

PART 4 - INVESTMENT AND CONDUCT OF BUSINESS OPERATIONS

Article 401: SCOPE

1. This Part shall apply to any measure of a Party affecting investors, service providers, or other persons of any other Party in respect of:

- a) the establishment;
- b) the acquisition;
- c) the conduct and operation; or
- d) the sale;

of business enterprises in or into its territory.

2. This Part shall apply to any measure of a self-regulatory organization whose mandate is conferred by the Party, or by its state, provincial or local governments.

Article 402: NATIONAL TREATMENT

1. Further to Article 105, and for greater certainty,

- (a) no Party shall impose on an investor of another Party a requirement that a minimum level of equity, other than nominal qualifying shares for directors or incorporators of corporations be held by its nationals in a business enterprise located in its territory;
- (b) no Party shall require an investor of another Party by reason of nationality to sell or dispose of the whole or any part of an investment made in its territory; and
- (c) no Party shall introduce any measure, including any measure requiring the establishment or commercial presence by a person of another Party in its territory, as a condition for the provision of a service, in a manner inconsistent with Article 106.

2. Further to Article 105, the Parties shall implement:
- (a) the provisions of Annex 402.1 regarding transportation;
[to be revisited in the light of transportation discussions, to determine if these obligations are best placed in Part 3, in connection with standards-related measures]
 - (b) the provisions of Annex 402.2 regarding telecommunications services;
 - (c) the provisions of Annex 402.3 regarding other measures affecting services; and
 - (d) the provisions of Annex 402.4 regarding measures affecting investors of the other Parties.

Article 403: SPECIFIC EXCEPTIONS

1. Subject to prior notification and consultation in accordance with Part 6, a Party may deny the benefits of this Part to investors or service providers if it establishes that they originate from a country which is not a Party to this Agreement.
2. The Party denying benefits pursuant to paragraph 1 shall have the burden of establishing that such action is in accordance with that paragraph.
3. This Part shall not apply to:
 - (a) services listed in Annex 403.3(a);
 - (b) financial services, except as provided in Annex 403.3(b);
 - (c) public procurement, except as provided in Part 3;

(d) public entities, to the extent such entities conduct activities:

(i) in pursuit of monetary, fiscal or exchange rate policy; or

(ii) for the account or with the guarantee or using the financial resources of the Party;

except when those activities are permitted to be carried out by service providers in competition with such public entities;

(e) public or private entities in respect of their activities forming part of a statutory system of social security, health care, education, daycare, or public retirement plans;

(f) measures of a Party, imposed in connection with the initial privatization of a state enterprise, that limit the rights of an investor of another country to own or control such enterprise;

(g) the specific measures of the Parties listed in Annex 403.3(f); and

(h) subject to Article 106, any subsidy.

4. Notwithstanding the provisions of Article 105, a Party may require an investor, service provider, or other person of another Party to submit to it routine information solely for information or for statistical purposes. Such Party shall protect such business information from disclosure that would prejudice the investor's competitive position.

Article 404: PERFORMANCE REQUIREMENTS

1. No Party shall impose on an investor of another Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a requirement to:

(a) export a given level or percentage of goods or services;

(b) substitute goods or services from the territory of such Party for imported goods or services;

- (c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or accord a preference to goods or services produced in such territory;
- (d) achieve a given level or percentage of domestic content;
or
- (e) relate the volume or value of its purchases of imported products or services to the volume or value of its products or services sold for export.

2. Further to Article 106, no Party shall impose on an investor of a non-Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a commitment to meet any of the requirements described in paragraph 1 where meeting such a requirement could have a significant impact on trade between two or more of the Parties.

3. Nothing in this Part shall prevent a Party from imposing requirements on an investor of another Party in connection with the grant of a subsidy to such investor.

4. For purposes of this Article, a Party "imposes" a requirement or commitment on an investor when it requires particular action of an investor or when, after the date of the entry into force of this Agreement for that Party, it enforces any undertaking or commitment described in this Part given to that Party after the date this Agreement enters into force for that Party.

Article 405: EXPROPRIATION

No Party shall directly or indirectly nationalize or expropriate an investment in its territory by an investor of another Party or take any measure or series of measures tantamount to an expropriation of such an investment, except:

- (a) for a public purpose;
- (b) in accordance with due process of law;

- (c) on a non-discriminatory basis; and
- (d) upon payment of prompt, adequate and effective compensation at fair market value.

Article 406: TRANSFERS

1. Subject to Article 505 and paragraphs 2 and 4, no Party shall prevent an investor or service provider of another Party from transferring the returns on an investment or service or from otherwise making international payments and transfers.

2. A Party may, through the equitable, non-discriminatory and good faith application of its laws, prevent or delay any transfer referred to in paragraph 1 if such transfer is inconsistent with any measure of general application relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities;
- (c) criminal or penal offenses;
- (d) reports of currency transfers;
- (e) withholding taxes; or
- (f) ensuring the satisfaction of judgments in adjudicatory proceedings.

3. No Party shall require its investors to repatriate, or penalize its investors who fail to repatriate, the income, earnings or profits attributable to any investment in another Party or to any businesses carried on in another Party either directly by the investors or indirectly through a business enterprise established in that other Party.

4. Paragraph 3 shall not be construed as preventing a Party from taxing its investors on their share of any income, earnings or profits attributable to a business carried on or an investment made in another Party, provided that the tax so charged does not exceed the tax that would be so charged if such income, earnings or profits were repatriated, without any further tax on the repatriation, to its investors.

Article 407: EXTRATERRITORIALITY

1. No party shall prohibit one of its investors on the territory of another Party from exporting goods and services from such territory to a third country, from importing to such territory goods and services from a third country or from using goods and services originating in a third country.

2. No Party may prescribe new laws or enforce existing laws so as to require investors or service providers to act, in the territory of another Party, in a manner that conflicts with the laws of such other Party.

COMPETITION

Article 408: MONOPOLIES

1. Subject to Article 106, nothing in this Agreement shall prevent a Party from maintaining or designating a monopoly.
2. A Party maintaining or designating a monopoly shall ensure that the monopoly will not, in providing the monopoly goods or service in the relevant market, behave in a manner which would nullify or impair benefits to which producers or service providers of any other Party is entitled.
3. Prior to designating a monopoly, a Party shall:
 - (a) notify the other Parties;
 - (b) upon request, engage in consultations; and
 - (c) endeavour to minimize or eliminate any nullification or impairment of benefits under this Agreement that might otherwise be caused by the designation.
4. Each Party shall ensure that, where it permits the monopoly supply of goods or services, the monopoly does not in its territory, either directly or through an affiliated company, engage in anti-competitive practices in areas outside its monopoly.

Article 409: TECHNOLOGY CONSORTIA

No Party may enact or apply any measure in respect of participation in or treatment of any combination, consortium, or other group of business enterprises including respecting access to technology, in a manner that would violate Article 105 or Article 106.

Article 410: STATE ENTERPRISES

Each Party shall ensure that state enterprises engaged in non-regulated commercial activities in competition with private enterprises:

- (a) be subject to domestic competition law and policies in respect of such activities; and

- (b) be given the same treatment under domestic competition law and policies as such private enterprises in respect of such activities.

Article 411: COMPETITION

1. The Parties recognize the contribution that competition laws and policies can make to the fulfilment of the object and purpose of this Agreement.
2. To that end, each Party agrees to:
 - (a) enact and enforce, within [] years of the entry into force of this Agreement for that Party, transparent competition laws, policies and procedures consistent with the governing principles of this Agreement, that have as their objective the control of anti-competitive agreements, mergers, monopolies, pricing practices and abuse of dominant position; and
 - (b) pursue negotiations with the other Parties to expand and enhance international agreements and arrangements for mutual legal assistance, notification, consultation, and exchange of information relating to the enforcement of competition laws and policies in the free trade area.
3. In the enforcement of their respective competition laws and policies in those cases involving persons, assets or practices located, or occurring, in the territory of any other Party, each Party shall, upon request, advise such other Party of the results of its assessment of the following factors:
 - (a) the relative significance of the anti-competitive activities involved and of conduct within the enforcing Party's territory as compared to conduct within such other Party's territory;
 - (b) the presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
 - (c) the relative significance of the effects of the enforcement activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

- (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and
- (f) the extent to which enforcement activities of such other Party with respect to the same persons, including judgements or undertakings resulting from such activities, may be affected.

4. The Commission shall establish a Competition Policy Committee to consider and make recommendations [no later than] on:

- (a) the impact of competition law and policy on trade within the free trade area;
- (b) the impact of trade law and regulation on competition within the free trade area; and
- (c) the potential for reliance on competition laws and policies to discipline anti-competitive transborder pricing practices and market segmentation.

DEFINITIONS

For the purposes of this Part,

acquisition with respect to:

- (a) a business enterprise carried on by an entity, means an acquisition, as a result of one or more transactions, of the ultimate direct or indirect control of the entity through the acquisition of the ownership of voting interests; or
- (b) any business enterprise, means an acquisition, as a result of one or more transactions, of the ownership of all or substantially all of the assets of the business enterprise used in carrying on the business;

business enterprise means a business that has, or in the case of an establishment thereof will have:

- (a) a place of business;
- (b) an individual or individuals employed or self-employed in connection with the business; and
- (c) assets used in carrying on the business;

NOTE: A part of a business enterprise that is capable of being carried on as a separate business enterprise is itself a business enterprise;

control or controlled, with respect to:

- (a) a business enterprise carried on by an entity, means
 - (i) the ownership of all or substantially all of the assets used in carrying on the business enterprise; and
 - (ii) includes, with respect to an entity that controls a business enterprise in the manner described in subparagraph (i), the ultimate direct or indirect control of such entity through the ownership of voting interests; and
- (b) a business enterprise other than a business enterprise carried on by an entity, means the ownership of all or substantially all of the assets used in carrying on the business enterprise;

enterprise means any juridical entity involving a financial commitment for the purpose of commercial gain;

entity means a corporation, partnership, trust or joint venture;

establishment means a start-up of a new business enterprise and the activities related thereto;

investment means:

- (a) the establishment of a new business enterprise; or
- (b) the acquisition of a business enterprise;

and includes:

- (c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and
- (d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor;

investor of a Party means:

- (a) such Party or agency thereof;
- (b) a province or state of such Party or agency thereof;
- (c) a national of such Party;
- (d) an entity ultimately controlled directly or indirectly through the ownership of voting interests by:
 - (i) such Party or one or more agencies thereof;
 - (ii) one or more provinces or states of such Party or one or more agencies thereof;
 - (iii) one or more nationals of such Party;
 - (iv) one or more entities described in paragraph (e); or
 - (v) any combination of persons or entities described in (i), (ii), (iii) and (iv); or
- (e) an entity that is not ultimately controlled directly or indirectly through the ownership of voting interests where a majority of the voting interests of such entity are owned by:
 - (i) persons described in subparagraphs (d) (i), (ii) and (iii);

(ii) entities incorporated or otherwise duly constituted in the territory of such Party and, in the case of entities that carry on business, carrying on a business enterprise located in the territory of such Party, other than any such entity in respect of which it is established that nationals of a third country control such entity or own a majority of the voting interests of such entity; or

(iii) any combination of persons or entities described in (i) and (ii);

that makes or has made an investment;

NOTE: For purposes of paragraph (e), in respect of individuals each of whom holds not more than one percent of the total number of the voting interests of an entity the voting interests of which are publicly traded, it shall be presumed, in the absence of evidence to the contrary, that those voting interests are owned by nationals of such Party on the basis of a statement by a duly authorized officer of the entity that, according to the records of the entity, those individuals have addresses in the territory of such Party and that the signatory to the statement has no knowledge or reason to believe that those voting interests are owned by individuals who are not nationals of such Party;

investor of a third country means an investor other than an investor of a Party, that makes or has made an investment;

joint venture means an association of two or more persons or entities where the relationship among those associated persons or entities does not, under the laws in force in the territory of the Party in which the investment is made, constitute a corporation, a partnership or a trust and where all those associated persons or entities own or will own assets of a business enterprise, or directly or indirectly own or will own voting interests in an entity that carries on a business enterprise;

located in the territory of a Party means, with respect to a business enterprise, a business enterprise that is, or in the case of an establishment will be, carried on in the territory of such Party and has, or in the case of an establishment will have therein:

- (a) a place of business;
- (b) an individual or individuals employed or self-employed in connection with the business; and
- (c) assets used in carrying on the business;

measure includes any law, regulation, procedure, requirement or practice, including any published policy;

monopoly means a sole provider of a good or service;

ownership means beneficial ownership and with respect to assets also includes the beneficial ownership of a leasehold interest in such assets;

person means a Party or agency thereof, a province or state of a Party or agency thereof, or a national of a Party;

service provider of a Party means any business enterprise legally constituted or organized under the law of that Party;

voting interest with respect to

- (a) a corporation with share capital, means a voting share;
- (b) a corporation without share capital, means an ownership interest in the assets thereof that entitles the owner to rights similar to those enjoyed by the owner of a voting share; and
- (c) a partnership, trust, joint venture or other organization means an ownership interest in the assets thereof that entitles the owner to receive a share of the profits and to share in the assets on dissolution; and

voting share means a share in the capital of a corporation to which is attached a voting right ordinarily exercisable at meetings of share-holders of the corporation and to which is ordinarily attached a right to receive a share of the profits, or to share in the assets of the corporation on dissolution, or both.

ANNEX 402.4

INVESTMENT

[This Annex would incorporate each Party's list of specific commitments on investment that result from negotiations, as set out in their respective instruments of ratification or accession.]

ANNEX 403.3(f)

EXCLUDED INVESTMENT MEASURES

[This Annex would incorporate each Party's list of investment measures excluded from coverage as the result of negotiations, as set out in their respective instruments of ratification or accession].