Investment Disputes under NAFTA

An Annotated Guide to NAFTA Chapter 11

By

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KLUWER LAW INTERNATIONAL
# TABLE OF CONTENTS

## GENERAL SECTION

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>General Section 15</td>
</tr>
<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

<table>
<thead>
<tr>
<th>I. Negotiating Text</th>
<th>1101-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Article 1101, Paragraph 1 - “Measures”</td>
<td>1101-1</td>
</tr>
<tr>
<td>B. Article 1101, Paragraph 1 - “Adopted or Maintained by a Party”</td>
<td>1101-1</td>
</tr>
<tr>
<td>C. Article 1101, Paragraph 1 - “Relating to”</td>
<td>1101-2</td>
</tr>
<tr>
<td>D. Article 1101, Paragraph 1 - “In the Territory”</td>
<td>1101-2</td>
</tr>
<tr>
<td>E. Article 1101, Paragraph 2</td>
<td>1101-5</td>
</tr>
<tr>
<td>F. Article 1101, Paragraph 3</td>
<td>1101-6</td>
</tr>
<tr>
<td>G. Article 1101, Paragraph 4</td>
<td>1101-7</td>
</tr>
</tbody>
</table>

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

### Article 1102 - National Treatment

<table>
<thead>
<tr>
<th>I. Negotiating Text</th>
<th>1102-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>II. Commentary</td>
<td>1102-10</td>
</tr>
</tbody>
</table>

Annotated Guide to NAFTA Chapter 11 (June 2006)
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

2 - General Section

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

Article 1107 – Senior Management and Boards of Directors
I. Negotiating Text .................................................. 1107-1
II. Commentary ..................................................... 1107-2
III. Cross-References ............................................ 1107-4
IV. Secondary Material ........................................... 1107-4

Article 1108 – Reservations and Exceptions
I. Negotiating Text .................................................. 1108-2
II. Commentary ..................................................... 1108-11
   A. Reservations and Exceptions Under Article 1108 ............ 1108-11
   B. General Exceptions Under Chapter 21 ......................... 1108-19
   C. NAFTA Jurisprudence on Article 1108 ....................... 1108-23
III. Cross-References ............................................ 1108-26
IV. Secondary Material ........................................... 1108-27

Article 1109 – Transfers
I. Negotiating Text .................................................. 1109-1
II. Commentary ..................................................... 1109-4
   A. Objectives of Transfer Provisions ............................ 1109-5
   B. Treaty Provisions ............................................ 1109-5
   C. NAFTA Article 1109 ......................................... 1109-7
   D. Balance of Payments Issues ................................ 1109-9
   E. Provisions in Current Model Investment Treaties ........ 1109-10
III. Cross-References ............................................ 1109-12
IV. Secondary Material ........................................... 1109-13

Article 1110 – Expropriation and Compensation
I. Negotiating Text .................................................. 1110-2
II. Commentary ..................................................... 1110-8
   A. Overview – History and Sources of Law ..................... 1110-9
   B. Scope of Obligation ........................................... 1110-12
   C. Approach to Article 1110(1)(a) to (d) ....................... 1110-30
   D. Interests Subject to Expropriation ......................... 1110-36
   E. Transfer of Expropriated Investment ....................... 1110-40
   F. Investment in its Territory ................................ 1110-41
   G. Intent .......................................................... 1110-42
   H. Compensation: Article 1110(2) (6) ......................... 1110-44
   I. Regulation and Expropriation ................................ 1110-49
   J. Taxation as Expropriation ................................... 1110-55
   K. Article 1110(7) ................................................ 1110-56
   L. Article 1110(8) ................................................ 1110-57
III. Cross-references ............................................. 1110-58
IV. Secondary Material ........................................... 1110-58
### Article 1111 - Special Formalities and Information Requirements

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1111-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1111-3</td>
</tr>
<tr>
<td>III. Cross-References</td>
<td>1111-6</td>
</tr>
<tr>
<td>IV. Secondary Material</td>
<td>1111-6</td>
</tr>
</tbody>
</table>

### Article 1112 - Relation to Other Chapters

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1112-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1112-3</td>
</tr>
<tr>
<td>A. Article 1112, Paragraph 1 - Inconsistency with Other Chapters</td>
<td>1112-3</td>
</tr>
<tr>
<td>B. Article 1112, Paragraph 2 - Requirements on Service Providers</td>
<td>1112-7</td>
</tr>
<tr>
<td>III. Cross-References</td>
<td>1112-7</td>
</tr>
</tbody>
</table>

### Article 1113 - Denial of Benefits

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1113-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1113-4</td>
</tr>
<tr>
<td>A. Criteria and Rationale for Denial of Benefits Provisions</td>
<td>1113-5</td>
</tr>
<tr>
<td>B. Prior Notification</td>
<td>1113-7</td>
</tr>
<tr>
<td>C. Denial of benefits in NAFTA Arbitrations</td>
<td>1113-8</td>
</tr>
<tr>
<td>D. Denial of benefits in Non-NAFTA Investor-State Arbitrations</td>
<td>1113-9</td>
</tr>
<tr>
<td>III. Cross-References</td>
<td>1113-13</td>
</tr>
<tr>
<td>IV. Secondary Material</td>
<td>1113-13</td>
</tr>
</tbody>
</table>

### Article 1114 - Environmental Measures

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1114-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1114-4</td>
</tr>
<tr>
<td>A. The Sovereign Right to Take Environmental Measures</td>
<td>1114-5</td>
</tr>
<tr>
<td>B. The Inappropriateness of Relaxing Health, Safety and Environmental Measures to Attract Investment</td>
<td>1114-9</td>
</tr>
<tr>
<td>III. Cross-References</td>
<td>1114-12</td>
</tr>
<tr>
<td>IV. Secondary Material</td>
<td>1114-13</td>
</tr>
</tbody>
</table>

### Article 1115 - Purpose

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1115-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1115-3</td>
</tr>
<tr>
<td>A. Investment Disputes</td>
<td>1115-5</td>
</tr>
<tr>
<td>B. Equality and Due Process</td>
<td>1115-6</td>
</tr>
<tr>
<td>III. Cross-References</td>
<td>1115-11</td>
</tr>
</tbody>
</table>
Table of Contents

Article 1116 - Claim by an Investor of a Party on its Own Behalf
I. Negotiating Text .................................................. 1116-1
II. 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
I. Negotiating Text .................................................. 1117-1
II. 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
I. Negotiating Text .................................................. 1118-1
II. Commentary .......................................................... 1118-2
III. Secondary Material ............................................. 1118-4

Article 1119 - Notice of Intent to Submit a Claim to Arbitration
I. Negotiating Text .................................................. 1119-1
II. 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
I. Negotiating Text .................................................. 1120-1
II. 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
I. Negotiating Text .................................................. 1121-2
II. Commentary .......................................................... 1121-9

Annotated Guide to NAFTA Chapter 11 (June 2009)  General Section - 5
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 11 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
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

---

Annotated Guide to NAFTA Chapter 11 (June 2006)
# 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
### Article 1136 – Finality and Enforcement of an Award

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1136-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1136-3</td>
</tr>
<tr>
<td>A. Introduction</td>
<td>1136-4</td>
</tr>
<tr>
<td>B. Precedential Value of Awards</td>
<td>1136-4</td>
</tr>
<tr>
<td>C. Compliance with Awards</td>
<td>1136-6</td>
</tr>
<tr>
<td>D. Set-Aside and Annulment of Awards</td>
<td>1136-7</td>
</tr>
<tr>
<td>E. Enforcement of Awards</td>
<td>1136-35</td>
</tr>
</tbody>
</table>

### Article 1137 – General

#### Annex 1137.2 – Service of Documents on a Party Under Section B

#### Annex 1137.4 – Publication of an Award

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1137-2</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1137-5</td>
</tr>
<tr>
<td>A. Time When a Claim is Submitted to Arbitration</td>
<td>1137-5</td>
</tr>
<tr>
<td>B. Service of Documents</td>
<td>1137-7</td>
</tr>
<tr>
<td>C. Receipts under Insurance or Guarantee Contracts</td>
<td>1137-7</td>
</tr>
<tr>
<td>D. Publication of an Award</td>
<td>1137-8</td>
</tr>
</tbody>
</table>

### Article 1138 – Exclusions

#### Annex 1138.2 – Exclusions from Dispute Settlement

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating History</td>
<td>1138-1</td>
</tr>
<tr>
<td>II. Commentary</td>
<td>1138-5</td>
</tr>
<tr>
<td>A. The Non-Applicability of Chapter 11 to Acquisition of Investments Challenged on National Security Grounds</td>
<td>1138-5</td>
</tr>
<tr>
<td>B. The Non-Applicability of Chapter 11 to Acquisitions of Investments Covered by Investment Review Legislation</td>
<td>1138-8</td>
</tr>
</tbody>
</table>

### Section C – Definitions

#### Article 1139 – Definitions

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Negotiating Text</td>
<td>1139-2</td>
</tr>
<tr>
<td>A. Disputing Investor, Disputing Parties, Disputing Party</td>
<td>1139-3</td>
</tr>
<tr>
<td>B. Enterprise, Enterprise of a Party</td>
<td>1139-4</td>
</tr>
<tr>
<td>C. Equity or Debt Securities</td>
<td>1139-7</td>
</tr>
</tbody>
</table>

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 references ........................................ 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

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

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

Index .......................................................... Appendices-55

10-14 - General Section

Annotated Guide to NAFTA Chapter 11 (June 2006)
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. 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. 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. 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.”

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 Article 1117. Mondev had brought its claim

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.


26. Id. at ¶ 80.

27. Id.