which made no mention of domestic courts at all.\textsuperscript{80} Even if one reads the \textit{ELSI Case} to require some affirmative words waiving the local remedies rule,\textsuperscript{81} such words seem to be provided by Article 1121's requirement that a foreign investor waive its "right to initiate or continue" proceedings in domestic court.\textsuperscript{82} This phrase strongly suggests that an investor is not required to complete any suit it may have filed in domestic court or even to initiate one at all before bringing its claims before a NAFTA tribunal.\textsuperscript{83}

The conclusion that Article 1121 waives the local remedies rule is strengthened by three other arguments. First, Article 1115 states that the purpose of Chapter Eleven, Section B is to "establish[] a mechanism for the settlement of investment disputes that assures


\textsuperscript{78} See \textit{supra} note 65 and accompanying text.

\textsuperscript{79} See \textit{supra} notes 36-41 and accompanying text.

\textsuperscript{80} See \textit{supra} notes 42-45 and accompanying text.

\textsuperscript{81} See Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 42 (July 20) ("[T]he Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.").

\textsuperscript{82} NAFTA, Arts. 1121(1)(b) \& (2)(b), 32 I.L.M. at 643.

\textsuperscript{83} One author has argued that although Article 1121 requires the foreign investor to waive its "right" to go to local court, it does not relieve the foreign investor of its "responsibility" to exhaust local remedies before bringing an international claim. See Tidrick, \textit{supra} note 75, at 53, 58. The problem with this reading is that it renders the waiver requirement redundant. If a foreign investor were required to exhaust its domestic remedies before bringing a NAFTA claim, domestic law principles of \textit{res judicata} would bar relitigation of the domestic law claims and thus no prospective waiver of the right to seek redress in domestic court would be necessary.
both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.\footnote{NAFTA, Art. 1115, 32 I.L.M. at 642.} Although requiring the exhaustion of local remedies would not necessarily deny access to "an impartial tribunal," it would clearly delay that access, which one might conclude is at least in tension with the purpose expressed in Article 1115. Second, Articles 1116(2) and 1117(2) bar a foreign investor from bringing a NAFTA claim if more than three years have elapsed since the foreign investor knew or ought to have known of the alleged breach of Chapter Eleven and the damage to its investment.\footnote{Id. Arts. 1116(2) & 1117(2), 32 I.L.M. 643.} There is no provision for tolling this requirement while the foreign investor pursues its rights in domestic court, which one might have expected if the exhaustion of local remedies were required. Third, the practice of the NAFTA Parties shows that they do not regard the exhaustion of local remedies as a prerequisite to bringing claims before a NAFTA tribunal. To date, the respondent States in Chapter Eleven proceedings have tended not to raise the local remedies rule as a defense.\footnote{Canada did not raise the local remedies rule as a defense in either the Ethyl case or the S.D. Myers case. See Statement of Defense at 9-12, Ethyl Corp. v. Canada (on file with the author) (arguing \textit{inter alia} that the tribunal lacked jurisdiction because claimant had not delivered the required consent and waivers, because proposed legislation was not a "measure," and because claimant filed within six months of event giving rise to claim, but not because Ethyl had failed to exhaust its remedies in Canadian courts); Statement of Defense at 10-11, S.D. Myers, Inc. v. Canada (on file with the author) (arguing \textit{inter alia} that claimant had not made an "investment" in Canada and the Canadian order at issue was not a measure "relating to" investors or investments, but not that claimant had failed to exhaust its remedies in Canadian courts). In the Azinian case, claimants had filed suit in Mexican courts, see infra notes 91-101 and accompanying text, but it is not clear they had completely exhausted their local remedies. However, Mexico did not raise the local remedies rule as a defense. See Counter Memorial of Respondent at 48-54, Azinian v. Mexico, 14 ICSID REV. FOR. INV. L.J. 535 (1999) (on file with the author) (arguing \textit{inter alia} that claimants had not made an "investment" in Mexico, but not that claimants had failed to exhaust their remedies in Mexican courts). It is possible that the United States will raise the local remedies rule as a defense in the Loewen case. See Notice of Claim, Exhibit A (opinion of Sir Robert Y. Jennings, Q.C.) at 14-15, Loewen Group, Inc. v. United States (on file with the author) (anticipating the defense of failure to exhaust local remedies). The United States' Counter Memorial on Jurisdiction was filed on February 18, 2000, but has not yet been made public.} Thus, it appears that the best reading of Article 1121 is that it allows a foreign investor to bring a Chapter Eleven claim without
exhausting its domestic remedies.\textsuperscript{87} Article 1121 certainly permits a foreign investor to seek damages, an injunction, or declaratory relief in domestic court prior to bringing a NAFTA claim but does not require it to do so. At any point within the three-year period set by Articles 1116(2) and 1117(2), the foreign investor may choose to waive its “right to initiate or continue”\textsuperscript{88} the domestic court proceedings for damages and bring a Chapter Eleven claim instead.

\section*{B. Res Judicata Under Chapter Eleven}

The next question is what effect the doctrine of \textit{res judicata} has on a foreign investor’s options under Chapter Eleven. It is certainly possible that, if a foreign investor seeks relief in domestic court (either in a prior suit for damages or a simultaneous suit for declaratory or injunctive relief), that domestic court might reach a judgment before the Chapter Eleven tribunal renders its award. It is unlikely that the domestic court will have reached the question of whether Chapter Eleven itself has been breached, because U.S. and Canadian laws preclude a foreign investor from raising its NAFTA claims before a domestic court, and NAFTA Annex 1120.1 will likely discourage foreign investors from raising such claims before Mexican courts.\textsuperscript{89} However, the domestic court may have decided issues of fact or domestic law that bear on the foreign investor’s NAFTA claims, raising the possibility of issue preclusion\textsuperscript{90} if the doctrine of \textit{res judicata} were to apply.

The facts of \textit{Azinian v. Mexico}\textsuperscript{91} provide a useful illustration.

\begin{itemize}
\item \textsuperscript{87} My conclusion that Chapter Eleven does not require the exhaustion of domestic remedies is limited to exhaustion as a procedural requirement. For some Chapter Eleven claims, like denial of justice, the exhaustion of local remedies may be a substantive requirement of the claim. \textit{See}, e.g., \textit{Cheng}, \textit{supra} note 47, at 179 (“where the international unlawful act consists in the remedial organs of the State failing to comply with the requirements of international law to provide redress for private wrongs suffered within its jurisdiction ... the international unlawful act does not arise unless there is an established failure of local remedies”); \textit{Freeman}, \textit{supra} note 55, at 407 (noting that for denial of justice claims, the local remedies rule “enjoys the substantive faculty of creating responsibility where local remedies function defectively”). That issue, however, lies beyond the scope of this article. For further discussion of the substance/procedure distinction and the local remedies rule, see \textit{Amerasinghe}, \textit{supra} note 19, at 319-58; J.E.S. Fawcett, \textit{The Exhaustion of Local Remedies: Substance or Procedure?}, 51 BRIT. Y.B. INT’L L. 452 (1954).
\item \textsuperscript{88} NAFTA, Arts. 1121(1)(b) & (2)(b), 32 I.L.M. at 643.
\item \textsuperscript{89} \textit{See supra} notes 68-70 and accompanying text.
\item \textsuperscript{90} \textit{See supra} note 52 and accompanying text.
\item \textsuperscript{91} \textit{Azinian v. Mexico}, 14 ICSID REV. FOR. INV. L.J. 535 (1999). The tribunal
\end{itemize}
The claimants in *Azinian* were investors in DESONA, a Mexican company that had entered a concession contract with the city of Naucalpan on November 15, 1993 to provide waste collection services. On January 1, 1994, a new administration took over the government of Naucalpan and, on March 21, decided to annul the concession contract. DESONA brought suit in the State Administrative Tribunal, seeking to have the annulment set aside and the concession contract reinstated, but the Administrative Tribunal upheld the annulment on the grounds of 27 irregularities in the conclusion and performance of the contract. The Superior Chamber of the Administrative Tribunal sustained this decision on the basis of nine of the irregularities (seven of which involved alleged misrepresentations to the Naucalpan City Council), and the Federal Circuit Court rejected DESONA's *amparo* petition. The claimants then brought claims on behalf of themselves and on behalf of DESONA under Chapter Eleven, arguing that their contractual rights under the concession contract had been expropriated by Naucalpan's annulment of the agreement. Obviously, the Mexican courts' factual determinations that the concession contract had been induced by fraud and its legal conclusion that the contract was not valid under Mexican law were relevant to the claimants' Chapter

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92. Id. at 542.
93. Id. at 542-43.
94. Id. at 543.
95. Id. The *amparo* proceeding may used to review the actions of public authorities, including courts. For further discussion of *amparo*, see the articles in the symposium on *amparo* beginning at 6 U.S.-MEX. L.J. 35 (1998). See also RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT (1971); Hector Fix Zamudio, A Brief Introduction to the Mexican Writ of Amparo, 9 CAL. W. INT’L L.J. 306 (1979); Helen L. Clagett, The Mexican Suit of Amparo, 33 GEO. L.J. 418 (1945).
96. It is well established that repudiation of a concession agreement can constitute an expropriation of contractual rights. See, e.g., Phillips Petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 79, 106 (1989); Starrett Housing Corp. v. Islamic Republic of Iran, 16 Iran-U.S. Cl. Trib. Rep. 112, 230 (1987); Libyan American Oil Co. v. Libyan Arab Republic (1977), 20 I.L.M. 1, 53 (1981); Shufeltd Claim (U.S. v. Guat.), 2 R.I.A.A. 1079, 1097 (1929); Certain German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25); Norwegian Shipowners’ Claims (Nor. v. U.S.), 1 R.I.A.A. 307, 334 (1922). The *Azinian* tribunal did not dispute this. It observed that a mere breach of the concession contract by Naucalpan would not be an expropriation, Azinian, 14 ICSID REV. FOR. INV. L.J. at 564, but proceeded to consider whether the annulment of the concession agreement was an expropriation. Id. at 565-74.
Eleven claims, for if the contract were invalid then there would be no contractual rights to be expropriated. Thus, the question of what effect the Mexican court decisions should be given was critical in *Aizinian*.

Unfortunately, the *Aizinian* tribunal’s discussion of this question is not entirely clear. Initially, the tribunal seemed to acknowledge that it was not bound by the decisions of the Mexican courts. “[T]he fact that the Claimants took the initiative before the Mexican courts,” the tribunal wrote, is not “fatal to the jurisdiction of the present Arbitral Tribunal. The Claimants have cited a number of cases where international arbitral tribunals did not consider themselves bound by decisions of national courts.”97 After quoting *Amco v. Indonesia*98 to this effect, the tribunal continued: “As the Claimants argue persuasively, it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration under NAFTA.”99 Yet, later in the award, the tribunal seemed to take the position that the decisions of the Mexican courts upholding the annulment of the concession contract could not be questioned unless those court decisions themselves constituted a denial of justice that violated Chapter Eleven.100 In the end, though, the tribunal made

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100. *Id.* at 566 (“How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento’s decision?... A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the Ayuntamiento’s decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico’s obligations under Chapter Eleven.”); see also *id.* at 568 (“What must be shown is that the court decision itself constitutes a violation of the treaty... [T]he Claimants must show either a denial of justice or a pretense of form to achieve an internationally unlawful end.”).

The dissenting arbitrator in *Waste Management Inc. v. Mexico*, also assumed that a domestic court decision would bind a Chapter Eleven tribunal as *res judicata* unless that decision constituted a denial of justice. *See* Waste Management, Inc. v. Mexico at 18 (dissenting opinion of Keith Hight) (June 2, 2000) (visited Aug. 15,
its own determination that the concession contract had been induced by fraud, rendering its prior discussions of the *res judicata* question dictum.\(^{101}\)

How, then, should future NAFTA tribunals treat the decisions of domestic courts? The text of Chapter Eleven does not address this issue. Because Article 1131(1) directs NAFTA tribunals to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law,"\(^{102}\) one might suppose that a NAFTA tribunal should apply the traditional customary international law rule that the decisions of domestic courts are not binding on international tribunals.\(^{103}\) However, the customary international law rule was developed under circumstances that are quite different from those of Chapter Eleven, and the reasons supporting the traditional rule do not seem to apply in the Chapter Eleven context.

One of the reasons international tribunals have refused to give *res judicata* effect to the decisions of domestic courts is because the parties in the international proceeding were different.\(^{104}\) Because Chapter Eleven allows a foreign investor to bring an arbitral claim directly against a host State, however, the parties to a Chapter Eleven

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2000) <http://www.worldbank.org/icsid/cases/publicationaward.pdf>, 15 ICSID Rev. FOR. INV. L.J. (forthcoming Spring 2000) ("to the extent that the local remedies were unavailing,... the NAFTA claimant's basis of claim against the contesting government would... be reduced by application of the *res judicata* of the unfavorable local result unless, and to the extent that, such unfavorable local result were to be considered itself as an international denial of justice").

101. Id. at 569-74. Even if the Azinian tribunal's discussion of *res judicata* were not dictum, it would not technically bind future NAFTA tribunals. Article 1136(1) 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." NAFTA, Art. 1136(1), 32 I.L.M. at 646. The Permanent Court of International Justice interpreted a similar provision in Article 59 of its Statute as rejecting a system of binding precedent. See Certain German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (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 upon other States or in other disputes."). See generally BROWNIE, supra note 55, at 20-22. *But see* Waste Management, Inc. v. Mexico at 1 (dissenting opinion of Keith Hight) (June 2, 2000), (visited Aug. 15, 2000) <http://www.worldbank.org/icsid/cases/publicationaward.pdf>, 15 ICSID Rev. FOR. INV. L.J. (forthcoming Spring 2000) (stating that "[t]he precedential significance of this Award for future proceedings under the North American Free Trade Agreement (NAFTA) cannot be underestimated").

102. NAFTA, Art. 1131(1), 32 I.L.M. at 645 (emphasis added).

103. For discussion of the customary international law rule, see *supra* pt. I.B.

104. *See, e.g.*, Affaire des Chemins de Fer de Buzau-Nehoiasi (Germ. v. Rom.), 3 R.I.A.A. 1827, 1836 (1939). For further discussion, see *supra* note 56 and accompanying text.
arbitration will typically be the same as the parties to the domestic lawsuit. Another reason for the traditional rule was that the issues raised in the international and domestic proceedings were different,\textsuperscript{105} sometimes stated more generally as the dualism of international and domestic law.\textsuperscript{106} Certainly the ultimate question in a Chapter Eleven proceeding (whether there has been a violation of NAFTA) will typically be different from the ultimate question in a domestic proceeding (whether there has been a violation of domestic law).\textsuperscript{107} But, as the Azinian case demonstrates,\textsuperscript{108} there can easily be questions of fact and of law that are common to both proceedings.

Nor can a rule against \textit{res judicata} be justified as a necessary companion to the local remedies rule.\textsuperscript{109} I have argued above that Chapter Eleven does not require a foreign investor to exhaust domestic remedies before bringing its claim before a NAFTA tribunal.\textsuperscript{110} One could, therefore, adopt a rule giving \textit{res judicata} effect to domestic court decisions under Chapter Eleven without having the effect of denying foreign investors access to an international forum. The foreign investor could avoid potentially being bound by an adverse domestic court decision simply by foregoing its option to sue in domestic court and bringing its claim immediately before a NAFTA tribunal.\textsuperscript{111}

Of the traditional reasons for declining to give a domestic court decision \textit{res judicata} effect, that leaves only the domestic court's possible lack of impartiality, or, in the words of the Amco tribunal, the fact that "[o]ne of the reasons for instituting an international arbitration procedure is precisely that parties—rightly or wrongly—feel often more confident with a legal institution which is not entirely related to one of the parties."\textsuperscript{112} This reason is consistent with Article

\textsuperscript{105} See, e.g., In re S.S. Newchwang (Gr. Brit. v. U.S.), 16 AM. J. INT'L L. 323, 324 (1922). For further discussion, see supra notes 57-58 and accompanying text.
\textsuperscript{106} See, e.g., CHENG, supra note 47, at 337, n.6. For further discussion, see supra notes 59-60 and accompanying text.
\textsuperscript{107} See supra notes 68-73 and accompanying text.
\textsuperscript{108} See supra notes 91-101 and accompanying text.
\textsuperscript{109} See supra note 63 and accompanying text.
\textsuperscript{110} See supra pt. II.A.
\textsuperscript{111} Obviously, this analysis applies only to suits initiated by the foreign investor. If a NAFTA tribunal were to treat the decision in a suit initiated by the host State as \textit{res judicata}, the foreign investor might indeed be effectively barred from bringing its Chapter Eleven claim.
\textsuperscript{112} Amco v. Indonesia (Award, Nov. 20, 1984), 1 ICSID Rep. 413, 460 (1993), \textit{sustained in relevant part}, Amco v. Indonesia (Decision on the Application for
1115 of NAFTA, which states that one of the purposes of Chapter Eleven’s dispute resolution provisions is to assure “due process before an impartial tribunal.” But so long as the foreign investor could avoid the res judicata effects of a domestic court decision by choosing not to bring suit in domestic court in the first place, a rule of res judicata will not deny the foreign investor access to “an impartial tribunal.” And if the foreign investor chooses to bring its suit before a potentially biased domestic court, it should arguably have to live with the results.

In short, none of the traditional reasons for the rule against giving domestic court judgments res judicata effect seem to fit the Chapter Eleven context. There is, however, an alternative reason for adhering to the traditional rule in the context of Chapter Eleven. A rule granting res judicata effect to the decision of a domestic court is likely to deter foreign investors from trying to resolve their disputes with the host State in domestic court, since they can reasonably expect such courts to be less impartial than a NAFTA tribunal. Such a result would deprive the host State of an opportunity to redress the alleged injury before the dispute is elevated to the international plane. As noted above in connection with the local remedies rule, resolution of disputes in domestic court tends to benefit the host State because it tends to be less expensive and attracts less publicity than international arbitration. Indeed, this argument against res judicata is closely related to the argument for the local remedies rule: that it is better to resolve investment disputes locally if possible.

It is reasonable to assume that such considerations were what motivated Canada, Mexico, and the United States to draft Article 1121 as they did. In particular, it explains why Article 1121 would

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1113. NAFTA, Art. 1115, 32 I.L.M. at 642.
1114. See Amco, 1 ICSID Rep. at 460.
1115. Even the Azinian tribunal thought that such a result would be “unfortunate.” Azinian, 14 ICSID REV. For. Inv. L.J. at 564. See supra note 99 and accompanying text.
1116. See supra note 24 and accompanying text.
1117. I have argued above, see supra pt. II.A., that the local remedies rule does not apply to Chapter Eleven claims not because I consider the argument that investment disputes should be resolved locally inapplicable but rather because the text of NAFTA Article 1121 seems to me to require a different result. The text of Chapter Eleven does not, by contrast, speak to the issue of res judicata, leaving more room for arguments based on policy.
permit a foreign investor to bring a claim in domestic court and subsequently to bring a claim before a NAFTA tribunal but not the reverse.\textsuperscript{118} It is worth emphasizing that this aspect of Article 1121 is in sharp contrast to the dispute resolution provisions of U.S. Bilateral Investment Treaties, which typically require a foreign investor at the outset to choose \textit{either} international arbitration \textit{or} domestic court.\textsuperscript{119} If Chapter Eleven tribunals were to give domestic court decisions \textit{res judicata} effect, they would effectively create a system in which foreign investors were forced to choose between domestic court and international arbitration, a model that the NAFTA negotiators seem to have deliberately rejected.

Nor are the traditional arguments in favor of \textit{res judicata} particularly persuasive here. \textit{Res judicata} is designed both to protect a defendant from the burden of having to relitigate issues that have already been decided and to conserve judicial resources.\textsuperscript{120} In the Chapter Eleven context, however, the only possible “defendants” are the governments of Canada, Mexico and the United States. They should be free to choose to bear the burden of relitigating some issues as the price of encouraging the resolution of some investment disputes in domestic court. And in the Chapter Eleven context, the cost of relitigating issues does not fall on a publicly supported and overburdened court system but rather on arbitrators, who serve voluntarily and are compensated by the parties (often quite handsomely).

In short, Chapter Eleven tribunals should adhere to the traditional customary international law rule that the decisions of domestic courts are not biding on them as \textit{res judicata}, not because the parties or the issues are different, not because of doubts about the impartiality of domestic courts or as a corollary of the local remedies rule, but rather to encourage foreign investors to pursue their remedies in domestic court in the hopes that at least some investment

\textsuperscript{118} See supra notes 64-65 and accompanying text. Once a foreign investor has brought a Chapter Eleven claim, the host State has little to gain from allowing a subsequent domestic suit for damages. Fairness to the foreign investor seems to support Article 1121’s exception for declaratory and injunctive relief, on the other hand, since a Chapter Eleven tribunal lacks authority to grant such remedies. See supra note 67 and accompanying text.

\textsuperscript{119} See supra notes 33-35 and accompanying text.

\textsuperscript{120} See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (“Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.”).
disputes may be resolved at the local level. Future tribunals should reject the Azinian tribunal’s dictum that domestic court decisions can only be questioned if they constitute a denial of justice\textsuperscript{121} in favor of a rule that permits the relitigation of the same issues decided by domestic courts. Alternatively, Canada, Mexico, and the United States should consider exercising their authority under Article 1131(2) to issue an interpretation of Article 1121 providing that the decisions of domestic courts shall not be binding on Chapter Eleven tribunals.\textsuperscript{122}

\textbf{III. Conclusion}

Chapter Eleven of NAFTA breaks new ground in permitting foreign investors to seek relief both in domestic court and before an international arbitral tribunal. It is this unique aspect of Chapter Eleven that raises new and difficult questions about the proper relationship between national courts and international arbitration. Chapter Eleven must, of course, be read against the background of the customary international law rules on exhaustion of remedies and \textit{res judicata}, but in so doing one must also attend carefully to the language of Chapter Eleven and be attuned to the possibility that traditional international law rules developed in a different context might need to be modified, or might at least require a different justification, to fit NAFTA.

I have argued that Chapter Eleven waives the customary international law rule requiring a foreign investor to exhaust its local remedies before bringing a claim before an international tribunal. Chapter Eleven permits a foreign investor to bring its claims before a NAFTA tribunal immediately if it so chooses. But I have also argued that Chapter Eleven tries to encourage foreign investors to seek relief in domestic courts first and that NAFTA tribunals should not, therefore, treat domestic court decisions as \textit{res judicata} for fear of discouraging investors from doing so.

\textsuperscript{121} See supra note 101 and accompanying text.

\textsuperscript{122} Article 1131(2) provides that “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.” NAFTA, Art. 1131(2), 32 I.L.M. at 645. This allows Canada, Mexico, and the United States to revise Chapter Eleven without the need formally to amend NAFTA.