Article 1117 - Claim by an Investor of a Party on Behalf of an Enterprise

Article 1117 Claim by an Investor of a Party on Behalf of an Enterprise

I Negotiating Text

– Like Article 1116, Article 1117 did not appear in an approximation of its final form until relatively late in the NAFTA negotiations. It, too, can trace its roots to the definition of investment disputes. See the negotiating history under Article 1116 for a description of the text's development, including drafts addressing investment disputes, through August 28, 1992.

Article 1117 made its debut in the September 4, 1992, draft. It was numbered Article 1117, and its title was "Claim by an Investor of a Party on Behalf of an Enterprise." The title had a footnote appended to it, the text of which read:

The Parties agree that neither an investor nor an enterprise should receive double recovery. To the extent necessary, this concept will be built into the final text. (1)

P 1117-1

The text of the article first appeared in virtually its final form, and read:

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other 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 enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events which gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established pursuant to Article 1125, unless the Tribunal finds that the interests of a disputing Party would be prejudiced thereby.

4. An investment may not make a claim under this Section. (2)

Paragraphs 2 and 4 were in their final form. Paragraphs 1 and 3 would change minimally to reach their 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. The footnote with respect to double recovery was removed. Paragraph 1 was amended 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." (3)

P 1117-2

Paragraph 3 was also changed slightly. The word "which" was replaced by that: "... arising out of the same events that gave rise to the claim under this Article ..." The reference to Article 1125 was changed to Article 1126, as the provision on consolidation had been renumbered. (4) The gist of the provision did not change, but with those amendments it reached its final form.

II Commentary

For all matters arising under Article 1117(1) and (2), *see* the commentary under Article 1116, which contains parallel provisions. This commentary will address 1117(3) and (4), neither of which has an analogue in Article 1116.

A Consolidation

Article 1117(3) addresses consolidation in the specific context of two or more claims, each bearing a relationship to the same enterprise, being submitted to arbitration under Chapter 11. (5) Article 1117(3) describes two scenarios when that is likely to happen. One is that the same investor brings a claim on behalf of an enterprise under Article 1117, and also brings a claim on its own behalf under Article 1116, and both claims arise from the same events. The second possible scenario is that the controlling investor brings a claim on behalf of an enterprise under Article 1117, while a non-controlling investor brings a claim on its own behalf under Article 1116, but both claims arise from the same events. In either case, Article 1117(3) calls for the establishment of a consolidation tribunal under Article 1126. (6)

This provision has never been invoked. This may be a result of the language of the provision: it applies when "two or more of the claims are submitted to arbitration under Article 1120." Many investors have submitted claims alleging violations of both Articles 1116 and 1117. These have been submitted together, however, as one claim. Thus, in those cases no one has suggested that a consolidation tribunal be constituted.

P 1117-3

The question of claims brought simultaneously by different investors with respect to the same enterprise has arisen in *The Loewen Group Inc. and Raymond L. Loewen v. United States*. *Loewen* 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. (7) 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. (8) Mr. Loewen and TLGI were thereafter represented by separate counsel, though there was some degree of cooperation between the parties. (9) However, no one ever suggested at any stage in the proceedings that a consolidation tribunal needed to be constituted to hear the case.

Article 1117(3) twice refers to the "making" of a claim. It states that if an investor "makes a claim" under Article 1117, and that investor or another investor "makes a claim" arising from the same events under Article 1116, and two or more of the claims are "submitted to arbitration," a consolidation panel should be constituted under Article 1126. (10) The United States has suggested that the distinction is likely the result of the fact that in Mexico a claimant may allege a violation of the NAFTA directly in local courts. (11) Thus, it is possible for more claims to be "made" than are actually "submitted" to arbitration under the procedures set forth in Section B of Chapter 11. Article 1126's consolidation procedure would not apply to claims made in Mexican courts, but only to claims submitted to arbitration under Chapter 11. (12)

The *Feldman* tribunal did not endorse the U.S. position, but suggested that "making a claim" was used in a "general rather than time-related or time-oriented meaning," while "submitting a claim" was used to "localize the commencement of the arbitration in terms of time." (13)

P 1117-4

B "An Investment May Not Make a Claim Under this Section"

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 entity that benefits from any successful NAFTA arbitration under this Article. Yet the investment itself has no standing to bring a claim. Only an investor of a NAFTA Party that owns or controls, directly or indirectly, an enterprise of another NAFTA Party may submit the claim under Chapter 11.

The provision also helps to clarify the relationship between NAFTA's standing provisions and those in the ICSID Convention. Under customary international law, only a non-national has standing to bring a claim against a State. (14) The NAFTA drafters chose to derogate from this customary international law principle by permitting an investor of a Party to bring a claim under Article 1117(1) on behalf of a juridical person of the respondent Party that it controls, whether directly or indirectly. The ICSID Convention derogates from the customary international law principle of non-responsibility in a different way. ICSID jurisdiction extends to disputes between nationals of contracting States. If a juridical person of one Contracting State is under the control of a national of another contracting State, the juridical person is deemed to have the nationality of the other contracting State. (15) In the event that either Canada or Mexico ratifies the ICSID Convention, thereby making dispute settlement under the Convention available to NAFTA investors, NAFTA's solution to the non-responsibility issue would govern. (16)

The provision is likely also designed to forestall the possibility that the investment could make one claim while its controlling owner advanced a different claim. (17) The rule of non-responsibility should prohibit that result, in any event, but given the different approach taken in the ICSID Convention, the provision provides extra guidance to tribunals as to the route an Article 1117 claim should take.

The same provision is in Canada's Model FIPA. (18) It does not appear in the U.S. Model BIT. (19)

III Cross-References

- *See also* Article 1116 and the references listed thereunder.
- Article 1120 provides that the applicable arbitration rules govern except to the extent modified by Section B of Chapter 11.
- Article 1126 provides for the consolidation of proceedings.
- Article 1135(2) provides that any award make under Article 1117 be paid to the investment.

IV Secondary Material

See also references listed under Article 1116.

Brownlie, Ian, Principles of Public International Law 459–461 (6th ed. 2003).

Burgstaller, Markus, *Nationality of Corporate Investors and International Claims Against the Investor's Own State*, 7 J. World Invest. & Trade 857 (2006).

P 1117-6

Crawford, James, The International Law Commission's Articles on State Responsibility: Introduction, Texts, and Commentaries 264–265 (2002).

References

1) INVEST.F-904 (Sept. 4, 1992) 2, Art. 1117.
2) *Id.*
3) INVEST.O02 (Oct. 2, 1992) 11-11–11-12, Art. 1117.
4) *Id.*
5) Article 23(3) of the 2003 Canadian Model FIPA contains a virtually identical consolidation clause. The 2004 U.S. Model BIT, however, has only a general consolidation clause which could be brought to bear in a similar situation. 2004 U.S. Model BIT Art. 33.
6) Article 1126 requires the establishment of a tribunal, at the request of a disputing Party, to decide whether or not two or more claims that have been submitted to arbitration under Article 1120, and that have questions of law or fact in common, should be consolidated under the jurisdiction of that tribunal. See the commentary under Article 1126 for a thorough discussion of those issues.
7) *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 1116.
8) *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).
9) 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).
10) For a discussion as to the effect this language has on interpreting the limitations provision in Articles 1116(2) and 1117(2), *see* the commentary under Article 1116.
11) Mexico is a so-called "direct effect" State. Canada and the United States, on the other hand, would have had to pass legislation giving claimants a right of action under NAFTA in local courts. Neither did so.
12) *See Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)99/1, ¶¶ 13–18 (Submission of the United States on Preliminary Issues) (Oct. 6, 2000).
13) *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)99/1, ¶ 44 (Interim Decision on Preliminary Jurisdictional Issues) (Dec. 6, 2000).
14) *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).
15) ICSID Convention Art. 25(2)(b).
16) NAFTA Art. 1120(2) (the applicable arbitration rules govern except to the extent modified by Section B). Canada signed the ICSID Convention in December 2006, and is in the process of passing domestic legislation. The House of Commons has tabled legislation that would enact the Convention at the federal level. If and when Canada ratifies it, Convention arbitration will be available to U.S. investors in Canada and Canadian investors in the United States.
17) *See* the commentary under Article 1116 for a discussion of the possibility that more than one investor could simultaneously bring a claim under Article 1117.
18) 2003 Canadian Model FIPA Art. 23(4).
19) Article 24 of the 2004 U.S. Model BIT governs the submission of a claim to arbitration.