

September 4, 1992

1:30 a.m.

**INVEST-F.904**

**INVESTMENT CHAPTER  
SECTION B  
SETTLEMENT OF DISPUTES BETWEEN A PARTY AND  
AN INVESTOR OF ANOTHER PARTY<sup>1</sup>**

**Article 1115: Purpose**

This Section 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 1116: Claim by an Investor of a Party on Behalf of Itself**

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

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<sup>1</sup> This Part is without prejudice to the rights and obligations of the Parties as set out in Chapter 23.

**Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise<sup>2</sup>**

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events which gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established pursuant to Article 1125, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

**Article 1118: Settlement of a Claim Through Consultation and Negotiation**

The disputing parties should first attempt to settle a claim through consultation or negotiation.

**Article 1119: Notice of Intent to Submit a Claim to Arbitration**

The disputing investor shall give to the disputing Party written notice<sup>3</sup> of its intention to submit a claim to arbitration

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<sup>2</sup> The Parties agree that neither an investor nor an enterprise should receive double recovery. To the extent necessary, this concept will be built into the final text.

<sup>3</sup> In the case of each Party, it is necessary to say where notice  
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at least ninety days before the claim is submitted, which notice shall specify:

- (a) the name and address of the disputing investor;
- (b) the provisions of this Agreement 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 damages claimed.

**Article 1120: Submission of a Claim to Arbitration**

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim 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, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

**Article 1121: Conditions Precedent to Submission of a Claim to Arbitration**

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

- (a) the investor consents to arbitration in accordance with the provisions of this Section; and
- (b) both the investor and an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, waive their 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

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and other documentation should be sent.

Party that is alleged to be a breach of Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

- (a) consent to arbitration in accordance with the provisions of this Section; and
- (b) waive their 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 Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be given to the disputing Party, and shall be included in the submission of a claim to arbitration.

#### **Article 1122: Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration in accordance with the provisions of this Section.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration in accordance with the provisions of this Section 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.

**Article 1123: Number of Arbitrators and Method of Appointment**

Subject to Article 1125, and unless the disputing parties agree otherwise, the Tribunal shall consist of three arbitrators. One arbitrator shall be appointed by each of the disputing parties. The third, who shall be the presiding arbitrator, shall be appointed by agreement of the disputing parties.

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

1. The Secretary-General of ICSID shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, at the request of either disputing party:

(a) shall appoint the arbitrator or arbitrators not yet appointed in his discretion, except for the presiding arbitrator; and

(b) shall appoint the presiding arbitrator in accordance with paragraph 3.

3. The Secretary-General shall appoint the presiding arbitrator from the list of presiding arbitrators described in paragraph 4.<sup>4</sup> In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint a presiding arbitrator who is not a national of any of the Parties from the ICSID Panel of Arbitrators.

4. 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 1120 and experienced in international law and investment.

5. Subject to paragraph 8, where a disputing investor submits a claim to arbitration under the ICSID Convention or the Additional Facility Rules, each Party agrees:

(a) to the appointment by the investor of a national of the Party of the investor as an arbitrator; and

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<sup>4</sup> Where an appointment is made in these circumstances, the issue of nationality of the presiding arbitrator remains to be resolved.

- (b) to the appointment by the Secretary-General of a national of the Party of the investor as an arbitrator or as a presiding arbitrator.<sup>5</sup>

6. Subject to paragraph 8, a disputing investor described in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the Additional Facility Rules, only on the following conditions:

- (a) where the disputing Party appoints a national of the disputing Party as an arbitrator, the investor agrees in writing to the appointment; and
- (b) where the Secretary-General appoints a national of the disputing Party as an arbitrator or as a presiding arbitrator<sup>6</sup>, the investor agrees in writing to the appointment.

7. Subject to paragraph 8, a disputing investor described in paragraph 1 of Article 1117 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the Additional Facility Rules, only on the following conditions:

- (a) where the disputing Party appoints a national of the disputing Party as an arbitrator, the investor and the enterprise agree in writing to the appointment; and
- (b) where the Secretary-General appoints a national of the disputing Party as an arbitrator or as a presiding arbitrator,<sup>7</sup> the investor and the enterprise agree in writing to the appointment.<sup>8</sup>

8. A disputing party:

- (a) in the case of a claim submitted to arbitration under the ICSID Convention, may propose, under Article 57 of the Convention, the disqualification of a member of the Tribunal on account of any fact indicating a manifest

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<sup>5</sup> See footnote 4.

<sup>6</sup> See footnote 4.

<sup>7</sup> See footnote 4.

<sup>8</sup> Canada and Mexico are prepared to have the Additional Facility (and later ICSID) operate in the NAFTA only on the condition that they may appoint nationals to an Additional Facility or ICSID arbitration panel.

lack of the qualities required by paragraph 1 of Article 14 of the Convention; and

- (b) in the case of a claim submitted to arbitration under the Additional Facility Rules, may propose, under Article 14 of the Rules, the disqualification of a member of the Tribunal on account of any fact indicating a manifest lack of the qualities required by Article 9 of the Rules.<sup>9</sup>

#### **Article 1125: Consolidation**

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules, and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal:

- (a) shall assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) shall assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General of ICSID to establish a Tribunal and shall specify in the request:

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

4. The disputing party shall give to the disputing Party or disputing parties against which the order is sought a copy of the request.

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<sup>9</sup>This is necessary only if there is a real concern that agreement to appointment under paragraphs 5 through 7 would constitute a waiver of the grounds for challenge.

5. Within 60 days of receipt of the request, the Secretary-General of ICSID shall establish a Tribunal consisting of three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster described in paragraph 4 of Article 1124. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint a presiding arbitrator, who is not a national of any of the Parties, from the ICSID Panel of Arbitrators. The Secretary-General shall appoint the two other members from the roster described in paragraph 4 of Article 1124, and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of the Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing party that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the party's name and address;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

7. A disputing party described in paragraph 6 shall give a copy of its request to the parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.<sup>10</sup>

9. A disputing Party shall give to the Secretariat of the Commission, within 15 days of receipt by the disputing Party, a copy of:

- (a) a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention;

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<sup>10</sup> This does not address the status of an Article 1120 Tribunal pending decision on whether to consolidate by a consolidation Tribunal, and does not address the effect of an order under paragraph 2(b). To be considered.

- (b) a notice for arbitration made under Article 2 of the Additional Facility Rules; or
- (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

10. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 3 of this Article:

- (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
- (b) within 15 days of making the request, in the case of a request made by the disputing Party.

11. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 6 of this Article within 15 days of receipt of the request.

12. The Secretariat of the Commission shall maintain a public register consisting of the documents referred to in paragraphs 9, 10 and 11 of this Article.

#### **Article 1126: Notice**

A disputing Party shall deliver to the other Parties:

- (a) written notice of a claim that has been submitted to arbitration within 30 days from the date that the claim is submitted; and
- (b) copies of all pleadings filed in the arbitration.

#### **Article 1127: Participation by a Party**

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

#### **Article 1128: 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 Tribunal; and
- (b) a copy of the written argument of the disputing

parties.<sup>11</sup>

**Article 1129: Place of Arbitration**

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration 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.

**Article 1130: Governing Law**

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

**Article 1131: Interpretation of Annexes**

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 I (Bound), Annex II (Unbound), Annex III (Mexican Constitution) or Annex IV (MFN), on request of the disputing Party, the 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.<sup>12</sup>

2. If the Commission submits to the Tribunal an agreed interpretation, the interpretation shall be binding on the Tribunal. If the Commission fails to submit an agreed interpretation or fails to submit an agreed interpretation within such 60 day period, the Tribunal shall decide the issue of interpretation of the exception.<sup>13</sup>

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<sup>11</sup> Wording must be developed to ensure that confidentiality is respected.

<sup>12</sup> The role of the Commission under this Article is unrelated to Chapter 23.

<sup>13</sup> 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.

**Article 1132: Report from an Expert**

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

**Article 1133: Interim Measures of Protection**

A Tribunal may take such measures as it deems necessary to preserve the respective rights of the disputing parties, or to ensure that the Tribunal's jurisdiction is made fully effective. Such measures may include, but are not limited to, orders to preserve evidence in the possession or control of a disputing party, or to protect the Tribunal's jurisdiction. 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 Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises). For purposes of this paragraph, an order includes a recommendation.

**Article 1134: Final Award**

1. Where a Tribunal makes a final award against a Party, the Tribunal may award only:

- (a) monetary damages, and any applicable interest; or
- (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages, and any applicable interest, in lieu of restitution.

2. Subject to paragraph 1, where a claim is made under paragraph 1 of Article 1117:

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages, and any applicable interest, shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages.

**Article 1135: Finality and Enforcement of Award**

1. An award made by a Tribunal 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. Subject to paragraph 3, a disputing party shall abide by and comply with an award without delay.<sup>14</sup>

3. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention:

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules:

(i) 3 months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or

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

5. Each Party undertakes to provide for the enforcement in its territory of an award.<sup>15</sup>

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<sup>14</sup> Original idea included only a final award, subject to review. If it includes interim awards, must also be subject to review.

<sup>15</sup> This should not place on a Party an extra-territorial obligation.

6. If a Party fails to abide by or comply with the terms of a final award under this Section, the Commission provided for in Chapter 20 shall, upon delivery of a request by any other Party whose investor was party to the investment dispute, establish a panel under Article 2008(1). 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) a recommendation that the defaulting Party abide by or comply with the terms of the final award.

7. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 6.

8. A claim that is submitted to arbitration 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.<sup>16</sup>

#### **Article 1136: General**

1. Time when a Claim is Submitted to Arbitration: A claim is submitted to arbitration under this Section when:

- (a) the notice of registration of the request to institute arbitration proceedings has been dispatched by the Secretary-General of ICSID in accordance with paragraph 3 of Article 36 of the ICSID Convention;
- (b) the certificate of registration of the notice for arbitration has been dispatched by the Secretary-General of ICSID in accordance with Article 4 of Schedule C of the Additional Facility Rules; or
- (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

2. Receipts under Insurance or Guarantee Contracts: In an arbitration under this Section, 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

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<sup>16</sup> Query whether this should be accomplished by Canada and the U.S. removing the commercial reservation.

insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

For purposes of this Section:

- (a) "disputing investor" means an investor that makes a claim under this Section;
- (b) "disputing Party" means a Party against which a claim is made under this Section;
- (c) "disputing party" means the disputing investor or the disputing Party;
- (d) "disputing parties" means the disputing investor and the disputing Party;
- (e) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;
- (f) "ICSID" means the International Centre for Settlement of Investment Disputes;
- (g) "Inter-American Convention" means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;
- (h) "New York Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;
- (i) "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;
- (j) "Tribunal" means an arbitration tribunal established under Article 1120 or 1125.

## Annex 1120.1

1. An investor of another Party may not allege that Mexico has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal.

2. Where an enterprise of Mexico that is a juridical person that an investor of another Party owns or controls directly or indirectly alleges in proceedings before a Mexican court or administrative tribunal that Mexico has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

the investor may not allege the breach in an arbitration under this Section.