

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GAMI INVESTMENTS, INC.,

Claimant/Investor,

-and-

THE UNITED MEXICAN STATES,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to NAFTA Article 1128, the United States of America makes this submission to address certain questions of interpretation of the NAFTA arising in the case brought by GAMI Investments, Inc. against the United Mexican States. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretations it offers below apply to the facts of this case. Nor does it take a position on whether the issues addressed here go to the merits of the claim or the jurisdiction of the Tribunal.

The Provisions At Issue

2. NAFTA Article 1116 permits an investor to present a claim for loss or damage suffered by the investor:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach.

NAFTA art. 1116(1) (emphasis added).

3. Article 1117, by contrast, permits an investor to present a claim on behalf of an enterprise that it owns or controls for loss or damage suffered by the enterprise:

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 another Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach.

NAFTA art. 1117(1) (emphasis added).

4. Another provision relevant to the issues of ownership and control presented in this case is Article 1139, which defines “investment of an investor of a Party” as follows:

[I]nvestment of an investor of a Party means an investment *owned or controlled* directly or indirectly by an investor of such Party.

NAFTA art. 1139 (emphasis added).

5. It is well established under customary international law that provisions of a treaty must be interpreted in such a manner that renders their terms effective.¹ As will be explained below, to permit a minority non-controlling shareholder to bring a claim on behalf of an enterprise would deprive the above provisions of any effect.

Standing of Minority Non-Controlling Shareholders Under Chapter Eleven

6. The United States agrees with the claimant that minority shareholders of a Party who hold shares of a company incorporated in the territory of another Party are of the class of investors that may bring a claim for loss or damage on their own behalf under Article 1116.² A minority non-controlling shareholder,³ under the definition provided in NAFTA Article 1139, is an “investor of a Party.”⁴

7. A minority non-controlling shareholder may not, however, bring a claim on behalf of an enterprise. Only investors that own or control an enterprise of another Party directly or indirectly have standing to bring a claim for loss or damage suffered by that enterprise under Article 1117. The investment that the minority non-controlling shareholder owns

¹ See *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, ¶51 (rejecting construction that was “contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.”) (collecting authorities); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (“It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”).

² See Claimant’s Reply ¶ 21.

³ This submission addresses only circumstances where an investor of a Party does not own or control a corporation of another Party.

⁴ See NAFTA, art. 1139 (**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment).

and controls is its ownership interest in the enterprise.⁵ If a minority non-controlling shareholder were permitted to bring a claim on behalf of an enterprise, the definition of “investment of investor of a Party” would be deprived of meaning.⁶

Relationship Between Articles 1116 and 1117

8. The interpretation of Articles 1116 and 1117 presented in this submission is informed by an examination of the principles of customary international law addressing the status of corporations against which the provisions were drafted.

9. Under customary international law, no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares.⁷ Only *direct* loss or damage suffered by shareholders is cognizable.⁸ A classic example of direct loss or damage suffered by shareholders is when the host State wrongfully expropriates the shareholders’ ownership interests, whether directly through an expropriation of the shares, or indirectly by expropriating the corporation as a whole.⁹ Another example of direct loss or damage sustained by a shareholder is that incurred by the shareholder as a result of it having been denied its right to vote its shares in a company incorporated in the territory of the host State.¹⁰

10. The second customary international law principle against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State’s own nationals.¹¹

⁵ An “investment,” as defined by Article 1139, may take the form of an enterprise, it may take the form of shares in an enterprise, or a number of other forms. An “investment of an investor of another Party,” however, is one that is “owned or controlled directly or indirectly by an investor of such Party.” Thus, the investment of a minority shareholder of a Party, for example, are its shares of an enterprise of another Party, not the enterprise itself.

⁶ See *supra* ¶ 5.

⁷ See *Barcelona Traction Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 46 (Feb. 5) (Judgment) (“[A]n act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.”).

⁸ See *id.* ¶ 47 (“Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”). The United States notes that some authors have asserted or proposed exceptions to this rule.

⁹ See *id.* The United States notes that the claimant has advanced such a claim of indirect expropriation. See Claimant’s Statement of Claim ¶¶ 134-138; Claimant’s Reply ¶ 57. We express no view on the merits of that claim.

¹⁰ See *id.* (providing examples of direct rights: “the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation.”).

¹¹ See, e.g., JENNINGS & WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 512-13 (1992) (“from the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.”).

11. Against these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate legal entity, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is suffered by the corporation. As the investor has not suffered direct loss or damage, it does not have standing to bring a claim. Nor may the corporation itself maintain an international claim against the State of which it is a national.

12. Article 1117 addresses this problem by creating a right to present a claim not found in customary international law. Where the investment is an enterprise of another Party,¹² an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise.¹³ Thus, Article 1117 derogates from the principles described above.

13. Article 1116 also derogates from customary international law to the extent that it permits individual investors to assert claims for State responsibility under international law that could otherwise be asserted only by States.¹⁴ The United States agrees with the claimant to this extent that the language of Article 1116 “supersedes inconsistent customary international law.”¹⁵ The United States also agrees with the claimant that, in granting this sort of claim, Article 1116 does not distinguish between investors that own or control an investment and minority shareholders.¹⁶

¹² See NAFTA Article 1139 (“**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”); NAFTA Article 201 (“**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.”).

¹³ See NAFTA art. 1117(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 . . .”).

¹⁴ See, e.g., *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 24 (Apr. 6) (Judgment) (“by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law”) (internal quotation omitted); F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 86 (1974) (“[I]nternational responsibility had been viewed as a strictly ‘interstate’ legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone.”); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) (“[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.”).

¹⁵ See Claimant’s Reply ¶ 20.

¹⁶ See Claimant’s Reply ¶ 21.

14. However, the United States does not believe that Article 1116 can fairly be construed to reflect an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation. It is well-recognized that “an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear intention to do so.”¹⁷ Nothing in the text of Article 1116 suggests an intent to derogate from customary international law restrictions on the assertion of claims on behalf of shareholders. By contrast, the view of at least one of the Parties as to the intent of the three NAFTA countries was expressed in the contemporaneous United States Statement of Administrative Action in terms that are quite clear: consistent with the prevailing rule under customary international law, Article 1116 provides standing for direct injuries; Article 1117 provides standing for indirect injuries.¹⁸ Were minority non-controlling shareholders to be permitted to bring a claim under Article 1116 for indirect injuries, Article 1117 would be superfluous.¹⁹

15. The awards in *Pope and Talbot* and *S.D. Myers* do not provide examples where claims for indirect injuries were allowed under Article 1116. In each of those cases, the damages awarded were limited to losses suffered directly by the investor bringing the claim, not by the investment/enterprise.²⁰

16. Nor does Article 1117(3) suggest that Article 1116 was intended to derogate from the customary international law rule that restricts shareholders from asserting a claim for

¹⁷ See *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, (Award of June 26, 2003) ¶ 160 (citing *Elettronica Sicula SpA (ELSI) (U.S. v. Italy)* 1989 I.C.J. 15,42), available at <www.state.gov/documents/organization/22094.pdf>; see also *id.* ¶ 162 (“It would be strange indeed if sub silentio the international rule were to be swept away.”).

¹⁸ North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. 103-159, Vol. I (1993) at 145 (“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.”) (emphasis added).

¹⁹ See *supra* ¶ 5; see also NAFTA, art. 102(1)(e) (“The objectives of this Agreement . . . are to create effective procedures for . . . the resolution of disputes.”).

²⁰ In *Pope*, the damages found by the tribunal consisted of the investor’s out of pocket expenses (accountants’ fees, legal fees and lobbying fees). See *Pope & Talbot* (Damages Award of May 31, 2002) ¶ 85. In *Myers*, the tribunal characterized the damages as losses to the investor’s income stream. See *S.D. Myers and Canada* (Second Partial Award of Oct. 21, 2002) ¶ 228 (“Canada should compensate SDMI for the net income streams that it lost, for the abridgement of the time available to SDMI and the value of the income delayed by the Canadian closure.”). Although each of these awards contains *obiter dicta* that might, or might not, be construed to suggest a receptiveness to permitting a controlling investor to pursue a claim based on injury to a subsidiary, neither supports extending that receptiveness to a minority non-controlling shareholder. See *Pope & Talbot* (Damages Award) ¶ 80 & n.51 (referring to the “link between the financial fortunes of parent and subsidiary corporations” as potentially serving to demonstrate damage to a controlling shareholder’s interest in the enterprise); *S.D. Myers and Canada* (Partial Award of Nov. 13, 2000) ¶ 229 (referring to an investor that *controls* the enterprise in question: “the Tribunal does 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.”) (emphasis added).

loss or damage suffered by a corporation. That provision makes clear, among other things, that nothing prevents an investor that owns or controls an enterprise, in an appropriate case, from submitting claims under both Articles 1116 and 1117.²¹ For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party . . . be made freely and without delay," the investor might be able to claim under Article 1116 damages stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 1117 damages relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations. A minority non-controlling shareholder under such a scenario, however, would have standing to submit only a claim for damages to its own interests as a shareholder – the loss of dividends – under Article 1116.

17. The distinction between Articles 1116 and 1117 is also critical to ensuring that creditors' rights with respect to the investment are respected. Under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This prevents the investor from effectively stripping away a corporate asset -- the claim -- to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.²² This goal is reflected in Article 1135(2)(c), which provides that where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief. If a minority non-controlling shareholder could bring a claim under Article 1116 for loss or damage incurred directly by the enterprise, this goal would be thwarted and both Articles 1117 and 1135(2) would be rendered ineffective.²³

18. In addition, the distinct functions of Articles 1116 and 1117 ensure that there will be no double recovery. When an investor that owns or controls an enterprise submits a claim under Article 1117 for loss or damage suffered by that enterprise, any award in the claimant investor's favor will make the enterprise whole and the value of the shares will be restored. A very different scenario arises if an investor that does not own or control an enterprise is permitted to bring a claim for loss or damage suffered by that enterprise under Article 1116. In such a case, for example, nothing would prevent the enterprise from also seeking available remedies under domestic law for the same injury.²⁴ A

²¹ See Article 1117(3) (anticipating that, under some circumstances, an investor may make a claim under Article 1117 and the investor or a non-controlling investor in the enterprise may make a claim under Article 1116).

²² Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties. See, e.g., Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT'L L.J. 71, 77, 78 (1965).

²³ See *supra* ¶ 5.

²⁴ Under Article 1121, a shareholder that owns or controls an enterprise and the enterprise itself must waive their rights to pursue damages in other forums. A minority non-controlling shareholder does not have the ability to compel an enterprise to submit such a waiver.

NAFTA Party could then be forced to defend against such claims in separate, consecutive proceedings, risking duplicative awards for the same loss or damage arising from the same breach.

Articles 1116 and 1117 Require Proximate Causation, Not A Lesser Standard

19. Finally, an investor has standing to bring a claim under Article 1116 for direct loss or damage, or under Article 1117 for indirect loss or damage, only when “the investor has incurred loss or damage by reason of or arising out of, that breach.”²⁵ The United States disagrees with the claimant that “the ordinary meaning of ‘arising out of’ and even ‘by reason of’ is obviously broader than proximate or direct causation.”²⁶ The ordinary meaning of these terms, as has been repeatedly recognized by international tribunals, is a reference to the customary international law rule of proximate cause.²⁷

20. In sum, a minority non-controlling shareholder may not bring a claim under the NAFTA for loss or damage incurred directly by an enterprise. A minority non-controlling shareholder has standing to bring a claim only for loss or damage to itself proximately caused by a breach.

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Respectfully submitted,

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²⁵ NAFTA art. 1116(1).

²⁶ Claimant’s Reply ¶ 25.

²⁷ A detailed analysis of international decisions construing the terms “by reason of” and “arising out of” in the NAFTA in particular and in international claims agreements in general is set forth the United States’ Reply on Jurisdiction, Admissibility and the Proposed Amendment in *Methanex Corp. v. United States* at pages 9-14 (available at <http://www.state.gov/documents/organization/3968.pdf>), and its Rejoinder on Jurisdiction, Admissibility and the Proposed Amendment at pages 11-14 (available at <http://www.state.gov/documents/organization/6040.pdf>).