Investment Disputes under NAFTA

An Annotated Guide to NAFTA Chapter 11

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KLUWER LAW INTERNATIONAL
# TABLE OF CONTENTS

## GENERAL SECTION

<table>
<thead>
<tr>
<th>Preface</th>
<th>General Section 15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abbreviations</td>
<td>General Section 17</td>
</tr>
<tr>
<td>Notes on Sources</td>
<td>General Section 19</td>
</tr>
<tr>
<td>Introduction</td>
<td>General Section 23</td>
</tr>
</tbody>
</table>

## ANNOTATIONS OF ARTICLES AND ANNEXES

### Section A - Investment

**Article 1101 - Scope and Coverage**

I. Negotiating Text
   - A. Article 1101, Paragraph 1 - "Measures" 1101-1
   - B. Article 1101, Paragraph 1 - "Adopted or Maintained by a Party" 1101-1
   - C. Article 1101, Paragraph 1 - "Relating to" 1101-2
   - D. Article 1101, Paragraph 1 - "In the Territory" 1101-2
   - E. Article 1101, Paragraph 2 1101-5
   - F. Article 1101, Paragraph 3 1101-6
   - G. Article 1101, Paragraph 4 1101-7

II. Commentary
   - A. Introduction 1101-9
   - B. Scope and Coverage: Jurisdiction and Preliminary Objections 1101-19
   - C. Article 1101, Paragraph 1 - Measures Relating to Investors and Investments 1101-27
   - D. Article 1101, Paragraph 2 - Exclusive Right to Perform Certain Economic Activities 1101-43
   - E. Article 1101, Paragraph 3 - Relationship to Chapter 14 1101-44
   - F. Article 1101, Paragraph 4 - Services for a Public Purpose 1101-47

### Article 1102 - National Treatment

I. Negotiating Text 1102-1

II. Commentary 1102-10
**Table of Contents**

A. Background ........................................... 1102–10
B. Like Circumstances .................................... 1102–20
C. “Treatment” - *De Jure and De Facto* Discrimination 1102–35
D. “Treatment” “No Less Favorable” ...................... 1102–44
E. State or Provincial Government Measures ............ 1102–46
F. National Treatment Claims in Pending Cases ......... 1102–49

III. Cross-References ...................................... 1102–51
IV. Secondary Material ..................................... 1102–51

**Article 1103 - Most-Favored-Nation Treatment**

I. Negotiating Text ........................................ 1103–1
II. Commentary ............................................ 1103–6
   A. Introduction ....................................... 1103–6
   B. MFN Jurisprudence in the NAFTA Context ......... 1103–9
   C. MFN Jurisprudence in Non-NAFTA Investor- State Arbitrations .................. 1103–12
   D. Questions Raised by MFN Jurisprudence ............ 1103–22

III. Cross-References ...................................... 1103–24
IV. Secondary Material ..................................... 1103–25

**Article 1104 - Standard of Treatment**

I. Negotiating Text ........................................ 1104–1
II. Commentary ............................................ 1104–3
III. Cross-References ...................................... 1104–6
IV. Secondary Material ..................................... 1104–7

**Article 1105 - Minimum Standard of Treatment**

I. Negotiating Text ........................................ 1105–1
II. Commentary ............................................ 1105–5
   A. Article 1105, Paragraph 1 - The Minimum Standard of Treatment .......... 1105–6
   B. Article 1105, Paragraphs 2 and 3 - Losses Suffered Owing to Armed Conflict or Civil Strife .... 1105–51

III. Cross-References ...................................... 1105–52
IV. Secondary Material ..................................... 1105–53

**Article 1106 - Performance Requirements**

I. Negotiating Text ........................................ 1106–2
II. Commentary ............................................ 1106–5
   A. Definition of Performance Requirements .......... 1106–5
   B. Prohibitions on Performance Requirements in Trade and Investment Agreements Generally .... 1106–7
   C. NAFTA Prohibition on Performance Requirements ........................................ 1106–10

III. Cross-References ...................................... 1106–17
IV. Secondary Material ..................................... 1106–17
### Table of Contents

**Article 1107 – Senior Management and Boards of Directors**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Negotiating Text</td>
<td>1107-1</td>
</tr>
<tr>
<td>II</td>
<td>Commentary</td>
<td>1107-2</td>
</tr>
<tr>
<td>III</td>
<td>Cross-References</td>
<td>1107-4</td>
</tr>
<tr>
<td>IV</td>
<td>Secondary Material</td>
<td>1107-4</td>
</tr>
</tbody>
</table>

**Article 1108 – Reservations and Exceptions**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Negotiating Text</td>
<td>1108-2</td>
</tr>
<tr>
<td>II</td>
<td>Commentary</td>
<td>1108-11</td>
</tr>
<tr>
<td>A</td>
<td>Reservations and Exceptions Under Article 1108</td>
<td>1108-11</td>
</tr>
<tr>
<td>B</td>
<td>General Exceptions Under Chapter 21</td>
<td>1108-19</td>
</tr>
<tr>
<td>C</td>
<td>NAFTA Jurisprudence on Article 1108</td>
<td>1108-23</td>
</tr>
<tr>
<td>III</td>
<td>Cross-References</td>
<td>1108-26</td>
</tr>
<tr>
<td>IV</td>
<td>Secondary Material</td>
<td>1108-27</td>
</tr>
</tbody>
</table>

**Article 1109 – Transfers**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Negotiating Text</td>
<td>1109-4</td>
</tr>
<tr>
<td>II</td>
<td>Commentary</td>
<td>1109-4</td>
</tr>
<tr>
<td>A</td>
<td>Objectives of Transfer Provisions</td>
<td>1109-5</td>
</tr>
<tr>
<td>B</td>
<td>Treaty Provisions</td>
<td>1109-5</td>
</tr>
<tr>
<td>C</td>
<td>NAFTA Article 1109</td>
<td>1109-7</td>
</tr>
<tr>
<td>D</td>
<td>Balance of Payments Issues</td>
<td>1109-9</td>
</tr>
<tr>
<td>E</td>
<td>Provisions in Current Model Investment Treaties</td>
<td>1109-10</td>
</tr>
<tr>
<td>III</td>
<td>Cross-References</td>
<td>1109-12</td>
</tr>
<tr>
<td>IV</td>
<td>Secondary Material</td>
<td>1109-13</td>
</tr>
</tbody>
</table>

**Article 1110 – Expropriation and Compensation**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Negotiating Text</td>
<td>1110-2</td>
</tr>
<tr>
<td>II</td>
<td>Commentary</td>
<td>1110-8</td>
</tr>
<tr>
<td>A</td>
<td>Overview – History and Sources of Law</td>
<td>1110-9</td>
</tr>
<tr>
<td>B</td>
<td>Scope of Obligation</td>
<td>1110-12</td>
</tr>
<tr>
<td>C</td>
<td>Approach to Article 1110 (1)(a) to (d)</td>
<td>1110-30</td>
</tr>
<tr>
<td>D</td>
<td>Interests Subject to Expropriation</td>
<td>1110-26</td>
</tr>
<tr>
<td>E</td>
<td>Transfer of Expropriated Investment</td>
<td>1110-40</td>
</tr>
<tr>
<td>F</td>
<td>Investment in its Territory</td>
<td>1110-41</td>
</tr>
<tr>
<td>G</td>
<td>Intent</td>
<td>1110-42</td>
</tr>
<tr>
<td>H</td>
<td>Compensation: Article 1110(2)(6)</td>
<td>1110-44</td>
</tr>
<tr>
<td>I</td>
<td>Regulation and Expropriation</td>
<td>1110-49</td>
</tr>
<tr>
<td>J</td>
<td>Taxation as Expropriation</td>
<td>1110-55</td>
</tr>
<tr>
<td>K</td>
<td>Article 1110(7)</td>
<td>1110-56</td>
</tr>
<tr>
<td>L</td>
<td>Article 1110(8)</td>
<td>1110-57</td>
</tr>
<tr>
<td>III</td>
<td>Cross-references</td>
<td>1110-58</td>
</tr>
<tr>
<td>IV</td>
<td>Secondary Material</td>
<td>1110-58</td>
</tr>
</tbody>
</table>
Table of Contents

Article 1111 – Special Formalities and Information Requirements
I. Negotiating Text ........................................ II111–1
II. Commentary ............................................. II111–3
III. Cross-References ...................................... II111–6
IV. Secondary Material ................................. II111–6

Article 1112 – Relation to Other Chapters
I. Negotiating Text ........................................ II112–1
II. Commentary ............................................. II112–3
   A. Article 1112, Paragraph 1 – Inconsistency with
      Other Chapters ....................................... II112–3
   B. Article 1112, Paragraph 2 – Requirements on
      Service Providers .................................... II112–7
III. Cross-References ...................................... II112–7

Article 1113 – Denial of Benefits
I. Negotiating Text ........................................ II113–1
II. Commentary ............................................. II113–4
   A. Criteria and Rationale for Denial of Benefits
      Provisions ............................................ II113–5
   B. Prior Notification .................................... II113–7
   C. Denial of benefits in NAFTA Arbitrations ........ II113–8
   D. Denial of benefits in Non-NAFTA Investor-
      State Arbitrations ................................... II113–9
III. Cross-References ...................................... II113–13
IV. Secondary Material ................................. II113–13

Article 1114 – Environmental Measures
I. Negotiating Text ........................................ II114–1
II. Commentary ............................................. II114–4
   A. The Sovereign Right to Take Environmental
      Measures ............................................. II114–5
   B. The Inappropriateness of Relaxing Health,
      Safety and Environmental Measures to Attract
      Investment ........................................... II114–9
III. Cross-References ...................................... II114–12
IV. Secondary Material ................................. II114–13

Section B – Settlement of Disputes between a Party and an
Investor of Another Party

Article 1115 – Purpose
I. Negotiating Text ........................................ II115–1
II. Commentary ............................................. II115–3
   A. Investment Disputes ............................... II115–5
   B. Equality and Due Process ....................... II115–6
III. Cross-References ...................................... II115–11

4 – General Section

Annotated Guide to NAFTA Chapter 11 (June 2006)
### Table of Contents

**Article 1116 – Claim by an Investor of a Party on its Own Behalf**
- Negotiating Text ........................................... 1116-1
- Commentary .................................................. 1116-4
  - A. Introduction ........................................ 1116-4
  - B. Interplay Between Articles 1116 and 1117 .... 1116-5
  - C. Standing .............................................. 1116-15
  - D. Three-year Limitation Period ..................... 1116-33
- III. Cross-References ................................... 1116-40
- IV. Secondary Material ................................... 1116-40

**Article 1117 – Claim by an Investor of a Party on Behalf of an Enterprise**
- Negotiating Text ........................................... 1117-1
- Commentary .................................................. 1117-3
  - A. Consolidation ........................................ 1117-3
  - B. “An Investment May Not Make a Claim Under this Section” .......... 1117-5
- III. Cross-References ................................... 1117-5
- IV. Secondary Material ................................... 1117-6

**Article 1118 – Settlement of a Claim through Consultation and Negotiation**
- Negotiating Text ........................................... 1118-1
- Commentary .................................................. 1118-2
- III. Secondary Material ................................... 1118-4

**Article 1119 – Notice of Intent to Submit a Claim to Arbitration**
- Negotiating Text ........................................... 1119-1
- Commentary .................................................. 1119-2
  - A. Overview ............................................ 1119-2
  - B. Form of Notice of Intent .......................... 1119-5
  - C. Consideration in Awards ......................... 1119-11
- III. Cross-References ................................... 1119-13

**Article 1120 – Submission of a Claim to Arbitration**
- Annex 1120.1 – Submission of a Claim to Arbitration – Mexico
  - Negotiating Text ........................................... 1120-1
  - Commentary .................................................. 1120-5
    - A. Article 1120 – Application ..................... 1120-5
    - B. Procedural Issues in Chapter 11 Cases ....... 1120-13
  - III. Cross-References ................................... 1120-69
  - IV. Secondary material ................................ 1120-70

**Article 1121 – Conditions Precedent to Submission of a Claim to Arbitration**
- Negotiating Text ........................................... 1121-2
- Commentary .................................................. 1121-9
Table of Contents

A. Introduction and Overview ........................................ 1121–9
B. Claimants' Waiver of the Right to Initiate or
   Continue Relief in Other Fora .......................... 1121–14
C. The Exhaustion of Local Remedies Rule ..................... 1121–28
D. The Exhaustion of Local Remedies Rule in
   NAFTA Arbitrations ....................................... 1121–33

III. Cross-references .............................................. 1121–37
IV. Secondary Material ............................................ 1121–37

Article 1122 – Consent to Arbitration

I. Negotiating Text ................................................. 1122–1
II. Commentary .................................................... 1122–3
III. Cross-References .............................................. 1122–8
IV. Secondary Material ............................................ 1122–9

Article 1123 – Number of Arbitrators and Method of
   Appointment

I. Negotiating Text ................................................. 1123–1
II. Commentary .................................................... 1123–2
   A. Overview .................................................. 1123–2
   B. Number and Nomination of Arbitrators .......... 1123–3
   C. Qualifications and Selection of Arbitrators .... 1123–4
   D. List of NAFTA Chapter II Arbitrators ........ 1123–7
   E. Appointment .............................................. 1123–13
   F. Replacement of Arbitrators ......................... 1123–14
   G. Fees and Expenses ..................................... 1123–15
III. Cross-references .............................................. 1123–17
IV. Secondary Material ............................................ 1123–17

Article 1124 – Constitution of a Tribunal When a Party Fails to
   Appoint an Arbitrator or the Disputing Parties Are
   Unable to Agree on a Presiding Arbitrator

I. Negotiating Text ................................................. 1124–1
II. Commentary .................................................... 1124–2
III. Cross-references .............................................. 1124–4
IV. Secondary Material ............................................ 1124–5

Article 1125 – Agreement to Appointment of Arbitrators

I. Negotiating Text ................................................. 1125–1
II. Commentary .................................................... 1125–2
   A. Consent to Appointment of Arbitrator ........ 1125–2
   B. Objection to Presiding Arbitrator Based On
      Nationality .............................................. 1125–3
   C. Objections Based on Grounds Other Than
      Nationality ............................................. 1125–4
   D. Applicable Arbitral Rules ......................... 1125–4
   E. Challenge Procedure ................................. 1125–5

6 - General Section

Annotated Guide to NAFTA Chapter II (June 2006)
Table of Contents

F. Impartiality and Independence .................................. 1125–7
G. NAFTA Chapter 11 Examples .................................... 1125–9
III. Cross-references ................................................... 1125–13
IV. Secondary Material ............................................... 1125–13

Article 1126 – Consolidation
I. Negotiating Text .................................................... 1126–2
II. Commentary ......................................................... 1126–3
   A. Overview ...................................................... 1126–4
   B. Rationale .................................................... 1126–4
   C. Procedure .................................................... 1126–6
   D. Model Treaties ............................................... 1126–16
III. Cross-references .................................................. 1126–16
IV. Secondary Material ............................................... 1126–17

Article 1127 – Notice
I. Negotiating Text .................................................... 1127–1
II. Commentary ......................................................... 1127–1
III. Cross-references .................................................. 1127–2

Article 1128 – Participation by a Party
I. Negotiating Text .................................................... 1128–1
II. Commentary ......................................................... 1128–1
III. Cross-references .................................................. 1128–4
IV. Secondary Material ............................................... 1128–5

Article 1129 – Documents
I. Negotiating Text .................................................... 1129–1
II. Commentary ......................................................... 1129–1
III. Cross-references .................................................. 1129–2
IV. Secondary Material ............................................... 1129–2

Article 1130 – Place of Arbitration
I. Negotiating Text .................................................... 1130–1
II. Commentary ......................................................... 1130–2
   A. Overview ...................................................... 1130–2
   B. Selecting the Place of Arbitration .......................... 1130–3
   C. Where Hearings Are Held ................................... 1130–17
   D. Changing the Place of Arbitration ......................... 1130–18
   E. Summary of Decisions ........................................ 1130–18
III. Cross-references .................................................. 1130–22
IV. Secondary Material ............................................... 1130–22

Article 1131 – Governing Law
I. Negotiating Text .................................................... 1131–1
II. Commentary ......................................................... 1131–2
   A. Article 1131, Paragraph 1 – Governing Law .............. 1131–3
Table of Contents

B. Article 1131, Paragraph 2 Interpretation of the Free Trade Commission ............... 1131–27
III. Cross-references ........................................... 1131–36
IV. Secondary Material ........................................... 1131–36

Article 1132 – Interpretation of Annexes
I. Negotiating Text .............................................. 1132–1
II. Commentary ................................................... 1132–3
III. Cross-references .............................................. 1132–5

Article 1133 – Expert Reports
I. Negotiating Text .............................................. 1133–1
II. Commentary ................................................... 1133–2
III. Cross-references .............................................. 1133–3
IV. Secondary Material ........................................... 1133–4

Article 1134 – Interim Measures of Protection
I. Negotiating Text .............................................. 1134–1
II. Commentary ................................................... 1134–2
   A. Overview ................................................... 1134–2
   B. Types of Interim Measures ................................ 1134–3
   C. Applicable Arbitration Rules ......................... 1134–4
   D. Article 1134 Interim Measures ....................... 1134–7
   E. Procedural Issues ........................................ 1134–11
   F. Enforcement Questions .................................. 1134–14
III. Cross-references .............................................. 1134–14
IV. Secondary Material ........................................... 1134–15

Article 1135 – Final Award
I. Negotiating Text .............................................. 1135–1
II. Commentary ................................................... 1135–2
   A. Introduction ............................................ 1135–3
   B. Types of Award .......................................... 1135–4
   C. Final Awards ............................................. 1135–6
   D. Bifurcation of Proceedings ............................ 1135–8
   E. Formal Requirements for Award .............. 1135–11
   F. Principles Governing Compensation .......... 1135–13
   G. Monetary Damages ..................................... 1135–17
   H. Restitution .............................................. 1135–25
   I. Costs of Arbitration ................................... 1135–26
   J. Interest ................................................... 1135–38
   K. No Punitive Damages .................................. 1135–42
   L. Payment to Enterprise ................................ 1135–42
   M. Post-Award Proceedings ............................. 1135–43
III. Cross-references .............................................. 1135–47
IV. Secondary Material ........................................... 1135–48

8 – General Section

Annotated Guide to NAFTA Chapter 11 (June 2006)
Table of Contents

D. G7 Currency ........................................ 1139-7
E. ICSID, ICSID Convention, Inter-American
   Convention ........................................... 1139-7
F. Investment ......................................... 1139-7
G. Investment of an investor of a Party .......... 1139-17
H. Investor of a Party ................................. 1139-18
I. Investor of a non-Party ............................ 1139-21
J. New York Convention ............................... 1139-21
K. Secretary-General .................................. 1139-21
L. Transfers ........................................... 1139-21
M. Tribunal ............................................ 1139-22
N. UNCITRAL Arbitration Rules .................... 1139-22

II. Commentary ......................................... 1139-22
   A. Investment ....................................... 1139-23
   B. Investor of a Party .............................. 1139-30

III. Cross-references .................................. 1139-35

IV. Secondary Material ............................... 1139-35

APPENDICES

Schedules
   - Notes of Interpretation on Access to Documents
     and Minimum Standard of Treatment in
     Accordance with International Law
       (July 31, 2001) ...................................... Appendices-1
   - Statement of the Free Trade Commission
     on Non-disputing Party Participation
       (October 7, 2003) .................................... Appendices-3
   - Statement of the Free Trade Commission on
     Notices of Intent to Submit a Claim to Arbitration
       (October 7, 2003) .................................... Appendices-5
   - Statement of Canada on Open Hearings
     in NAFTA Chapter Eleven Arbitrations (October
     7, 2003) ............................................... Appendices-11
   - Statement of United States on Open Hearings
     in NAFTA Chapter Eleven Arbitrations (October
     7, 2003) ............................................... Appendices-13
   - NAFTA Free Trade Commission Joint
     Statement (Mexico Endorses Open Hearings)
       (July 16, 2004) ...................................... Appendices-11

Comprehensive Bibliography ........................ Appendices-15

Table of Cases ....................................... Appendices-47

Index ................................................... Appendices-55
Art. 1116

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.” The gist of the provision did not change, but with those amendments it reached its final form.

II. COMMENTARY

CONTENTS

A. Introduction ............................. 4
B. Interplay Between Articles 1116 and 1117 ............................. 5
   1. The Principle of Non-responsibility ..................................... 5
   2. The Barcelona Traction Problem ............................................ 6
   3. Derivative Damages ......................................................... 7
   4. Minority Shareholders ..................................................... 11
   5. Multiple Claimants ....................................................... 12
C. Standing .................................... 15
   1. “Loss or Damage by Reason of, or Arising out of, that
      Breach” ........................................................................... 15
   2. Continuous Nationality Rule ............................................... 20
   3. Dual Nationality ............................................................... 24
   4. Jurisdiction Ratione Temporis ............................................. 28
   5. Relationship Between Chapter 15 (Monopolies) and Section
      A of Chapter 11 .................................................................. 32
   6. Nature of the Rights Asserted ............................................. 35
D. Three-year Limitation Period .............................. 36b

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 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.\footnote{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.}

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."

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. . .\footnote{See U.S. Statement of Administrative Action, at 145.} Under the law of State responsibility for injuries
Art. 1116

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. 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.

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. 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. 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

18. The area of international human rights law is an exception to this norm.
20. See the commentary under Article 1117 for discussion of the ICSID Convention's approach to non-responsibility.

6 – 1116

Annotated Guide to NAFTA Chapter 11 (June 2006)
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 damages to the enterprise itself

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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 Sp.A. (U.S. v. Italy)* [1989] I.C.J. 15, 23, 48-42. 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.

Annotated Guide to NAFTA Chapter 11 (March 2008)