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SETTLEMENT OF DISPUTES BETWEEN A PARTY
AND AN INVESTOR OF ANOTHER PARTY.

Article 2119: Purpose

This Part establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 2120: Investment Dispute

Investment dispute means a dispute between a Party and an investor of another Party in which the investor alleges that the Party has breached a provision of this Chapter and that the investor has incurred loss or damage by reason of, or arising out of, that breach. An investment dispute does not include an alleged breach of this Chapter where the measure constituting the alleged breach is ^{USA} [expressly] ^{CDA USA} [authorized by] ^{MEX} [in accordance with] another provision of this Agreement ^{CDA} [or is a non-conforming provision of a measure covered by Articles ... or Annexes ...].

Article 2121: Consultation and Negotiation

The parties to an investment dispute should first attempt to settle the dispute through consultation or negotiation. Consultation or negotiation under this Article shall not constitute the initiation of domestic proceedings for purposes of Article 2122.

Article 2122: Fora for Resolving an Investment Dispute

1. If an investment dispute cannot be settled by consultation or negotiation, the investor may choose either to:

a) initiate proceedings under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party with a right of action under its domestic law for an alleged breach of this Chapter; or

b) submit the investment dispute to arbitration under Article 2124;

and the choice, once made by the investor, shall be exclusive.

2. A Party shall not provide a right of action under its domestic law against any other Party for an alleged breach of this

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Agreement.¹

Article 2123: Limitation Period

An investor shall not be entitled to submit an investment dispute to arbitration if more than three years have elapsed since the date on which the investor first acquired ^{Max}[, or should have first acquired,] knowledge of the alleged breach and knowledge that it has incurred loss or damage.

Article 2124: Arbitration Fora

1. Provided that six months have elapsed since the date on which the investment dispute arose, the investor may submit the dispute to arbitration under:

- a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
- b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor is a party to the ICSID Convention; or
- c) the UNCITRAL Arbitration Rules.

2. The Secretary General of ICSID shall serve as appointing authority for an arbitration under the UNCITRAL Arbitration Rules.

3. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Part.

Article 2125: Consent to Arbitration

1. Each Party hereby consents to the submission of an investment dispute between that Party and an investor of another Party for settlement by arbitration in accordance with the provisions of this Part.

2. The submission by an investor of an investment dispute to arbitration under this Part, together with the consent given by each Party in paragraph 1, shall satisfy the requirement of:

- a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent

¹ The Lawyers' Group will develop wording to make this provision generic and will decide where, outside the Investment Chapter, to place the provision.

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of the parties;

- b) Article II of the New York Convention for an agreement in writing; and
- c) Article I of the Inter-American Convention for an agreement.

3. Any dispute submitted by an investor for arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

- 4. By submitting the dispute to arbitration, the investor:
 - a) consents to arbitration in accordance with the provisions of this Part; and
 - b) waives its right to initiate or continue before any administrative tribunal or court (under the domestic law) of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of this Chapter, except for proceedings for injunctive, declaratory or other extraordinary relief ~~that are initiated or continued~~ before an administrative tribunal or court (under the domestic law) of the disputing Party.

Article 2126: Notice

An investor shall give to the disputing Party written notice of its intention to submit an investment dispute to arbitration at least ninety days before the dispute is submitted, which notice shall specify:

- a) the names and addresses of the parties to the dispute;
- b) the provisions of this Chapter alleged to have been breached and any other relevant provisions;
- c) the issues and the factual basis for the claim; and
- d) the relief sought and the approximate amount of compensation claimed.

Article 2127: Selection or Appointment of Presiding Arbitrator

1. Unless the disputing parties select the presiding arbitrator:

- a) the presiding arbitrator shall be selected or appointed in accordance with the applicable arbitration rules from the

list of presiding arbitrators described in paragraph 2; and

b) in the event that no such presiding arbitrator is available to serve, the Secretary-General of ICSID shall appoint from the ICSID Panel of Arbitrators a presiding arbitrator who is not a national of any of the Parties [or of the disputing party].²

2. As of the entry into force of this Agreement, the Parties shall have jointly designated, without regard to nationality, thirty presiding arbitrators meeting the qualifications of the rules referred to in Article 2124 and experienced in international law and investment.

Article 2128: Consolidation³

1. The Secretariat of the Commission shall maintain a public register of ^{USA}[notices given under Article 2126 and] submissions to arbitration under Article 2124 ^{CA}{and requests made under paragraph 2}.

2. A disputing party that seeks an order under paragraph x may request the Secretary General of ICSID to establish an arbitration tribunal and shall specify in the request:

- a) the name of the disputing party or parties against which the order is sought;
- b) the nature of the order sought; and
- c) the grounds on which the order is sought.

A disputing party that seeks an order under paragraph x shall give to the disputing party or parties against which the order is sought a copy of the request.

3. Within ~~90~~ days of receipt of the request, the Secretary General of ICSID shall establish an arbitration tribunal consisting of three arbitrators. The presiding arbitrator shall be selected from the roster described in Article 2127. In the event that no such presiding arbitrator is available to serve, the Secretary-

² Mexico will develop wording to express more precisely the thought contained in brackets.

³ Canada to prepare draft language to flesh out this Article.

⁴ Confirm timeframe.

General of ICSID shall appoint a presiding arbitrator, who is not a national of any of the Parties [or of a disputing party]⁵ from the ICSID Panel of Arbitrators. The two other members shall be selected from that roster or the ICSID Panel of Arbitrators. The arbitration tribunal shall conduct itself in accordance with the UNCITRAL Arbitration Rules.

4. Where it appears to the arbitration tribunal that arbitrations have been initiated under Article 2124 that have a question of law or fact in common, the tribunal may, in the interests of fair and efficient resolution of the disputes, [and after hearing from the interested parties]⁶, order that the arbitration tribunal shall:

- a) assume jurisdiction over, and hear and determine together, all or part of the investment disputes in accordance with the UNCITRAL Arbitration Rules; or
- b) assume jurisdiction over, and hear and determine, one or more representative investment disputes in accordance with the UNCITRAL Arbitration Rules.

5. An arbitration tribunal established under Article 2124 shall not have jurisdiction to decide an investment dispute, or a part of an investment dispute, that is heard and determined by an arbitration tribunal established under this Article.

Article 2129: General Provisions Applicable to Arbitrations under Articles 2124 or 2128

1. Notice: A disputing Party shall deliver to the other Parties:

- a) written notice of an arbitration initiated under Article 2124 or 2128 within 30 days of initiation of the arbitration; and
- b) copies of all pleadings filed in the arbitration.

2. Participation by a Party: On written notice to the disputing parties, a Party may make submissions to an arbitration tribunal established under Article 2124 or 2128 on a question of interpretation of this Agreement.

3. Documents: A Party shall be entitled to receive from the

⁵ Mexico to draft language.

⁶ More precise wording for the concept contained in these brackets is required.

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disputing Party at the cost of the requesting Party:

- a) a copy of the evidence that has been tendered to the arbitration tribunal; and
- b) a copy of the written argument of the disputing parties.⁷

4. Place of Arbitration: Unless the disputing parties agree otherwise, an arbitration proceeding under Article 2124 or 2128 shall be held in the territory of a Party which is a party to the New York Convention selected in accordance with the applicable arbitration rules.⁸

5.⁹ Interim Measures of Protection: An arbitration tribunal established under Article 2124 or 2128 may take such measures as it deems necessary to preserve the respective rights of the disputing parties, or to insure that the tribunal's jurisdiction is made fully effective. Such measures may include, but are not limited to, orders to preserve evidence ^{CDA}[in the possession or control of a disputing party] or to protect the tribunal's jurisdictional exclusivity. An interim measure of protection may not include an order of attachment or an order to enjoin the application of the measure alleged to be the breach of the Chapter. For purposes of this paragraph, an order includes a recommendation.

6. Final Relief: An arbitration tribunal established under Article 2124 or 2128 may award only monetary damages or restitution of property. An award providing for restitution shall also provide that a Party may pay compensation in lieu thereof. An arbitration tribunal established under Article 2124 or 2128 shall not order a Party to pay punitive damages.

^{CDA}[Article 2130: Arbitration under Chapter 23

1. In the event that a disputing Party believes that:
 - a) an arbitration initiated under Article 2124 or 2128 raises an issue that may significantly affect the operation of

⁷ Wording must be developed to ensure that confidentiality is respected.

⁸ Mexico will develop wording to avoid avoid the requirement under the ICSID Convention that an ICSID arbitration be held in Washington (eg. Unless the parties agree, the place of arbitration will be held in accordance with the Additional Facility Rules.)

⁹ Canada has this paragraph under consideration.

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this Agreement; or

b) an arbitration initiated under Article 2124 or 2128 raises an issue of interpretation of a provision of this Agreement other than a provision of this Chapter,

it may establish an arbitration panel by making a request the Commission to establish an arbitration panel in accordance with Article 2309.

2. The disputing Party shall deliver the request to the other party or parties to the investment dispute, to the other Parties, and to its section of the Secretariat, and shall state:

a) the issues over which an arbitration panel established under this paragraph should assume jurisdiction; and

b) the grounds on which the panel should assume jurisdiction.

3. Where it appears to the arbitration panel that subparagraphs (a) or (b) of paragraph 1 apply, the arbitration panel may, subject to Article 2313, assume jurisdiction over the issue and make such findings, determinations, and disposition as provided in Article 2317(2).

4. Except as modified by this paragraph, the provisions of Chapter 23 apply to an arbitration proceeding that is initiated under this Article.

5. An arbitration tribunal established under Article 2124 or 2128 shall cease, on the date on which an arbitration proceeding is initiated under this Article, to have jurisdiction with respect to any issue in the proceeding before it that is also at issue in the proceeding before the panel established under this Article pending determination of the issue by the panel established under this Article.

6. An arbitration proceeding is initiated under this Article on the date of delivery of the request to the Commission.

7. The determination and disposition of the panel, or a settlement by the Parties with respect to any measure or other matter at issue in the proceeding before the panel, is binding on any panel established under Article 2124 or 2128 to which the same matter is or has been referred for arbitration.]

Article 2131: Governing Law

An arbitration tribunal [or panel] established under this Part shall decide the issues in dispute in accordance with this

Agreement and applicable rules of international law.

Article 2132: Finality and Enforcement of Award¹⁰

1. A final award made in an arbitration proceeding under Article 2124 or 2128 is binding on the disputing parties but shall have no binding force except between the disputing parties and in respect of the particular case.

2. A disputing Party shall abide by and comply with a final award made in an arbitration proceeding under Article 2124 or 2128 without delay, but shall not be required to abide by or comply with an award that is not final.

3. If a Party fails to abide by or comply with the terms of a final award under this Part, the Commission provided for in Chapter 23 shall, upon delivery of a request by any other Party whose investor was party to the investment dispute, establish an arbitration panel under Article 2309(2). The requesting Party may seek in such proceedings:

- a) a determination that the failure to abide by and comply with the terms of the final award is inconsistent with the obligations of this Agreement; and
- b) the disposition of the dispute that requires the defaulting Party to abide by and comply with the terms of the final award.

4. Paragraph 3 is without prejudice to an investor's rights to seek enforcement under the ICSID Convention, the New York Convention or the Inter-American Convention.

5. For the purposes of this Article, an arbitration award made under the ICSID Convention is final if:

- a) 120 days have elapsed from the date the award was rendered and no party to the dispute has requested revision or annulment of the award; or
- b) revision or annulment proceedings have been completed.

6. For the purposes of this Article, an arbitration award made under the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules is final if:

- a) 3 months have elapsed from the date the award was

¹⁰ Proposed Canadian re-draft of this article and article 2135.

rendered and no party to the dispute has commenced a proceeding to revise, set aside or annul the award;

b) a court has dismissed or allowed an application to ~~set~~ revise, set aside or annul the award and there is no further appeal.

7. Each Party undertakes to provide in its territory for the enforcement of an arbitration award made under Article 2124 or 2128.

Article 2133: Receipts Under Insurance or Guarantee Contracts

In any proceeding under this Article involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

Article 2134: Companies Incorporated Under the Laws of a Party

For purposes of an arbitration proceeding under this Part, any company that is legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of another Party, shall be treated as an investor of such other Party, including in accordance with Article 25(2)(b) of the ICSID Convention.

Definitions: Note: to be moved to the general definitions section.

For purposes of this Article:

- a) "disputing party" means the investor or the disputing Party, and "disputing parties" means the investor and the disputing Party;
- b) "disputing Party" means the Party alleged to have breached a provision of this Chapter;
- c) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;
- d) "ICSID" means the International Centre for Settlement of Investment Disputes;

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- e) "Inter-American Convention" means the Inter-American Convention on International Commercial Arbitration, done at Panama, [Month] [Day], 1975;
- f) "New York Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;
- g) "UNCITRAL Arbitration rules" means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976;
- h) "parties" means the disputing party and the disputing Party;
- i) "respondent" means a disputing party who has submitted an investment dispute to arbitration under Article 2124 and who