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Article 1116 - Claim by an Investor of a Party on its Own Behalf

Article 1116 Claim by an Investor of a Party on its Own Behalf

I Negotiating Text

- Article 1116 in a close approximation of its final form did not appear in the NAFTA until quite late in the negotiations. It appears to have been the successor to the definition of "investment disputes." In that guise, it appeared in the very first drafts. In the December 1991, draft, the United States proposed a definition of investment dispute within the dispute settlement article. It read:

For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of another Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Chapter with respect to an investment. (1)

- In the March 6, 1992, draft, Mexico offered alternative language:

In the event of an investment dispute, the investor may send written notice to the Party with which it has the dispute ('the host government'), setting forth the provision or provisions of this Chapter which it believes has been breached and the facts on which its assertion is based. The investor shall simultaneously send a copy of this written notice to the Party of which it is a national ('the home government'). ▲▼ The two Parties shall thereupon immediately refer the matter to dispute resolution under Chapter 23. (2)

- The U.S. proposal changed slightly in the May 1, 1992, draft. It became shorter, and the references to "investment agreement" and "investment authorization" disappeared. It read thus:

For purposes of this Article, an investment dispute means only a dispute between a Party and an investor of another Party involving an alleged breach of any right conferred by this Chapter where the investor claims as final relief only monetary damages or restitution of property. (3)

- The U.S. proposal was shortened even further in the May 13, 1992, draft. The final clause – "where the investor claims as final relief only monetary damages or restitution of property" – was deleted. (4)

- The Mexican proposal did not appear in the May 22, 1992, draft. The U.S. proposal was identical to the May 13 draft, except for the addition of a sentence reading: "[a]n investment dispute shall not include an alleged breach of this Chapter where the very measure constituting the alleged breach is itself expressly permitted by another Chapter." (5)

- In the June 4, 1992, draft, Canada proposed a definition of investment dispute for the first time. It read:

'[I]nvestment dispute' means a dispute between a Party to this Agreement and an investor of another Party whereby the investor alleges that the first-mentioned Party has breached a right conferred by this Chapter and that it has suffered loss or damage by reason of, or arising out of, that breach, but does not include a dispute with respect to

- (i) measures that are inconsistent with this Chapter but that are authorized by other provisions of this Agreement,
- (ii) non-conforming provisions of measures covered by Articles ... and Annexes ... ; or
- (iii) an alleged breach of any right to the security of the person of an investor; (6)

- In the August 4, 1992, text, no provision appeared. Under the section entitled "Dispute Settlement" there was a directive to see the subgroup text. (7)

- The next draft, also dated August 4, 1992, included language on which all three Parties agreed in a provision labeled "Investment Dispute":

Investment dispute means a dispute between a Party and an investor of another Party in which the investor alleges that the Party has breached a provision of this Chapter and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (8)

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Mexico proposed adding a sentence to the end of the provision which read “An investment dispute does not include an alleged breach of this Chapter where the measure constituting the alleged breach is authorized by another provision of this Agreement.” (9) Mexico also proposed a further article: “[w]here it is alleged that a Party has breached a provision of this Chapter it shall be a defense that the measure is authorized by another provision of this Agreement.” (10)

- In the August 11 draft, both of Mexico's proposals failed to appear, but the language otherwise remained unchanged. (11)
- The next change occurred in the August 28, 1992, draft. It introduced the idea that the provisions on monopolies or state enterprises could give rise to an investment dispute. The provision read as follows:

Investment dispute means a dispute between a Party and an investor of another Party in which the investor alleges that the Party has breached:

- (a) a provision of this Chapter, or
- (b) paragraph 3(a) of Article 2602 (Monopolies) or paragraph 2 of Article 2603 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (12)

- A significant change occurred in the September 4, 1992, draft. The language was modified so that it was nearly in final form. In addition, the limitation language was added. The provision was numbered Article 1116, and entitled “Claim by an Investor of a Party on Behalf of Itself.” It read:

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. (13)

P 1116-3 Paragraph 2 was thus in its final form.▲▼

- Save for minor conforming changes (Section A became a subchapter for a time), the provision did not change again until October 2, 1992. At that time, the title was amended to read “Claim by an Investor of a Party on Its Own Behalf.” The language of paragraph one was changed slightly. The word “obligation” was inserted into the first sentence, so that it read “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under...” Subparagraph (a) was amended to exclude the word “provision” (which was effectively replaced by the word “obligation” in the chapeau), and to include a specific reference to Article 1503(2) (State Enterprises), which had previously been in subparagraph (b). Subparagraph (b) was amended slightly to read “Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A.” (14) The gist of the provision did not change, but with those amendments it reached its final form.

II Commentary

A Introduction

Articles 1116 is entitled “Claim by an Investor of a Party on Its Own Behalf,” while Article 1117 is entitled “Claim by an Investor of a Party on Behalf of an Enterprise.” Both, then, have to do with claims submitted by investors, and both serve two primary purposes. First, they are effectively

P 1116-4 standing provisions, ▲▼ describing who is entitled to bring a claim under Chapter 11. Article 1116(1) gives an investor the right to bring a claim on its own behalf, while Article 1117(1) gives an investor that owns or controls an investment that is an enterprise the ability to bring a claim on behalf of that investment. Second, they contain a limitation provision: a claimant must make a claim within three years of having acquired knowledge of the alleged breach, or within three years of the date they *should* have acquired knowledge of the alleged breach, and accompanying loss or damage. Article 1116(1) parallels Article 1117(1), while Article 1116(2) parallels Article 1117(2). It is difficult to separate the commentary on some aspects of these parallel provisions. For that reason, much of the commentary under Article 1116 is applicable to Article 1117 as well, and *vice versa*. For the sake of clarity and parsimony, we will not repeat the commentary under both Articles, but discuss those common issues relating to paragraphs

(1) and (2) of each article in this commentary.

B Interplay Between Articles 1116 and 1117

Articles 1116 and 1117 were designed to be broad standing provisions that addressed certain aspects of the customary international law of State responsibility for injuries to aliens. Article 1116 permits an investor to bring a claim on its own behalf for loss or damage incurred by reason of a breach of Section A of Chapter 11. The focus in Article 1116 is on the loss or damage suffered by the investor. An award made under Article 1116 is payable to the investor. Article 1117 permits an investor to bring a claim on behalf of an enterprise of another Party provided that enterprise is both a juridical person that the investor owns or controls, directly or indirectly, and has incurred loss or damage as a result of a breach of Section A of Chapter 11. The focus is on the enterprise, and the damage it suffers. An award under Article 1117 is payable to the enterprise. (15) The U.S. Statement of Administrative Action puts the matter as follows:

Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor. (16)

This seemingly simple dichotomy can be, in practice, rather complicated.

1 The Principle of Non-responsibility

Traditionally, international law governs inter-State relationships. “State Responsibility implicates the entirety of a nation’s duty to respect the international law rights of other countries...” (17) Under the law of State responsibility for injuries to aliens, a State has certain responsibilities to the nationals of foreign states. Those responsibilities generally do not extend to nationals of the State itself. (18) Thus, an international law claim may not be made against a State by a national of that State, but only by another State on behalf of its national. This is the principle of non-responsibility of States for injuries to its own nationals. (19)

The result of applying this customary international law principle in the realm of investor-State arbitration would be to limit the kinds of claims that could be presented against a host State. First, an investor would have to convince its State to espouse its claim. Second, a U.S. company, even if owned by a foreign investor from another NAFTA Party, could not bring a claim against the United States for a breach of an international obligation owed to itself, such as one found in Section A of Chapter 11. The home State foreign investor could bring such a claim, but only for injury to the foreign investor.

Article 1117 derogates from this rule to a degree by permitting an investor of a Party to submit a claim to arbitration, and by permitting an investor of a Party to bring a claim against another Party on behalf of a juridical person that is an enterprise of that other Party. Because any award made under Article 1117 is payable to the investment by virtue of Article 1135(2), one could view the investment as the beneficiary of any award. Yet the enterprise may not itself assert the claim; its foreign owner is the only entity able to bring the NAFTA claim. (20) Thus, the domestic enterprise may in fact receive some protection from violations of Section A of Chapter 11, but a remedy may only be sought by an investor of another NAFTA Party.

2 The *Barcelona Traction* Problem

In *Barcelona Traction*, the International Court of Justice set forth as a matter of customary international law the principle that shareholders had no standing to bring a claim on behalf of a corporation; only the corporation could act in its own interests. (21) Correlatively, in the law of diplomatic protection, only the State of the corporation, rather than the State of its controlling shareholders, could espouse an international claim on the part of the corporation.

In *Barcelona Traction*, the ICJ dismissed the claim that Belgium asserted on behalf of Belgian shareholders in a Canadian company incorporated under Canadian law and with its principal place of business in Canada. The Canadian company was operating in Spain and had been effectively expropriated by the Spanish government. The ICJ reasoned that municipal law placed great weight on the distinction between the shareholders of a company and the company itself, and determined that only Canada could espouse the claim on behalf of the Canadian company. (22)

Articles 1116 and 1117 avoid any potential *Barcelona Traction* problem. (23) Article 1117 specifies that an investor of a Party that owns or controls, either directly or indirectly, an enterprise in the territory of another NAFTA Party may advance a claim on behalf of that enterprise. The “directly or indirectly” language solves the problem raised by *Barcelona Traction* and permits a controlling shareholder that is a national of a NAFTA Party to bring a claim on behalf of an enterprise in another NAFTA Party, even if the shareholder owns the controlling interest through intermediaries.

The *Barcelona Traction* distinction between a corporation and its shareholders could also limit claims by shareholders if not for Article 1116. For example, if a Mexican shareholder owned a Mexican corporation, which in turn owned property in Canada, the principle in *Barcelona Traction* would permit only the Mexican corporation to bring a claim for any breach of Section A of Chapter 11. However, an investor of a Party may submit an Article 1116 claim on behalf of an investment that is “owned or controlled directly or indirectly by an investor of a Party.”

Thus, in the hypothetical described above, the Mexican shareholder could itself bring the claim on behalf of the investment.

3 Derivative Damages

The NAFTA Parties have argued that tribunals should treat seriously the differences between claims under Articles 1116 and 1117. In particular, they have argued that Article 1116 permits a claim only for damage suffered by the investor. If the investment is an enterprise, any claim for P 1116 damages to the enterprise itself ▲▼ could only be made under Article 1117. Under this theory, so-called “derivative damages” – damages based on the diminution in value of the interest in the enterprise owned by the investor – would not be compensable under Article 1116.

Article 1116 does permit an investor of a Party to submit a claim alleging that it has been harmed due to injuries suffered by its investment, including an investment that is itself an enterprise. (24) What constitutes injuries suffered separately by the investor that are compensable under Article 1116, and injuries suffered by the investment that is an enterprise, compensable only under Article 1117, must be determined on a case-by-case basis.

Derivative damages raise a concern about double recovery. If an enterprise were indeed to suffer loss or damage due to a breach of Section A of Chapter 11, damages to the enterprise could be awarded under Article 1117. If an investor pursuing a claim on its own behalf could also recover for the diminution in the value of the interest it owned, the injury might be recompensed twice.

Derivative damages also raise a concern about basic corporate structure. If an enterprise is injured, but damages are paid directly to shareholders with standing to bring a claim under an investment treaty such as NAFTA Chapter 11, what is the effect on other shareholders of the corporation and on creditors? Are their rights effectively circumvented by the payment of damages directly to other shareholders?

These questions have not yet been thoroughly addressed in NAFTA jurisprudence. In particular, the questions posed above have not been adequately considered.

In *Pope & Talbot v. Canada*, Pope & Talbot had brought a claim under Article 1116 on behalf of its wholly-owned subsidiary in Canada. Canada argued that the claim should have been submitted under Article 1117, and that Pope & Talbot had suffered no direct injury, but only derivative injury due to the damage to its investment. (25) The tribunal rejected Canada's contention. It cited Article 1121(1)(b), which requires that in an Article 1116 claim which involves “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 must sign a waiver separate from that of the investor. Thus, concluded the tribunal, NAFTA evidently contemplates an Article 1116 claim arising from loss or damage to an investor's interest in the relevant enterprise. (26) It noted, however, that the investor would still have to prove “that the loss or damage was caused to its interest, and that it was causally connected to the breach complained of.” (27)

A similar issue arose in *Mondev Ltd. v. United States*. The United States had challenged Mondev's failure to bring a claim on behalf of its enterprise, Lafayette Place Associates, under P 1116-A Article 1117. Mondev had brought its claim ▲▼ under Article 1116 (though it subsequently suggested that its claim be considered to have been brought under Article 1117 as well). (28) The United States argued that under Article 1116 Mondev could only claim for damages it suffered directly, but that in its Notice of Arbitration Mondev had alleged no damages that it suffered independent of those suffered by Lafayette Place Associates. According to the United States, basic principles of international law, as set forth in the *Barcelona Traction* case, precluded shareholders from bringing a claim on behalf of injuries suffered by a corporation. (29) NAFTA derogated from this rule in Article 1117, but not in Article 1116. Mondev could thus only bring a claim for injuries suffered directly by it, but it had identified no such injuries. The distinction between Articles 1116 and 1117 was particularly important, according to the United States, because of the potential damages award. By permitting an Article 1117 claim to wear the guise of an Article 1116 claim, damages would be payable to the investor, rather than to the enterprise. Thus, those with security interests or other rights in the enterprise would not be able to claim their share of any such damages. (30) The tax treatment of the award might also change. (31)

The *Mondev* tribunal agreed that a NAFTA tribunal should be very careful to ensure that any recovery in a claim that should have been brought under Article 1117 not be paid directly to the investor. (32) It noted that there were several ways of accomplishing that outcome; one was to treat the claim as in truth having been brought under Articles 1117. (33) This solution could work provided that sufficient notice of the substance of the claim had been given, that the waiver from the enterprise, which was required by Article 1121, had been given, and that adding the claim would cause no prejudice to the Respondent State or third parties. (34) In *Mondev* all of those requirements had been met, so the tribunal would have been prepared to treat the claim as having been made under Article 1117, had that been necessary. (35) The tribunal also noted that another possibility would be simply to pay the damages award to the enterprise. (36) Although these solutions were unnecessary as the case turned out, the *Mondev* tribunal cautioned future claimants to consider carefully the basis for their claims, and to fulfill the procedural requirements in Articles 1117 and 1121 if the claim were actually brought on behalf of an enterprise. (37)

A similar issue arose in *Methanex Corporation v. United States*. The United States challenged, as a jurisdictional matter, Methanex's failure to raise a claim under Article 1117 in its original statement of claim, even though the losses it alleged were suffered by its investments, and not directly by Methanex, and it had alleged no direct loss that would sustain a claim under Article 1116. (38) The *Methanex* tribunal dismissed this objection. First, it noted that the objection was moot given that the tribunal had decided, on other grounds, that it had no jurisdiction to consider the claim as advanced in Methanex's original statement of claim. (39) Second, if it were considering the original claim, the tribunal would regard the objection as "technical and capable of being cured by Methanex's reliance on Article 1117," which it did in its amended statement of claim. (40) Furthermore, the tribunal noted that it was sympathetic to Methanex's reliance on Article 1117 in a fresh pleading. (41) Finally, the issue of standing under Article 1117 could be addressed at the merits stage, if necessary. (42)

In *Marvin Roy Feldman Karpa v. Mexico*, the investor brought a claim under Article 1117 on behalf of his investment in Mexico, CEMSA. The claimant, Marvin Roy Feldman Karpa ("Feldman") prevailed in the case, and the tribunal ordered the award to be paid to Feldman, rather than to CEMSA. The Respondent asked the tribunal to correct its award to order that the damages be payable to CEMSA, as required by Article 1135(2). (43) The Claimant did not oppose this request, and the tribunal corrected its award "to include the *mandatory language* in NAFTA Article 1135(2)(c)." (44)

For an investor to bring a claim under Article 1117, it must "own or control, directly or indirectly" the enterprise on behalf of which the claim is being brought. Proof of ownership or control of the investment has not figured prominently in the NAFTA cases to date. There may be practical reasons for this: submitting a claim on behalf of an enterprise will likely entail that entity's cooperation, so that an investor without the requisite ownership or control is unlikely to be able to bring a successful case. Furthermore, because an award payable under Article 1117 is payable directly to the enterprise, an investor that did not own or control the enterprise would have little incentive to bring a claim.

The tribunal in *Waste Management Inc. v. Mexico* made clear, though, that documents relating to ownership and control are relevant and need to be produced. (45) The documents could be relevant to an objection under Article 1117. (46) Furthermore, the Respondent argued, they could be relevant to the quantum of damages. (47)

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In *International Thunderbird Gaming Corporation v. Mexico*, the tribunal rejected Mexico's claim that Thunderbird did not own or control the Mexican companies on whose behalf it purported to assert claims under Article 1117. The tribunal noted that Article 1117 required that a claimant "control" the enterprise, but that it did not define "control." The tribunal rejected Mexico's argument that control be construed to mean legal control under the corporate law of the Party in which the enterprise was incorporated, and determined that control should be interpreted in accordance with its ordinary meaning. (47a) Thus, Thunderbird need show only effective or "de facto" control; in the absence of legal control *de facto* control must be shown beyond any reasonable doubt. (47b) The tribunal determined that this standard had been met given that Thunderbird had "key involvement" with decision-making during the relevant time frame, which included the "planning of the business activities in Mexico, the initial expenditures and capital, the hiring of the machine suppliers"; that the key personnel were shared between Thunderbird and the Mexican enterprises; that initial expenditures and know-how were supplied by Thunderbird; and that legal advice addressed to the enterprises' activities and know-how was directed to Thunderbird. (47c) In summary, the tribunal concluded: "[W]ithout the consistent and significant initiative, driving force and decision-making of Thunderbird, the investment in Mexico could not have materialized. Accordingly, the Tribunal finds that Thunderbird exercised control over the [enterprises] for the purpose of Article 1117 of the NAFTA." (47d)

In *UPS*, Canada argued that the tribunal lacked jurisdiction because UPS brought its claim under Article 1116, but alleged harm only to its subsidiary, UPS Canada. Thus, the claim would properly have been brought under Article 1117, and by failing to submit the claim properly, UPS had failed to meet the condition precedent for the submission of a claim to arbitration. The *UPS* tribunal disagreed. First, it determined that the claim was properly submitted under Article 1116. (47e) Second, in the context of the *UPS* dispute, it held that the distinction between Articles 1116 and 1117 was merely formal, "without any significant implication for the substance of the claims or the rights of the parties." (47f) The tribunal acknowledged, however, that if there were multiple owners of UPS Canada, the question of the share of UPS Canada's losses flowing through to UPS might be more salient. (47g)

4 Minority Shareholders

An issue closely related to the question of derivative damages is the status of minority shareholders to submit claims. Under customary international law as set forth in *Barcelona Traction*, minority shareholders could not bring a claim on behalf of a corporation. NAFTA fairly clearly permits a claim to be brought by a non-controlling, or minority, shareholder. (48) Other investment treaties are not as clear. The issue of minority shareholders and their standing to advance claims has been an issue in several recent BIT cases, many of which were raised in the context of the recent Argentine financial crisis. Most of those cases have, however, determined that minority shareholders may bring claims on their own behalf. (49)

The issue of minority shareholder standing was addressed in *GAMI Investments Inc. v. Mexico*. In that case, a U.S. company with a 14.18 percent equity interest in a Mexican investment, GAM, brought an Article 1116 claim against Mexico after Mexico had expropriated five sugar mills owned by GAM. Mexico argued that GAMI lacked standing to pursue a claim because it had suffered only derivative damage as a minority shareholder. As a result, GAMI would only have standing if Mexico had in fact expropriated its shares; in fact, GAMI still owned its shares, albeit in an investment that owned five fewer sugar mills, and so had suffered no direct damage. (50) The tribunal rejected Mexico's contention:

The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. (51)

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If one accepts that minority shareholders are entitled to bring a claim, the question of what they can recover remains difficult. The *GAMI* tribunal did not award damages as it found no breach of NAFTA. (52) Of particular concern, as noted above, is the prospect of double recovery, and the erosion of the distinction habitually made between shareholders and the companies in which they have interests. These issues have not yet arisen in the NAFTA context, but they have arisen in several BIT cases. (53)

5 Multiple Claimants

By its terms, NAFTA permits more than one claimant to submit claims arising out of the same event that gives rise to a breach of the Agreement. Article 1117(3) contains directives with respect to the consolidation of claims if a claim is brought on behalf of an enterprise under Article 1117 and a claim arising from the same events is submitted by one, or more than one, non-controlling shareholder. (54) To date, however, few NAFTA claims have involved two claimants bringing a claim with respect to the same investment. (55)

In *Azinian v. Mexico*, several shareholders brought claims on behalf of a Mexican enterprise in which they allegedly owned stock. Mexico challenged the standing of the shareholders to bring the claim, but not on the basis of there being more than one claimant. Rather, Mexico claimed that certain of the claimants did not actually own the shares in question, and that they did not own shares in the enterprise that had entered into the concession agreement on which the NAFTA claim was based. The tribunal declined to address the matter at the jurisdictional stage. (56) In its decision on the merits, the tribunal concluded it need not address the issues because it had found that there was no liability in any event. (57)

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The Loewen Group, Inc. and Raymond L. Loewen submitted to arbitration a joint claim against the United States. The *Loewen* case involved a challenge to court actions in Mississippi. At the time of the court decisions in question, Raymond L. Loewen was the controlling shareholder in The Loewen Group, Inc. ("TLGI"), a Canadian corporation. TLGI, in turn, controlled The Loewen Group International Inc. ("LGII"), its U.S. subsidiary. TLGI and Raymond Loewen submitted a joint claim on October 30, 1998. Both TLGI and Raymond Loewen claimed standing under Article 1116, and both claimed standing under Article 1117. (58) On November 2, 1998, Raymond Loewen lost most of his shares in TLGI when they were seized by the Canadian Imperial Bank of Commerce to satisfy outstanding loans. (59) Raymond Loewen and TLGI were thereafter represented by separate counsel, though there was some degree of cooperation between the parties. (60)

In its objections to jurisdiction, the United States argued that Article 1117 did not permit more than one investor to bring a claim on behalf of an enterprise. (61) The United States conceded that Article 1117 did not expressly prohibit more than one investor from bringing a claim on behalf of an enterprise, but suggested that the provision was premised on only one investor's bringing the claim. (62) The United States pointed to the potential for multiple investors offering "divergent, and possibly conflicting, theories on behalf of the same enterprise." (63) It also noted that each of the *Loewen* claimants had already filed separate memorials, each ostensibly on behalf of LGII. (64) The United States suggested that, in a case in which one investor has direct ownership and control, while the other has only indirect ownership, the direct owner should be entitled to bring the claim, to the exclusion of the others. (65)

By the time the U.S. brief was filed, Raymond Loewen had lost most of his shares in TLGI and no longer owned or controlled either TLGI or LGII. The United States suggested that even if Raymond Loewen could have brought his Article 1117 claim on October 30, 1998, he no longer had standing to sustain it. (66) The United States suggested that for practical reasons prosecuting an arbitration claim on behalf of an enterprise suggested a degree of cooperation with that enterprise likely to be absent given that the investor had lost its position of ownership and control. (67) Moreover, the fact that the award would be payable only to the enterprise suggested that the investor and the investment needed to have interests that were aligned during the arbitration. (68)

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The *Loewen* tribunal declined to rule on the matter at the jurisdictional stage. It noted that even if it dismissed Raymond Loewen's Article 1117 claim, his Article 1116 claim would remain. (69) Furthermore, it suggested that the objection was not one that was relevant to jurisdiction and, in the event it was, the matter could be dealt with at the merits stage. (70) The *Loewen*

tribunal ultimately disposed of the claim on other grounds, as discussed in the section on continuous nationality, below. It did, however, suggest that Raymond Loewen had not produced evidence to establish that he had stock in TLGI at the time of the proceeding's commencement, and that it was certainly clear that he did not control the enterprise by the time of its reorganization in bankruptcy, which event the tribunal found extinguished its NAFTA claims. (71) Thus, his Article 1117 claim would have failed in any event.

No one suggested that Raymond Loewen was not entitled to bring his Article 1116 claim at the same time that TLGI was bringing a claim under both Articles 1116 and 1117. The only question would be the amount of recovery to which he would be entitled, as discussed above in the section on derivative damages. Raymond Loewen, at the time the claim was submitted, was the controlling shareholder; after he lost most of his shares, he was at most a minority shareholder, yet he could maintain his standing under Article 1116.

C Standing

Articles 1116 and 1117 have figured prominently in objections to jurisdiction and admissibility on the basis that the disputing investor lacked standing to bring a claim. They have involved arguments based on interpretations of NAFTA Chapter 11 itself, arguments derived from customary international law, and arguments about the interrelationship between the two.

1 “Loss or Damage by Reason of, or Arising out of, that Breach”

Articles 1116 and 1117 both require that an investor allege a breach of an applicable provision of the NAFTA, and require that an investor have “incurred loss or damage by reason of, or arising out of, that breach.” In certain cases, Parties have alleged that the investor in question has suffered no loss or damage arising from the alleged breach, whether because the claimant did not qualify as an investor at the time of the alleged breach, or because factually it suffered no loss or injury arising from the breach.

In *Mondev*, for example, the United States challenged Mondev's standing to bring its claims under Article 1116. The United States claimed that Mondev no longer had an investment in the United States, and thus was not an “investor of a Party” as required to fall within the jurisdiction of Article 1116. The United States claimed that any investment Mondev had in Boston had been foreclosed on by Manufacturer's Hanover Bank in 1991. Thus, at the time of NAFTA's entry into force, Mondev had no investment on which to base a claim. All Mondev had were claims for certain damages, which the United States contended fell outside the definition of investment in Article 1139. The tribunal rejected this contention. First, it found that Mondev's claims were “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory” as of January 1, 1994, and were thus within the broad definition of investment in Article 1139. (72) Second, it found that once an investment exists, it remains protected by NAFTA even after the enterprise in question has failed. It supported this finding by pointing to the language in the definition of investor as someone who “seeks to make, is making or has made an investment.” Even if an investment is expropriated, it remains true that an investor has made an investment. (73) The *Mondev* tribunal noted that the same kinds of issues could arise under the other substantive provisions of Chapter 11, including Articles 1102 and 1105. (74) Finally, the fact that Mondev owned its subsisting interests through Lafayette Place Associates, its Massachusetts subsidiary, did not change the outcome; Lafayette Place Associates was “owned or controlled directly or indirectly” by Mondev, and those interests thus fell within the definition of “investment of an investor of a Party.” (75)

In *Methanex Corp. v. United States*, the United States challenged Methanex's claim on the grounds of jurisdiction and admissibility. Two of those challenges alleged that Methanex failed to demonstrate sufficient loss or damage arising from the breach, as required by Article 1116. (76) *Methanex* involved California's proposed ban (later implemented) on the gasoline additive methyl tertiary-butyl ether (“MTBE”), an oxygenate blended with gasoline to make it burn more cleanly and cause less air pollution. Methanex is a Canadian manufacturer of methanol, a feedstock for MTBE. It claimed that its business would be adversely affected by the ban; it would be able to sell less methanol to blenders and refiners who would no longer use MTBE as an oxygenate, but would begin to use ethanol instead. (77)

The first jurisdictional objection was that Article 1116 requires that the alleged breach be the proximate cause of the alleged loss, and that Methanex had failed to show such proximate cause in its pleading. (78) The *Methanex* tribunal denied that this could properly be considered a challenge based on jurisdiction. (79) The tribunal noted that the claimant had alleged loss or damage arising from the breach, as required by Article 1116, and determined that at the pleading stage it did not need to prove such loss or damage. (80)

The second jurisdictional challenge based on Article 1116 was that Methanex had not suffered and could not suffer any loss as a result of the measure, which at the time the NAFTA case commenced was merely a proposed ban on using MTBE in gasoline, not an actual ban. The *Methanex* tribunal also determined that this claim failed as a jurisdictional challenge based on the plain meaning of the words in Article 1116(1). (81) As before, Methanex had pleaded loss or damage, and that was all that was required at the jurisdictional stage. (82)

The question of loss or damage was also discussed in the *Methanex* award on the merits. The tribunal did not need to decide the proximate cause or loss or damage issues recounted above because it found that there had been no breach of Section A of Chapter 11. (83) One small piece

of the decision, however, addressed the question of “loss or damage” as required by Articles 1116 and 1117. In its case on the merits, Methanex had relied on a new California state regulation implementing the ban on MTBE, but which was not pleaded in Methanex’s revised amended statement of claim. The tribunal determined that Methanex could rely on the new regulation as evidence of California’s intent to harm methanol producers, but could not rely on it as a measure subject to challenge under Chapter 11. (84) It based this decision, in part, on the fact that Methanex had made no claim with respect to the new regulation, and therefore had not alleged that it suffered any loss as a result of a breach of one of the substantive provisions of Chapter 11 by virtue of the introduction of the new regulation. (85) “The Tribunal construes Articles 1116 and 1117 as requiring a claim of loss or damage that originates in the measure adopted or maintained by the NAFTA Party.” (86)

S. D. Myers Inc. v. Canada also presented a “loss or damage” issue. The case involved a claim by a U.S. company with a polychlorinated biphenyls (“PCB”) waste disposal facility in Ohio. S.D. Myers Inc. (“SDMI”) brought a claim under Article 1116 challenging Canada’s closure of the border to exports of PCB waste. Canada challenged SDMI’s claim on the ground that it was not an investor of a Party under the definition of investor in Article 1139 because it did not have an investment in Canada. If SDMI was not an “investor of a Party,” then SDMI would not have standing to bring a claim under Article 1116. (87)

Most of the argument around the issue hinged on the definition of “investor” and “investment” in Article 1139. (88) An investor of a Party is one that “seeks to make, is making, or has made an investment.” An “investment of an investor of a Party” is “an investment owned or controlled directly or indirectly by an investor of such Party.” One of SDMI’s claimed investments was an enterprise in Canada called Myers Canada. Myers Canada was not owned directly by SDMI. (89) Canada argued that Myers Canada was not owned indirectly by SDMI either, because the shares in Myers Canada were owned by members of the Myers family individually, and not by SDMI itself. Thus, Myers Canada could not be the investment in question. The *S.D. Myers* tribunal rejected this argument, holding that it did not accept “that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs.” (90) The tribunal suggested that its view was reinforced by the term “indirectly.” (91) Thus, SDMI was an “investor of a Party” entitled to bring its claim under Chapter 11. (92)

Canada challenged this determination in the set-aside proceeding it brought before the Federal Court of Canada. Canada alleged that SDMI was not an “investor,” and that Myers Canada was not an “investment,” and that therefore the claim fell outside the submission to arbitration. The court, however, refused to disturb the decision of the *S.D. Myers* tribunal. It concluded that

the broad nature of the definition of “investment of an investor of a Party”, in particular the use of the words “controlled directly or indirectly”, together with the objective of NAFTA that it shall be interpreted and applied to meet the objectives of NAFTA, support the finding of the Tribunal at paragraph 231. (93)

Waste Management II involved a concession agreement between a provider of waste collection services and the City of Acapulco. The gist of the NAFTA claim was whether the manner in which the concession agreement was breached and the subsequent court proceedings constituted violations of Articles 1105 (the minimum standard of treatment) or 1110 (expropriation). Mexico argued that Waste Management lacked standing because Acaverde, Waste Management’s Mexican subsidiary, had not been owned by a U.S. company at the time the Concession Agreement was concluded, on February 9, 1995. (94) At that time, Acaverde was owned by a Cayman Islands company. That company was in the process of negotiating to sell Acaverde to Waste Management’s predecessor, Sanifill. Sanifill actually bought Acaverde on June 27, 1995, (95) and Acaverde commenced operations on August 15, 1995. (96) Mexico’s claim was that Acaverde was not an “investment of an investor of a Party” entitled to protection under Articles 1105 and 1110 because Sanifill did not yet own Acaverde at the time the Concession Agreement was signed. The tribunal dismissed this argument, noting that Chapter 11 spells out a range of possibilities, including indirect ownership and control of an investment, with no requirement that every intervening holding company also have NAFTA-Party nationality. (97) With respect to claims by investors on their own behalf under Article 1116:

it is sufficient that the investor has the nationality of a Party and has suffered loss or damage as a result of action in breach of one of the specified obligations, including Articles 1105 and 1110. The extent of that loss or damage is a matter of quantum, not jurisdiction. (98)

Moreover, there was no dispute that Acaverde was an enterprise controlled directly or indirectly by a U.S. investor at the time the activities alleged to have been a breach of NAFTA occurred. (99) Thus, the fact that Sanifill did not own Acaverde at the time of the signing of the concession was somewhat irrelevant.

The *Waste Management II* tribunal suggested that the investment with respect to which a Party has undertaken obligations under, *inter alia*, Articles 1105 and 1110 need not have the nationality of the Party in which it is located to be the subject of a NAFTA claim. This would be true whether or not the investment was an enterprise, or was another form of investment. According to the tribunal, this determination flows from the definitions of investment and enterprise, neither of which specifies that the investment (or enterprise) be a national of the Party in which it is located, so long as a foreign investor owns or controls it. (100)

If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text. (101)

This statement is arguably *obiter dicta*, since *Acaverde* itself was a Mexican enterprise at all times. It is also surprising that the *Waste Management II* tribunal did not appear to take into account the language in Article 1117, which says that an investor may bring a claim on behalf of “an enterprise of another Party that is a juridical person that the investor controls directly or indirectly.” Nor did it address similar language in Article 1121(1)(b), which, in the case of an Article 1116 claim based on alleged loss or damage to an interest in “an enterprise of another Party,” requires a waiver from that enterprise, as well as from the investor. The most straightforward explanation of the phrase “enterprise of another Party” is that the enterprise be a national of that Party, an interpretation supported by the definition in Article 1139. Even if the language is susceptible to other interpretations, one might have expected the tribunal to address those provisions.

The *Glamis Gold* tribunal also rejected the U.S. assertion that the investor in *Glamis Gold* lacked standing because it had not suffered a loss as required by Article 1117(1). The tribunal held that such an assertion could not properly be considered a plea as to jurisdiction, but that the existence of loss was an issue for the merits. (102)

In *UPS v. Canada*, Canada asserted as a jurisdictional defense its contention that UPS had not suffered any damage from the conduct alleged to breach Canada's NAFTA obligations. The *UPS* tribunal rejected Canada's objection to jurisdiction. First, it held that Canada had improperly separated damage and causation, whereas in fact they are inseparable, “as damage must flow from some cause.” (102a) Second, it said that for jurisdiction to attach, a claimant need only assert the damages claimed to result from the breach, which UPS had done. (102b) Third, it held that UPS had stated a sufficient claim to make a *prima facie* case for going forward, notwithstanding the existence of record evidence that contradicted UPS's showing. (102c) The tribunal noted these assertions were subject to a different standard than would be required to prevail on a claim for damages:

P 1116-21 At that stage, a claimant must show not only that it has persuasive evidence of damage from the actions alleged to constitute breaches of NAFTA obligations but also that the damage occurred as a consequence of the breaching Party's conduct within the specific time period subject to the Tribunal's jurisdiction. (102d)

The United States challenged the jurisdiction of the tribunal in *Canadian Cattlemen Claims* on the ground that the claimants were not “investors of a Party,” as required under Article 1116, and thus not entitled to claim the protection of the NAFTA. The tribunal described the claim as one of “subject matter jurisdiction – *ratione materiae*.” (102e)

Canadian Cattlemen involved Canadians operating feedlots and other cattle-related businesses in Canada who claimed that their investments were adversely affected by the U.S. ban on the import of cattle from Canada due to concerns about bovine spongiform encephalopathy (“BSE”). They did not have an investment in the United States, but claimed their Canadian investments were adversely affected by a U.S. measure, that the cattle market between the United States and Canada was regionally integrated, and that the United States breached its NAFTA obligations by treating U.S.-based competitors more favorably than it treated Canadian cattle operators. Furthermore, they claimed the language of Article 1102, the applicable obligation, did not contain any territorial limitation. (102f)

The tribunal determined that the drafters of NAFTA intended to accord protection to cross-border investments only. An “investor of a Party” is one “that seeks to make, is making or has made an investment.” (102g) “Investor of another Party” is not specifically defined, but is used in Articles 1101(a) and 1102(1). Much of their analysis was based on Article 1101 in its capacity as a “gateway” to the rest of Chapter 11. Even though the drafters were not uniform in their usage of a specific territorial limitation – in Article 1101, for example, two provisions refer to “investments” and contain territorially limiting references, but a third refers to “investors” without any corresponding territorial delimitation – investors only exist based on their investments. (102h) Because the first two provisions in Article 1101 require that an investment be in the territory of the Party whose measure is challenged, and because those provisions are linked to the third, an investor can only make claim with respect to “‘foreign investments’ – that is to say, investments of an investor in the territory of another Party whose measure is at issue.” (102i)

Furthermore, Article 1116 and Article 1117 both focus on investors only; that investments may not make a claim is made clear in Article 1117. (102j) Both articles rely on the Article 1139 definition of “investor,” and “investors do not exist in isolation from their investments.” (102k)

P 1116 Article 1101 applies to all of Chapter 11, including the procedural dispute settlement mechanisms in Chapter B. Neither Article 1116 nor Article 1117 contains territorially restrictive language, but Article 1117 makes clear investors can only submit a claim on behalf of enterprises of another Party – that is to say, foreign investors. (102l) Given that context, it would not make sense to conclude that Article 1116 was intended to establish a claim mechanism for domestic investors. (102m)

The claimants also submitted that Articles 1102(a) and 1103(l) supported their contentions because neither contains a territorial limitation in application. According to the claimants,

both were intended to protect for NAFTA investors, regardless of where their investment is made. (102n) Reading those provisions in conjunction with Article 1116, which gives investors the procedural right to launch a claim but makes no mention of investment, supports the conclusion that any NAFTA investor could submit a claim under Article 1116 alleging a breach of national treatment or most-favored-nation treatment. (102o) The tribunal rejected this argument: “Claimants’ attempt to present Article 1116 as the procedural complement to the investor-focused rights in Article 1102(1) makes little sense both as a textual matter and also when the claiming provisions are considered comparatively and in context.” (102p)

The claimant in *Merrill & Ring Forestry L.P. v. Canada* sought to amend its claim to add another party, Georgia Basin Holding, under Article 20 of the UNCITRAL Arbitration Rules, which provide that a party may amend or supplement a statement of claim or defense. (102q) Canada opposed the motion. One of its objections was that Georgia Basin had failed to make out a *prima facie* claim under Article 1116 because it had not demonstrated any loss or damage incurred as a result of Canada’s obligations. (102r) It had not been affected by actions taken under Notice 102, the primary measure alleged to be a breach in Merrill & Ring’s claim; at most it might be affected by that claim in future, and Canada argued that “Article 1116 does not apply to future breaches.” (102s) The tribunal refused to grant the motion on a number of grounds. With respect to the Article 1116 claim, it stated:

And while the Claimant is correct in arguing that Article 1116 does not require actual proof of loss or damage arising from the claimed breach (a matter which belongs to the merits), and it suffices that a credible allegation to this effect be made, the damage claimed would nevertheless have to be specific enough to make a determination of the amount of damage feasible. (102t)

The tribunal did not decide whether the motion reached that standard, however, as it found multiple other reasons to dismiss the motion.

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20b

2 Continuous Nationality Rule

The “continuous nationality” rule developed in the context of diplomatic protection. It follows from the principle that a State may only espouse the claim of its national. It has been formulated in different ways. Professor Shaw puts it as follows:

The nationality must exist at the date of the injury, and should continue until at least the date of the formal presentation of the claim, although this latter point may depend upon a variety of other facts, for example any agreement between the contending states as regards the claim. (103)

It has also been suggested that the continuous nationality rule requires that the national retain the nationality of the espousing State through the date of the award itself, subject to exceptions arising from involuntary loss of nationality. (104) Professor Brownlie notes, however, that “there is a respectable body of opinion that rejects [the rule] altogether.” (105)

The issue of continuous nationality arose in NAFTA in the context of the *Loewen* case. During the pendency of the NAFTA arbitration, TLGI sought bankruptcy protection. In the course of the reorganization, it transferred all of its assets to its U.S. subsidiary, which was renamed Alderwoods Group Inc., though TLGI remained extant. Before TLGI completed its reorganization, it assigned its rights in the NAFTA arbitration to a Canadian corporation, Nafcanco, an entity apparently created solely to hold those rights. (106) Nafcanco was a wholly-owned subsidiary of Alderwoods. After the reorganization, and before the award on the merits was rendered, the United States brought a new jurisdictional objection, in which it claimed that TLGI no longer had standing to bring a claim. It based its objection on three grounds. First, TLGI was no longer a disputing party as it was now merely a moribund company unable to prosecute its claims. (107) Second, because the true ownership of the NAFTA claims now lay with a U.S. company (Nafcanco being only a facade), there was no longer a Canadian national entitled to pursue a claim against the United States. The rule of continuous nationality, as applied in the NAFTA context, required Canadian ownership of claims through the time the award was made. (108) Third, TLGI in particular could no longer bring a claim under Article 1117 on behalf of its U.S. subsidiary, LGII, since TLGI no longer owned or controlled the company. (109)

The tribunal upheld the U.S. objections arising from Loewen’s corporate restructuring. The NAFTA, the tribunal observed, was not intended to protect American investors’ rights against practices of the United States that adversely affect those investors. (110) Such claims should be pursued in domestic courts; otherwise the NAFTA would effectively create a collateral appeal from a decision of U.S. courts. (111) In the tribunal’s view, nothing in the NAFTA altered the longstanding customary international law principle of continuous nationality, i.e. “there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which is known as the *dies ad quem*.” (112) The claimant argued that by its terms the NAFTA required that a claimant have the requisite nationality only as of the date of submission, but the tribunal determined that the NAFTA had not addressed the issue. “It is the silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.” (113) The tribunal also dismissed the claimants’ invocation of specific modifications of the continuous nationality rule in other contexts, including many BITs and the Iran–United States Claims Agreement, observing that

“such specific provisions in other treaties and agreements only hinder TGLI's contentions, since NAFTA has no such specific provision.” (114)

The tribunal recognized that there was some debate about whether the continuous nationality rule required that a claimant retain its nationality until the date of the award, but suggested that its genesis supported such a conclusion. The fact that investment claims were espoused required that the espousing State continue to have an interest in the matter until the matter was finally settled. The rule could be and was often abrogated, particularly in the context of investor-State dispute resolution, but that was done by specific treaty language, and any suggestion that it had been changed was notably absent in the NAFTA. (115)

The *Loewen* claimants had invoked the *Mondev* tribunal's award in support of their argument that they retained ownership of the claim. In *Mondev*, the issue had been whether the fact that *Mondev* had possibly lost its interest in the relevant investment through foreclosure meant that it no longer could be considered an investor of a Party for the purposes of submitting a NAFTA claim. The *Mondev* tribunal had found that this action did not deny *Mondev*'s right to pursue NAFTA arbitration, noting that the loss of an investment is often the basis for such disputes and that the purpose of the NAFTA would be frustrated if such a loss extinguished a claim. The *Loewen* tribunal declined to give weight to this analogy. This, said the *Loewen* tribunal, was quite a different matter from a change in nationality; in *Mondev* the investor retained its nationality throughout the proceedings. (116) By changing nationality, the claimant broke the chain ▲▼ that the NAFTA requires, thereby depriving the tribunal of its jurisdiction. While the claimant asserted that the United States was asking the tribunal to pierce Nafcanco's corporate veil, the tribunal denied that it was “enter[ing] into that thicket.” (117) The question was simply whether there was any remaining Canadian national to pursue the claim and “[s]uch a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding.” (118) Thus, the tribunal found that it lacked “jurisdiction to determine TGLI's claims under NAFTA concerning the decisions of United States courts in consequence of TGLI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.” (119)

As to the individual claims of Raymond L. Loewen, the Tribunal also found that it:

lacks jurisdiction to determine Raymond L. Loewen's claims under the NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TGLI when the claims were submitted to arbitration or after TGLI was reorganised under Chapter 11 of the United States Bankruptcy Code. (120)

This language disposed of Raymond Loewen's Article 1117 claim, but he had also submitted a claim on his own behalf under Article 1116, and his Canadian nationality did not change through the course of the proceeding. The *Loewen* Award did not specifically dismiss Raymond Loewen's Article 1116 claim, although it stated that all claims were dismissed in their entirety. (121) The United States petitioned the tribunal to issue a supplementary decision with respect to that claim. (122) The *Loewen* tribunal rejected the contention that it had not dealt with the claim and declined to issue a supplementary decision, but affirmed that it had dismissed all claims in their entirety. (123) Raymond L. Loewen has filed a petition to vacate the award on the ground, *inter alia*, that the *Loewen* tribunal decision did not in fact address or dispose of his claim under Article 1116. (124) The court rejected the ▲▼ set-aside petition on the ground that it was untimely filed, and so never reached the substance of Raymond Loewen's claim. (124a)

The *Loewen* decision on continuous nationality has been the subject of scholarly debate and criticism. (125) A threshold question is whether there is, at customary international law, any rule of continuous nationality. Professor John Dugard, the ▲▼ International Law Commission's special rapporteur on diplomatic protection, concluded in 2000 that there was not. (126) In particular he noted uncertainties “regarding the meaning of the ‘date of the injury’, nationality, continuity, and the *dies ad quem*.” (127) He also noted the variety of state practice on all of these points, and identified at least ten ways in which the *dies ad quem* had been specified in international practice. (128)

A second issue raised in the debate is whether, assuming there is a customary international law principle of continuous nationality, it has a role to play in investment treaty arbitration in which investors are able to submit claims directly against the host States. (129) The rule arose in the context of diplomatic protection and makes some sense when a State is espousing a claim on behalf of its national. It helps to ensure that a national cannot “shop” for an influential State to espouse its claim. (130) To the extent that an espousing State is identified with the entity whose claim it is advocating, their congruence of interest would often cease with the cessation of nationality. A State would likely no longer wish to espouse the claim of an person or entity who was no longer its national. These concerns are not, however, relevant in the context of investor-State arbitration.

This criticism does not mean, in the investor-State context, that there are no important dates on which a claimant must have the nationality of his home State that is Party to the treaty under which he is submitting a claim. The applicable treaty provisions usually stipulate that a claimant must have the requisite nationality on the date of the injury, as the host State's obligations are owed only to nationals of the other treaty Party, and as of the date of the commencement of the claim, again because the obligations are owed only to nationals of the other treaty Party. (131) NAFTA's provisions are similar. The substantive obligations in Section A are owed to an “investor of a Party” and/or to an “investment of an investor of a Party.” Article

1116(1) and Article 1117(1) permit an “investor of a Party” to submit claims to arbitration. Those are effectively standing provisions, and it is doubtful that the continuous nationality rule, as such, even applies to them. (132)

The next line of criticism addresses the duration of the continuous nationality a claimant must possess under the rule. The *Loewen* tribunal stated that an investor must retain nationality through the date of the award, although it acknowledged some debate on that front. In fact, as P 1116-24 Professor Dugard suggested, ▲▼ it is far from clear, even in the context of diplomatic protection, that the claimant need possess the requisite nationality through the date of the making of the award; in fact, Professor Dugard described this position on the requisite date as “the most extreme.” (133)

Finally, the *Loewen* tribunal's determination that the claimant no longer retained its Canadian nationality has itself been questioned. The claim remained, at least formally, with Canadian entities. (134) Though the tribunal suggested it was not “piercing the corporate veil,” some commentators have argued that it did. For example, a tribunal in one subsequent BIT case concluded:

Although the *Loewen* tribunal denied that it pierced the claimant's corporate veil, in reality, the tribunal did exactly that. Indeed, the tribunal could not have concluded that the nationality of the claimant had changed from Canadian to U.S. origin without piercing the claimant's corporate veil. Although one may debate whether veil piercing was justified in that case, the *Loewen* decision does not clarify the jurisprudence of veil piercing because the tribunal did not admit to, much less explain its reasons for, piercing the claimant's corporate veil. (135)

Given that the purported nationality of the claim's holder did not change, one might have expected the *Loewen* tribunal to give a more thorough explanation both of its piercing of the corporate veil and of its thereafter determining that the claim was no longer held by a Canadian national. (136)

3 Dual Nationality

One of the first issues raised in Chapter 11 cases with respect to standing was a question of alleged dual nationality. Though the claim in *Feldman* was brought under Article 1117, the issue P 1116-26 could arise in the context of Article 1116 as well. ▲▼ The question was whether a U.S. citizen, who also qualified as a “national” of Mexico under the NAFTA definition of national, had standing to bring a claim against Mexico under Chapter 11.

In *Feldman*, the claimant brought a claim under Article 1117 on behalf of his investment in Mexico, CEMSA. (137) The gravamen of Feldman's claim was that Mexico had impermissibly denied him the tax rebates to which he was entitled under Mexican law. Feldman is a U.S. citizen by birth who, at the time of his claim, had been resident in Mexico for 27 years and made Mexico the center of his business activity. (138) He had obtained “immigrado” status in Mexico, which gave him the right of “definitive residence” in Mexico, but he maintained his U.S. citizenship, used a U.S. passport and registered to vote in San Antonio, Texas. (139) When Feldman began his dispute with the Mexican tax authorities, well before he filed his NAFTA Chapter 11 claim, the U.S. Embassy in Mexico intervened on his behalf several times; this diplomatic protection was based on his U.S. citizenship. (140) Mexico challenged Feldman's standing to bring his claim under Article 1117 on the ground that he was a national of Mexico and thus not entitled to invoke the provisions of Article 1117. (141)

The relevant provisions of NAFTA are quite broad and the definitions of “national” include both citizens and permanent residents. Under Article 1139, an “investor of a Party” includes a “national” of a Party “that seeks to make, is making, or has made an investment.” National is defined under Article 201 as “a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1.” Annex 201.1 provides that “national” also includes, “with respect to Mexico, a national or citizen according to Articles 30 and 34, respectively, of the Mexican Constitution.” Thus, the text of NAFTA does not resolve the issue; Mr Feldman is a “national” of both Mexico and the United States under the NAFTA definitions.

The *Feldman* tribunal rejected Mexico's claim. The *Feldman* tribunal started its analysis by stating the general international law principle that “citizenship rather than residence or any other geographic affiliation is the main connecting factor between a state and an individual.” (142) For example, citizenship, rather than residence, provided the relevant connection in terms of diplomatic protection cases. (143) Thus, in the tribunal's view, problems arising from dual nationality, including a determination of which nationality was “dominant or effective” for P 1116-25 purposes of international law, could only arise when dual citizenships were at ▲▼ issue. (144) The tribunal noted that with respect to the matters it was discussing, it would use the terms citizenship and nationality interchangeably. (145)

Given the *Feldman* tribunal's conclusion with respect to dominant and effective nationality arising only when dual citizenships were at issue, it determined that the *Nottebohm* Case was not precisely on point. (146) *Nottebohm* is an ICJ decision that involved a German citizen with strong ties to Guatemala who became a naturalized citizen of Liechtenstein “in exceptional circumstances of speed and accommodation,” and who had no substantial bond with Liechtenstein. (147) Guatemala had objected to Liechtenstein's assertion of diplomatic protection on behalf of Nottebohm. The ICJ upheld Guatemala's objection, reasoning that Nottebohm had no substantial connection with Liechtenstein, but had taken citizenship there

only because Germany was a belligerent and Nottebohm desired to disassociate himself from Germany. In fact, Nottebohm had much closer ties with Guatemala than with Liechtenstein. Thus, Guatemala was not obliged to recognize his Liechtenstein citizenship. (148)

The *Feldman* tribunal explained that the case before it, contrary to Nottebohm, did not involve the “superficial or artificial” conferral of citizenship. (149) Rather, Feldman was born a U.S. citizen and had always been a U.S. citizen. (150) In the tribunal's view, then, citizenship would prevail over permanent residence, at least insofar as the issue of standing was concerned. (151)

The *Feldman* tribunal then “checked” its conclusion against the NAFTA framework. (152) The tribunal rejected any argument that the definition of national contained in Article 201 made permanent residence tantamount to nationality for all purposes. The tribunal reiterated the definition of investor in Article 1139, which defines an investor as “a national or enterprise of such Party, that seeks to make, is making or has made an investment.” This definition, the tribunal noted, only refers to an investor of a Party other than the one in which the investment is made. (153) The definition of “national” in Article 201, then, would only become relevant with respect to the Party in which the investor was located. Thus, “permanent residents are treated like nationals in a given State Party only if that State is different from the State where the investment is made.” (154) The tribunal asserted that its result was corroborated by the purpose of the NAFTA itself – to “increase substantially investment opportunities in the territories of the Parties” and to “create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes.” (155) These goals supported “enlarging the circle of investors to be protected, beyond nationals of another State Party, to permanent residents therein as well.” (156) The tribunal then gave as an example that an investor of Party, who was both a U.S. citizen and a French citizen, could bring a claim under NAFTA Chapter 11 so long as he was permanently residing in the United States. (157)

The *Feldman* decision leaves open the question of what would have been the result had Feldman indeed been a dual citizen of Mexico and the United States. Customary international law ordinarily permits an international claim to be maintained only by a non-national against a State. This principle of non-responsibility, however, ordinarily yields to the principle of “dominant and effective citizenship” in the event that such citizenship is not that of the defending State. (158) Nothing in the NAFTA suggests that the Parties have explicitly waived the rule of non-responsibility. In a case of dual citizenship, the issue of permanent residence might indeed be important as part of an inquiry to establish “dominant and effective citizenship.” (159)

The example offered by the *Feldman* tribunal of the dual French–U.S. citizen bringing a claim against another NAFTA Party did not implicate the rule of non-responsibility. The hypothetical posed by the tribunal thus seems to have been off-point. The question of dominant and effective nationality would not be directly relevant to the hypothetical claimant's standing to bring the claim.

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4 Jurisdiction *Ratione Temporis*

In *Feldman v. Mexico*, the tribunal made clear that the “scope of application of NAFTA in terms of time” defined the jurisdiction of the tribunal *ratione temporis*. (159a) It held that no obligations adopted under NAFTA existed before January 1, 1994, and thus its jurisdiction did not extend before that date. (160) “Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.” (161) It then explained the effect this decision would have on a so-called “continuing violation”:

[h]owever, this also means that if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, ‘became breaches’ of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction.... (162)

In *Mondev Ltd. v. United States*, the tribunal offered a cogent explanation of what constitutes a “continuing violation” that could bring an otherwise untimely cause of action into the time period for which redress is available. (163) The issue in *Mondev* was addressed in the context of the U.S. objection to the tribunal's jurisdiction on the ground that certain of the measures alleged to have been breaches occurred before the NAFTA's entry into force and were thus not actionable under the Agreement, which by its terms is not retrospective. (164)

The *Mondev* Corporation had, through its U.S. subsidiary, Lafayette Place Associates, (165) developed commercial property in downtown Boston in an area known as the “Combat Zone.” As part of this urban redevelopment project, *Mondev* had a contract with the City of Boston under which it could buy a parcel of land adjacent to that commercial property, provided certain conditions were met. Its ability to exercise its right was contingent on the City's deciding to remove the parking garage that occupied the site. Once the City made such a decision, *Mondev* would have three years to notify the City that it wanted to purchase the property. The City closed the parking garage, and *Mondev* notified the City of its intent to purchase the so-called “Hayward Parcel” in 1986, well within the three-year period. The City needed to obtain certain appraisals on the property before the actual closing could occur. Land in downtown Boston, even in the Combat Zone, had appreciated in value in the time since *Mondev* and the City had signed the initial contract, and the agreed formula for calculating the

sales price of the Hayward Parcel would have given Mondev a very favorable price. The contract was amended once to provide time for revising the agreement; under the amended contract, the last date for closing was January 1, 1989. The closing did not occur.

Apart from closing on the property itself, Mondev had to obtain the approval of the Boston Redevelopment Authority ("BRA") before proceeding with the development. The proposed contours of the project changed several times, and Mondev never gained BRA approval of its plans. Instead, Mondev leased its commercial property, including the rights in the project, to the Campeau Corporation in 1988. After the January 1, 1989, deadline, the BRA approved plans submitted by Campeau, but the project never went forward. The leased rights later reverted to Mondev after Campeau went bankrupt. Manufacturer's Hanover, the bank that held the mortgage on the commercial property, foreclosed on the mortgage in 1991.

Mondev then brought claims against both the City and the BRA in Massachusetts court. Mondev alleged that the City of Boston had breached its contract with Mondev, and that, motivated by the desire to sell the Hayward Parcel at market rates, the City had deliberately engaged in obstructionist tactics to stymie the land acquisition. These included failing to get the necessary appraisals, initiating zoning changes that would have reduced the allowable height of the buildings planned for the site, not cooperating with respect to traffic changes necessary to accommodate the project, and threatening to put a new street through the center of the proposed development. (166) Mondev also alleged that the BRA had tortiously interfered with the contract. It secured a jury verdict on both counts, but lost on both issues in an appeal before the Supreme Judicial Court of Massachusetts. (167)

In the NAFTA case, Mondev challenged the conduct of the City of Boston and the BRA, as well as the decisions by the U.S. courts that considered the legal issues raised by Mondev's court challenge. Mondev alleged that the conduct of the City and the BRA was part of a continuing violation, and was thus brought within the jurisdiction of the tribunal. For its part, the United States argued that the claims against the City and the BRA were not properly before the tribunal because their actions had occurred well before the NAFTA's entry into force. (167a) The P 1116-29 tribunal agreed that NAFTA was non-retrospective, but that it was possible for an act, initially committed before the NAFTA's entry into force, to continue to be of relevance and thus give rise to a NAFTA violation. The tribunal distinguished, however, between "an act of a continuing character and an act, already completed, which continues to cause loss or damage." (168) It then went through Mondev's claims to determine which, if any, fell within the category of a continuing act.

The *Mondev* tribunal described Mondev's Article 1110 claim as capable of being put three ways, which partially overlapped: (1) the City's action in frustrating the exercise of the Hayward Parcel option amounted to an expropriation of the value of the option; (2) the course of conduct by the City and the BRA effectively expropriated the entire value of Mondev's proposed development; and (3) the decisions of the U.S. courts could be said to have expropriated "the value of the rights to redress from the failure of the project." (169) As to the first claim, the tribunal determined that any expropriation of the value of the option was complete as of January 1, 1989. No issues of compensation with respect to the taking ever arose that could have extended the date of the taking. (170) As for the second claim, the tribunal determined that Mondev's rights in the project as a whole were extinguished as of the date of the foreclosure. Thus, if there had been any expropriation, it must have been complete as of that date. Thereafter Mondev had only *in personam* tort and contract claims against the City and the BRA. (171) As for the third claim, which was based on Mondev's surviving tort and contract claims, the tribunal concluded "the failure (if failure there was) of the United States courts to decide those cases in accordance with existing Massachusetts law, or to act in accordance with Article 1105, could not have involved an expropriation of those rights." (172)

As for Mondev's claim under Articles 1102 and 1105, the tribunal noted that Mondev had pointed to several instances of anti-Canadian animus demonstrated by certain officials of the City and of the BRA. Yet even were those instances to amount to a violation of Article 1102 (which the tribunal doubted), they had occurred well before the NAFTA's entry into force. (173)

Mondev also alleged that there was a continuing violation under Article 1105's minimum standard of treatment in the form of unremedied acts by the BRA and the City. The subsequent failure of the United States to provide any redress through its court system was a breach of Article 1105, and the breach "matured only with the definitive rejection of Mondev's claims." P 1116-30 (174) The tribunal rejected the suggestion that the United States could be held responsible for the breach of a treaty obligation when that obligation was not yet in force. It cited the *Feldman* tribunal's conclusion that conduct committed before January 1, 1994, could not constitute a breach under the NAFTA. (175) Yet the tribunal also noted that events prior to the NAFTA's entry into force could still be relevant to the question of whether a Party had breached its treaty obligations after that date. (176) The *Mondev* tribunal described the language in the *Feldman* tribunal decision ("This Tribunal may not deal with acts or omissions that occurred before January 1, 1994.") as "too categorical" to the extent the language held otherwise. (177) Yet in order to find a NAFTA violation a tribunal must be able to point to conduct of the State that occurred after the obligation had commenced and which was in itself a breach. In *Mondev*, the only actionable post-January 1, 1994, conduct was the decisions by the U.S. courts. The tribunal concluded:

The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any

other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility. (178)

The *Mondev* tribunal then considered more generally the relationship between a continuing violation and an expropriation, which may be lawful even if the award of compensation was not contemporaneous with the taking. It noted that the State must recognize its duty to compensate at the time of the taking, even if such compensation would be effected through a judicial or administrative process, to make the taking lawful. Suing the State for conversion or breach of contract did not amount to such a process. Nonetheless, even if the acts of the City and/or the BRA constituted a taking in violation of customary international law, the continuing failure to compensate could not bring them within the NAFTA's purview. (179)

5 Relationship Between Chapter 15 (Monopolies) and Section A of Chapter 11

Articles 1116 and 1117 limit the jurisdiction of Chapter 11 tribunals to disputes that a Party has breached an obligation under Section A of that Chapter; under Article 1503(2) (State Enterprises); and under Article 1502(3)(a) (Monopolies and State Enterprises) "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A." Article 1503(2) obliges Parties to ensure that state enterprises do not act in a manner contrary to Chapters 11 and 14 when those state enterprises are exercising "any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges." Article 1502(3)(a), by contrast, obligates NAFTA Parties to ensure that their monopolies act in a manner consistent with "this Agreement," when exercising a delegated governmental authority "in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges." (180) Both articles, then, prevent a Party from avoiding its NAFTA obligations by delegating governmental authority to entities "outside the core government." (181)

The extent of a Party's obligations under Articles 1503(2) and 1502(3)(a) arose in *UPS v. Canada*. Canada Post Corporation is both a monopoly and a state enterprise, and accordingly UPS claimed both Articles could apply to it. UPS alleged that Canada had breached its obligations under both articles by failing to ensure that Canada Post acted consistently with Canada's obligations under the NAFTA. (182) The heart of UPS's claim against Canada was an allegation of anticompetitive behavior by Canada Post. UPS claimed that Canada had violated Article 1502(3)(a) and Article 1502(3)(d), which requires a State to prevent a state-designated monopoly from using its monopoly position to engage in anticompetitive practices in a non-monopolized market in its territory. (183) It also alleged violations of Articles 1102 and 1105 under Section A of Chapter 11.

Canada challenged UPS's claim under Article 1502(3)(d) on jurisdictional grounds. UPS had relied on the difference in language between Article 1503(2), which explicitly requires that Parties ensure their state enterprises not violate a Party's obligations under Chapters 11 and 14, and Article 1502(3)(a), which requires that Party ensure monopolies and state enterprises not violate a Party's obligations under "this Agreement." UPS interpreted the difference in language as bringing within the jurisdiction of the Chapter 11 tribunal alleged violations of Article 1502(3)(d), which would fall in the category of Canada's obligations under "the Agreement." (184)

The question was whether the language in Article 1116 and 1117 limited the NAFTA obligations that could serve as predicates for Chapter 11 claims. Article 1116(1)(b) and Article 1117(1)(b) permit an investor to bring a claim based on a violation of Article 1502(3)(a) "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A." UPS interpreted this latter provision as requiring merely that the investor allege a violation of Section A, which it had done. (185) UPS thus read the requirements as disjunctive; once a claimant had alleged a violation of Section A, it could then allege a violation of Article 1502(3)(d) "based on cross-subsidization or other anti-competitive acts alone and not involving any breach of national treatment or other violation of Chapter 11." (186) Canada, on the other hand, argued that the language in the standing provisions limited the jurisdiction of the tribunal only to those instances in which the violation of Article 1502(3)(a) was also a violation of Section A.

(187) Canada argued that the tribunal should distinguish between a Party's obligations under the Agreement as a whole, and those obligations that are subject to investor-State dispute settlement. The former category is larger than the latter. Thus, obligations can be the subject of State-to-State dispute settlement without being subject to investor-State dispute settlement. Canada's position was supported by both Mexico and the United States. (188)

The *UPS* tribunal accepted Canada's position on the matter and dismissed UPS's claim under Article 1502(3)(a) insofar as it was based on obligations found outside Section A of Chapter 11. The tribunal parsed the language of Article 1116(1)(b), which permits a claim under Article 1502(3)(a) "where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A." The tribunal read the word "where" as a substantial, conjunctive limitation on the scope of jurisdiction, rather than a disjunctive condition as suggested by UPS. (189) It also noted that such an interpretation was more consistent with the structure of the jurisdictional grant in Article 1116. Both of the other provisions grant jurisdiction only over violations of obligations found in Section A of Chapter 11, whether those violations are committed by the State directly or by a State enterprise exercising delegated authority. Accepting UPS's

interpretation would grant jurisdiction to investor-State tribunals over alleged violations of any provision of the Agreement, a much broader grant of jurisdiction. “No obvious reason appears why Parties, having twice confined investor-State dispute resolution to a narrow set of claims, would expand the ambit of disputes dramatically if a state monopoly, instead of the State itself, acts inconsistently with the State’s obligations under chapter 11A.” (190)

In its merits decision, the *UPS* tribunal reaffirmed its jurisdictional decision with respect to the interaction between Chapter 15 and Chapter 11. It then had to consider whether UPS had proved its case with respect to the alleged violations of Article 1502(3)(a) or Article 1503(2). The first issue was whether Canada Post’s actions were directly attributable to Canada, in which case the tribunal would consider UPS’s allegations that Canada had violated Articles 1102 to 1105, or whether Canada Post was a monopoly or State enterprise, such that the immediate issue was whether Canada had violated the relevant provisions in Chapter 15.

The *UPS* tribunal determined that by inserting specific definitions of monopolies and State enterprises in Chapter 15, the drafters of NAFTA had indeed created a *lex specialis* with respect to those entities. (190a) Thus, the residual customary international law rules that attributed the acts of State organs to the State itself did not apply. The tribunal based its decision on the ILC Articles on State Responsibility, which specifically make clear that special rules on State responsibility can displace the customary international law obligations. (190b) It then cited the specific language of Chapters 11 and 15, and the clear distinctions drawn between Parties, on the one hand, and government and other monopolies and State enterprises on the other. (190c) After noting the many careful distinctions drawn in Article 15, and the limits imposed on asserting claims under Articles 1116 and 1117, the tribunal concluded:

The careful construction of distinctions between the State and the identified entities and the precise placing of limits on investor arbitration when it is the actions of the monopoly or the enterprise that are principally being questioned would be put at naught on the facts of this case were the submission of UPS to be accepted. (190d)

Thus, responsibility attaches to State enterprises and monopolies under Chapter 15 when the entities in question are exercising “regulatory, administrative or other governmental authority,” but not when they are acting in their commercial capacity. Canada argued that the activities challenged by UPS were purely commercial conduct, whereas UPS claimed that Canada Post was exercising governmental functions by (1) using the monopoly infrastructure to provide a competitive advantage to Purolator and its own courier services; (2) determining when to perform customs tasks and to collect duties and taxes; and (3) unfairly denying the bid of an aspiring contractor. (190e) Canada did not dispute that Canada Post’s customs collection activities fell within the realm of delegated governmental authority, but claimed the other two activities were commercial. (190f)

In making its determinations, the *UPS* tribunal made three points. First, the obligations accepted by the Parties under Chapter 15 were obligations of result – the Party had to ensure that the monopoly or State enterprise did not act inconsistently with the Party’s own obligations. (190g) Second, the disputing parties agreed that Canada Post was a State enterprise and the tribunal concurred in that conclusion. Even though the definitional section in Article 1505 said it applied only to Article 1503(3), the tribunal determined there was no reason to use a different definition of state enterprise for different provisions. The tribunal did not determine whether Canada Post was also a monopoly; given that the obligations were the same whether it was only a State enterprise or both, it did not need to come to that conclusion. (190h) Third, the tribunal used the definition of delegation found in Article 1502(3) to apply to Article 1503 as well. (190i)

The tribunal noted that an essential purpose of the statement of the Parties’ obligations in Chapter 15 was to ensure that the Parties did not escape their obligations by delegating authority to State enterprises. (190j) Yet the Parties also restricted the operation of Chapter 15 by defining the delegations of authority for which Parties would be responsible. (190k) The tribunal again looked to the State Responsibility articles, and particularly to the example of a railway company which might exercise police powers granted to it by a State, but which would exercise commercial powers when it decided matters such as the sale of tickets or the purchase of rolling stock. (190l) The tribunal determined that the decisions made by Canada Post with respect to the use of its infrastructure by Purolator and decisions about from whom to purchase services were more akin to the commercial acts of the railroad than government authority. (190m) UPS’s Chapter 15 claims respecting those activities therefore failed. (190n)

Dean Ronald Cass, the UPS-appointed arbitrator who wrote a separate opinion in the case, concurred in part of the tribunal’s decision. He did not, however, agree that Canada Post was acting in a commercial capacity with respect to all of the activities challenged by UPS. In his view the addition of administrative authority to other forms of governmental authority suggested a broader scope of activity covered by Articles 1502 and 1503 than suggested by Canada. (190o) He accepted that strictly commercial decisions would be excluded, but noted that Articles 1502 and 1503 explicitly stated that the delegated exercise of authority “to approve commercial transactions” could implicate State responsibility. (190p) He rejected Canada’s assertion that this be read to include only one enterprise’s ability to approve the conduct of others. (190q) He accepted Canada’s arguments that Canada Post’s decisions with respect to its own courier services be viewed as commercial activity outside the scope of Articles 1502 and 1503. He did not, however, come to the same conclusion with respect to the access to infrastructure given by Canada Post to Purolator. (190r) Dean Cass emphasized that

the decisions made with respect to Purolator regarding preferential access to monopoly infrastructure were approvals of commercial transactions of a kind very different from those taken with respect to everyday product pricing. (190s) Dean Cass also rejected Canada's argument that any delegation of authority covered by Articles 1502 and 1503 be specific, rather than general. (190t)

6 Nature of the Rights Asserted

In *Archer Daniels Midland et al. v. Mexico* the claimants, suppliers of high fructose corn syrup ("HFCS"), challenged Mexico's tax on soft drinks and syrups that used any sweetener other than cane sugar, such as HFCS, as violative of Articles 1102, 1106, and 1110. In addition to arguing that P 1116-31 it had not breached those provisions, Mexico asserted a countermeasures defense under customary international law. Mexico argued that it was justified in levying the tax as retaliation for breaches by the United States of its own obligations under NAFTA, including opening the U.S. market to imports of Mexican sugar. (190u) The claimants challenged the applicability of the countermeasures defense on the ground that, as qualified investors under Chapter 11, they have "direct independent rights and [] are immune from the legal relationship between the Member States." (190v) Mexico, on the other hand, argued that the substantive obligations found in Section A of Chapter 11 are obligations that run as between the State Parties to NAFTA. (190w)

The tribunal adopted the argument set forth by Mexico. According to the tribunal, "the obligations under Section A remain inter-state, providing the standards by which the conduct of the NAFTA Party towards the investor will be assessed in the arbitration. All investors have under Section B is a procedural right to trigger arbitration against the host State." (190x) This approach is consistent with what the tribunal terms the "derivative rights" theory – that the claimant steps into the shoes of the host State when it asserts a claim under Chapter 11. (190y) The tribunal agreed with the claimants that international law may, under certain circumstances, confer direct rights on individuals, and noted in particular the case of human rights treaties. (190z) While human rights treaties and Chapter 11 both confer on non-State actors a procedural right to invoke the responsibility of State actors before international tribunals, the tribunal found that Chapter 11, unlike human rights treaties, does not confer any substantive rights on investors. (190aa) The countermeasures argument was thus permissible (although Mexico did not win under the argument) (190ab) but did not impair the claimants' procedural right to submit a claim against Mexico as it had "no relation whatsoever with the Respondent's offer to submit the present dispute to arbitration." (190ac)

The concurring arbitrator in *ADM*, Arthur Rovine, disagreed with the majority's assessment of the rights conferred by Chapter 11 on the individual investors and the proper treatment of Mexico's countermeasures defense. (190ad) He questioned the majority's conclusion vis-à-vis derivative rights, noting that the State Parties to NAFTA (as well as to other investment treaties, and the ICSID Convention) had deliberately chosen a dispute settlement mechanism that was not based on espousal and all of the concomitant political difficulties. He stated "Unless the provisions of Chapter Eleven create obligations owed to investors, to be enforced by investors, P 1116-31 they have no meaning, even if the enforcement rights are 'procedural' and 'derivative.'" (190ae) Moreover, the right to redress should be viewed as substantive, rather than procedural. "The substantive investment protections conferred by treaty upon NAFTA investors include the substantive right of legal redress for breaches of Section A of Chapter Eleven." (190af) Mexico's argument that the NAFTA Parties can amend or terminate the rights conferred on investors was not persuasive; while it might be true that the States could "amend or repeal" rights of non-state actors, they had not done so in this case. (190ag) Even if one regards investors as having rights similar to those of third-party beneficiaries, those rights still cannot be impeded by the assertion of countermeasures, as they are rights and remedies separate from those possessed by the home state. (190ah) The ILC Articles on State Responsibility permit countermeasures that have an incidental effect on third parties so long as those parties do not have independent rights. (190ai) According to Arbitrator Rovine, "In the instant case, the third-party investors have both treaty-granted remedies against State Parties who have obligations under Chapter Eleven, and a complaint that they have filed here alleging breaches by Respondent of Chapter Eleven, Section A." (190aj)

The concurring arbitrator also dismissed the argument that the arguments raised by the Parties to NAFTA in *Loewen*, along with the tribunal's ruling, support the argument that the law of diplomatic protection should be viewed as having been incorporated into investment treaties. To the contrary, "Investor protection treaties, in substantial measure, although certainly not entirely, displaced certain rules of the traditional system of diplomatic protection and to a certain extent diminished the rights of states under that system." (190ak) Further, "In my view, the States Parties to NAFTA intended to and did override the customary espousal rules of diplomatic protection for investors to enforce State obligations." (190al) The purpose of Section B of NAFTA was to assure investors of due process before an impartial tribunal, and making an international arbitral tribunal available to commercial investors was meant to change the relationship between the individual and the State. (190am)

The tribunal in *Corn Products International, Inc. v. Mexico* hewed much more closely to the *ADM* Concurrence than to the majority. The *Corn Products* tribunal concluded that "NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals." (190an) It supported its conclusion by reference to the treaty and by reference to the "fiction" underlying diplomatic protection cases – the idea that the State was bringing a claim because of the injury to itself, rather than because of the injury done its national. (190ao)

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36a The fiction was necessary because only the State had the procedural right to submit a claim, but that it was a fiction was shown by two rules: first, the exhaustion of local remedies rule, which requires individuals to exhaust local remedies before a State can submit a claim on their behalf, but which does not apply to claims submitted directly by the State; and second, the doctrine of continuing nationality, which requires that the claimant have the nationality of the espousing state from the date of the injury through at least the date of the claim (and possibly through the date of the award – views differ on the appropriate ending date). (190ap) If the injury was done to the State, neither rule makes sense. Accordingly, the tribunal concluded that the investor had rights of its own under Chapter 11. (190aq) Even if the countermeasures defense could operate to preclude the wrongfulness of the HFCS tax as against the United States, it could not operate to deprive the investor of the rights to which it was entitled under Chapter 11. Under Article 49 of the ILC Articles, a countermeasure cannot operate to deprive a third party of its rights, even if it has an incidental effect on that party's interests. (190ar)

The concurring arbitrator in *Corn Products*, Professor Andreas Lowenfeld, agreed with the majority's conclusion. To him, however, the matter was quite simple: "The essence of each of these arrangements is that controversies between foreign investors and host states are insulated from political and diplomatic relations between states. In return for agreeing to independent international arbitration, the host state is assured that the state of the investor's nationality (as defined) will not espouse the investor's claim or otherwise intervene in the controversy between an investors and a host state. ... (190as) Thus, much of the majority's discussion of the law of countermeasures and of the prerequisites of espousal was unnecessary. (190at)

D Three-year Limitation Period

Articles 1116(2) and 1117(2) insert what is effectively a three-year limitation period into Chapter 11 of NAFTA. This statement is, however, deceptively simple. The language of the provisions introduces some interpretive complexities.

First, the three-year period runs from the date on which the investor acquires, or should have acquired, both knowledge of the breach and knowledge that the investor, or, in the case of Article 1117(1), the enterprise on behalf of which the investor is asserting a claim, has been injured by the breach. Conscious ignorance, then, will not save the investor from a claim that the time period has run. The investor must, however, acquire knowledge of both the breach and the ensuing damage. The three-year limitation period presumably runs from the later of these events to occur in the event that the knowledge of both events is not simultaneous.

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Second, Articles 1116(2) and 1117(2) both say that an investor must "make a claim" within three years of acquiring the requisite knowledge. Most of the procedural provisions in Chapter 11 refer to the "submission of a claim," which is defined in Article 1137 as the time when the notice of arbitration is received by the Secretary-General of ICSID, in the case of arbitrations under the ICSID Convention or the ICSID Additional Facility, or is received by the disputing Party, in the case of arbitrations under the UNCITRAL Rules. One question that has arisen in the cases is whether there is a difference between "making" a claim and "submitting" a claim. In particular, the question has arisen whether the delivery of a notice of intent to arbitrate under Article 1119 qualifies as the "making" of a claim for purposes of Articles 1116(2) and 1117(2), thereby tolling the limitation period, or whether only the submission of the actual notice of arbitration would qualify. A subsidiary question is whether the notice of arbitration would also have to be accompanied by the appropriate waiver under Article 1121 to satisfy the requirements of Articles 1116(2) and 1117(2).

In *Pope & Talbot*, questions with respect to Article 1116(2) arose with respect to the so-called "Harmac Motion." (191) In its Statement of Claim, the investor had claimed damage under Article 1116 with respect to its investment in Harmac Pacific, Inc., which it claimed was injured because it had to purchase wood chips for its pulp and paper operation that were made increasingly expensive by the implementation of the Softwood Lumber Agreement between the United States and Canada. The claim was not accompanied by a waiver by Harmac of its right to initiate or continue proceedings with respect to the measure at issue in domestic courts or administrative tribunals, as required by Article 1121(1)(b). On December 31, 1999, Harmac was amalgamated with Pope & Talbot Inc. In response to a request by the tribunal, Pope & Talbot Inc. executed a waiver, which was dated January 10, 2000, under which it waived its right with respect to the business formerly known as Harmac to initiate or continue any proceedings with respect to the measure at issue in any court or administrative proceedings.

Canada moved to strike the claim with respect to Harmac on the grounds that it was too vague and that it violated the limitation period in Article 1116(2) and Article 1117(2). The tribunal decided the limitation issue only with respect to Article 1116(2). In the waiver it ultimately filed, Pope & Talbot had waived its claims under Article 1121(1)(b), as required by Article

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1116(2). It did not waive its claim under Article 1121(2)(b), which is necessary when an investor makes an Article 1117(2) claim on behalf of an investment. Thus, the tribunal found that only a claim under Article 1116(2) had been advanced before the tribunal. (192)

Because the waiver was not filed until January 10, 2000, Canada argued that the claim with respect to measures relating to Harmac had not been "made" as of the date of the Statement of Claim as all of the conditions precedent to arbitration had not yet been satisfied, so the

claim could not be considered as having been submitted to arbitration. Because the claim was made as of January 10, 2000, the three-year period should stretch back only to January 10, 1997. The Softwood Lumber Agreement had been signed on May 29, 1996, and details on its implementation, from which the injury was alleged to have flowed, had been announced on October 31, 1996. Thus, Canada argued that Pope & Talbot or Harmac must have known of any damage to its investment in Harmac well before 1997.

The *Pope & Talbot* tribunal rejected Canada's argument. First, it determined that the time-bar claim was "in the nature of an affirmative defense" and that Canada thus had "the burden of proof of showing [sic] factual predicate to that defense." (193) The tribunal found that Canada's assertions had failed to establish the factual proof. Because the claim was made only under Article 1116(2), the investor, rather than the investment, had to have knowledge of both the breach and of the damage ensuing therefrom. (194) The implementation of the export control regime under the Softwood Lumber Agreement was insufficient to give rise to the requisite knowledge on the part of the investor; rather, knowledge could only date from the time when the investor knew that Harmac had to purchase expensive wood chips, which could only have come some time after the implementation of the regime. "The critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur." (195) Thus, according to the *Pope & Talbot* tribunal, actual damage, rather than predicted future damage, was required to trigger the three-year limitation period.

Though the *Pope & Talbot* tribunal had considered Canada's claim as if the three-year limitation period had run from January 10, 2000, it rejected Canada's claim that the filing of the waiver was required to perfect the underlying claim. It did not ground its decision in the "make a claim" language of Article 1116(2), but rather in its interpretation of Article 1121. It regarded the submission of a claim to arbitration as a "constructive waiver" of the rights of the investor, and the investment, when the claim is submitted to arbitration. (196)

The significance of the "make a claim" language was also at issue in *Feldman v. United States*. Feldman had filed his notice of intent to submit a claim to arbitration on February 16, 1998, while the notice of arbitration was received by the Secretary-General of ICSID on April 30, 1999. If the filing of the notice of intent constituted "making a claim," then the measures alleged to have been breaches would be actionable so long as they occurred after February 16, 1995. If, however, the claim was only made on April 30, 1999, the relevant time period would commence on April 30, 1996. Some of the measures that Feldman claimed to have been breaches of Chapter 11 occurred between those two dates.

The *Feldman* tribunal remarked upon the lack of clarity in the language of Article 1117(2). It compared that phraseology – "make a claim" – with other provisions of the NAFTA: Article 1119, which requires a claimant to "deliver" a notice of intent; Article 1120(1), which addresses the "submitting of a claim to arbitration"; and Article 1137(1), which addresses the time when a claim is considered to have been "submitted to arbitration." (197) The tribunal also pointed to Article 1117(3), which addresses the consolidation of claims under Article 1116 and 1117 and appears to differentiate between an investor that "makes a claim" and claims that are "submitted to arbitration." In its 1128 submission, the United States had argued that the difference in language arose because in Mexico a NAFTA claim may be made in local courts; thus, Article 1117(3) was distinguishing between NAFTA claims made in accordance with the procedures of Chapter 11 and NAFTA claims made in Mexican courts; only the former could be consolidated under Chapter 11. (198) The *Feldman* tribunal did not endorse the U.S. explanation, but nonetheless found that "make a claim" was used "to denote the definitive activation of an arbitration procedure rather than to localize the commencement of arbitration in terms of time." (199) Article 1137(1) performs the latter function; thus, the time at which the notice of arbitration was received by the Secretary-General was "apt to interrupt the running of [sic] limitation period under NAFTA Article 1117(2)." (200)

The *Feldman* tribunal then addressed the interplay between the limitation period in Article 1117(2) (and by extension Article 1116(2)) and the other preparatory steps a NAFTA claimant must take before the arbitration can commence. A claimant must abide by a six-month "cooling off period" between the events giving rise to a claim and the submission of the claim to arbitration. (201) Furthermore, when the measure involves a challenge to a tax measure alleged to be an expropriation, Article 2103(6) also imposes a waiting period of up to six months. The claimant must submit the notice of intent to submit a claim to arbitration to the relevant tax authorities, who then have up to six months to determine whether the measure is not an expropriation. Finally, the claimant must wait for 90 days after filing a notice of intent to submit a claim to arbitration before he submits the claim to arbitration. (202) The *Feldman* tribunal determined, however, that these periods could all run concurrently. Thus, "even taking into account all the preparatory periods, there still seem to remain for Claimant's benefit about 30 months of 'pure' limitation period in order for him to definitely proceed to arbitration." (203)

Feldman offered an interesting twist to the question of limitation. The claimant argued that the limitation period should have been tolled for some 32.5 months, during the time when Mexico and Feldman came to an agreement about resolving their dispute, an agreement that Feldman claimed Mexico subsequently disavowed. (204) Feldman further claimed that Mexico was estopped from invoking the limitation period because Mexico had given Feldman assurances that the exports would be permitted. (205) This issue was joined to the merits. (206)

In its merits award, the *Feldman* tribunal explored the question of when the running of a limitation period is tolled. The claimant alleged that he was given oral assurances by Mexican officials that the rebates to which he claimed to be entitled would be given to him. He claimed that this conduct was akin to cases in which the filing of a lawsuit is discouraged by a putative defendant's making representations to the putative claimant, and that estoppel would be appropriate. Mexico countered that there had never been any oral agreement, and that any such agreement would, in any event, have had no effect under Mexican law. (207)

The tribunal commenced by noting that any tolling of the limitation period would be of limited use to the claimant given the *ratione temporis* issue, discussed in Part C.4, *supra*. NAFTA only went into effect on January 1, 1994, so even if the limitation period were to be tolled, that tolling could only extend the actionable period back to January 1, 1994, rather than to mid-August, 1993, to which the 32.5 month period suggested by the claimant would extend. (208)

The *Feldman* tribunal concluded that there was no automatic tolling of the limitation period in Article 1117(2). It pointed to two national law systems that permitted tolling (those of Germany and Greece), but noted that the concept came into play only in extreme cases involving unavoidable events or malicious interference with the claim. At most, the respondent had "discouraged" Feldman from pursuing his case, but Feldman had the ability to gauge the benefits and drawbacks to litigating, had the benefit of counsel, and was not in any way prevented from bringing a case. (209)

The *Feldman* tribunal next considered the estoppel issue: should the respondent have been estopped from invoking the limitation period due to the assurances it gave the claimant about his concerns with the government? The claimant had alleged that Mexico had assured it, both orally and in writing, that it was entitled to claim the tax rebates in question. CEMSA, the investment, had relied on those statements to its detriment. Feldman claimed that under international law principles it mattered not whether the statements made by Mexico were those of fact or of law, and alleged that the doctrine of estoppel, "based on the fundamental legal interest in predictability, reliance and consistency" played a particular role in the NAFTA, a regime that was designed to encourage trade and investment among the Parties. (210) Mexico, in addition to denying that any oral agreement ever existed, argued that no such agreement had any legal effect in Mexico, nor indeed under the laws of any of the three Parties. Estoppel applies only to statements of fact, rather than to statements of law; Feldman was arguing that Mexico had made statements about the meaning of a particular law. Mexico also questioned the cases invoked by Feldman in support of his estoppel argument. They were ICJ cases having to do with border disputes, rather than cases establishing any principle of estoppel. (211)

The tribunal rejected Feldman's estoppel claim. It emphasized that NAFTA Articles 1117(2) and Article 1116(2) introduced "a clear and rigid limitation defense," and that the NAFTA Parties had all entered into the Treaty knowing that each would like to raise the defense on certain occasions. (212) It further held that "[t]he quality of one Party as a state as well as all specificities and constraints necessarily connected to any state activity neither exclude nor qualify resort to the defense of limitation." (213) The tribunal did not foreclose the possibility that in certain circumstances action by the State could interrupt the running of the limitation period, but such circumstances would have to be exceptional. "Such exceptional circumstances include a long, uniform, consistent and effective behavior of the competent State organs which would recognize the existence, and possibly also the amount, of the claim." (214) Though various State officials had given Feldman certain assurances, they neither amounted to a formal acknowledgement of Feldman's claim nor to a "uniform, consistent and effective" pattern of behavior, and thus could not support an estoppel claim. (215)

In *Mondev v. United States*, the tribunal considered, albeit in *obiter dicta*, the "knowledge" requirement of Articles 1116 and 1117. By the time the *Mondev* tribunal reached the limitation question, the conduct of both Boston and the BRA, which had occurred more than three years prior to the making of the claim, had been dismissed on *ratione temporis* grounds because it pre-dated NAFTA's entry into force. (216) Nevertheless, the tribunal considered the question of imputation of knowledge because of an argument *Mondev* made to try to bring the conduct within the limitation period. *Mondev* had argued that it could not have had knowledge of loss or damage arising from the actions of the City of Boston or the BRA until after the proceedings it had commenced in Massachusetts courts had concluded. The Supreme Judicial Court of Massachusetts issued its decision on May 20, 1998, (217) well within both the limitation period and the tribunal's jurisdiction *ratione temporis*.

The *Mondev* tribunal rejected this contention. "A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear." (218) It reasoned that the claimant knew that it had suffered loss or damage before it had filed its claim in Massachusetts court, and that it must have known that not all of its loss or damage would be recompensed, even if it had been successful in its claim. Moreover, all Articles 1116 and 1117 required was knowledge of "loss or damage," which *Mondev* evidently had, as its desire for recompense had triggered its filing of its claim in Massachusetts courts. Thus, *Mondev's* claims with respect to the City and the BRA would have been time-barred had the tribunal been considering the issue.

The limitation period is also at issue in *Glamis Gold v. United States*. In that case, the respondent raised a jurisdictional objection to three of the U.S. government measures alleged to be breaches under the NAFTA on the grounds that they did not fall within the three-year

limitation period of Article 1117(2). The tribunal determined that such a plea properly went to jurisdiction, but did not dismiss the case as to those actions. (219) It noted that other government measures clearly fell within the time period, and the measures falling outside the time period might be considered supporting evidence at the merits phase, even if they were dismissed as possible breaches. (220)

In *Grand River Enterprises v. United States*, the United States argued that Grand River's claims should be dismissed for lack of jurisdiction because they were time-barred under Articles 1116(2) and 1117(2). Grand River has challenged the Master Settlement Agreement, which was entered into by the four major tobacco companies and nearly every U.S. state to settle claims against the tobacco companies for costs incurred by the states to treat tobacco-related illnesses. Specifically, Grand River claims that it was not given the opportunity to participate in negotiating the agreement, nor was it given an adequate opportunity to join the agreement, which would have exempted Grand River from the responsibility of paying into escrow accounts sums to be used by the states to defray tobacco-related costs. (221) Because it did not join the agreement, Grand River must place funds into special escrow accounts in any state in which it sells tobacco products. The United States argued that the claimants knew, or should have known, of any loss or damage they suffered arising from the Master Settlement Agreement prior to March 10, 2001, three years before they filed their claim. The Master Settlement Agreement, which received enormous publicity, was signed on November 23, 1998, and gives an exemption on payment ▲▼ by manufacturers who joined the agreement no later than February 23, 1999. (222) The tribunal has bifurcated the question of jurisdiction and the merits and has ordered briefing with respect to the time-bar issue. (223)

The *Grand River* tribunal issued its jurisdictional decision on July 20, 2006. It noted first that the issue of extinctive prescription – time bar – is well known in customary international law and in the domestic laws of both Canada and the United States. (224) It then suggested it would construe the time bars in Articles 1116(2) and 1117(2) in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, and reviewed the limited negotiating history available. (225) The tribunal emphasized that while it considered awards in other NAFTA cases, as well as other court and arbitral decisions, in coming to its conclusions, it decided the limitation issue “based upon the law and its independent assessment of the peculiar facts of the case.” (226)

Grand River had argued that the United States, as the moving party, bore the burden of proof in establishing the disputed facts bearing on the time-bar issue. The United States insisted that the claimants bore the burden of establishing the facts required to show that the tribunal had jurisdiction over the claims at issue. The *Grand River* tribunal declined to resolve this argument. It noted the extensive evidence each side had produced in support of its case, and considered all of the evidence, including that belatedly produced, but did not find it necessary to decide who bore the burden of proof. (227)

The tribunal set forth its view of Articles 1116(2) and 1117(2):

Claims are barred as untimely only if the investor or enterprise:

- First acquired certain specified knowledge, or
- Should have first acquired such knowledge, and
- Did so within three years of the alleged breach.

The requisite knowledge has two elements:

- Knowledge of the alleged breach, and
- Knowledge that the investor has incurred loss or damage. (228)

It then proceeded to consider the issues before it.

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The tribunal first addressed the question of actual knowledge, which it characterized as foremost a question of fact. The tribunal noted the preliminary stage of the proceedings and the contradictory nature of the evidence before it. The respondent had offered newspaper articles that, standing alone, suggested certain of the claimants had actual knowledge of the issues in dispute. Grand River had been sued in the states of Iowa and Missouri in 2000 for failure to pay the required funds into escrow. The claimants responded by affidavit, however, that they had never received notice about those actions, and demonstrated that none of the communications from Iowa and Missouri were sent to their current address. (229) The tribunal thus determined that the evidence in the record did not establish that, prior to March 12, 2001, the claimants had actual knowledge of the MSA or other actions alleged to be a breach of NAFTA.

The next issue was the claimants' constructive knowledge – what should they have known with respect to the alleged breaches by the United States of its NAFTA obligations? In this respect, the tribunal noted “The duty or responsibility involved usually falls short of a legal obligation to do something, although the Tribunal believes that the existence of such a legal obligation may help to show that something “should” have been done or known.” (230) The tribunal noted that the claimants had presented themselves to the tribunal as “experienced and substantial” participants in the tobacco industry throughout the United States and Canada, (231) and also

remarked on the fact that the distribution and sale of tobacco products are heavily regulated and taxed by both federal and state authorities. (232) The tribunal found that the record indicated that the claimants were very well aware of the tax and regulatory measures affecting the tobacco trade, and that their activities occurred on and off Indian reservations. (233)

The question for the tribunal was whether these facts established constructive knowledge on the part of the claimants. The tribunal concluded that the appropriate test was to establish what a “reasonably prudent investor” should have done in connection with the extensive investments and trading efforts engaged in by the claimants. (234) It aligned itself with other investment treaty tribunals in noting that “agreements intended to protect international investment are not substitutes for prudence and diligent inquiry in international investors’ conduct of their affairs.” (235) The MSA and its implementing regulations were precisely the kind of information that even limited inquiries would have discovered. Thus, the tribunal held that the claimants should have known of the MSA and of the escrow laws and other regulations implementing the off-reservation sale of their tobacco products. (236) It therefore dismissed the claimants’ allegations with respect to the MSA, the escrow statutes, and any related enforcement measures adopted or implemented prior to March 12, 2001. (237) This constructive knowledge requirement did not, however, extend to on-reservation sales, as the reasonably prudent investor would not have expected state escrow laws to apply to those transactions given the usual immunity of reservations from regulation by the constituent states of the United States. (238)

The next considerations for the tribunal were whether Grand River and the other claimants had suffered loss or damage and, if so, when it had been incurred. The tribunal determined that any loss or damage was incurred when the claimants became obligated to place funds in unreachable escrow accounts, even if the actual placement of those funds into escrow was not required for several months. (239) In coming to this conclusion the tribunal aligned itself with the *Mondev* tribunal, which had held that “a Claimant may know that it has suffered loss of [sic] damage even if the extent of quantification of the loss or damage is still unclear.” (240) This date did not coincide with the enactment of the laws, but with the date Grand River took actions (such as selling cigarettes) that made it liable under those laws. The tribunal rejected Grand River’s claim that there were in fact several limitations periods at issue, with each state’s adoption and enforcement of its escrow statutes constituting a separate measure from which the limitations period should be measured. “[T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.” (241) In any event, all of the concerned states had passed and begun enforcing such laws by 2000, so there was an existing duty to place funds into escrow by the relevant date.

A further issue for the *Grand River* tribunal was whether actions taken after March 12, 2001 to strengthen their existing escrow laws constituted new measures that could be challenged without falling afoul of the limitations period, or whether they were merely enforcement tools that enhanced but did not change the existing regime. The tribunal held that statutory amendments undertaken within the limitations period could form the basis for a Chapter 11 claim, even if they were related to earlier events. (242)

The *UPS* decision also involved a time-bar defense. Canada argued that all of the measures alleged by UPS to breach NAFTA, except one, were maintained or first occurred before April 19, 1997, three years before the claim was made. The tribunal divided these claims into two categories. One involved allegations with respect to the Publications Assistance Program, which had existed prior to April 1997, but which UPS argued had been amended significantly since that time. The second involved claims relating to “on-going conduct” – whether government measures can constitute a new violation of NAFTA each day they are repeated, such that the three-year limitations period begins anew each day. (243) The tribunal did not specifically address the claims respecting the Publications Assistance Program, but apparently subsumed it in the continuing violation arguments. The tribunal accepted UPS’s argument that “continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. ... The use of the term ‘first acquired’ is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss.” (244) UPS’s claims were thus not time-barred. The UPS tribunal emphasized, however, that the limitations period did have an effect on losses associated with the claim. Thus, a claimant could only recover for losses incurred during the three-year limitations period. “It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2).” (245)

III Cross-References

- Article 201 identifies a national as “a natural person or citizen who is a permanent resident of a Party.”
- Article 1113 permits a Party to deny the benefits of Chapter 11 to so-called “sham” companies, which only ostensibly have the nationality of a NAFTA Party.

- Article 1121(1)(b) and 1121(2)(b) requires that claimants under Articles 1116 and 1117 waive their right to initiate or continue proceedings with respect to the measure at issue before any courts or administrative tribunals.
- Article 1135(2) requires that any award made under Article 1117 be made payable to the investment, rather than the investor.
- Article 1137 defines the time when a claim is submitted to arbitration.
- Article 1139 contains definitions. Of particular relevance are the definitions of “investor of a Party,” “investment,” and “investment of an investor of a Party.”
- Article 1502(3)(a) requires that a Party ensure that any government-designated monopoly abide by the provisions of NAFTA whenever it exercises regulatory, administrative, or other government authority.
- Article 1503(2) requires that a Party ensure that any state enterprise that exercises regulatory, administrative, or other governmental authority acts in a manner that is consistent with Chapters 11 and 14 of the NAFTA.
- Note 39 specifies that Chapter 11 applies to investments existing on the date of the entry into force of the Agreement and to investments made thereafter.

IV Secondary Material

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- 9) *Id.*
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- 11) INVEST.811, Watergate Daily Update (Aug. 11, 1992) 13–14, Art. 2114.
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- 13) INVEST-F.904 (Sept. 4, 1992) 1, Art. 1116.
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- 15) NAFTA Art. 1135(2). The Canadian Model FIPA contains a virtually identical provision, as does the U.S. Model BIT. 2003 Canadian Model FIPA Art. 44; 2004 U.S. Model BIT Art. 34.
- 16) See U.S. Statement of Administrative Action, at 145.
- 17) David J. Bederman, *International Law Frameworks* 80 (2001).
- 18) The area of international human rights law is an exception to this norm.
- 19) See, e.g., Ian Brownlie, *Principles of Public International Law* 459–461 (6th ed. 2003); James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Texts, and Commentaries* 264–265 (2002).
- 20) See the commentary under Article 1117 for discussion of the ICSID Convention's approach to non-responsibility.

- 21) *The Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 [hereinafter *Barcelona Traction*].
- 22) *Id.* at ¶¶ 41–47.
- 23) *Barcelona Traction* was decided in the context of diplomatic protection, in which a State was espousing a claim on behalf of its nationals. Its relevance to claims brought under investment treaties that permit claims to be made directly by investors is therefore debatable. Furthermore, in *Elettronica Sicula*, a case brought under the auspices of the Italy–United States Treaty of Friendship, Commerce & Navigation, a Chamber of the International Court of Justice recognized that shareholders could be protected even though the corporation itself had the nationality of the host State. *Elettronica Sicula S.p.A. (U.S. v. Italy)* [1989] I.C.J. 15, 23, 48–82. The International Court of Justice recently had occasion to revisit its holding in *Barcelona Traction*. In the *Case Concerning Ahmadou Sadio Diallo* (Guinea v. Republic of the Congo), the question was whether Guinea could exercise diplomatic protection on behalf of Guinean shareholders in a Congolese company. (Decision on Preliminary Objections) (May 24, 2007). The claims themselves were to be submitted against the Republic of the Congo. Guinea invoked the principle of “protection by substitution,” under which foreign shareholders in a company could claim the protection of their home State to assert claims that would otherwise be unavailable because the company itself had the same nationality as the State against which the claims were sought. The ICJ held that, at the present time, there is no principle in customary international law of protection by substitution such as was relied on by Guinea. *Id.* at ¶ 89. The Court did not rule out the possibility of a more limited rule of protection by substitution that could be invoked in circumstances in which a company's incorporation in the State whose conduct was challenged was required as a precondition for doing business in that State, but such was not the case here. *Id.* at ¶¶ 91–93.
- 24) Article 1121(1)(b) requires that an “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 rights to initiate or continue proceedings with respect to the measure at issue in local courts or administrative proceedings.
- 25) *Pope & Talbot Inc. (U.S.) v. Canada*, (UNCITRAL) ¶¶ 75–76 (Award in Respect of Damages) (May 31, 2002).
- 26) *Id.* at ¶ 80.
- 27) *Id.*
- 28) *Mondev Ltd. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/99/2, ¶ 50 (Award) (Oct. 11, 2002) [hereinafter *Mondev Award*].
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- 30) *Mondev Award*, *supra* note 28, at ¶ 84.
- 31) *Id.*
- 32) *Id.* at ¶ 86.
- 33) *Id.*
- 34) *Id.*
- 35) *Id.* The tribunal dismissed *Mondev*'s claims, so it was not obliged to allocate any award on damages.
- 36) *Id.* at ¶ 86 n. 24.
- 37) *Id.* at ¶ 86.
- 38) *Methanex Corp. (Can.) v. United States*, (UNCITRAL), 39 (Preliminary Award on Jurisdiction and Admissibility) (Aug. 7, 2002) [hereinafter *Methanex Award on Jurisdiction*].
- 39) *Id.* at 39.
- 40) *Id.*
- 41) *Id.*
- 42) *Id.* This precise issue was not addressed in the decision on the merits, but a related issue is addressed in Part B.1 of this commentary.
- 43) *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/99/1, ¶ 12 (Correction and Interpretation of Award) (June 13, 2003). Mexico had also requested that the tribunal interpret its award, which the tribunal saw as effectively a request for a new decision; it denied the request. *Id.* at ¶¶ 10–11.
- 44) *Id.* at ¶ 13 (emphasis in original).
- 45) *Waste Management Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/00/3 [*Waste Management II*], ¶¶ 7, 12 (Procedural Order concerning Disclosure of Documents) (Oct. 1, 2002).
- 46) *Id.* at ¶ 7.
- 47) *Id.* at ¶ 5.
- 47a) *International Thunderbird Gaming Corp. (U.S.) v. Mexico*, (UNCITRAL) ¶¶ 105–106 (Award) (Jan. 26, 2006).
- 47b) *Id.* at ¶ 106.
- 47c) *Id.* at ¶ 109.
- 47d) *Id.* at ¶ 110.
- 47e) *United Parcel Svc. of Am. Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 35 (Award on the Merits) (June 11, 2007) [hereinafter *UPS Merits Award*].
- 47f) *Id.*

- 47g) *Id.*
- 48) Article 1117(3) provides that claims be consolidated when “an investor makes a claim under Article 1117 and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under Article 1117.” See the commentary to that provision for further details.
- 49) For an excellent discussion of the issue of minority shareholders' standing to bring investment treaty claims, see Stanimir A. Alexandrov, *The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals*, 6 J. World Inv. & Trade 387 (2005). See also *CMS Gas Transmission Co. (U.S.) v. Argentina*, ICSID (W. Bank) ARB/01/8, ¶ 49 (Decision on Jurisdiction) (July 17, 2003); *Enron Corp. (U.S.) v. Argentina*, ICSID (W. Bank) ARB/01/3, ¶¶ 39–40 (Decision on Jurisdiction) (Jan. 14, 2004); *Siemens A.G. (Ger.) v. Argentina*, ICSID (W. Bank) ARB/02/8, ¶ 142 (Decision on Jurisdiction) (Aug. 3, 2004); *Compañía de Aguas del Aconquija S.A. (Fr.) v. Argentina*, ICSID (W. Bank) ARB/97/3, ¶ 50 (Decision on Annulment) (July 3, 2002); *Lanco Int'l, Inc. (U.S.) v. Argentina*, ICSID (W. Bank) ARB/97/6, § 43 (Decision on Jurisdiction) (Dec. 8, 1998); *Champion Trading Co. (U.S.) v. Egypt*, ICSID (W. Bank) ARB/02/9, at 3, 18 (Decision on Jurisdiction) (Oct. 21, 2003); *Azurix Corp. (U.S.) v. Argentina*, ICSID (W. Bank) ARB/01/12, ¶ 72 (Decision on Jurisdiction) (Dec. 8, 2003); *LG & E Energy Corp. (U.S.) v. Argentina*, ICSID (W. Bank) ARB 02/1, ¶¶ 46–63 (Decision of the Arbitral Tribunal on Objections to Jurisdiction) (April 30, 2004).
- 50) *GAMI Invs. Inc. v. Mexico*, (UNCITRAL) ¶¶ 26–28 (Final Award) (Nov. 15, 2004).
- 51) *Id.* at ¶ 33. In an Article 1128 submission the United States stated its view that Article 1116 did permit minority shareholders to submit claims on their own behalf, but that they could only recover for injuries to their interests and not for injuries to the corporation, and cited *Barcelona Traction* in support of its argument. The tribunal rejected the view that *Barcelona Traction* applied outside the realm of diplomatic protection, citing *Elettronica Sicula* in support. *Id.* at ¶¶ 29–32. See *supra* notes 21–23 and accompanying text.
- 52) *Id.* at ¶ 137. It is possible that the tribunal was influenced by the fact that the investment had pursued local remedies and in fact had recovered damages.
- 53) See, e.g., *Nykomb Synergetics Tech. Holding AB (Swe.) v. Latvia*, (Energy Charter Treaty), at 38ff. (Award) (Dec. 16, 2003); *CMS Gas Transmission Co. (U.S.) v. Argentina*, ICSID (W. Bank) ARB 01/8, ¶ 408ff. (Award) (May 12, 2005). See generally Charles N. Brower, *Richard Lillich and the United Nations Compensation Commission: Goodbye Forever to “Direct” Versus “Indirect” Damages*, 38 Va. J. Int'l L. 21 (1997).
- 54) See the commentary under Article 1117 for more analysis of this provision.
- 55) A recently filed cases involves two claimants, each of which owns 50 percent of an enterprise in Mexico. They have jointly submitted a claim under Articles 1116 and 1117. *Archer Daniels Midland Co. & A.E. Staley Manu. Co. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/04/05 (Notice of Arbitration) (Aug. 4, 2004). The cases in which requests for consolidation have been received have involved unrelated claimants who are challenging the same measures as breaches of the NAFTA. See the commentary under Article 1126 for a discussion of NAFTA's consolidation procedures.
- 56) *Robert Azinian et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/97/2, ¶¶ 34–40 (Interim Decision Concerning Respondent's Motion for Directions) (Jan. 22, 1998).
- 57) *Robert Azinian et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/97/2, ¶ 77 (Award) (Nov. 1, 1999).
- 58) *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3, ¶¶ 175–182 (Notice of Claim) (Oct. 30, 1998). The issues arising from this claim are dealt with in the commentary to Article 1117.
- 59) *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3, at 91 n. 58 (Memorial of the United States of America on Matters of Competence and Jurisdiction) (Feb. 18, 2000) [hereinafter *Loewen U.S. Memorial on Jurisdiction*].
- 60) For example, they filed a joint reply to the Counter-Memorial of the United States. *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3 (Joint Reply of Claimants The Loewen Group, Inc. and Raymond L. Loewen to the Counter-Memorial of the United States) (June 8, 2001).
- 61) *Loewen U.S. Memorial on Jurisdiction*, *supra* note 59, at 88–90.
- 62) *Id.* at 89.
- 63) *Id.* at 89.
- 64) *Id.* at 89–90. The United States recognized that the memorials to date had been largely duplicative, but noted the potential for divergence in the future. *Id.*
- 65) *Id.* at 90.
- 66) *Id.* at 91–92.
- 67) *Id.* at 92.
- 68) *Id.*
- 69) *The Loewen Group Inc. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3, ¶ 76 (Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction) (Jan. 9, 2001).
- 70) *Id.*
- 71) *The Loewen Group, Inc. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3, ¶ 239 (Award) (June 26, 2003) [hereinafter *Loewen Award*].
- 72) *Mondev Award*, *supra* note 28, at ¶ 80.
- 73) *Id.*

- 74) *Id.* at ¶ 81.
- 75) *Id.* at ¶ 82.
- 76) A third jurisdictional claim based on Article 1116 is discussed in Part A.3 of the commentary, *supra*.
- 77) *Methanex Corp. (Can.) v. United States*, (UNCITRAL), at 21–30 (Memorial on Jurisdiction and Admissibility of Respondent United States of America) (Nov. 13, 2000) [hereinafter *Methanex U.S. Memorial on Jurisdiction*].
- 78) *Methanex Corp. (Can.) v. United States*, (UNCITRAL), at 37 (Preliminary Award on Jurisdiction and Admissibility) (Aug. 7, 2002) [hereinafter *Methanex Award on Jurisdiction*].
- 79) *Id.* at 37. The *Methanex* tribunal explained later in its opinion that the UNCITRAL rules gave it no authority to dismiss claims based on challenges to “admissibility.” *Id.* at 55–57.
- 80) *Id.* at 37. Of course, an investor must prove his loss or damage at the merits stage. The *UPS* tribunal made a similar point: “The Tribunal repeats that it will be for the Investor, if it is to establish a breach of article 1115, to demonstrate that it has suffered loss or damage.” *United Parcel Svc. of Am., Inc. (U.S.) v. Canada*, (UNCITRAL), ¶ 8 (Decisions of the Tribunal Relating to Document Production and Interrogatories) (June 21, 2004); “UPS will have to demonstrate in terms of article 1116, that it has incurred loss or damage.” *United Parcel Svc. of Am., Inc. (U.S.) v. Canada*, (UNCITRAL), ¶ 4 (Direction of the Tribunal Concerning Document Production) (Aug. 1, 2003).
- 81) *Methanex Award on Jurisdiction*, *supra* note 78, at 38.
- 82) *Id.*
- 83) *Methanex Corp. (Can.) v. United States*, (UNCITRAL), Part IV, Ch. F, ¶¶ 1–2 (Final Award of the Tribunal on Jurisdiction and the Merits) (Aug. 3, 2005) [hereinafter *Methanex Award*]. The tribunal noted that it would have been minded to decide the Article 1116 and 1117 claims in favor of the United States. *Id.*
- 84) *Id.* at Part II, Ch. F., ¶¶ 19–20.
- 85) *Id.* at Part II, Ch. F., ¶¶ 26–27.
- 86) *Id.* at ¶ 26.
- 87) *S.D. Myers Inc. (U.S.) v. Canada*, (UNCITRAL) ¶¶ 227–229 (Counter-Memorial of Canada) (Oct. 5, 1999) [hereinafter *S.D. Myers Counter-Memorial of Canada*].
- 88) See the commentary under Article 1139 for a full discussion of Canada's arguments with respect to the investor's status. See also *S.D. Myers Counter Memorial of Canada*, *supra* note 87, at ¶¶ 218–262.
- 89) *S.D. Myers Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 227 (Award) (Nov. 13, 2000) [hereinafter *S.D. Myers Award*].
- 90) *Id.* at ¶ 228.
- 91) *Id.*
- 92) *Id.* at ¶ 231. The *S.D. Myers* tribunal also recognized several other bases that could have supported SDMI's standing, including the view that SDMI and Myers Canada were a joint venture, that Myers Canada was a branch of SDMI, that SDMI had made a loan to Myers Canada, and that SDMI's market share in Canada constituted an investment. *Id.* at 232.
- 93) *Attorney General of Canada v. S.D. Myers Inc.*, 2004 F.C. 38, at 29 (Jan. 13, 2004).
- 94) *Waste Management Inc (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)00/3, ¶ 41 (Award) (April 30, 2004). The concession agreement was further modified by a May 12, 1995, agreement.
- 95) *Id.* at ¶ 77.
- 96) *Id.* at ¶ 78.
- 97) *Id.* at ¶ 80. As the tribunal noted, the concern addressed by the NAFTA is the establishment by a company from a non-NAFTA State of a shell company in NAFTA territory for the sole purpose of bringing a Chapter Eleven claim; not the ownership or control of an intermediary company outside NAFTA territory by a *bona fide* NAFTA enterprise. *Id.*; see also NAFTA Art. 1113(2).
- 98) *Id.* at ¶ 83. The tribunal in *Société Générale v. Dominican Republic* was faced with a very complex ownership structure through which Société Générale claimed to own the investments in the Dominican Republic whose interests were allegedly affected by government measures in violation of the applicable BIT. It concluded that the claimant's French nationality entitled it to assert its claims under the treaty, but that the amount of damages it would be awarded would be limited to an amount commensurate with its interests in the investments. *Société Générale (Fr.) v. Dominican Republic*, (UNCITRAL) LCIA Case No. UN 7927, ¶¶ 115–121 (Award on Preliminary Objections to Jurisdiction) (Sept. 19, 2008).
- 99) *Id.* ¶ at 85.
- 100) *Id.* at ¶¶ 82–85.
- 101) *Id.* at ¶ 85.
- 102) *Glamis Gold Ltd. (Can.) v. United States*, (UNCITRAL) ¶¶ 22–23 (Procedural Order No. 2 (Revised)) (May 31, 2005) [hereinafter *Glamis Gold Procedural Order No. 2*].
- 102a) *UPS Merits Award*, *supra* note 47a, at ¶ 37.
- 102b) *Id.*
- 102c) *Id.*
- 102d) *Id.* at ¶ 38.
- 102e) *Canadian Cattlemen Claims – De Boer et al. (Can.) v. United States*, (UNCITRAL) ¶ 44 (Award on Jurisdiction) (Jan. 28, 2008) [hereinafter *Canadian Cattlemen Claims Award*].

- 102f) *Id.* at ¶¶ 2, 39.
- 102g) NAFTA Art. 1139.
- 102h) *Id.* at ¶¶ 121–128.
- 102i) *Id.* at ¶ 126.
- 102j) *Id.* at ¶ 137.
- 102k) *Id.*
- 102l) *Id.*
- 102m) *Id.*
- 102n) *Canadian Cattlemen Claims – De Boer et al. (Can.) v. United States*, (UNCITRAL) ¶ 62 (Reply Memorial on the Preliminary Question) (Jan. 30, 2007).
- 102o) *Id.* ¶¶ 53–54.
- 102p) *Canadian Cattlemen Claims Award*, *supra* note 102e, at ¶ 136.
- 102q) *Merrill & Ring Forestry L.P. (U.S.) v. Canada*, (UNCITRAL) ¶ 17 (Decision on a Motion to Add a New Party) (Jan. 31, 2008).
- 102r) *Id.* at ¶ 12.
- 102s) *Id.* at ¶¶ 12, 20.
- 102t) *Id.* at ¶ 23.
- 103) Malcolm N. Shaw, *International Law* 726 (5th ed. 2003) (internal citations omitted).
- 104) Brownlie, *supra* note 19, at 460–461.
- 105) *Id.* at 461.
- 106) *Loewen Award*, *supra* note 71, at ¶ 220.
- 107) *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank.) ARB(AF)/98/3, at 10–13 (Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc.) (Mar. 1, 2002).
- 108) *Id.* at 13–34.
- 109) *Id.* at 34–35.
- 110) *Loewen Award*, *supra* note 71, at ¶ 223.
- 111) *Id.* at ¶ 224.
- 112) *Id.* at ¶ 225.
- 113) *Id.* at ¶ 226.
- 114) *Id.* at ¶ 229.
- 115) *Id.* at ¶¶ 229–230.
- 116) *Id.* at ¶ 227.
- 117) *Id.* at ¶ 237.
- 118) *Id.* at ¶ 237.
- 119) *Id.* at 69 (orders).
- 120) *Id.* at 69–70 (orders).
- 121) *Id.* at ¶ 70.
- 122) *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)98/3 (Request for Supplementary Decision) (Aug. 11, 2003).
- 123) *The Loewen Group, Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)98/3 ¶¶ 19–23 (Decision on Respondent's Request for a Supplementary Decision) (Aug. 17, 2004).
- 124) *Raymond L. Loewen v. United States*, No. 1:04-CV-02141 (RWR), at 11ff. (D.D.C. Feb. 25, 2004) (Motion to Vacate and Remand Arbitration Award) [hereinafter *Loewen Set-Aside Petition*].
- 124a) *Raymond L. Loewen v. United States*, No. 94-2141, slip op. at 5–6 (D.D.C. Oct. 31, 2005).
- 125) See, e.g., Maurice Mendelson, *The Runaway Train: The “Continuous Nationality” Rule from the Panavezys-Saldutiskis Railway case to Loewen*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 97 (Todd Weiler ed., 2005); Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 *Arb. Int'l* 1 (2005); Jan Paulsson, *Continuous Nationality in Loewen*, 20 *Arb. Int'l* 213 (2004); Emmanuel Gaillard, *La Jurisprudence du CIRDI* 788ff (2004).
- 126) International Law Commission, *Report to the International Law Commission on Diplomatic Protection*, A/CN.4/506/Add.1 (2000) [hereinafter *ILC Report on Diplomatic Protection*].
- 127) *Mendelson*, *supra* note 125, at 118.
- 128) *ILC Report on Diplomatic Protection*, *supra* note 126, at 11; see also *Mendelson*, *supra* note 125, at 118–123; *Paulsson*, *supra* note 125, at 214.
- 129) See, e.g., *Mendelson*, *supra* note 125, at 124–135; *Rubins*, *supra* note 125, at 25–26; *Paulsson*, *supra* note 125, at 214–215; *Gaillard*, *supra* note 125, at 788–789.
- 130) *Rubins*, *supra* note 125, at 26–27.
- 131) *Mendelson*, *supra* note 125, at 132–134.
- 132) See *Mendelson*, *supra* note 125, at 132–134; *Paulsson*, *supra* note 125, at 214–215. The ICSID Convention does not require continuous nationality. *Mendelson*, *supra* note 125, at 129–131; *Gaillard*, *supra* note 125, at 788–789.
- 133) *ILC Report on Diplomatic Protection*, *supra* note 126, at 11; see also *Paulsson*, *supra* note 125, at 214 (“The *dies ad quem* requirement which commended itself to the Loewen arbitrators was perhaps among the least plausible of a long series of alternative candidates.”).
- 134) *Raymond L. Loewen* retains his Canadian nationality. In his set-aside motion, however, he has not challenged the *Loewen* tribunal's decision with respect to Article 1117. *Loewen Set-Aside Petition*, *supra* note 124.

- 135)** *Tokios Tokelés (Lith.) v. Ukraine*, ICSID (W. Bank) ARB/02/18, ¶ 65 (Decision on Jurisdiction) (April 29, 2004). The tribunal in Tokios determined that the claimant, which was incorporated in and had its principal place of business in Lithuania, was a Lithuanian national and thus an “investor of Lithuania” under the applicable BIT; in so doing, it rejected Ukraine’s request that it pierce the corporate veil and determine that the corporation had the identity of its shareholders, who were predominantly Ukrainian.
- 136)** See Mendelson, *supra* note 125, at 143–145; Rubins, *supra* note 125, at 26–28. The question of whether TLGI could transfer its claims is another issue, and one not addressed by the *Loewen* tribunal. Article 1109 requires that assets be transferable; yet it is not clear whether it is meant to apply during the conduct of an arbitration itself. See Rubins, *supra* note 125, at 27. It is not the case that claims can invariably be assigned, particularly if they are being assigned from a non-national to a national. See *Mihaly Int’l Corp. (U.S.) v. Sri Lanka*, ICSID (W. Bank) ARB/00/2 ¶ 24 (Award) (March 15, 2002).
- 137)** *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/99/1, ¶ 4 (Award) (Dec. 16, 2002) [hereinafter *Feldman Award*].
- 138)** *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/99/1, ¶ 27 (Interim Decision on Preliminary Jurisdictional Issues) (Dec. 6, 2000) [hereinafter *Feldman Decision on Jurisdiction*].
- 139)** *Id.* at ¶¶ 27–28.
- 140)** *Id.* at ¶ 29.
- 141)** *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)99/1, ¶¶ 13–122 (Counter-Memorial on Preliminary Questions) (Sept. 8, 2000).
- 142)** *Feldman Decision on Jurisdiction*, *supra* note 138, at ¶ 30.
- 143)** *Id.*
- 144)** *Id.* at ¶ 31.
- 145)** *Id.*
- 146)** *Id.* at ¶ 32 (citing *Nottebohm (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4).
- 147)** *Id.*
- 148)** *Nottebohm (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4.
- 149)** *Feldman Decision on Jurisdiction*, *supra* note 138, at ¶ 32.
- 150)** Feldman’s U.S. citizenship was never in question. In a case brought under the Italy–United Arab Emirates BIT, the Respondent challenged the claimant’s standing to invoke the BIT on the grounds that he had lost his Italian nationality by becoming resident in, and taking the citizenship of, Canada. *Hussein Nuaman Soufraki (It.) v. United Arab Emirates*, ICSID (W. Bank) ARB/02/07 (Award) (July 7, 2004). The tribunal determined that there was no question that Soufraki had lost his Italian citizenship by operation of Italian law; the only question was whether he had reacquired it, also by operation of Italian law, by virtue of having resided in Italy for at least a one-year period after he had acquired Canadian citizenship. Though Soufraki claimed that he resided in Italy for just over a year during the applicable period, the tribunal determined that he had failed to discharge his burden of proof as to that matter. *Id.* at ¶ 81. Because of the tribunal’s decision with respect to Soufraki’s loss of Italian citizenship, it did not need to consider the matter of dominant and effective nationality. *Id.* at ¶ 46.
- 151)** *Feldman Decision on Jurisdiction*, *supra* note 138, at ¶ 32.
- 152)** *Id.* at ¶ 33.
- 153)** *Id.* at ¶ 34.
- 154)** *Id.*
- 155)** *Id.* at ¶ 35.
- 156)** *Id.*
- 157)** *Id.*
- 158)** See, e.g., *Mergé Case (Italian–U.S. Claims Commission)*, 14 R.I.A.A. 236 (1955); Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251 (1984). This is true in the absence of a specific treaty provision to the contrary. For example, the ICSID Convention appears explicitly to prohibit a dual national from bringing a claim if one of his or her nationalities is that of the disputing contracting Party. ICSID Conv. Art. 25(2)(a).
- 159)** In a recent ICSID case, however, the tribunal refused to apply the *Nottebohm* rule, and dismissed claims submitted by three American claimants who were also citizens of Egypt as a result of their parentage. *Champion Trading Co. (U.S.) v. Egypt*, ICSID (W. Bank) ARB/02/9, 16 (Decision on Jurisdiction) (Oct. 21, 2003). The question of nationality has also arisen in *Grand River Enterprises Six Nations Ltd. v. United States*, in which the United States has alleged that one of the claimants, Arthur Montour, Jr., has failed to maintain his Canadian nationality at all times from the date that any claims arose through their resolution and that, even if he has retained Canadian nationality, he has not shown that it was his dominant and effective nationality to sustain his ability to assert a claim under Chapter 11. *Grand River Six Nations Ltd. et al. (Can.) v. United States*, (UNCITRAL) ¶ 86 (Statement of Defense of Respondent United States of America) (Aug. 29, 2005). These jurisdictional arguments have been asserted as failures to meet the requirements of Article 1101. *Id.* at ¶¶ 85–86.

- 159a)** *Ratione temporis* objections sometimes relate to the existence of an investment and, hence, to the jurisdiction of the tribunal. In *Limited Liability Company Amto v. Ukraine*, the respondent argued that the investor's ownership of a contractual right to purchase shares was not sufficient to qualify as an investment under the Energy Charter Treaty. It thus argued that the jurisdiction of the tribunal should commence only as of the date that Amto could show its ownership of some 67 percent of the stock in its investment. In fact, the tribunal put the date of the investment at the time on which records showed Amto's actual ownership of 16 percent of the shares in the investment; it was on that date that the tribunal's jurisdiction *ratione temporis* began. *Limited Liability Company Amto (Latvia) v. Ukraine*, Stockholm Chamber of Commerce Arb. No. 080/2005, at 33 (Final Award) (Mar. 26, 2008).
- 160)** Note 39 of the NAFTA states that "Chapter [11] covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter." See the commentary under Article 1101 for more discussion of jurisdiction *ratione temporis* and the scope of the NAFTA Parties' obligations under Chapter 11.
- 161)** *Feldman* Decision on Jurisdiction, *supra* note 138, at ¶ 62.
- 162)** *Id.*
- 163)** *Mondev* Award, *supra* note 28, at ¶¶ 57–75.
- 164)** In *Mondev* and *Feldman* the continuing violation question occurred in the context of an objection *ratione temporis*. It should be noted that a claimant could also seek to argue that a continuing violation would bring an otherwise time-barred claim within a limitation period, such as the one set forth in Articles 1116(2) and Article 1117(2).
- 165)** For ease of reference, I will refer to both entities as "Mondev."
- 166)** *Lafayette Place Assocs. v. Boston Redev't Auth.*, 427 Mass 509, 514 (1998).
- 167)** *Id.* at 536.
- 167a)** The issue of retroactivity came up in a novel way in *MCI Power Group v. Ecuador*. There Ecuador challenged the jurisdiction of the tribunal on the ground that MCI Ecuador had already triggered the BIT's "fork-in-the-road" provision by seeking relief in local courts. The tribunal held that, because the disputes giving rise to the claims in local courts pre-dated the BIT's entry into force, they could not qualify as an election of remedy under the BIT. *MCI Power Group L.C. et al. (U.S.) v. Ecuador*, ICSID (W. Bank) ARB/03/6, ¶¶ 187–190 (Award) (Jul. 31, 2007).
- 168)** *Mondev* Award, *supra* note 28, at ¶ 58. The tribunal cited the ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA. Res. 86/83, Dec. 12, 2001, Art. 14(1).
- 169)** *Mondev* Award, *supra* note 28, at ¶ 59.
- 170)** *Id.* at ¶ 60.
- 171)** *Id.* at ¶ 61.
- 172)** *Id.*
- 173)** *Id.* at ¶ 65.
- 174)** *Id.* at ¶ 66.
- 175)** *Id.* at ¶ 68.
- 176)** *Id.* at ¶ 69.
- 177)** *Id.* (quoting *Feldman* Decision on Jurisdiction, *supra* note 138, at ¶ 67). The *Feldman* tribunal did, in the next sentence, note the possibility of a continuing violation. See the discussion of *Feldman* in the text accompanying note 160.
- 178)** *Mondev* Award, *supra* note 28, at ¶ 70. A similar situation was at issue in *Chevron Corp. et al. v. Ecuador*. That tribunal, too, distinguished between the breaches of contract (prior to the entry into force of the BIT) that gave rise to court actions, and to the court actions themselves, which were properly the subject of the claim under the Ecuador-United States BIT. *Chevron Corp. et al. (U.S.) v. Ecuador*, (UNCITRAL) ¶ 270 (Interim Award) (Dec. 1, 2008). This did not mean the tribunal need ignore all acts or facts that occurred prior to the BIT's entry into force; rather, "that conduct might relevant in determining whether a violation of BIT standards has occurred after the date of entry into force." *Id.* at ¶ 283. The tribunal in *Société Générale v. Dominican Republic*, which also faced the question of retroactive treaty application, came to a similar conclusion. *Société Générale (Fr.) v. Dominican Republic*, (UNCITRAL) LCIA Case No. UN 7927, at ¶ 92 (Award on Preliminary Objections to Jurisdiction) (Sept. 19, 2008). It also elaborated on the question of composite or continuing acts: "The Tribunal accordingly concludes that to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal's jurisdiction. This will also be the case if a series of acts results in the aggregate in such breach of an obligation in force at the time the accumulation culminates after the critical date." *Id.* at ¶ 94.
- 179)** *Id.* at ¶¶ 71–73. The tribunal also distinguished between a NAFTA claim and a diplomatic protection claim, which it noted that Canada had never espoused. *Id.* at ¶ 73.
- 180)** NAFTA Art. 1502(3)(a) (emphasis added).
- 181)** *United Parcel Svc. of Am. Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 17 (Award on Jurisdiction) (Nov. 22, 2002) [hereinafter *UPS Award on Jurisdiction*].
- 182)** *Id.* at ¶ 12.
- 183)** *United Parcel Svc. of Am. Inc. (U.S.) v. Canada*, (UNCITRAL) ¶¶ 30–34 (Counter-Memorial of the Investor) (Jurisdiction Phase) (March 26, 2002).
- 184)** *UPS Award on Jurisdiction*, *supra* note 181, at ¶¶ 52–58.

- 185) *Id.* at ¶ 51.
- 186) *Id.* at ¶ 52.
- 187) *Id.* at ¶ 54.
- 188) *Id.* at ¶ 59.
- 189) *Id.* at ¶ 66.
- 190) *Id.* at ¶ 68. This outcome is consistent with the decision of Mr. Justice Tysoe in the *Metalclad* set-aside determination: “[T]he right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA.” *Mexico v. Metalclad Corp.*, [2001] B.C.J. No. 950, at ¶ 58 (B.C.S.C.) (May 2, 2001).
- 190a) *UPS Merits award, supra* note 47a, at ¶ 59.
- 190b) *Id.* (citing ILC Articles 4 and 55).
- 190c) *Id.*
- 190d) *Id.* at ¶ 60.
- 190e) *Id.* at ¶ 66.
- 190f) *Id.* at ¶ 67.
- 190g) *Id.* at ¶ 69.
- 190h) *Id.*
- 190i) *Id.*
- 190j) *Id.* at ¶ 70.
- 190k) *Id.* at ¶¶ 72–73.
- 190l) *Id.* at ¶ 76.
- 190m) *Id.* at ¶ 77.
- 190n) *Id.* at ¶ 78.
- 190o) *United Parcel Svc. of Am. Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 172 (Separate Statement of Dean Ronald A. Cass) (June 11, 2007).
- 190p) *Id.* at ¶ 177.
- 190q) *Id.* at ¶¶ 178–180.
- 190r) *Id.* at ¶ 184.
- 190s) *Id.* at ¶¶ 185–88.
- 190t) *Id.* at ¶¶ 189–90.
- 190u) *Archer Daniels Midland et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/04/05, ¶ 4 (Award) (Nov. 21, 2007) [hereinafter *ADM Award*].
- 190v) *Id.* at ¶ 162.
- 190w) *Id.* at ¶ 164.
- 190x) *Id.* at ¶ 173.
- 190y) *Id.* at ¶¶ 169, 171.
- 190z) *Id.* at ¶¶ 170–71.
- 190aa) *Id.* at ¶ 171.
- 190ab) For a more in-depth discussion of Mexico's countermeasures defense, see the commentary under Articles 1101 and 1131.
- 190ac) *ADM Award, supra* note 190u, ¶ 179.
- 190ad) *Archer Daniels Midland et al. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/04/05 (Concurring Opinion of Arthur W. Rovine, Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures) (Nov. 21, 2007) [hereinafter *ADM – Rovine Concurrence*].
- 190ae) *Id.* at ¶ 45.
- 190af) *Id.* at ¶ 46.
- 190ag) *Id.* at ¶¶ 51–52.
- 190ah) *Id.* at ¶¶ 58–59.
- 190ai) International Law Commission, State Responsibility Articles, Art. 49.
- 190aj) *ADM – Rovine Concurrence, supra* note 190ad, at ¶¶ 2–16, 59.
- 190ak) *Id.* at ¶ 69.
- 190al) *Id.* at ¶ 74.
- 190am) *Id.* at ¶¶ 74–80.
- 190an) *Corn Products Int'l, Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/04/01, ¶ 167 (Decision on Responsibility) (Jan. 15, 2008) [hereinafter *Corn Products Decision*].
- 190ao) *Id.* at ¶ 170.
- 190ap) See the discussion in C.2, *supra*, for more explanation of the continuous nationality rule.
- 190aq) *Corn Products Decision, supra* note 190an, at ¶ 176.
- 190ar) *Id.*
- 190as) *Corn Products Int'l, Inc. (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/04/10, ¶ 1 (Separate Opinion of Andreas F. Lowenfeld) (Jan. 15, 2008).
- 190at) *Id.* at ¶¶ 3–5.
- 191) *Pope & Talbot, Inc. (U.S.) v. Canada*, (UNCITRAL) (Award in Relation to Preliminary Motion By Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim From the Record (The “Harmac Motion”)) (Feb. 24, 2000) [hereinafter *Pope & Talbot Award on the Harmac Motion*].
- 192) *Id.* at ¶ 5.
- 193) *Id.* at ¶ 11.
- 194) *Id.* at ¶ 12.
- 195) *Id.*

- 196) *Id.* at ¶¶ 14–17. For a more thorough discussion of this issue, see the commentary under Article 1121.
- 197) *Feldman Decision on Jurisdiction, supra* note 138, at ¶ 41.
- 198) *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)99/1, ¶¶ 13–16 (Submission of the United States of America on Preliminary Issues) (Oct. 6, 2000). For a more thorough explanation of this issue, see the commentary under Article 1117.
- 199) *Feldman Decision on Jurisdiction, supra* note 138, at ¶ 44.
- 200) *Id.*
- 201) NAFTA Art. 1120(1).
- 202) NAFTA Art. 1119.
- 203) *Feldman Decision on Jurisdiction, supra* note 138, at ¶ 46.
- 204) *Id.* at ¶ 48.
- 205) *Id.*
- 206) *Id.* at ¶ 49.
- 207) *Feldman Award, supra* note 137, at ¶¶ 55–56.
- 208) *Id.* at ¶ 57.
- 209) *Id.* at ¶ 58.
- 210) *Id.* at ¶ 60.
- 211) *Id.* at ¶¶ 61–62.
- 212) *Id.* at ¶ 63.
- 213) *Id.*
- 214) *Id.*
- 215) *Id.*
- 216) The three-year limitation issue in *Mondev* was interwoven with *ratione temporis* issues. The NAFTA went into effect on January 1, 1994, and is not retroactive. The United States had thus argued that any conduct by the City of Boston and by the BRA was both time-barred and outside the jurisdiction of the tribunal by virtue of having occurred before January 1, 1994. As noted in section C.4, *supra*, the tribunal sustained the *ratione temporis* argument, finding it had jurisdiction only over the claims vis-à-vis the court actions, all of which occurred after January 1, 1994.
- 217) *Lafayette Place Assocs. v. Boston Redevel't Auth.*, 427 Mass. 509 (1998).
- 218) *Mondev Award, supra* note 28, at ¶ 87.
- 219) *Glamis Gold Procedural Order No. 2, supra* note 102, at ¶¶ 16–21.
- 220) *Id.* at ¶¶ 20–21.
- 221) *Grand River Enterprises Six Nations Ltd. et al. (Can.) v. United States*, (UNCITRAL) (Notice of Arbitration) (Mar. 10, 2004).
- 222) *Grand River Enterprises Six Nations Ltd. et al. (Can.) v. United States*, (UNCITRAL) ¶¶ 68–70 (Statement of Defense of Respondent United States of America) (Aug. 29, 2005). In the alternative, the United States has argued that Grand River must have known of any injury if suffered by April 15, 2000, the date on which payments into escrow were required. *Id.* at ¶ 73 n. 41.
- 223) *Grand River Enterprises Six Nations Ltd. et al. (Can.) v. United States*, (UNCITRAL) ¶¶ 1–2 (Decision on Bifurcation) (Oct. 26, 2005).
- 224) *Grand River Enterprises Six Nations Ltd., et al. v. United States*, (UNCITRAL) ¶ 33 (Decision on Objections to Jurisdiction) (July 20, 2006).
- 225) *Id.* at ¶¶ 34–35.
- 226) *Id.* at ¶ 36.
- 227) *Id.* at ¶ 37.
- 228) *Id.* at ¶ 38.
- 229) *Id.* at ¶ 56.
- 230) *Id.* at ¶ 58.
- 231) *Id.* at ¶ 61.
- 232) *Id.* at ¶ 62.
- 233) *Id.* at ¶¶ 63–65.
- 234) *Id.* at ¶ 66.
- 235) *Id.* at ¶ 67.
- 236) *Id.* at ¶ 71.
- 237) *Id.* at ¶ 103.
- 238) *Id.* at ¶ 72.
- 239) *Id.* at ¶ 82.
- 240) *Id.* at ¶ 78 (citing *Mondev Award, supra* note 28, at ¶ 87).
- 241) *Id.* at ¶ 81.
- 242) *Id.* at ¶ 86. A further issue was whether Article 1120 permitted Grand River's claim to be amended to include some of those later-enacted measures; the tribunal determined that it did. *Id.* at ¶¶ 95–102. See the commentary to Article 1120 for full discussion of these issues.
- 243) *UPS Merits Award, supra* note 47a, at ¶¶ 23–24.

244) *Id.* at ¶ 28. The United States has challenged this conclusion in an 1128 submission it filed in *Merrill & Ring L.P v. Canada*. According to the United States, the UPS tribunal's conclusion that the limitations period can be renewed effectively negates the "first acquired" language in Article 1116(2) and substitutes "last acquired": "the limitations period [on the UPS tribunals' reading] would fail to renew only after an investor acquired knowledge of the state's final transgression in a series of similar and related actions." *Merrill & Ring Forestry, L.P. (U.S.) v. Canada*, (UNCITRAL) ¶ 10 (Submission of the United States of America) (July 14, 2008).

245) *Id.* at ¶ 30.

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