

CHAPTER 21

INVESTMENT

December 9, 1991

Article 2101: Scope and Coverage

1. Subject to paragraphs 2, 3 and 4, this Chapter shall apply to any measure of a Party affecting investment in its territory by an investor of the other Parties.

2. This Chapter shall not apply to any measure taken pursuant to a restriction [expressly] mandated by the Constitution of a Party.

3. This Chapter shall not apply to any measure affecting investments related to:

- a) the provision of financial services or insurance; or
- b) government procurement.

4. Except as otherwise provided, the provisions of subparagraph (c) of Article 2103 shall apply to any measure affecting investments related to the provision of services if such services are covered by Chapters [].

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Article 2102: National Treatment

Except as otherwise provided in this Chapter, each Party shall grant to investors of the other Parties treatment no less favourable than that granted in like circumstances to its investors with respect to measures affecting:

- a) the establishment of business enterprises in its territory;
- b) the acquisition of business enterprises in its territory;
- c) the conduct and operation of business enterprises in its territory; and
- d) the sale of business enterprises in its territory.

December 9, 1991

Article 2103: Provincial and State Measures

The provisions of this Chapter regarding the treatment of investors shall mean, with respect to a province or state, treatment no less favorable than that granted by such province or state to any investor of that province or state.

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Article 2104: Performance Requirements

1. Except as provided in Annex 2104.1, no Party shall impose on an investor of the other Parties, 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 grant a preference to goods or services produced in such territory; or
- d) achieve a given level or percentage of domestic content.

2. No Party shall prohibit or otherwise restrict an investor established in the territory of another Party from:

- a) exporting goods and services from such territory to a non-party country;
- b) importing to such territory goods and services from a non-party country; or
- c) using goods and services originating in a non-party country.

3. For purposes of paragraphs 1 and 2, a Party "imposes" a requirement or commitment on an investor when it requires, as a matter of law, a particular act or omission of an investor.

December 9, 1991

Article 2105: Monitoring

1. Each Party may require investors of the other Parties who make or have made an investment in its territory to submit to it routine information respecting such investment. The Parties shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position.

2. Nothing in paragraph 1 shall preclude a Party from otherwise obtaining or disclosing information in connection with the nondiscriminatory and *bona fide* application of its laws.

December 9, 1991

Article 2106: Transfers

1. Subject to paragraph 2, a Party shall not prevent an investor of another Party from transferring:

- a) any profits from an investment, including dividends;
- b) any royalties, fees, interest and other earnings from an investment; or
- c) any proceeds from the sale of all or any part of an investment or from the partial or complete liquidation of such investment.

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

- a) exchange controls or preferential exchange rates arrangements;
- b) bankruptcy, insolvency or the protection of the rights of creditors;
- c) issuing, trading or dealing in securities;
- d) criminal or penal offences;
- e) reports of currency transfers;
- f) withholding taxes; or
- g) ensuring the satisfaction of judgments in judicial proceedings.

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Article 2107: Existing Legislation and Transition Measures

1. The provisions of Articles 2102, 2103, 2104 and 2106 of this Chapter shall not apply to:

- a) a non-conforming provision of any existing measure;
- b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or
- c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of Articles 2102, 2103, 2104 or 2106.

2. During the transition period of this Agreement, a Party may establish, on a case by case basis, limits on foreign equity ownership of a business enterprise in its territory with respect to an acquisition made [on or after June 12, 1991] by an acquirer of another Party with which the business enterprise has a technical assistance or transfer of technology agreement.

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Article 2108: Disputes

Disputes arising from the interpretation and application of this Chapter shall not be subject to the dispute settlement provisions of this Agreement.

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Article 2109: National Security

A Party may deny the application of this Chapter to investors of the other Parties for reasons of national security.

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Article 2110: Definitions

For purposes of this Chapter;

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.

agency

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.

Constitution of a Party

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.

discriminatory performance requirement means a requirement imposed only on foreign investors and not on nationals of a Party.

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

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

indirect acquisition [has the same meaning as in Annex].

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 subparagraph[s] (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 non-party 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.

law

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 shall have the same meaning as in Article 201, except that it shall also include any published policy.

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.

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.

voting share means a share in the capital of a corporation to which is attached a voting right ordinarily exercisable at meetings of shareholders 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.