

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 authorized by another provision of this Agreement.]~~

[Mexico Proposed Article: Where it is alleged that a Party has breached a provision of this Chapter it shall be a defense that the measure is authorized by another provision of this Agreement.]

Article 2121: Interpretation of Annexes ... (Constitution), ... (National Treatment) and ... (Unbound)

1. Where a disputing Party asserts as a defence that the measure alleged to be a breach of this Chapter is within the scope of an exception set forth in Annex ... (Mexican Constitution), Annex ... (National Treatment or Annex ... (Unbound)), on request of the disputing Party, the arbitration tribunal shall request the interpretation of the Commission on this question. The Commission shall have 60 days to submit its interpretation in writing to the tribunal.²

¹ The Parties will endeavour to develop language to the effect that regulation does not in itself constitute expropriation (placement of language to be determined by the Lawyers' Group.)

² The role of the Commission under this Article is unrelated to Chapter 23.

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2. If the Commission ~~agrees on an interpretation,~~³ it shall be binding on the tribunal. If the Commission fails to agree or fails to submit an interpretation within such 60 day period, the tribunal shall decide the issue of interpretation of the exception.]⁴

Article 2122: 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 2123.

Article 2123: 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 2125;

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 Agreement.⁵

Article 2124: Limitation Period

³ It is recognized that the Commission is an "it", which issues an interpretation rather than an agreed interpretation, the U.S. considers it important to build into this article the concept of agreement.

⁴ The parties agree that trilateral agreement on interpretation of a provision of the NAFTA will be binding on an investor/state arbitration tribunal, and will draft language accordingly with appropriate location to be determined by the Lawyers' Group.

⁵ 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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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, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

Article 2125: 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 2126: 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 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 before an administrative tribunal or court [under the domestic law] of the disputing Party.

Article 2127: 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

6. Choice between reference to administrative tribunal or court, on the one hand, or "under the domestic law", on the other, to be made during scrubbing.

7. The final drafting must make it clear that article 2122(1)(a) addresses a domestic cause of action under the NAFTA and article 2126(4)(b) addresses domestic law other than the NAFTA.

In the case of Mexico, it is agreed that an investor must elect, at the end of the administrative process, either to submit his dispute to arbitration under the NAFTA or initiate judicial proceedings or administrative tribunal proceedings under Mexican domestic law. If the investor is successful in amparo proceedings, he may then submit the issue of compensation to arbitration under the NAFTA or, if Mexico creates a cause of action for a violation of the NAFTA, submit the issue of compensation to a court. Placement of this exception will be subject to determination of placement of other exceptions currently in the Investment Chapter. See attached Mexican text.

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- d) the relief sought and the approximate amount of compensation claimed.

Article 2128: 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.

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 2125 and experienced in international law and investment.

Article 2129: Consolidation

1. The Secretariat of the Commission shall maintain a public register of submissions to arbitration under Article 2125 and requests made under paragraph 2.

2. A disputing party that seeks an order under paragraph 4 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 4 shall give to the disputing party or parties against which the order is sought a copy of the request.

3. Within 60 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 2128. In the event that no such presiding arbitrator is available to serve, the Secretary-General of ICSID shall appoint a presiding arbitrator, who is not a national of any of the Parties from the ICSID Panel or

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Arbitrators. ~~The two other members shall be selected from the roster described in Article 2128, or to the extent not available from that roster, from the ICSID Panel of Arbitrators, or to the extent not available from that panel, in the discretion of the Secretary General, provided that one member shall be a national of the disputing Party and one member shall be a national of the Party whose investors are disputing parties.~~ 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 2125 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 parties¹, 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 of the investment disputes ~~the determination of which it believes would assist in the resolution of the others,~~ in accordance with the UNCITRAL Arbitration Rules.

5. An arbitration tribunal established under Article 2125 shall not have jurisdiction to decide an investment dispute, or a part of an investment dispute, over which an arbitration tribunal established under this Article has assumed jurisdiction.

Article 2130: General Provisions Applicable to Arbitrations under Articles 2125 or 2129

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

- a) written notice of an arbitration initiated under Article 2125 or 2129 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

¹ This term is in contemplation of language that will give a disputing party who is not named in an application for an order under paragraph 4 the right to cross-apply to the tribunal established under paragraph 3 to be added in an order made under paragraph 4.

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disputing parties, a Party may make submissions to an arbitration tribunal established under Article 2125 or 2129 on a question of interpretation of this Agreement.

3. Documents: A Party shall be entitled to receive from the 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.⁹

4. Place of Arbitration: Unless the disputing parties agree otherwise, an arbitration proceeding under Article 2125 or 2129 shall be held in the territory of a Party which is a party to the New York Convention, selected in accordance with:

- a) the Additional Facility Rules if the arbitration is under those rules or the ICSID Arbitration Rules; or
- b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.

5. Interim Measures of Protection: An arbitration tribunal established under Article 2125 or 2129 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 evidence¹⁰ 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 2125 or 2129 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 2125 or 2129 shall not order a Party to pay punitive damages.

Article 2131: Governing Law

⁹ Wording must be developed to ensure that confidentiality is respected.

¹⁰ This is to be drafted so that the federal government of Canada will not be the subject of an order to preserve evidence that is in the possession or control of a subnational government.

An arbitration tribunal 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 Award

1. A final award made in an arbitration proceeding under Article 2125 or 2129 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 2125 or 2129 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 rendered and no party to the dispute has commenced a proceeding to revise, set aside or annul the award; or

b) a court has dismissed or allowed an application to set aside, 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 2135 or 2129.

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;
- e) "Inter-American Convention" means the Inter-American Convention on International Commercial Arbitration, done at Panama, [Month] [Day], 1975;

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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.

Article 2135

CDA MEX [Nothing in this Part prejudices the right of a Party to invoke Chapter 23 OR Nothing in Part X of Chapter 21 prejudices the right of a Party to invoke this Chapter (Chapter 23).]

Mexican Text Referred to in Footnote 7

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

(a) assertion of rights under domestic law:

The investor may initiate (or cause its investment to initiate) proceedings under the domestic law of the disputing Party, based on rights and obligations other than those established in this Chapter; or

(b) assertion of right under this Chapter:

The investor may either:

(i) submit the investment dispute to arbitration under Article 2125 on rights and obligations established in this Chapter, or

(ii) initiate (or cause its investment to initiate) proceedings based on such rights and obligations under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party or their investments with a right of action under its domestic law for an alleged breach of this Chapter.

2. The choice of forum under paragraph 1, once made by the investor shall be exclusive, with the following exceptions:

[(a) simultaneous pursuit of extraordinary relief and damages in different fora:]

Submission of a dispute to arbitration under Article 2125 shall not preclude an investor from seeking, in an administrative tribunal or court of the disputing Party, injunctive, declaratory or other extraordinary relief based on rights and obligations other than those established in this Chapter. In such circumstances, no determination of damages shall be made by the arbitration tribunal until the determination regarding such extraordinary relief has been made; and

(b) [sequential pursuit of extraordinary relief and damages in different fora:]

An investor that succeeds in obtaining final injunctive, declaratory or other extraordinary relief in an administrative tribunal or court of the disputing Party

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(based on rights and obligations in this Chapter or otherwise) may subsequently submit the issue of compensation to arbitration under Article 2125.