

COMMENTARIES ON
SELECTED MODEL
INVESTMENT TREATIES

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The second paragraph is a three-year limitation period, which specifies that an investor must make a claim within three years of having acquired, or within three years of the time it should have acquired, knowledge of the breach *and* knowledge that the breach caused loss or damage.

Deceptively simple, Article 1116 plays many roles. First, and in combination with Articles 1117 and 1121, it derogates from *Barcelona Traction*, the International Court of Justice decision in which the court held that in the event a corporation is the injured party, only the corporation's home State can submit a claim on its behalf.¹⁸⁴ Article 1116 thus permits an investor to submit a claim for its loss or damage regardless of intervening tiers of corporation ownership. Under Article 1116 an investor should only be able to recover damage it suffers directly; in order to recover for all damages done to its investment an investor should file an Article 1117 claim. If it does so, however, then the investor should not be able to recover derivative damages—those that the investor suffers by reason of the diminution in value of its investment—as the monies paid to the investment should flow through to the investor. The investor would have to demonstrate a separate head of damages to recover directly. It appears that the investor has the choice of claiming under Article 1116 or 1117, or both.

Second, Article 1116 appears to permit claims by minority shareholders, and presumably by multiple shareholders. Should a minority shareholder submit a claim, it can be consolidated with a claim brought by the controlling shareholder under Article 1117. Article 1116 itself contains no consolidation provision; the assumption appears to be that in the event minority shareholders wanted to submit claims it is likely that the controlling shareholder would submit a claim as well. Consolidation even in the absence of the controlling shareholder would likely be possible under Article 1126 or the procedural rules applicable to the arbitration. This is clearly so in the case of the UNCITRAL rules, but would likely be possible under the ICSID Convention Arbitration Rules or under the ICSID Additional Facility Rules.

Third, Article 1116 requires that the investor have standing—that it must have suffered loss or damage.

Fourth, and relatedly, it requires that the investor have been injured by reason of, or arising out of, the breach. States Parties have sought to dismiss cases on jurisdictional grounds based on the argument that there was no damage, or that there was no causal connection between the alleged injury and the breach. One source of this argument is Article 1116; others are Article 1101 and Article 1115.

Fifth, NAFTA's standing provisions have given rise to questions of the nationality of the investor. One question is whether and how the continuous nationality rule, which was developed in the context of diplomatic protection, applies to investor-State arbitration.¹⁸⁵ NAFTA requires that the injury be suffered by an investor of a Party and that the claim be submitted by an investor of a Party, but says nothing about whether that status must be maintained through the date of any award.¹⁸⁶ A second nationality issue is whether a dual national of, for example, Mexico and the United States can maintain a