

**CHAPTER 21 - INVESTMENT**  
**Chapter XX - Investment**  
**PART 4 - INVESTMENT AND CONDUCT OF BUSINESS OPERATIONS**

**SCOPE, COVERAGE AND DURATION**

**Article Y01: Scope<sup>USA</sup> [and Post Termination Coverage]**

1. <sup>MEX</sup> [Subject to paragraphs 3, 4 and 5,] <sup>CDA MEX</sup> [this ~~XX~~ [Chapter] ~~2A~~ [Part] shall apply to any measure of a Party affecting] <sup>MEX</sup> [investment in its territory by an investor of the other Parties] <sup>CDA</sup> [investors or service providers 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.]

<sup>USA</sup> [2. This Chapter shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter. ~~With respect to investments made prior to the date of termination of this Agreement and to which this Chapter otherwise applies, the provisions of all of this Chapter shall thereafter continue to be effective for a further period of ten years from such date of termination.~~

<sup>MEX</sup> [3. This Chapter shall not apply to any measure taken pursuant to a restriction expressly mandated by the Constitution of a Party.]

<sup>MEX CDA</sup> [4. This <sup>MEX</sup> ~~Chapter 21~~ [Part] shall not apply to:

- a) the provision of financial services or insurance <sup>CDA</sup> [except as provided in Annex Y01.4(a)];

**U.S.: Note 2 – While financial services will be covered in the financial services chapter, certain provisions of the investment chapter may apply to financial services by cross-reference in the financial services chapter.**

- b) government procurement <sup>CDA</sup> [except as provided in Part 3 (Internal Measures)];

<sup>CDA</sup> [c) services listed in Annex Y01.3(c)]

<sup>CDA</sup> [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;]

CDA [e] public or private entities in respect of their activities forming part of a statutory system of social security, health care, education, day care, or public retirement plans;]

CDA [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;]

CDA [g] the specific measures of the Parties listed in Annex Y01.3(f); and]

CDA [h] subject to Article 106 (Nullification or Impairment of Benefits), any subsidy;]

MEX [5. Except as otherwise provided, the provisions of subparagraph (c) of Article Y02 shall apply to any measure affecting investments related to the provision of services if such services are covered by Chapters \_\_\_\_.]

CDA [6. This Part shall apply to any measure of a selfregulatory organization whose mandate is conferred by the Party, or by its state, provincial or local governments.]

#### **ADDITIONAL CANADIAN EQUIVALENCES**

[From Canadian Protocol, Part 2: SPECIFIC COMMITMENTS AND EXCEPTIONS

~~12. 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~~

An identical provision is included in the Canadian draft of the U.S. Protocol.

...

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.]

#### **CDA [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.]

#### **CDA [Article 106: Nullification and Impairment of Benefits]**

1. No measure shall be implemented or applied by any Party in a manner that would:
  - (a) constitute a means of arbitrary or unjustifiable discrimination between its goods, services and service providers, investors and suppliers and those of any other Party;
  - (b) ...
  - (c) otherwise nullify or impair any benefit reasonably expected to accrue to one or more of the other Parties, directly or indirectly, under this Agreement.]

USA [Notes:

3. Language on the environment may be provided for this chapter and/or generically.]

#### **EXISTING LEGISLATION**

##### **CDA [Existing Legislation]**

Notwithstanding Article 103, paragraph 1 (Extent of Obligations), except in respect of Part 2 (Border Impediments to Free Trade) and as otherwise provided herein the obligations of this Agreement] 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 the obligations of this Agreement].

##### **USA [Article XX01: Treatment of Investments (continued)]**

1. ...

2. ...

3. With the approval of all other Parties, a Party may maintain limited exceptions to the obligations of (paragraph concerning nondiscriminatory treatment) provided that any exception to national treatment, other than in the maritime sector, shall not be a greater departure from such obligations than required by or specified in domestic law in force on the date of signature of this Agreement. In the event that the relevant domestic law is liberalized to conform more closely to the obligations of (such paragraphs), it may not thereafter be made more restrictive. Where a Party takes an exception to national treatment it shall nonetheless accord most favored nation treatment unless specified otherwise in Annex A. A brief description of all exceptions and the laws on which they are based shall be set forth in Annex A.]

## **TREATMENT OF INVESTMENTS**

### **MEX [Article 2102: National Treatment**

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

### **USA [Article XXO1: Establishment and Treatment of Investment**

1. Each Party shall accord ~~nondiscriminatory treatment~~ to nationals and companies of another Party in the making of investments in its territory, and in the management, control, operation, maintenance, or disposition of such investments...]

### **CDA [Article 105: National Treatment**

1. Each Party shall accord to the goods, ~~services and service providers~~, investors ~~and suppliers~~ of the other Parties treatment no less favorable than that accorded to its own like goods, services and service providers, investors and suppliers in respect of all matters covered by this Agreement, except as otherwise provided in this Agreement.]

### **CDA [Article 108: Most Favored Nation Treatment**

Subject to the specific exceptions listed in a Party's instrument of ratification or accession, ~~each Party shall~~, immediately and unconditionally, accord to the goods, services and service providers, investors and suppliers of all other Parties treatment no less favorable than that accorded by it to the like goods, services and service providers, investors and suppliers of any other country or international entity, whether or not that country or entity is a Party to this Agreement, in respect of all matters covered by this Agreement.]

USA [1... In particular, no Party shall

(a) impose on a national or company of another Party a requirement that a minimum level of equity in an investment by such national or company (other than nominal qualifying shares for directors or incorporators of corporations) be held by nationals of such Party; or]

<sup>1</sup> "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."

CDA [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;]

USA [(b) require a national or company of another Party, by reason of its nationality, to sell or otherwise dispose of an investment (or any part thereof) in its territory.]

CDA [(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...]

USA [2. Each Party shall accord nondiscriminatory treatment to investments in its territory of nationals or companies of another Party, and activities associated therewith.]

~~CDA [(c) No Party shall require the establishment of an investment or a 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.]~~

~~CDA [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.]

**MEX [Article 2102: National Treatment, continued**

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.

2. The Parties are excepted from the obligations of this Article as set forth in Annexes 2102.1 and 2102.2.]

**MEX [Article 1310: Emergency Safeguard Measures**

1. If, as a result of the reduction or elimination of a restriction provided for in this Chapter, or in the Sectoral Chapters, a service is being imported into the territory of a

6

Party or produced within its territory by providers of another Party in such increased quantities, and under such conditions, as to constitute a substantial cause of serious injury to domestic industry providing a like or directly competitive service, the Party may, to the extent directly necessary to remedy the injury:

(a) ...

(b) limit the establishment in its territory of providers of such service not already established there; and

(c) ....

2. The following conditions and limitations shall apply to an action taken pursuant to paragraph 1....]

### **OTHER U.S. TREATMENT PROVISIONS WITH NO CAN, MEX COUNTERPARTS**

#### **Article XX01: Establishment and Treatment of Investment**

4. Investments of nationals and companies of a Party in the territory of another Party shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

5. Without prejudice to paragraph 4, nationals or companies of a Party whose investments suffer losses in the territory of another Party owing to war or other armed conflict, revolution, insurrection or other similar events shall be accorded at least nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

6. [Temporary entry provision deleted; it will be addressed elsewhere in NAFTA]

7. A Party shall not require that companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments of nationals or companies of another Party, engage as top managerial personnel individuals of any particular nationality.

8. Each Party shall provide nationals and companies of another Party with an effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

### **ADDITIONAL CANADIAN COMMENT AND EQUIVALENCES**

Derogations from MFN treatment are provided in the Protocols of the Canadian draft. For example:

#### **PART 2: SPECIFIC COMMITMENTS AND EXCEPTIONS**

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

(a) bilateral air agreements to which Canada is a party;

- (b) maritime cabotage regulations providing a Commonwealth preference;
- (c) Canada-United States reciprocal salvage rights;
- (d) goods benefiting from tariff preferences accorded by the Canada-United States Free Trade Agreement;
- (e) goods benefitting from tariff preferences accorded by the Generalized Preferential Tariff or by the Economic and Trade Development Assistance Program for the Countries of the Commonwealth Caribbean;
- [(f) to be negotiated].

USA [9. The most favored nation provisions 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.]

10. ...

11. Each Party reserves the right to deny to a company of another Party the advantages of this Chapter if:

- a) nationals of any nonParty own or control such company and such company has no substantial business activities in the territory of the Party under whose laws it is constituted; or
- b) such company is owned or controlled by nationals of a nonParty with which the denying Party does not maintain normal economic relations.

#### **CDA [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.]

### **PROVINCIAL AND STATE MEASURES**

#### **Application of Obligations to Sub-divisions:**

##### **USA [Article XX11: Political Subdivisions**

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

##### **CDA [Article 103: Extent of Obligations**

4. 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.]

## **Relative Standard of Treatment in Political Sub-divisions**

### **MEX [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.]

### **USA [Article XX11: Application to Subdivisions**

#### **2. The treatment accorded by a Party**

- a) under Article XX01.1 with respect to nationals and companies of another Party; and
- b) under Article XX02.2 with respect to the investments (and associated activities of those nationals and companies)

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

### **USA [Article 105: National Treatment**

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 any like goods, services and service providers, investors and suppliers, as the case may be, of the Party of which it forms a part.]

## **USA [TRADE-RELATED] PERFORMANCE REQUIREMENTS**

MEX CDA [1. MEX [Except as provided in Annex Y04.1,] 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:]

USA [1. No Party shall apply, or condition the receipt of an incentive on, any traderelated performance requirement connected with the making, maintenance, or operation of investments of investors of a Party or a nonParty. Traderelated performance requirements include requirements on or commitments by an investment to:]

- USA CDA (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 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; or



- e) relate the volume or value of its purchases of imports of goods or services to the volume, value or proportion of its exports of goods or services, or relate the volume or value of its exports to the volume, value or proportion of its purchases of imports.

MEX CDA [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.]

MEX CDA [3. For purposes of this Article, a Party "imposes" a requirement on an investor when it requires MEX [as a matter of law,] particular action MEX [or omission] of an investor CDA [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.]]

CDA [4. Further to Article 106 (Nullification and Impairment), no Party shall impose on an investor of a nonParty, 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.]

~~CDA [5. 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.]~~

MEX CDA [6. 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.]

#### MEX [SCREENING, AUTHORIZATION AND] MONITORING

~~MEX [1. A Party may maintain screening and authorization procedures for investments as set forth in Annex 2102.]~~

MEX [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.]

3. Notwithstanding Article (on national treatment), a Party may require an investor of another Party USA [or its investments] CDA [or a service provider of another Party] to submit to it routine information USA [respecting such investment] solely for information or statistical purposes. Such Party shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position.

4. 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 <sup>CDA</sup> [and paragraphs 4 and 5] a Party shall permit all transfers <sup>USA</sup> <sup>CDA</sup> [and international payments (hereinafter "transfers")] relating to an investment in <sup>CDA</sup> [or provision of a service in or into] its territory of an investor <sup>CDA</sup> [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, <sup>USA</sup> [returns in kind,] and other amounts derived from an investment <sup>CDA</sup> [or service];
- (b) proceeds from the sale of all or any part of an investment <sup>CDA</sup> [or service] or from the partial or complete liquidation of an investment <sup>CDA</sup> [or service];
- (c) <sup>USA</sup> <sup>CDA</sup> [payments made under a contract entered into by an investor, <sup>USA</sup> [investment] <sup>CDA</sup> [or service provider], including payments made pursuant to a loan agreement;]
- (d) <sup>USA</sup> <sup>CDA</sup> [compensation pursuant to {Article on expropriation};] and
- (e) <sup>USA</sup> [payments arising out of an investment dispute as defined in {Article on dispute settlement}];

<sup>USA</sup> [2. 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) ~~MEX~~ [exchange controls or preferential exchange rate arrangements;]

<sup>CDA</sup> [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;]

**NOTE:** The foregoing Canada proposal reiterates with one change in syntax Canada Art. 505 because Canada Art. 406 states that the obligation not to prevent transfers is subject to Art. 505.

**NOTE:** The United States will be providing balance of payments language.

- (b) bankruptcy, insolvency or the protection of the rights of creditors;

- (c) MEX CDA [issuing, trading or dealing in securities];

**NOTE:** US is checking with its regulatory authorities to ascertain whether such an exception is necessary or whether securities matters are adequately covered by the other subparagraphs.

- (d) criminal or penal offenses;
- (e) reports of currency transfers;
- (f) imposing <sup>USA</sup> [income] taxes by such means as a withholding tax <sup>USA</sup> [applicable to dividends or other transfers;] or
- (g) ensuring the satisfaction of judgments in adjudicatory proceedings.

4. <sup>CDA</sup> [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.]

5. <sup>CDA</sup> [Paragraph 4 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.]

## STATE ENTERPRISES

### <sup>CDA</sup> [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.]

<sup>USA</sup> [Provisions on state enterprises to be provided; may be included elsewhere in the NAFTA text.]

## 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 <sup>USA</sup> <sup>CDA</sup> [or nationalization] of such an investment <sup>USA</sup> <sup>CDA</sup> [{"expropriation"}], except:

- (a) for a public purpose;
- (b) on a nondiscriminatory basis;

- (c) in accordance with due process of law <sup>USA</sup> [and the general principles of treatment provided for in Article ----]; and
- (d) upon payment of <sup>USA, CAN</sup> [prompt, adequate and effective] compensation.

2. Compensation shall be <sup>MEX</sup> [paid within a reasonable period of time] <sup>USA, CAN</sup> [equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; 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 <sup>USA</sup> [expropriation.] <sup>CDA</sup> [transfer].]

### **DISPUTE SETTLEMENT**

#### **MEX [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.]

### **CDA 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 a National or Company of Another Party]**

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of another Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Chapter with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

- a) to the courts or administrative tribunals of the Party that is a party to the dispute;
- b) in accordance with any applicable previously agreed dispute settlement procedures; or
- c) in accordance with the terms of paragraph 3.

3.
  - a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
    - i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention;
    - ii) to the Additional Facility of the Centre, if the Centre is not available;
    - iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or
    - iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
  - b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3, shall satisfy the requirement for:
  - a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
  - b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").
5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to New York Convention.
6. Any arbitral award resulting from an arbitration under paragraphs 3(a)(ii), (iii) or (iv) of this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.
7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set off or otherwise, that the national or company 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.

8. For purposes of an arbitration held under paragraph 3 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 a national or company of such other Party, including in accordance with Article 25(2)(b) of the ICSID Convention.]

#### 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 decision in accordance with the applicable rules of international law to an arbitral tribunal composed of three arbitrators.
2. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) shall apply. The appointing authority referenced in those rules shall be the Secretary General of the Centre.
3. Fees and expenses of the arbitrators and appointing authority, and other costs of the proceedings, shall be borne equally by the Parties. Each Party shall bear the cost of its legal representation.]

#### Publication

USA CDA [1. Each Party shall publish promptly all CDA [measures of general application] USA [laws, regulations, procedures and administrative rulings of general application, and adjudicatory decisions] that pertain to or affect CDA [any matter covered by this Agreement] USA [investments] CDA [or ensure that they are made available in such a manner as to enable interested persons and Parties to become acquainted with them.]]

#### Notification

1. ~~Each Party shall, to the maximum extent practicable, USA [publish in advance]~~ and allow opportunity for comment on, any law, regulation, procedure or administrative ruling of general application that it proposes to adopt respecting the matters covered by this Chapter] CDA [with respect to any proposed measure that might materially affect the operation of this Agreement].

- CDA [(a) publish a notice in its official journal at an early stage in such a manner as to enable interested persons and Parties to become acquainted with the measure;
- (b) provide written notice to the other Parties as far in advance as possible of the implementation of the measure;
- (c) provide upon the request of any Party information and respond to questions pertaining to the measure, whether or not previously notified; and
- (d) allow reasonable time between publication and entry into force of the measure to permit interested persons and other Parties to make

15  
comments in writing, discuss these comments upon request of any Party, and take the comments and the results of the discussions into account.

2. Paragraph 1 shall not apply in urgent circumstances, provided that the Party:

- (a) immediately notifies the other Parties of the measure, together with a brief indication of the objective and rationale of the measure, including the nature of the urgency;
- (b) provides to other Parties upon request copies of the measure in its final form; and
- (c) allows the other Parties to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.]

3. The provisions of this Article shall not require any Party to provide confidential information, the disclosure of which would prejudice legitimate commercial interests.

4. Each Party shall provide written notice to the other Parties of any measure that it considers might materially affect the operation of this Agreement. The notice shall include, whenever appropriate, a description of the reasons for the measure.

5. The Party implementing the measure shall provide written notice to the other Parties as soon as possible after implementation.

6. Upon request of any other Party, a Party shall promptly provide information and respond to questions pertaining to any measure.

7. The provision of written notice shall be without prejudice as to whether the measure is consistent with the Agreement.<sup>3</sup>

NOTE: See also Mexican text Art. 1306.

## **NATIONAL SECURITY**

### **MEX [Article 2109: National Security]**

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

### **USA [Article XX09: Public Order and National Security]**

Nothing in this Chapter shall preclude the application by a Party of measures necessary for the maintenance of public order, the fulfilment 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.]

16  
[Note: This provision is selfjudging.]

**CDA [Article 110: National Security]**

1. Nothing in this Agreement shall be construed:

- a) to prevent 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) to prevent any Party from imposing any measure 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 fulfilment 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) to prevent any Party from taking measures in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. Any determination made under paragraph 1(b) shall be published promptly in the official journal of that Party.

3. The Party refusing to furnish or allow access to any information under paragraph 1(a) or imposing any measure under paragraphs 1(b) or (c) shall ensure that such action constitutes the means that least infringes on the rights and reasonable expectations of the Parties under this Agreement and is no broader in scope or duration than necessary.

4. Except in cases of emergency, the Party proposing to take any measure under paragraphs 1(b) or (c) shall consult with the other Parties prior to taking such measure, and in any event shall consult upon request in accordance with the provisions of Part 6.]

**TAXATION**

**USA [Article XX10: Taxation]**

Issues of nondiscrimination arising under Article XX01 of this Chapter and involving taxation shall be resolved under the criteria and procedures of the convention for the avoidance of double taxation between the Parties involved.]



**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.
2. Nothing in this Agreement shall affect:
  - (a) the right of any Party to adopt or maintain any measure designed to prevent the avoidance of tax by producers, service providers, investors and suppliers of any other Party or to impose nonresident withholding taxes on payments made to producers, service providers, investors and suppliers of any other Party; or
  - (b) rights and obligations under any international taxation agreement, as may be specified in a Party's instrument of ratification or accession.]

**EXTRA-TERRITORIALITY**

**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.]

**MONOPOLIES**

**CDA [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 could 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.]

NOTE: The U.S. will also be providing text on monopolies.

### **ADDITIONAL MEXICAN EQUIVALENCES**

#### **Article 2403: Monopolies and Other Practices Affecting Competition**

1. Subject to Article 2404, nothing in this Agreement shall prevent a Party from maintaining or designating a monopoly.
2. Prior to designating a monopoly, and where the designation may affect interests of persons of the other Parties, a Party shall:
  - a)
    - i) notify the other Parties, and
    - ii) at the request of another Party, engage in consultations prior to the designation; and
  - b) endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits under this Agreement.
3. Where a Party designates a monopoly, that Party shall ensure, whether through regulatory supervision, administrative control, or the application of other measures, that the monopoly shall not:
  - a) in the monopoly market, engage in discrimination in its sales or purchases against persons or goods of the other Parties, contrary to the principles of this Agreement; or
  - b) in any other market, either directly or through its dealings with an affiliated enterprise, use its monopoly position to engage in anticompetitive practices that adversely affect a person of the other Parties, whether through the discriminatory provision of the monopoly good or covered service, through cross subsidization, or through predatory conduct.
4. A Party shall not adopt or condone such conduct, nor shall it enforce or implement laws to encourage anticompetitive conduct in the market of another Party.

### **TECHNOLOGY CONSORTIA**

#### **CDA [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.

### **COMPETITION POLICY**

#### **CDA [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 related 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 judgments 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.]

<sup>4</sup>USA [NOTE #4: The suitability of some of the foregoing provisions may depend on the outcome of negotiations in other areas.]

## USA Definitions Without Mexican Equivalents

2. "Company" means any kind of corporation, company, association, partnership, sole proprietorship or other organization whether or not organized for pecuniary gain.
3. "Company of a Party" means a company legally constituted under the laws and regulations of a Party or a political subdivision thereof.
4. "National" means a natural person who is a national of a country under its applicable law.
5. "National of a Party" means a natural person who is a national of a Party under its applicable law.
8. "State enterprise" means a company of a Party that is owned or controlled through ownership interests, directly or indirectly, by such Party or any agency or instrumentality thereof.
9. "National treatment" means treatment no less favorable than that accorded by a Party, in like circumstances, to nationals or companies of such Party or to investments of such nationals or companies, as the case may be.
10. "Most favored nation treatment" means treatment no less favorable than that accorded by a Party, in like circumstances, to nationals or companies of any third party or to investments of such nationals or companies.
- ~~11. "Nondiscriminatory treatment on a nondiscriminatory basis" means treatment on a nondiscriminatory basis, no less favorable than the better of national treatment or most favored nation treatment.~~
12. "Return" means an amount derived from an investment of nationals or companies of a Party, including profit, dividend, interest, capital gain, royalty payment, management fee, technical assistance or other fee, or returns in kind.
13. "Activities associated with an investment" or "associated activities" include the making, management, control, operation, maintenance and disposition of investments; the making, performance and enforcement of contracts; the acquisition, use, protection, enforcement and disposition of property of all kinds including intellectual property rights; the borrowing of funds; and the purchase, issuance, and sale of equity shares and other securities.

## CANADIAN DEFINITIONS WITHOUT MEXICAN EQUIVALENTS

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

monopoly means a sole provider of a good or service;

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

**Article 2110: Definitions**

**For purposes of this Chapter;**

As used in this Chapter, the following terms shall have the following meanings:

**DEFINITIONS**

For the purposes of this Part,

**acquisition with respect to:**

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**
- (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.**
- (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:**

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

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

**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:**

control or controlled, with respect to:

- a) a business enterprise carried on by an entity, means**
  - (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**
      - (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**
    - (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.**
    - (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;**

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

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

**establishment means a startup of a new business enterprise and the activities related thereto.**

establishment means a startup of a new business enterprise and the activities related thereto;

**investment means:**

investment means:

- a) the establishment of a new business enterprise, or**
  - (a) the establishment of a new business enterprise; or**

- b) **the acquisition of a business enterprise; and includes:**
- (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**
- (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.**
- (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;

1. "Investment" means every kind of investment, including investment consisting or taking the form of:

- a) equity;
- b) a company or shares of stock or other interests in a company or interests in the assets thereof;
- c) loans (other than the extension of short term credit), bonds or debt securities;
- d) service or investment contracts;
- e) a claim to money or a claim to performance having economic value;
- f) tangible or intangible property;
- g) intellectual property which includes rights relating to:
  - i) literary and artistic works, including sound recordings,
  - ii) inventions,
  - iii) industrial designs,
  - iv) semiconductor mask works,
  - v) trade secrets, knowhow, and confidential business information,and
  - vi) trademarks, service marks, and trade names; and
- h) any right conferred by law or contract, or any license or permit pursuant to law.



[NOTE: to "make investments" includes establishing a new investment, acquiring all or part of an existing investment, and expanding an existing investment (Paragraph 7 of the definitions in the U.S. text).]

**investor of a Party means:**

6. "Investments of nationals or companies of a Party" mean investments owned or controlled directly or indirectly by nationals or companies of such Party.

investor of a Party means:

- a) **[such Party or agency thereof];**
- (a) such Party or agency thereof;
- b) **[a province or state of such Party or agency thereof];**
- (b) a province or state of such Party or agency thereof;
- c) **a national of such Party;**
- (c) a national of such Party;
- d) **an entity ultimately controlled directly or indirectly through the ownership of voting interests by:**
- (d) an entity ultimately controlled directly or indirectly through the ownership of voting interests by:
- I) **[such Party or one or more agencies thereof],**
- (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],**
- (II) one or more provinces or states of such Party or one or more agencies thereof;
- III) **one or more nationals of such Party,**
- (III) one or more nationals of such Party;
- IV) **[one or more entities described in paragraph (e)], or**
- (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**
- (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:**
- (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),**
- (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**
- (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)];**
- (iii) **any combination of persons or entities described in (i) and (ii);**

**that makes or has made an investment.**

**that makes or has made an investment;**

28

**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.

**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.**

**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.**

**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:**

**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;**

**(a) a place of business;**

**b) an individual or individuals employed or selfemployed in connection with the business; and**

**(b) an individual or individuals employed or selfemployed in connection with the business; and**

**c) assets used in carrying on the business.**

**(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.**

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

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

**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.**

**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**

**voting interest with respect to**

**a) a corporation with share capital, means a voting share;**

**(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**

**(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.**

**(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 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.

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.