

3
4
5 INVESTMENT

6
7 SCOPE, COVERAGE AND DURATION

8
9 1. This Chapter shall apply to CDA [measures affecting]
10 investments (of investors of a Party) in the territory of
11 another party existing at the time of entry into force as
12 well as to investments made or acquired thereafter.

13
14 2. USA [With respect to investments established prior to the
15 date of termination of this Agreement and to which this
16 Chapter otherwise applies, the provisions of all of this
17 Chapter shall thereafter continue to be effective for a
18 further period of ten years from such date of termination.]

19
20 3. MEX CDA [This Chapter shall not apply to:

21
22 a) MEX [any measure taken pursuant to a restriction
23 expressly mandated by the Constitution of a
24 Party.]

25
26 b) the provision of financial services or insurance
27 CDA [except as provided in the Chapter on
28 Financial Services;]

29
30 U.S.: Note 1 - While financial services will be
31 covered in the financial services chapter, certain
32 provisions of the investment chapter may apply to
33 financial services by cross-reference in the financial
34 services chapter.

35
36 c) government procurement CDA [except as provided in
37 the Chapter on Government Procurement;]

38
39 d) MEX, CDA [services listed in Annex Y01.3(c)]

40
41 e) MEX [public entities, to the extent such entities
42 conduct activities:

43
44 (i) in pursuit of monetary, fiscal or exchange
45 rate policy; or

46
47 (ii) for the account or with the guarantee or
48 using the financial resources of the Party;]

49
50 f) CDA [public or private entities in respect of
51 their activities forming part of a statutory
52 system of social security, health care,
53 education, day care, or public retirement plans;]

- 1 g) CDA [measures of a Party, imposed in connection
2 with the initial privatization of a state
3 enterprise, that limit the rights of an investor
4 of another country to own or control such
5 enterprise;]
6
7 h) CDA [the specific measures of the Parties listed
8 in Annex Y01.3 (f); and]
9
10 i) CDA [subject to Article 106 (Nullification or
11 Impairment of Benefits), any subsidy.]
12
13 j) CDA [as between Canada, the United States of
14 America, and the United States of Mexico,
15 cultural industries as defined in article 2012 of
16 the U.S.-Canada Free Trade Agreement.]]

17
18 4. MEX [Except as otherwise provided, the provisions of
19 subparagraph (c) of Article Y02 shall apply to any measure
20 affecting investments related to the provision of services if
21 such services are covered by Chapters ____.]

22
23 5. USA [The Parties affirm that this Chapter shall not be
24 construed to prevent the adoption or enforcement of any
25 measure, otherwise consistent with this Chapter, that a Party
26 deems appropriate to ensure that investment activity in its
27 territory is undertaken in a manner sensitive to
28 environmental concerns.]

TREATMENT OF INVESTMENTS

1. Each Party shall accord nondiscriminatory treatment¹ to an investor of another Party in the establishment, acquisition, expansion, ~~MEX USA~~ [management], conduct, operation and sale or other disposition of investments in its territory. For greater certainty, no Party shall

a) impose on an investor of another Party a requirement that a minimum level of equity in a business enterprise in its territory be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in its territory.

2. A Party's failure to accord nondiscriminatory treatment to an investment in its territory of an investor of another Party, ~~MEX USA~~ [and activities associated therewith], shall be a breach of that Party's obligation under paragraph 1.²

3. Each Party shall at all times provide to investments in its territory of investors of another Party full protection and security, fair and equitable treatment and in all other respects as well treatment in accordance with international law.

4. Without prejudice to paragraph 3, investors of a Party whose investments suffer losses in the territory of another Party owing to conflict or civil strife shall be accorded at least nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

5. ~~MEX USA~~ [A Party shall not require that entities which are legally constituted under the applicable laws or regulations of one Party, and which are investments of

¹ "nondiscriminatory treatment" or "nondiscriminatory basis" means treatment, or treatment on a basis, no less favorable than the better of national treatment or most favored nation treatment.

2. Canada proposes that the definitions of non-discriminatory treatment, national treatment and MFN be placed here in the text rather than in the definition section.

investors of another Party, engage as top managerial personnel individuals of any particular nationality.]

6. The most favored nation obligations of this Chapter shall not apply to advantages accorded by a Party by virtue of the Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade ^{CDA} [and other matters as set forth in Annex ____.]

7. **MEX USA** [Each Party reserves the right to deny to an entity of another Party the advantages of this Chapter if:

a) nationals of any non Party own or control such entity and such entity has no substantial business activities in the territory of the Party under whose laws it is constituted;] ^{USA} [or

b) such entity is owned or controlled by nationals of a non Party with which the denying Party does not maintain normal economic relations.]

8. a) A Party may maintain exceptions from the obligations of paragraphs 1 and 2 in respect of:

i) a non-conforming provision of any existing measure ^{USA} [but only to the extent required by domestic law³⁴];

ii) the continuation or prompt renewal of such a non-conforming provision of any existing measure; or

iii) an amendment to such a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with the obligations of this Agreement.

3. Existing measure will be defined to mean ^{CDA} [any measure] law in force on the date of the signature of the Agreement

4. Measure under the CFTA, includes any law, regulation, procedure, requirement or practice. To allow an exception for an existing measure with thus permit exceptions for administrative practices which are not required under existing law, but which are within administrator's discretion. To avoid such open-ended exceptions, the U.S. proposes the addition of this proviso to the CFTA grandfathering language.

1
2 b) A Party shall describe in detail in Annex A a as
3 of the date of signature of this Agreement the
4 non-conforming provisions of existing domestic
5 measures for which exceptions are taken under
6 paragraph (a), except that, for non-conforming
7 state or provincial measures, a Party shall have
8 two years from the entry into force of this
9 Agreement to complete its detailed description.⁵

10
11 c) As a further departure from the obligations of
12 paragraphs 1 and 2, which should occur only in
13 the most limited circumstances, a Party, by the
14 date of signature of this Agreement, may identify
15 in Annex B activities or sectors in respect of
16 which it maintain non-conforming provisions of
17 existing measures and in respect of which it
18 shall be permitted to impose non-conforming
19 measures in the future.

20
21 9. USA [Where a Party has or takes a measure covered in
22 Annexes A and B it shall nonetheless accord most favored
23 nation treatment unless set forth in the respective Annex.]
24

25
26 10. CDA [No Party shall require the establishment of an
27 investment or a commercial presence by a person of another
28 Party in its territory as a condition for the provision of a
29 service in a manner inconsistent with Article (on
30 nullification and impairment).]
31

32 11. CDA [The Parties shall implement the provisions of
33 Annex _____ regarding measures affecting investors of the
34 other Parties.]
35

5. This language is taken from agreed language in the services text. Additions are possible, e.g., a provision to the effect that a failure to describe an exception in any way means that the exception is lost.

PROVINCIAL AND STATE MEASURES

MEX USA[1. The obligations of this Chapter shall apply to the USA[political subdivisions] of the Parties.]

CDA[1. The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state, provincial and local governments.]

MEX USA[2. The treatment accorded by a Party

a) under Article ____ with respect to nationals and entities of another Party; and

b) under Article ____ with respect to the investments (and associated activities of those nationals and companies)

shall, in any state USA[or political subdivision], be no less favorable than the treatment accorded by such state USA[or political subdivision] to its residents, or entities legally constituted under its laws, or their investments in its territory.]

CDA[2. The provisions of this Article shall mean, with respect to measures of a province or state, treatment no less favorable than the most favorable treatment accorded by such province or state to investors, in like circumstances, of the Party of which it forms a part.]

PERFORMANCE REQUIREMENTS⁶

1. MEX CDA [Except as provided in Annex _____, *], no Party shall apply or condition the receipt of an incentive on, any of the following requirements, CDA [enforceable under domestic law or administrative ruling,] in connection with the establishment, acquisition, expansion, conduct or operation of investments in its territory of investors of USA [a Party or a non-Party] MEX CDA [another Party]:

- a) MEX USA [achieve a given level or percentage of domestic content; substitute domestic goods or services for imported goods or services; or otherwise] favour CDA [in any way] the purchase or use of goods MEX USA [or services] of domestic origin or from domestic sources CDA [in a manner inconsistent with Article _____ (national treatment on goods)];
- b) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- c) restrict domestic sales of goods MEX USA [and services] that such investment produces by limiting such sales in any way to the volume or value of its exports or foreign exchange earnings;
- d) MEX USA [transfer, import or use a particular technology, production process or other proprietary knowledge; or]
- e) MEX USA [act as the exclusive supplier of the goods or services it produces to a specific market or region.]

MEX USA [With respect to paragraph 1(a), benefits associated with the government procurement or export promotion program shall not be considered "incentives".]

2. CDA [Except as provided in Annex _____, 7*), no Party shall require, in connection with the establishment, acquisition, expansion, conduct or operation of investments in its territory of an investor of USA [a Party or a non-Party] MEX CDA [another Party] that such investment:

6. A draft text for discussion purposes only.

7. e.g., tax, autos, excluded services, energy, environment, aboriginal programs, financial services, etc.

- a) export a given level of percentage of goods or services;
- b) CDA[achieve a given level or percentage of domestic content;]
- c) CDA[substitute goods or services from the territory of such Party for imported goods or services.]

3. MEX CDA[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.]

4. CDA[For purposes of this Article, a Party "imposes" a requirement 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.]

5. CDA[Further to Article 106 (Nullification and Impairment), 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.]

6. MEX CDA[Nothing in this Agreement shall prevent a Party from imposing requirements on an investor of another Party in respect of activities not listed in paragraph 1.]

CDA [PERFORMANCE REQUIREMENTS

1. No Party shall apply, in connection with permitting the establishment or acquisition of an investment in its territory of an investor of a Party or non-Party, or after the date of entry into force of this Agreement in connection with the regulation of the conduct or operation of an investment located in its territory of an investor of a Party or non-Party, any of the following requirements enforceable under domestic law or administrative ruling:

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

b) achieve a given level or percentage of domestic content;

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

d) purchase or use goods or services of domestic origin or from domestic producers or service providers, or otherwise accord a preference to goods or services produced in such territory;

e) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

f) restrict domestic sales of goods or services that such investment produces by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

g) US MEX [transfer, import or use a particular technology, production process or other proprietary knowledge; or]

h) US MEX [act as the exclusive supplier of the goods or services it produces to a specific market or region.]

2. No Party, after the date of entry into force of this Agreement, shall condition the receipt of a financial contribution on any of the following requirements in connection with investments in its territory of investors of a Party or non-Party:

a) prescribe in any way the purchase or use of goods of domestic origin or from domestic producers;

1
2 c) restrict domestic sales of goods or services that
3 such investment produces by relating such sales in any way to
4 the volume or value of its exports or foreign exchange
5 earnings;

6
7 d) US MEX [transfer, import or use a particular
8 technology, production process or other proprietary
9 knowledge; or]

10
11 e) US MEX [act as the exclusive supplier of the goods
12 or services it produces to a specific market or region.]

13
14 3. CDA MEX [No Party shall prohibit or otherwise restrict an
15 investor established in the territory of another Party from:

16
17 a) exporting goods and services originating in such
18 territory to a non-party country;

19
20 b) importing to such territory goods and services
21 from a non-party country; or

22
23 c) using goods and service originating in a non-party
24 country.

25
26 4. CDA MEX [Nothing in this Chapter including the principle of
27 non-discrimination shall prevent a Party from imposing
28 requirements on an investor of a Party or non-Party in
29 respect of activities not covered in paragraphs 1 or 2.]

MONITORING

1. Notwithstanding Article (on national treatment), a Party may require routine information, to be used solely for informational or statistical purposes, concerning an investment of an investor of another Party in its territory. Such Party 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 equitable and good faith application of its laws.

TRANSFERS

1. Subject to paragraph 3 MEX CDA [and paragraphs 4 and 5] a Party shall permit all transfers and international payments (hereinafter "transfers") relating to an investment in CDA [or provision of a service in or into] its territory of an investor CDA [or service provider] of another Party to be made freely and without delay. Such transfers include:

- a) profits, dividends, interest, capital gains, royalty payments, management, technical assistance and other fees, MEX USA [returns in kind,] and other amounts derived from an investment CDA [or service];
- b) proceeds from the sale of all or any part of an investment CDA [or service] or from the partial or complete liquidation of an investment CDA [or service];
- c) payments made under a contract entered into by an investor, or investment, CDA [or service provider], including payments made pursuant to a loan agreement;
- d) compensation pursuant to {Article on expropriation}; and
- e) payments arising out of an investment dispute USA [as defined in {Article on dispute settlement}.]

2. USA [Except as provided in paragraph 2 of {Article on expropriation} and] subject to paragraph 3, a Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3. A Party may, through the equitable and good faith 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) CDA [restrictions applied by a Party to persons of another Party on the making of payments and transfers for current international transactions which conform with Article VIII of the Articles of Agreement of the International Monetary Fund;]
- b) bankruptcy, insolvency or the protection of the rights of creditors;

- 1 c) issuing, trading or dealing in securities;
- 2
- 3 d) criminal or penal offenses;
- 4
- 5 e) reports of currency transfers;
- 6
- 7 f) imposing taxes by such means as a withholding
- 8 tax; or
- 9
- 10 g) ensuring the satisfaction of judgments in
- 11 adjudicatory proceedings.
- 12

13 4. MEX CDA [No Party shall require its investors to
14 repatriate, or penalize its investors who fail to repatriate,
15 the income, earnings or profits attributable to any
16 investment in another Party or to any businesses carried on
17 in another Party either directly by the investors or
18 indirectly through a business enterprise established in that
19 other Party.]

20 5. MEX CDA [Paragraph 4 shall not be construed as
21 preventing a Party from taxing its investors on their share
22 of any income, earnings or profits attributable to a business
23 carried on or an investment made in another Party, provided
24 that the tax so charged does not exceed the tax that would be
25 so charged if such income, earnings or profits were
26 repatriated, without any further tax on the repatriation, to
27 its investors.]
28

STATE ENTERPRISES

CDA [STATE ENTERPRISES]

1. Nothing in this Agreement shall prevent a Party from maintaining or establishing a state enterprise.

2. The Party maintaining or establishing a state enterprise shall ensure, whether regulatory supervision, administrative control or the application of other measures, including where appropriate, through the application of its domestic competition laws, that the state enterprise:

- a) in the provision of its goods or services in the territory of the Party, accord nondiscriminatory treatment to investments of investors of another Party;
- b) where engaged in non-regulated commercial activities in competition, in the relevant market within the territory of such Party or any part thereof, with investments of investors of another Party, does not engage in anti-competitive practices that adversely affect investments of investors of another Party.

3. Where a state enterprise of a Party is engages in competition with investments of investors of another Party in the relevant market within the territory of that Party or any Part thereof, that Party shall accord to investments of investors of the other Party, treatment no less favorable than that accorded, in like circumstances, to investors of any other private persons.

USA [1. The provisions of this Chapter, and in particular the obligation to accord nondiscriminatory treatment to investments in the territory of a Party of investors of another Party, shall apply to the state enterprises of a Party.

2. Further to Article (concerning nondiscriminatory treatment), where a state enterprise of a Party is in competition, within the territory of such Party, with an investment o f an investor of another Party, and where there are no other investments of investors of that Party which are not state enterprises in competition with the state enterprise, that Party shall accord the investment of the investor of the other Party treatment no less favorable than that which it provides its state enterprise. Where investments of investors of that Party which are not state enterprises also compete with the state enterprise, the investment of the investor of the other Party shall be

- 1 accorded treatment no less favorable than that provided such
- 2 other investments.]

EXPROPRIATION AND COMPENSATION

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

- a) for a public purpose;
- b) on a nondiscriminatory basis;
- c) in accordance with due process of law and the general principles of treatment provided in paragraph 3 Article (on treatment of investment); and
- d) upon payment of compensation in accordance with paragraph 2.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier. Valuation criteria shall include going concern value, asset value (including declared tax value of tangible property), and other criteria, as appropriate to determine fair market value. Compensation shall be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of ~~MEX USA~~ [expropriation.] ^{CDA} [transfer].

DISPUTE SETTLEMENT

MEX [Article ____ : Dispute Settlement

1. (Definition of an investment dispute)
2. In the event of an investment dispute, the investor may send written notice to the Party with which it has the dispute ("the host government"), setting forth the provision or provisions of this Chapter which it believes has been breached and the facts on which its assertion is based. The investor shall simultaneously send a copy of this written notice to the Party of which it is a national ("the home government"). The two Parties shall thereupon immediately refer the matter to dispute resolution under Chapter 23.]

MEX [Article ____ : Domestic Judicial Enforcement of the Rights of Investors

1. Each Party shall provide investors of the other Parties access to an impartial judicial system with authority to enforce the rights of investors established under this Agreement.]

CANADA ADDITIONAL EQUIVALENCES

(From Canadian Protocol, Part 2: Specific Commitments and Exceptions):

[22. Notwithstanding anything in the Agreement, the provisions of Part 6 shall not apply to any Decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review.]

USA [Article XX07: Settlement of Disputes between a Party and an Investor of another Party.

1. The provisions of this article reflect the desirability of a mechanism for the settlement of investment disputes that assures equal treatment between investors of the Parties in accordance with the principle of international reciprocity and that assures that the Parties to the dispute are afforded due process before an impartial tribunal.

2. For purposes of this Article, an investment dispute means a dispute between a Party and an investor of another Party involving an alleged breach of any right conferred by this Chapter where the investor claims as final relief only monetary damages or restitution of property.

3. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through

1 consultation and negotiation. If the dispute cannot be
2 settled amicably, the investor concerned may choose to submit
3 the dispute for resolution:

- 4
5 a) to the courts or administrative tribunals of the
6 Party that is a Party to the dispute; or
7
8 b) in accordance with the terms of paragraph 4.
9

10 The choice made by the investor shall be exclusive.

11
12 4. Provided that the investor concerned has not submitted
13 the dispute for resolution under paragraph 3 (a) and that six
14 months have elapsed from the date on which the dispute arose,
15 the investor concerned may submit the dispute for settlement
16 by binding arbitration:

- 17
18 a) to the International Centre for the Settlement of
19 Investment Disputes ("Centre") established by the
20 Convention on the Settlement of Investment
21 Disputes between States and Nationals of other
22 States, done at Washington, March 18, 1965
23 ("ICSID Convention"), provided that the Party
24 concerned is a party to such Convention;
25
26 b) to the Additional Facility of the Centre, if the
27 Centre is not available; or
28
29 c) in accordance with Arbitration Rules of the
30 United Nations Commission on International Trade
31 Law (UNCITRAL).
32
33

34 5. Notwithstanding paragraphs 3 and 4, the investor and
35 the Party to the dispute may mutually agree to arbitration in
36 accordance with other arbitration rules or before another
37 arbitration institution.
38

39 6. Each Party hereby consents to the submission of any
40 investment dispute for settlement by binding arbitration in
41 accordance with the choice made by the investor under
42 paragraph 4. Such consent, together with this submission of
43 the dispute by the investor under paragraph 4 or 5 shall
44 satisfy the requirement for:
45

- 46 a) written consent of the parties to the dispute for
47 purposes of Chapter II of the ICSID Convention
48 (Jurisdiction of the Centre) and for purposes of
49 the Additional Facility Rules; and
50
51 b) an "agreement in writing" for purposes of Article
52 II of the United Nations Convention of the
53 Recognition and Enforcement of Foreign Arbitral

Awards, done at New York, June 10, 1958 ("New York Convention").

7. Any arbitration under paragraph 4 or 5 of this Article shall be held in a State that is a party to the New York Convention.

8. [Subject to the New York Convention and the ICSID Convention],

a) any arbitral award resulting from an arbitration under paragraphs 4 or 5 of this Article shall be final and binding on the parties to the dispute; and

b) each Party undertakes to carry out without delay the provisions of any such award and to provide for its enforcement.

9. In any proceeding 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.

10. For purposes of an arbitration held under paragraph 4 or 5 of this Article, any company 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.

11. No Party shall give diplomatic protection, or bring an international claim for money damages or restitution of property, in respect of the investment dispute which one of its investors shall have submitted to arbitration under this Article, unless such other Party shall have failed to abide by and comply with the award rendered in such dispute. Diplomatic protection for purposes of this paragraph shall not include informal diplomatic exchanges for the sole purposes of facilitating settlement of a dispute or any consultation or dispute settlement proceedings between states pursuant to Chapter 23 of this Agreement.

USA [Article XX08: Settlement of Disputes Between Parties

1. Any dispute between Parties concerning the interpretation or application of this Chapter which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of a Party, for binding

1 decision in accordance with the applicable rules of
2 international law to an arbitral tribunal composed of three
3 arbitrators.
4

5 2. In the absence of an agreement by the Parties to the
6 contrary, the arbitration rules of the United Nations
7 Commission on International Trade Law (UNCITRAL) shall apply.
8 The appointing authority referenced in those rules shall be
9 the Secretary General of the Centre.
10

11 3. Fees and expenses of the arbitrators and appointing
12 authority, and other costs of the proceedings, shall be borne
13 equally by the Parties. Each Party shall bear the cost of its
14 legal representation.]

NATIONAL SECURITY

MEX USA [1. Nothing in this Chapter shall preclude the application by a Party of measures necessary for the maintenance of public order, the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Note: This provision is self-judging.]

CDA [1. Nothing in this Agreement shall be construed to prevent:

- a) any Party from refusing to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
- b) any Party from imposing any measure affecting goods, services, service providers, suppliers or investors of a Party which it determines is directly related and essential to:
 - i) supplying a military establishment of a Party with arms, ammunition or implements of war, or enabling fulfillment of a critical defence contract of a Party;
 - ii) responding to a situation of armed conflict involving the Party taking the measure;
 - iii) implementing international agreements relating to the nonproliferation of nuclear, chemical or biological weapons, other nuclear explosive devices, or chemical or biological agents;
 - iv) responding to direct threats of disruption in the supply of nuclear materials for defence purposes.
- c) any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Party relying on paragraphs a) - c) shall ensure that its action or measure is that which least infringes the rights or any reasonable expectations of the other Parties

1 under this Agreement, and is no broader in scope or duration
2 than necessary.

3
4 3. Any determination made under paragraph 1(b) shall be
5 published promptly in the official journal of that Party.
6 Any determination made under paragraph 1(a) or action taken
7 under paragraph 1(c) shall, where appropriate, be similarly
8 published.

9
10 4. Except in cases of emergency, the Party proposing to
11 impose any measure under paragraph 1(b), or proposing to take
12 action under 1(c) shall consult with the other Parties prior
13 to imposing such measure or taking such action.]

14
15 MEX CDA [5. If a Party considers that any action or measure
16 taken by another Party under this Article constitutes a
17 disguised restriction on trade or investment or otherwise
18 nullifies or impairs any benefit reasonably expected under
19 this Agreement, it may request consultations. Such
20 consultations shall be held promptly. The Party whose action
21 or measure is the subject of the consultations shall give
22 full and sympathetic consideration to the view of the
23 complaining Party and shall explain, in as much detail as is
24 consistent with its assessment of its security interests, the
25 reasons for the measure. Where appropriate following such
26 consultations, such Party shall re-consider whether its
27 action or the application of its measure could be altered in
28 any way, in order to minimize the infringement of rights and
29 benefits otherwise secured by this Agreement.]

30
31 CDA [6. No Party may invoke the provisions of this Article to
32 derogate from the requirement to pay compensation for an
33 expropriation in accordance with Article ____ or to permit
34 the transfer of an investment and returns, in accordance with
35 Article ____.]

TAXATION

USA [ARTICLE XX. TAXATION⁸

1. Nondiscriminatory Treatment

a) The most favored nation provisions of the Agreement shall not apply to advantages with respect to taxation accorded by a Party pursuant to a convention for the avoidance of double taxation (hereinafter "Tax Convention") or other international agreement or arrangement, or domestic legislation, relating wholly or mainly to taxation.

b) Except as provided in subparagraph (c) and except as provided in [] with respect to goods, provisions in the Agreement for nondiscriminatory treatment shall not apply to:

i) measures relating to the taxation of income (including capital gain); or

ii) other measures aimed at ensuring the equitable or effective imposition or collection of taxes.

c) A claim by a Party or an investor of such Party that a tax measure of another Party constitutes an expropriation shall be resolved under Article (expropriation) of the Investment Chapter. The issue of whether such tax is discriminatory shall be referred for resolution to the competent authorities under a Tax Convention between the relevant Parties. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to resolve it within a reasonable period of time⁹, the issue shall also be resolved, together with all other issues of the expropriation, under Article (Dispute Settlement) of the Investment Chapter.

2. Notwithstanding Article (Transfers), a Party may impose or collect a tax by withholding or other means.]

CDA [Article 112: Taxation

1. Subject to Article 106 and except as otherwise provided in this Agreement, nothing in this Agreement shall affect the right of any Party to adopt or maintain any taxation measure.

⁸. This proposal assumes that bilateral tax treaties are in force between all three countries and applies to the agreement as a whole.

⁹. Further drafting required to clarify that "reasonable period of time" is subject to investor-state arbitration.

1
2 2. Nothing in this Agreement shall affect:
3

4 a) the right of any Party to adopt or maintain any
5 measure designed to prevent the avoidance of tax
6 by producers, service providers, investors and
7 suppliers of any other Party or to impose
8 nonresident withholding taxes on payments made to
9 producers, service providers, investors and
10 suppliers of any other Party; or

11
12 b) rights and obligations under any international
13 taxation agreement, as may be specified in a
14 Party's instrument of ratification or accession.]

EXTRA-TERRITORIALITY

MEX CDA [Article 407: Extra-territoriality

...
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.]

1 TECHNOLOGY CONSORTIA

2
3 MEX CDA [Article 409: Technology Consortia

4
5 1. No Party shall maintain or introduce any measure that
6 limits or prevents an investor of another Party from
7 participating in a technology consortium or other group of
8 business enterprises respecting the development of or access
9 to technology (in a manner that would violate Article (on
10 national treatment) or Article (on nullification and
11 impariment).]

12
13 CDA [2. Any measure imposed by a Party on a global basis that
14 would be consistent with this Agreement but for paragraph 1
15 of this Article, including those imposed in accordance with
16 the national security provisions of this Agreement, that
17 limits or prevents such participation, shall not apply to the
18 investors of the other Parties unless the other Parties are
19 specifically named as being included in the measure. Any
20 Party proposing to implement such measure that places a
21 restriction or limitation on the investors of the other
22 Parties shall consult with the other parties prior to its
23 implementation.]

COMPETITION POLICY

CDA [New Article 411: Competition

1. The Parties agree to implement such laws and regulations as are necessary and appropriate that result in the transparent regulation, as well as enforcement thereof, of anti-competitive conduct by private persons such as anti-competitive agreements, mergers, monopolies and pricing practices and abuse of dominant position, recognizing that such conduct may frustrate the fulfillment of the object and purpose of this agreement.

2. The obligations of paragraph 1 shall not be subject to review pursuant to section(s) (the dispute settlement mechanisms).

3. Each party agrees to notify the others prior to the adoption of any such laws, regulations or policies, or modification thereof and, upon request of any other Party, to hold consultations and to consider the views of the other Party(ies).

4. The Parties recognize that effective competition law enforcement in the free trade area requires cooperation and coordination among national authorities. For the purpose of implementing such coordination and cooperation, the Parties agree to pursue negotiations on a trilateral basis to create, expand or 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.

5. 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 of the other Parties, each Party shall, in addition to any obligations incorporated in agreements reached pursuant to section 4 (above), assess, and be prepared to advise the other Parties of the results of its assessment of, the following factors:

a) the relative significance of the anti-competitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the 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 law 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.

6. 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;
- c) the potential for reliance on competition laws and policies to discipline anti-competitive transborder pricing practices and market segmentation.¹⁰

¹⁰. Paragraph 6 and the Mexican equivalent for Working Group review of removal of barriers to competition is under consideration in the Lawyers' Group in consultation with the Trade Remedies Group.

1 DEFINITIONS

2
3 For purposes of this Chapter:

4
5 **National** means a natural person who is a national of a
6 country under its applicable law.

7
8 CDA[**State enterprise** means for Canada a Crown Corporation
9 within the meaning on the Financial Administration Act. For
10 the U.S. and Mexico].

11
12 USA[**State enterprise** means an entity of a Party that is
13 owned, or controlled through ownership interests, directly or
14 indirectly, by such Party or any agency or instrumentality
15 thereof.]

16
17 **Business enterprise** means a business that has, or in the case
18 of an establishment thereof will have:

19
20 a) a place of Business;

21
22 b) an individual or individuals employed or self-
23 employed in connection with the Business; and

24
25 c) assets used in carrying on the business, and

26
27 CDA[that involves a financial commitment for the purpose of
28 commercial gain.]

29
30
31
32 **Entity** means any corporation, trust, partnership, sole
33 proprietorship, joint venture or other association
34 MEXUSA[whether or not for profit, and whether privately-
35 owned or governmentally-owned]

36
37 USA[**National treatment** means treatment no less favorable than
38 that accorded by a Party, in like circumstances, to nationals
39 or companies of such Party or to investments of such
40 nationals or companies, as the case may be.]

41
42 CDA[**National treatment** means treatment of investors of
43 another Party no less favorable than that accorded by a Party
44 in like circumstances to its own investors.]

45
46 USA[**Most favored nation treatment** means treatment no less
47 favorable than that accorded by a Party, in like
48 circumstances, to nationals or companies of any other party
49 or to investments of such nationals or companies.]

50
51 CDA[**Most favored nation treatment** means treatment of
52 investors of another Party no less favorable than that

1 accorded by a Party in like circumstances to investors of a
2 Party or a non-Party.]

3
4 **USA** [**Nondiscriminatory treatment or nondiscriminatory basis**
5 **mean treatment, or treatment on a basis, no less favorable**
6 **than the better of national treatment or most favored nation**
7 **treatment.**]

8
9 **CDA** [**monopoly means any entity, or group of entities acting**
10 **in concert to effect a common purpose, that in any relevant**
11 **market, is the sole provider of a good or service;**

12
13 **Relevant market means the market of the good or service**
14 **within the territory of a Party, or any part thereof, which**
15 **is the subject of the maintained or designated monopoly.]**

16
17 **control means**

18
19 **MEX USA** [**Entity of a Party means an entity legally constituted**
20 **under the laws and regulations of a Party or a political**
21 **subdivision thereof.]**

22
23 **MEX CDA** [**establishment means a startup of a new business**
24 **enterprise and the activities related thereto;**]

25
26 **CDA** [1. **Investment of an investor of a Party means an**
27 **investment that is owned or controlled directly or indirectly**
28 **by an investor of such Party**¹¹.
29

30 **2. Investment consists of:**

31
32 **a) a business enterprise located in the territory**
33 **of another Party;**

34
35 **b) equity or debt securities of a business**
36 **enterprise located in the territory of another Party, or in**
37 **any interest in such enterprise that entitles the owner to**
38 **share the income or profits or to share in the assets on**
39 **dissolution.**

40
41 **c) real estate or other tangible property located**
42 **in the territory of another Party, [or intangible property**
43 **excluding intellectual property, located in the territory of**
44 **another Party,] that is acquired in the expectation of or**
45 **used for the purpose of commercial gain;**

46
47 **d) a loan to a business enterprise located in the**
48 **territory of another Party made or guaranteed by an affiliate**
49 **of such business enterprise (but not including a loan**

¹¹. For purposes of paragraph 1, an investor owns or controls an investment indirectly when he has a determining influence on the management of such investment.

1 through a bank or other financial institution as defined in
2 Chapter (on Financial Services), whether or not such loan is
3 guaranteed by one of the affiliated business enterprises).
4

5 e) interests arising from the commitment of
6 significant capital in the territory of another Party to a
7 major project or permanent commercial presence in that
8 territory related to (i) contracts involving the presence of
9 the investor-s property in the territory of another Party
10 (such as concession agreements, turnkey or construction
11 contracts) or (ii) contracts where remuneration depends
12 substantially on the production, revenues or profits of a
13 business enterprise.
14

15 3. For greater clarity, investment exclude the following
16 kind of interests:
17

18 a) claims to money which arise solely from:
19

20 (i) commercial contracts for the sale of goods
21 or services by a national or entity in the territory of one
22 Party to a business enterprise in the territory of another
23 Party;
24

25 (ii) the extension of credit in connection
26 with a commercial transaction (e.g. trade financing); or
27

28 (iii) any other claims to money
29

30 and which do not involve the kinds of interests in paragraph
31 2.
32

33 b) any loan to a business enterprise other than a
34 loan between affiliated business enterprises described in
35 paragraph 2 d).
36

37 c) bonds, treasury bills, or any other kind of
38 debt, security issued by a Party, including those issued by
39 State, Provincial or local governments of a Party.
40

41 4. "Equity or debt" securities includes voting and non-
42 voting shares, bonds, convertible deventures, stock options
43 and warrants.
44

45 **MEX USA** [1. Investment of an investor of a Party means an
46 investment owned or controlled directly or indirectly by an
47 investor of such Party.
48

49 2. Investment includes the following kinds of interests:
50

51 a) equity or debt securities of a business
52 enterprise, or any interest in such enterprise

that entitles the owner to share in the income or profits or to share in the assets on dissolution;

b) real estate or other property (tangible or intangible) acquired in the expectation of used for the purpose of economic benefit or other business purposes;


c) a loan to a business enterprise made or guaranteed by an affiliate of such business enterprise ^{USA} [and any other loan to a business enterprise if the mean repayment period exceeds three years];

d) interests arising from the commitment of capital or other resources to economic activity in the territory of another Party such as under (i) contracts involving the presence of the investor's property in the territory of another Party (e.g., concession agreements, turnkey or construction contracts), (ii) contracts where the remuneration depends substantially on the production, revenues or profits of a business enterprise ^{USA} [or (iii) government-issued permits to engage in such economic activity.]

3.  claims to money which arise solely from:

a)

(i) commercial contracts for the sale of goods or services by a national or entity in the territory of one Party to a business enterprise in the territory of another Party; or

(ii) any other claim to money 

b) the extension of credit in connection with a commercial transaction (e.g., trade financing) other than a loan covered by paragraph 2(c);

and which do not involve the kinds of interests in paragraph 2 shall not be considered investments.

4. "Equity or debt securities" includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants.]

Investor of a Party means a national or entity of such Party.

CDA [investor of a Party means:

a) such Party or agency thereof;

- 1
2 b) a province or state of such Party or agency
3 thereof;
4
5 c) a national of such Party;
6
7 d) an entity ultimately controlled directly or
8 indirectly through the ownership of voting
9 interests by:
10
11 (i) such Party or one or more agencies thereof;
12
13 (ii) one or more provinces or states of such
14 Party or one or more agencies thereof;
15
16 (iii) one or more nationals of such Party;
17 (iv) one or more entities described in paragraph
18 (e); or
19
20 (v) any combination of persons or entities
21 described in (i), (ii), (iii) and (iv); or
22
23 e) an entity that is not ultimately controlled
24 directly or indirectly through the ownership of
25 voting interests where a majority of the voting
26 interests of such entity are owned by:
27
28 (i) persons described in subparagraphs (d) (i),
29 (ii) and (iii);
30
31 (ii) entities incorporated or otherwise duly
32 constituted in the territory of such Party and,
33 in the case of entities that carry on business,
34 carrying on a business enterprise located in the
35 territory of such Party, other than any such
36 entity in respect of which it is established that
37 nationals of a third country control such entity
38 or own a majority of the voting interests of such
39 entity; or
40
41 (iii) any combination of persons or entities
42 described in (i) and (ii);
43

44 that makes or has made an investment;
45

46 NOTE: For purposes of paragraph (e), in respect of
47 individuals each of whom holds not more than one percent of
48 the total number of the voting interests of an entity the
49 voting interests of which are publicly traded, it shall be
50 presumed, in the absence of evidence to the contrary, that
51 those voting interests are owned by nationals of such Party
52 on the basis of a statement by a duly authorized officer of
53 the entity that, according to the records of the entity,

1 those individuals have addresses in the territory of such
2 Party and that the signatory to the statement has no
3 knowledge or reason to believe that those voting interests
4 are owned by individuals who are not nationals of such
5 Party;]

6
7 MEX CDA [investor of a non-Party means an investor other than
8 an investor of a Party, that makes or has made an
9 investment;]

10
11 MEX CDA [joint venture means an association of two or more
12 persons or entities where the relationship among those
13 associated persons or entities does not, under the laws in
14 force in the territory of the Party in which the investment
15 is made, constitute a corporation, a partnership or a trust
16 and where all those associated persons or entities own or
17 will own assets of a business enterprise, or directly or
18 indirectly own or will own voting interests in an entity that
19 carries on a business enterprise;]

20
21 measures includes "any law, regulation, procedure,
22 requirement or practice." It should be noted that this
23 definition is not exhaustive of the forms that measures may
24 take.

25
26 MEX CDA [ownership includes beneficial ownership and with
27 respect to assets also includes the beneficial ownership of a
28 leasehold interest in such assets;]

29
30 MEX CDA ["person means a natural person or an enterprise"

31
32 MEX CDA [voting share means a share in the capital of a
33 corporation to which is attached a voting right ordinarily
34 exercisable at meetings of shareholders of the corporation
35 and to which is ordinarily attached a right to receive a
36 share of the profits, or to share in the assets of the
37 corporation on dissolution, or both.]

CDA [CANADIAN GENERIC ANNEX

ADDITIONAL CANADIAN EQUIVALENCES

From Canadian Protocol, Part 2: SPECIFIC COMMITMENTS AND
EXCEPTIONS

1. Notwithstanding any provision of the Agreement,
Article 2005 of the Canadian-United States Trade Agreement
shall continue to apply as between Canada and the United
States.

Article 111: General Exceptions

Nothing in this Agreement shall be construed to prevent the
adoption or enforcement by any Party of measures:

- a) necessary to protect public order, safety or
public morals;
- b) necessary to protect human, animal or plant life
or health or the environment in its territory, or
to enforce generally agreed international
environmental or conservation rules or standards;
- c) relating to the products or services of prison
labor;
- d) imposed for the protection of national treasures
of artistic, historic or archaeological value;
- e) necessary for fiduciary or consumer protection
reasons;
- f) necessary to secure compliance with laws or
regulations which are not inconsistent with the
provisions of this Agreement, including those
relating to the avoidance of fraudulent or
deceptive practices;

provided that such measure is:

- g) consistent with Article 106; and
- h) is the least trade-restrictive necessary for
securing the protection required.

Article 106: Nullification and Impairment of Benefits

1. No measure shall be implemented or applied by any
Party in a manner that would:

- 1 a) constitute a means of arbitrary or unjustifiable
2 discrimination between its goods, services and
3 service providers, investors and suppliers and
4 those of any other Party;
5
6 b) ...
7
8 c) otherwise nullify or impair any benefit
9 reasonably expected to accrue to one or more of
10 the other Parties, directly or indirectly, under
11 this Agreement.]
12
13

14 **SPECIFIC COMMITMENTS AND EXCEPTIONS**

15
16 2. Regarding Article 108 of the Agreement, the
17 most-favoured-nation treatment set out therein shall not
18 apply to:
19

- 20 a) bilateral air agreements to which Canada is a
21 party;
22
23 b) maritime cabotage regulations providing a
24 Commonwealth preference;
25
26 c) Canada-United States reciprocal salvage rights;]
27
28 d) (to be negotiated)].