

**IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL RULES OF 1976**

BETWEEN:

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE, INC.**

Claimants/Investors

AND:

GOVERNMENT OF CANADA

Respondent

**INVESTORS' RESPONSE
TO THE UNITED STATES'
1128 SUBMISSION**

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1. The Investors file this Reply to the United States of America's Article 1128 Submission dated December 29, 2017.

I. REFLECTIVE LOSS IS RECOVERABLE UNDER ARTICLE 1116

2. The United States raises no new arguments in its Article 1128 Submission. All of the United States' substantive arguments have already been raised by Canada and addressed by the Investors.
3. Substantially, the United States advances the same argument as Canada, suggesting that Article 1116 does not provide compensation for reflective loss.¹ This is neither a new argument, nor persuasive. As explained in the Investors' Reply Memorial on Damages, there is nothing in the ordinary meaning of Article 1116 to suggest it excludes the reflective loss incurred by an investor as a shareholder of an enterprise.² To the contrary, reflective loss is clearly included in the scope of the damages recoverable under Article 1116 when read together with Article 1121(1), its companion provision.³ Article 1121(1) lists the conditions precedent to submitting a claim to arbitration under Article 1116, and specifically contemplates that an investor's claim under Article 1116 can include a claim "*for loss or damage to an interest in an enterprise that the investor owns or controls directly or indirectly.*" In other words, a claim under Article 1116 can include an investor's claim for reflective or derivative loss.
4. Repeating Canada's argument, the United States submits that allowing a claim for indirect loss under Article 1116 would render Article 1117 superfluous.⁴ The United States' contention is incorrect, as it minimizes the important differences between Articles 1116 and 1117, which remain when these Articles are properly interpreted.

¹ 1128 Submission of the United States of America, dated December 29, 2017, paras. 4, 6, 12.

² Investors' Reply Damages Memorial, dated August 23, 2017, para. 350.

³ Investors' Reply Damages Memorial, dated August 23, 2017, para. 351.

⁴ 1128 Submission of the United States of America, dated December 29, 2017, para. 12; Canada's Counter Memorial on Damages, dated June 9, 2017, para. 20; Canada's Rejoinder Memorial on Damages, dated November 6, 2017, para. 32.

5. Article 1117 provides domestic enterprises a remedy for violations of Section A of Chapter 11 of NAFTA, conditional on a claim being made on their behalf of an enterprise by an investor of another NAFTA Party. However, in a situation where the enterprise is not operational, such as where the state has destroyed the enterprise, it makes no sense for the controlling shareholder to bring a claim on behalf of the enterprise under Article 1117, as the award of damages would need to be made either to an entity which no longer exists, or that continues to exist under the control of the expropriating State.
6. The United States' observation that no NAFTA tribunal has awarded damages for indirect loss under Article 1116⁵ is meaningless. None of the cases cited by the United States involve a decision to not award damages because the damages were indirect. To the contrary, all of the decisions fundamentally agreed with the principle that Article 1116 was not limited to compensation for direct damage.
7. The Tribunal in *Pope and Talbot v. Canada*, for example, declined to award damages because the Claimants were unable to show how a week-long shutdown of their production facility led to lost profits.⁶ In addressing whether reflective loss may be claimed under Article 1116, however, the Tribunal was unambiguous. It affirmed that "*it could scarcely be clearer that claims may be brought under 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns.*"⁷ Similarly, the Tribunal in *GAMI Investments, Inc. v. The Government of the United Mexican States* held that GAMI had standing to bring a claim under Article 1116.⁸ The Tribunal in *United Parcel Service v. Government of Canada* also agreed that claims for reflective loss were "*properly brought under article 1116*", and "*agree[d] as well that the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an entirely formal*

⁵ 1128 Submission of the United States of America, dated December 29, 2017, para. 21.

⁶ *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages (May 31, 2002) (*Investors' Authorities, Tab CA39*) (*Pope & Talbot*).

⁷ *Pope & Talbot*, para. 80.

⁸ *GAMI Investments, Inc v. United Mexican States*, NAFTA/UNCITRAL, Final Award, paras. 116-121 (Nov 15, 2004) (*Investors' Authorities, Tab CA15*) (*GAMI*), paras. 29, 30, 33, and 120.

*one, without any significant implication for the substance of the claims or the rights of the parties”.*⁹

8. Like Canada, the United States contends that by simply repeatedly submitting the same strained argument regarding the interpretation of Articles 1116(1) and 1117(1), the Parties to the NAFTA have established some form of “subsequent agreement or subsequent practice” under the Vienna Convention on the law of Treaties.¹⁰ This is wrong for two reasons. First, the prescribed mechanism for the NAFTA Parties to agree on a matter of interpretation is through the Free Trade Commission. Under Article 2001 of NAFTA, it is the Commission that “shall resolve disputes that may arise” regarding interpretation or application of the NAFTA, and it is only an interpretation of a provision by the Commission that is binding on a tribunal established under Chapter Eleven. Second, this contention has been rejected by every tribunal that has considered it.¹¹ The United States is thus trying to transform a consistently failed argument into a governing principle, on the absurd basis that it has already lost the same argument many times before. Moreover, a major change to the settled interpretation of Articles 1116 and 1117 must be implemented through unequivocal Notes of Interpretation issued by the Free Trade Commission, and not by invocation of repeatedly rejected self-serving submissions advanced by the NAFTA Parties in prior cases.
9. The Investors’ decision to bring their claim under Article 1116 was not an “error”, as the United States presumes to characterize it.¹² Given the clear and settled meaning of Article 1116, on which the Investors are entitled to rely, they plainly have standing to bring a claim for loss under Article 1116 in regard to their interest in their enterprise, Bilcon of Nova Scotia.

⁹ *United Parcel Service v. Government of Canada*, ICSID Case No. UNCT/02/1, para. 35 (*Investors’ Authorities, Tab CA89*) (UPS).

¹⁰ 1128 Submission of the United States of America, dated December 29, 2017, para. 5; Canada’s Rejoinder Memorial on Damages, dated November 6, 2017, para. 39.

¹¹ UPS, paras. 364-377.

¹² 1128 Submission of the United States of America, dated December 29, 2017, para. 22.

10. Should the Tribunal prefer to depart from the settled interpretation of Article 1116, and conclude that Article 1116 precludes recovery of reflective loss, then it may simply treat the Investors' claim as made under Article 1117. While the United States selectively refers to *Mondev International Ltd v. United States of America*,¹³ it omits to note that the *Mondev* Tribunal acknowledged: “[t]here are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties.”¹⁴
11. In this case each of these conditions has been met by the Investors. As in *Mondev*, the Investors included an Article 1121 waiver, not only on their own behalf but also on behalf of their enterprise, Bilcon of Nova Scotia. The substance of the claim has been clearly and completely disclosed from the start, and there is no prejudice of any kind to Canada.
12. In contrast, barring the Investors' Article 1116 claim at this late stage, ten years later, would be grossly unfair to the Investors. Canada has raised this argument for the first time in its Counter-Memorial on Damages. Having failed to raise it in any way in the Jurisdiction and Liability phase of these proceedings, let alone at the outset, Canada ought now to be estopped from even raising the argument.

II. DIRECT CAUSALITY AND PROXIMITY BETWEEN CANADA'S WRONGS AND THE INVESTORS' LOSS

13. The Investors do not contest the United States' assertion that there needs to be a causal nexus between Canada's wrongful conduct and the Investors' loss,¹⁵ and that the resulting loss needs to be proximate to Canada's wrongful conduct. Indeed, that is exactly what the Investors' evidence has established. Citing the *Administrative Decision 2* of November 1, 1923 of the US-German Mixed

¹³ 1128 Submission of the United States of America, dated December 29, 2017, para. 21.

¹⁴ *Mondev International Ltd v. United States of America*, NAFTA/ICSID Case No ARB(AF)/99/02, Award, para. 86 (*Investors' Authorities*, Tab CA40).

¹⁵ 1128 Submission of the United States of America, dated December 29, 2017, para. 24.

Commission, the Tribunal in *Lemire v. Ukraine* affirmed the principle that the fact of multiple steps between Canada's wrongful conduct and the Investors' loss does not bar full reparation of their loss:

*It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. – It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no breach in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act.*¹⁶

14. As succinctly noted by the *Lemire* Tribunal, "proof of causation requires (A) cause, (B) effect, and (C) a logical link between the two to be established."¹⁷ In this arbitration, the evidence establishes clearly that but for Canada's wrongdoing, the Investors would have operated a profitable quarry at Whites Point.
15. The evidence confirms that there was no legal or regulatory impediment to building the Quarry. There was no valid basis for the JRP to recommend against approval. There was no reasonable basis for the Ministers to deny approval. And there can be no doubt, based on the evidence, that the Investors would have secured all permits and authorizations necessary to build and operate the Quarry.
16. The evidence also clearly confirms that the Quarry would have been built and operated, and it confirms the quality and quantity of stone at Whites Point, which the Investors had the established ability to sell directly into the mature and stable market of New York City.
17. Although there is no single formula in investment arbitration to guide tribunals in assessing causality with respect to damages, the Tribunal in *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* provides a useful example of how it was done in the context of forward-looking damages and multiple links

¹⁶ *Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011 (*Investors' Authorities, Tab CA325 (Lemire)*).

¹⁷ *Ibid*, para. 157.

between a state's breach and an investor's loss.¹⁸ In that case, the Respondent was found liable under Article 10(1) of the *Energy Charter Treaty* for failing to provide licenses under four hydrocarbon exploration agreements between the Claimant and the Respondent's State Committee for Oil and Gas. The Tribunal analyzed the issue this way:

77. The Tribunal thus considers that there are four steps to pass before cash flow can be expected; financing of the exploration, finding hydrocarbons, financing the extraction; and the sale. To determine whether the DCF method can be applied to assess the value of the licenses, the following questions need to be analysed:

(1) Was the Claimant able to finance the exploration for hydrocarbons?

(2) Would the exploration have been successful, i.e. Claimant found oil & gas reserves which could be exploited?

(3) Would Claimant have been able to finance and perform the exploitation of any hydrocarbon reserves found?

(4) Would it have been possible to sell any hydrocarbons produced?

18. Although the Tribunal in *Al Bahloul* concluded that the Claimant had not, on a balance of probabilities, discharged its burden of proof, it did so only because of a lack of evidence.¹⁹ This is in sharp contrast to the overwhelming body of evidence in the present case, which goes far beyond the mere balance of probabilities required.²⁰

19. For its part, Canada has a much higher burden to overcome. As explained by the Tribunal in *Gemplus*:

[I]t is a "general legal principle [that] when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it

¹⁸ International Law Commission's Articles on State Responsibility, Commentary 10 of Article 31, p. 93 (*Investors' Authorities*, Tab CA76); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008) (*Investors' Authorities*, Tab CA469) (*Al-Bahloul*).

¹⁹ *Al-Bahloul*, paras. 79-99.

²⁰ *Gold Reserve v. Venezuela Award*, para. 685 (*Investors' Authorities*, Tab CA316); *Khan Resources v. Mongolia*, PCA Case No. 2011-09, Award, para. 375.

*would compound the respondent's wrongs and unfairly defeat the Claimant's claim for compensation.*²¹

20. The *Gemplus* Tribunal further noted:

*it would be wrong in principle to deprive or diminish the Claimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the Respondent's own wrongs. This is not therefore a case where the burden of proof lay exclusively on the Claimants: and, in the Tribunal's view, it was also for the Respondent to prove the contrary.*²²

21. In regard to quantum, the Tribunal in *Crystallex* also held that any uncertainty is to be resolved in favour of the investors, where the uncertainty is the fault of the State:

*In the Tribunal's view, this approach may be particularly warranted if the uncertainty in determining what exactly would have happened is the result of the other party's wrongdoing.*²³

22. In this case, Canada's breaches are not only responsible for the Investors' loss, they are also the direct cause of any evidentiary limitations regarding future lost profits. It is therefore not enough for Canada to raise speculative, hypothetical *possibilities* that might have affected the building, operation, or profitability of the Whites Point Quarry. Rather, it is Canada that must prove there would probably be no profitable Quarry operating at Whites Point. Canada has manifestly failed to do so, while the Investors have established, beyond just a balance of probabilities, that but for the wrongdoing of Canada that constituted breaches of the NAFTA, there would have been a profitable Quarry operating at Whites Point.
23. In paragraph 27 of its Article 1128 Submission, the United States asserts that "[v]aluing damages as of the date of an award, rather than as of the time of the

²¹ *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, 13-92, 13-99 (*Investors' Authorities*, Tab CA321).

²² *Ibid.*, paras. 13-99.

²³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, para. 871 (*Investors' Authorities*, Tab CA317).

breach, could fail to appropriately exclude injuries resulting from events subsequent to the date of breach that lack sufficient causal connection to the breach". In saying this, the United States is wrongly conflating causation of lost profits as a recoverable head of damage and the valuation of the resulting damages. These are distinct concepts. The Investors' evidence clearly establishes the proximity between Canada's wrongful conduct and the lost profit that the Whites Point Quarry would have generated over its lifetime. Since the lost profit was directly and foreseeably caused by Canada's wrongful conduct, the Investors are entitled in law to full reparation of their lost profit as damages.

24. Whether the Investors' lost profits are valued as of the date of Canada's breach of the NAFTA, or the date of the Tribunal's award, depends not on causation, but on the standard of compensation applicable to the breach. The standard of compensation for lost profits in international law is full reparation, as opposed, for example, to a defined standard such as "fair market value at the time of the breach," which applies with regard to expropriation. The *Chorzow Factory* case, to which both the Investors and Canada refer in their submissions, describes the full reparation standard as follows:

*Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation for an act contrary to international law.*²⁴

25. As detailed in the Investors' Reply Damages Memorial (paras. 33ff), many recent awards have confirmed that the "*value which a restitution in kind would bear*" means a value determined as of the date of the Tribunal's award, not the date of Canada's breach of the NAFTA, so that the actual reality of the conditions after the date of breach can be taken into account. The appropriate date to value the Investors' loss is therefore the date of the Tribunal's award, as this is what full

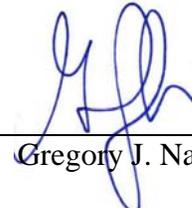
²⁴ *Case Concerning the Factory at Chorzow (Germany v. Poland)*, 1928 PCIJ (ser A) No 17 (September 13, 1928), p. 47 (*Investors' Authorities*, Tab CA327).

reparation requires to put the Investors in the same position they would have been in if Canada had not breached the NAFTA.

III. RESTRICTIONS ON PARALLEL PROCEEDINGS UNDER ARTICLE 1121

26. The United States acknowledges that Article 1121(1)(b) allows an investor to bring a claim to arbitration rather than to the courts of the NAFTA Party that breached its NAFTA obligations. The United States also acknowledges that the Article requires a claimant to waive its “*right to initiate or continue ... any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116,*” for the purpose of avoiding concurrent proceedings and conflicting outcomes. Both of these acknowledgments lead to the conclusion that it is untenable to suggest, as Canada does, that the Investors were required to mitigate their loss by “simply appl[ying] for judicial review of the JRP Report in the Canadian courts, whether in lieu or in tandem with the NAFTA arbitration.”²⁵ Canada’s suggestion is not only legally and practically unreasonable, but runs counter to the mandate of Article 1121.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF JANUARY, 2018.



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Chris Elrick

²⁵ Canada’s Counter-Memorial on Damages, dated June 9, 2017, para. 84.