

INVESTMENT

SCOPE, COVERAGE AND DURATION

MEX USA [1. This Chapter shall apply to investments (of investors of a Party) in the territory of another party existing at the time of entry into force as well as to (any such) investments made or acquired thereafter.] USA [With respect to investments established 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.]

1. CDA [This Part shall apply to any measure of a Party affecting 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.]

MEX CDA [2. This MEX [Chapter] CDA [Part] shall not apply to:

MEX [a] any measure taken pursuant to a restriction expressly mandated by the Constitution of a Party.]

b) the provision of financial services or insurance CDA [except as provided in Annex Y01.4(a)];

U.S.: Note 1 — 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.

c) government procurement CDA [except as provided in Part 3 (Internal Measures)];

CDA [d] services listed in Annex Y01.3(c)]

e) public entities, to the extent such entities conduct activities:

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

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

3 CDA[except when those activities are permitted to be carried
4 out by service providers in competition with such public
5 entities];

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

10 CDA[g] measures of a Party, imposed in connection with the
11 initial privatization of a state enterprise, that limit the
12 rights of an investor of another country to own or control
such enterprise;]

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

16 CDA[i] subject to Article 106 (Nullification or Impairment
17 of Benefits), any subsidy.]

18 CDA[g] as between Canada, the United States of America, and
19 the United States of Mexico, cultural industries as defined
20 in article 2012 of the U.S.-Canada Free Trade Agreement.]]

21 MEX[3. Except as otherwise provided, the provisions of subparagraph
22 (c) of Article Y02 shall apply to any measure affecting investments
23 related to the provision of services if such services are covered
24 by Chapters ____.]

25 CDA[4. This Part shall apply to any measure of a self-regulatory
organization whose mandate is conferred by the Party, or by its
state, provincial or local governments.]

1 ADDITIONAL CANADIAN EQUIVALENCES

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

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

7 CDA [Article 111: General Exceptions

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

10 (a) necessary to protect public order, safety or public
morals;

12 (b) necessary to protect human, animal or plant life or
13 health or the environment in its territory, or to enforce
14 generally agreed international environmental or conservation
15 rules or standards;

16 (c) relating to the products or services of prison labor;

17 (d) imposed for the protection of national treasures of
18 artistic, historic or archaeological value;

19 (e) necessary for fiduciary or consumer protection reasons;

20 (f) necessary to secure compliance with laws or regulations
21 which are not inconsistent with the provisions of this
22 Agreement, including those relating to the avoidance of
23 fraudulent or deceptive practices;

provided that such measure is:

25 (g) consistent with Article 106; and

26 (h) is the least trade-restrictive necessary for securing
27 the protection required.]

28 CDA [Article 106: Nullification and Impairment of Benefits

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

31 (a) constitute a means of arbitrary or unjustifiable
32 discrimination between its goods, services and service
33 providers, investors and suppliers and those of any other
34 Party;

1 (b) ...

2 (c) otherwise nullify or impair any benefit reasonably
3 expected to accrue to one or more of the other Parties,
4 directly or indirectly, under this Agreement.]

5 CDA [Article 103(2): Extent of Obligations

6 Notwithstanding Article 103, paragraph 1 (Extent of
7 Obligations), except in respect of Part 2 (Border Impediments to
8 Free Trade) and as otherwise provided herein the obligations of
9 this Agreement shall not apply to:

10 a) a non-conforming provision of any existing measure;

11 b) the continuation or prompt renewal of a non-conforming
12 provision of any existing measure; or

13 c) an amendment to a non-conforming provision of any
14 existing measure to the extent that the amendment does not
15 decrease its conformity with the obligations of this
16 Agreement.]

TREATMENT OF INVESTMENTS

MEX USA [1. Each Party shall accord nondiscriminatory treatment¹ to an investor of another Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. In particular,]
CDA [Further to Article 105 and for greater certainty] no Party shall

(a) impose on an investor of another Party a requirement that a minimum level of equity in an 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^{CDA} [and...(see para. 13 below on non-establishment).]

MEX USA [2. A Party's failure to accord nondiscriminatory treatment to an investment in its territory of an investor of another Party, and activities associated therewith, shall be a breach of that Party's obligation under paragraph 1.]

MEX USA [3. Investments of investors of a Party in the territory of another Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security]^{USA} [, all 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.

MEX USA [5. 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 investors of another Party, engage as top managerial personnel individuals of any particular nationality.]

USA CAN [6. Each Party shall provide investors of another Party with an effective means of asserting claims and enforcing rights with respect to investments],^{USA} [investment agreements, and

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.

1 with respect to investments], ^{USA}[investment agreements, and
2 investment authorizations.]

3 MEX ^{USA}[7. The most favored nation obligations of this Chapter
4 shall not apply to advantages accorded by a Party by virtue of the
5 Party's binding obligations under any multilateral international
6 agreement under the framework of the General Agreement on Tariffs
7 and Trade.]

8 ^{USA MEX}[8. Each Party reserves the right to deny to an entity of
9 another Party the advantages of this Chapter if:

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

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

17 MEX[9. The Parties are excepted from the obligations of this
18 Article as set forth in Annexes 2102.1 and 2012.2. Any such
19 exceptions shall not be a greater departure from the obligations of
20 this Article than required by or specified in domestic law in force
21 on the date of signature or this Agreement. In the event that the
22 relevant domestic law is liberalized to conform more closely to the
23 obligations of paragraphs 1 and 2, it may not thereafter be made
24 more restrictive. Where a Party takes an exception to national
25 treatment it shall nonetheless accord most favored treatment.]

26 ^{USA}[10. A Party may maintain existing measures, and impose
27 measures in the future, which depart from the obligations of
28 paragraphs 1 and 2, but only in respect of the activities set out
in Annex _____. Any future departures from those obligations in
30 respect of those activities shall not apply to investments existing
31 at the time the measure becomes effective.]

32 ^{USA}[11. A Party may maintain existing measures departing from
33 the obligations of paragraphs 1 and 2 as set out in Annex _____.
34 Such measures shall either:

35 (a) not be a greater departure from such obligations than
36 required by or specified in domestic law in force on the
37 date of signature of this Agreement; and that law shall be
38 briefly described; or

39 (b) be described in detail in the Annex itself.

40 In the event that the relevant domestic law is liberalized to

1 conform more closely to the obligations of paragraphs 1 and 2, such
2 measures may not thereafter be made more restrictive.]

3 USA [12. Where a Party has or takes a measure covered in Annexes
4 and it shall nonetheless accord most favored nation
5 treatment unless set forth in the respective Annex.]

6 CDA [13. No Party shall require the establishment of an
7 investment or a commercial presence by a person of another Party in
8 its territory as a condition for the provision of a service in a
9 manner inconsistent with Article 106.]

10 CDA [14. Further to Article 105, the Parties shall implement:

(a) the provisions of Annex 402.1 regarding transportation;

12 [to be revisited in the light of transportation discussions,
13 to determine if these obligations are best placed in Part 3,
14 in connection with standards related measures]

15 (b) the provisions of Annex 402.2 regarding
16 telecommunications services;

17 (c) the provisions of Annex 402.3 regarding other measures
18 affecting services; and

19 (d) the provisions of Annex 402.4 regarding measures
20 affecting investors of the other Parties.]

21 CDA [Article 403: Specific Exceptions

22 15. Subject to prior notification and consultation in accordance
23 with Part 6, a Party may deny the benefits of this Part to
24 investors or service providers if it establishes that they
25 originate from a country which is not a Party to this Agreement.

26 16. The Party denying benefits pursuant to paragraph 15 shall
27 have the burden of establishing that such action is in accordance
28 with that paragraph.]

29 **ADDITIONAL MEXICAN EQUIVALENCES**

30 MEX [Article 1310: Emergency Safeguard Measures

31 1. If, as a result of the reduction or elimination of a
32 restriction provided for in this Chapter, or in the Sectoral
33 Chapters, a service is being imported into the territory of a Party
34 or produced within its territory by providers of another Party in
35 such increased quantities, and under such conditions, as to
36 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....]

ADDITIONAL CANADIAN COMMENT AND EQUIVALENCES

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

2. 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.]

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

SPECIFIC COMMITMENTS AND EXCEPTIONS

CDA[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) (to be negotiated)

PROVINCIAL AND STATE MEASURES

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

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.]

ADDITIONAL CANADIAN COMMENT AND EQUIVALENCES

^{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.]

^{CDA}[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.]

PERFORMANCE REQUIREMENTS

1. ^{MEX}[Except as provided in Annex____,] no Party shall ^{MEX USA}[apply]
^{CDA}[impose] ^{MEX USA}[, or condition the receipt of an incentive on,]
any of the following requirements 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] ^{CDA MEX}[another Party]:

a) achieve a given level or percentage of domestic
content; substitute domestic goods or services for imported
goods or services; or otherwise favor the purchase or use
of goods or services of domestic origin or from domestic
sources;

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 or services that such
investment produces by limiting such sales in any way to
volume or value of its exports or foreign exchange
earnings;

^{USA MEX}[d) transfer, import or use a particular technology,
production process or other proprietary knowledge; or]

^{USA MEX}[e) 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
government procurement or export promotion programs shall not be
considered "incentives".]~~

2. 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 export a given level or percentage of
goods or services.

^{MEX CDA}[3. 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.]

CDA[4. 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.]

CDA[5. 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.]

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.]

New Canadian Non-Paper

1. CDA MEX[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 CDA[a Party or a non-Party] CDA MEX[another Party]:

(a) USA MEX[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 USA MEX[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 USA MEX[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;

USA MEX[(d) transfer, import or use a particular

1 technology, production process or other
2 proprietary knowledge; or]

3 USA MEX[(e) act as the exclusive supplier of the goods
4 or services it produces to a specific market
5 or region.]

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

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

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

16 CDA[(b) achieve a given level or percentage of domestic
17 content;]

18 CDA[(c) substitute goods or services from the territory
19 of such Party for imported goods or services.]

20 * eg., tax, autos, excluded services, energy, environment,
21 aboriginal programs, financial services, etc.

1 MONITORING

2 1. Notwithstanding Article (on national treatment), a Party may
3 require an investor of another Party ^{MEX USA}[or its investments]
4 ^{CDA}[or a service provider of another Party] to submit to it routine
5 information ^{MEX USA}[respecting such investment] solely for
6 information or statistical purposes.¹ Such Party shall protect
7 such business information that is confidential from disclosure that
8 would prejudice the investor's competitive position.

9 2. Nothing in paragraph 1 shall preclude a Party from otherwise
10 obtaining or disclosing information in connection with the
11 equitable and good faith application of its laws.

12 ¹ The U.S. suggests the following substitute sentence,
13 "Notwithstanding Article (on national treatment), a Party may
14 require routine information, to be used solely for informational or
15 statistical purposes, concerning an investment of an investor, of
16 another Party in its territory."

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, ^{USA MEX}[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, ^{MEX USA}[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}.]

^{USA}[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:

^{CDA}[(a) 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;

(c) issuing, trading or dealing in securities;

1 (d) criminal or penal offenses;

2 (e) reports of currency transfers;

3 (f) imposing ^{USA}[income] taxes by such means as a
4 withholding tax ^{USA}[applicable to dividends or other
5 transfers;] or

6 (g) ensuring the satisfaction of judgments in adjudicatory
7 proceedings.

8 4. MEX CDA [No Party shall require its investors to repatriate, or
9 penalize its investors who fail to repatriate, the income, earnings
10 or profits attributable to any investment in another Party or to
11 any businesses carried on in another Party either directly by the
12 investors or indirectly through a business enterprise established
13 in that other Party.]

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

1 STATE ENTERPRISES

2 CDA [Article 410: State Enterprises

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

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

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

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

15 2. Further to Article (concerning nondiscriminatory treatment),
16 where a state enterprise of a Party is in competition, within the
17 territory of such Party, with an investment of an investor of
18 another Party, and where there are no other investments of
19 investors of that Party which are not state enterprises in
20 competition with the state enterprise, that Party shall accord the
21 investment of the investor of the other Party treatment no less
22 favorable than that which it provides its state enterprise. Where
23 investments of investors of that Party which are not state
24 enterprises also compete with the state enterprise, the investment
25 of the investor of the other Party shall be accorded treatment no
26 less favorable than that provided such 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 ^{USA}[and the general principles of treatment provided for in Article —]; and

(d) upon payment of ^{USA CDA}[prompt, adequate and effective] compensation.

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 ^{USA}[expropriation.] ^{MEX CDA}[transfer].

Mexican Note 1 -- Mexico considers that the concerns expressed by the U.S. and Canada delegations on compensation are covered by the new draft proposal on paragraph 2. On that basis Mexico will only accept this paragraph if the U.S. and Canada delegations drop the actual bracketed text in paragraph 1(c) and (d).

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 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:

- 1 a) to the courts or administrative tribunals of the Party
2 that is a party to the dispute;
- 3 b) in accordance with any applicable previously agreed
4 dispute settlement procedures; or
- 5 c) in accordance with the terms of paragraph 3.
- 6 3. a) Provided that the national or company concerned has not
7 submitted the dispute for resolution under paragraph 2 (a)
8 or (b) and that six months have elapsed from the date on
9 which the dispute arose, the national or company concerned
10 may choose to consent in writing to the submission of the
11 dispute for settlement by binding arbitration:
- 12 i) to the International Centre for the Settlement of
13 Investment Disputes ("Centre") established by the
14 Convention on the Settlement of Investment Disputes
15 between States and Nationals of other States, done at
16 Washington, March 18, 1965 ("ICSID Convention"),
17 provided that the Party is a party to such Convention;
- 18 ii) to the Additional Facility of the Centre, if the
19 Centre is not available;
- 20 iii) in accordance with the Arbitration Rules of the
21 United Nations Commission on International Trade Law;
22 or
- 23 iv) to any other arbitration institution, or in
24 accordance with any other arbitration rules, as may be
25 mutually agreed between the parties to the dispute.
- 26 b) Once the national or company concerned has so
27 consented, either party to the dispute may initiate
28 arbitration in accordance with the choice so specified in
29 the consent.
- 30 4. Each Party hereby consents to the submission of any
31 investment dispute for settlement by binding arbitration in
32 accordance with the choice specified in the written consent of the
33 national or company under paragraph 3. Such consent, together with
34 the written consent of the national or company when given under
35 paragraph 3, shall satisfy the requirement for:
- 36 a) written consent of the parties to the dispute for
37 purposes of Chapter II of the ICSID Convention (Jurisdiction
38 of the Centre) and for purposes of the Additional Facility
39 Rules; and
- 40 b) an "agreement in writing" for purposes of Article II of

1 the United Nations Convention on the Recognition and
2 Enforcement of Foreign Arbitral Awards, done at New York,
3 June 10, 1958 ("New York Convention").

4 5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of
5 this Article shall be held in a state that is a party to New York
6 Convention.

7 6. Any arbitral award resulting from an arbitration under
8 paragraphs 3(a)(ii), (iii) or (iv) of this Article shall be final
9 and binding on the parties to the dispute. Each Party undertakes to
10 carry out without delay the provisions of any such award and to
11 provide in its territory for its enforcement.

12 7. In any proceeding involving an investment dispute, a Party
13 shall not assert, as a defense, counterclaim, right of set off or
14 otherwise, that the national or company concerned has received or
15 will receive, pursuant to an insurance or guarantee contract,
16 indemnification or other compensation for all or part of its
17 alleged damages.

18 8. For purposes of an arbitration held under paragraph 3 of
19 this Article, any company legally constituted under the applicable
20 laws and regulations of a Party or a political subdivision thereof
21 but that, immediately before the occurrence of the event or events
22 giving rise to the dispute, was an investment of nationals or
23 companies of another Party, shall be treated as a national or
24 company of such other Party, including in accordance with Article
25 25(2)(b) of the ICSID Convention.]

26 USA [Article XX08: Settlement of Disputes Between Parties

27 1. Any dispute between Parties concerning the interpretation or
28 application of this Chapter which is not resolved through
29 consultations or other diplomatic channels, shall be submitted,
30 upon the request of a Party, for binding decision in accordance
31 with the applicable rules of international law to an arbitral
32 tribunal composed of three arbitrators.

33 2. In the absence of an agreement by the Parties to the
34 contrary, the arbitration rules of the United Nations Commission on
35 International Trade Law (UNCITRAL) shall apply. The appointing
36 authority referenced in those rules shall be the Secretary General
37 of the Centre.

38 3. Fees and expenses of the arbitrators and appointing
39 authority, and other costs of the proceedings, shall be borne
40 equally by the Parties. Each Party shall bear the cost of its legal
41 representation.]

NATIONAL SECURITY

MEX [Article 2109: National Security

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

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 [Article 110: National Security

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

1 any reasonable expectations of the other Parties under this
2 Agreement, and is no broader in scope or duration than necessary.

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

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

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

25 6. No Party may invoke the provisions of this Article to
26 derogate from the requirement to pay compensation for an
27 expropriation in accordance with Article ____ or to permit the
28 transfer of an investment and returns, in accordance with Article
____.

1 TAXATION

2 USA[1. Issues of nondiscrimination arising under Article XX01 of
3 this Chapter and involving taxation shall be resolved under the
4 criteria and procedures of the convention for the avoidance of
5 double taxation between the Parties involved.]

6 CDA[Article 112: Taxation

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

10 2. Nothing in this Agreement shall affect:

11 (a) the right of any Party to adopt or maintain any measure
12 designed to prevent the avoidance of tax by producers,
13 service providers, investors and suppliers of any other
14 Party or to impose nonresident withholding taxes on payments
15 made to producers, service providers, investors and
16 suppliers of any other Party; or

17 (b) rights and obligations under any international taxation
18 agreement, as may be specified in a Party's instrument of
19 ratification or accession.]

1 EXTRA-TERRITORIALITY

2 CDA [Article 407: Extra-territoriality

3 ...

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

1 MONOPOLIES

2 CDA [Article 408: Monopolies

3 1. Subject to Article 106, nothing in this Agreement shall
4 prevent a Party from maintaining or designating a monopoly.

5 2. A Party maintaining or designating a monopoly shall ensure
6 that the monopoly will not, in providing the monopoly goods or
7 service in the relevant market, behave in a manner which could
8 nullify or impair benefits to which producers or service providers
9 of any other Party is entitled.

10 3. Prior to designating a monopoly, a Party shall:

11 a) notify the other Parties;

12 b) upon request, engage in consultations; and

13 c) endeavour to minimize or eliminate any nullification or
14 impairment of benefits under this Agreement that might
15 otherwise be caused by the designation.

16 4. Each Party shall ensure that, where it permits the monopoly
17 supply of goods or services, the monopoly does not in its
18 territory, either directly or through an affiliated company engage
19 in anti-competitive practices in areas outside its monopoly.]

1 TECHNOLOGY CONSORTIA

2 CDA [Article 409: Technology Consortia

3 1. No Party shall maintain or introduce any measure that limits
4 or prevents an investor of another Party from participating in a
5 technology consortium or other group of business enterprises
6 respecting the development of or access to technology (in a manner
7 that would violate Article 105 or Article 106).

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

COMPETITION POLICY

^{CDA}[Article 411: Competition

1. The Parties recognize the contribution that competition laws and policies can make to the fulfillment 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

- 1 articulated economic policies; and
- 2 f) the extent to which enforcement activities of such
3 other Party with respect to the same persons, including
4 judgments or undertakings resulting from such activities,
5 may be affected.
- 6 4. The Commission shall establish a Competition Policy
7 Committee to consider and make recommendations [no later than] on:
- 8 a) the impact of competition law and policy on trade
9 within the free trade area;
- 10 b) the impact of trade law and regulation on competition
within the free trade area; and
- 12 c) the potential for reliance on competition laws and
13 policies to discipline anti-competitive transborder pricing
14 practices and market segmentation.]

DEFINITIONS

USA DEFINITIONS WITHOUT MEXICAN EQUIVALENTS

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 other party or to investments of such nationals or companies.

11. 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.

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;

DEFINITIONS

MEX [For purposes of this Chapter;]

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

CDA [For the purposes of this Part,]

MEX CDA [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

1 ultimate direct or indirect control of the entity through
2 the acquisition of the ownership of voting interests; or

3 (b) any business enterprise, means an acquisition, as a
4 result of one or more transactions, of the ownership of all
5 or substantially all of the assets of the business
6 enterprise used in carrying on the business;]

7 MEX[agency]

8 MEX CDA[business enterprise means a business that has, or in the case
9 of an establishment thereof will have:

(a) a place of business;

11 (b) an individual or individuals employed or self-employed
12 in connection with the business; and

13 (c) assets used in carrying on the business;

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

17 MEX[Constitution of a Party]

18 MEX CDA[control or controlled, with respect to:

19 (a) a business enterprise carried on by an entity, means

20 ~~(i) the ownership of all or substantially all of the~~
21 ~~assets used in carrying on the business enterprise; and~~

22 (ii) includes, with respect to an entity that controls
23 a business enterprise in the manner described in
24 subparagraph (i), the ultimate direct or indirect
25 control of such entity through the ownership of voting
26 interests; and

27 (b) a business enterprise other than a business enterprise
28 carried on by an entity, means the ownership of all or
29 substantially all of the assets used in carrying on the
30 business enterprise;]

31 CDA[entity means a corporation, partnership, trust or joint
32 venture;]

33 MEX USA[Entity means any kind of corporation, company, association,
34 partnership, sole proprietorship or other organization whether or
35 not organized for pecuniary gain.

1 laws and regulations of a Party or a political subdivision
2 thereof.]

3 ^{MEX CDA} [establishment means a startup of a new business enterprise and
4 the activities related thereto;]

5 ^{CDA} [investment means:

6 (a) the establishment of a new business enterprise; or

7 (b) the acquisition of a business enterprise; and includes:

8 (c) as carried on, the new business enterprise so
9 established or the business enterprise so acquired, and
10 controlled by the investor who has made the investment; and

11 (d) the share or other investment interest in such business
12 enterprise owned by the investor provided that such business
13 enterprise continues to be controlled by such investor or
14 the investor continues to own a significant minority
15 interest in such business enterprise.]

16 ^{MEX USA} [1. Investment of an investor of a Party means an investment
17 owned or controlled directly or indirectly by an investor or such
18 Party.

19 2. Investment includes the following kinds of interests:

20 a) equity or debt securities of a business enterprise, or
21 any interest in such enterprise that entitles the owner to
22 share in the income or profits or to share in the assets on
23 dissolution;

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

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

31 d) interests arising from the commitment of capital or
32 other resources to economic activity in the territory of
33 another Party such as under (i) contracts involving the
34 presence of the investor's property in the territory of
35 another Party (e.g., concession agreements, turnkey or
36 construction contracts), (ii) contracts where the
renumeration depends substantially on the production,

USA

1 revenues or profits of a business enterprise ^{USA} (or (iii)
2 government-issued permits to engage in such economic
3 activity.]

4 3. Claims to money which arises solely from:

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

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

c) any other claims to money,

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

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

17 ^{USA} [Investments of nationals or companies of a Party means

18 investments owned or controlled directly or indirectly by nationals
19 or companies of such Party.]

20 ^{USA} [Investor of a Party means a national or company of such party.]

21 ^{HEX CDA} [Investor of a Party means:

22 (a) such Party or agency thereof;

23 (b) a province or state of such Party or agency thereof;

24 (c) a national of such Party;

25 (d) an entity ultimately controlled directly or indirectly
26 through the ownership of voting interests by:

27 (i) such Party or one or more agencies thereof;

28 (ii) one or more provinces or states of such Party or
29 one or more agencies thereof;

30 (iii) one or more nationals of such Party;

31 (iv) one or more entities described in paragraph (e);
32 or

1 (v) any combination of persons or entities described
2 in (i), (ii), (iii) and (iv); or

3 (e) an entity that is not ultimately controlled directly or
4 indirectly through the ownership of voting interests where
5 a majority of the voting interests of such entity are owned
6 by:

7 (i) persons described in subparagraphs (d) (i), (ii)
8 and (iii);

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

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

that makes or has made an investment;

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

31 ^{MEX CDA} [investor of a non-party country means an investor other than
32 an investor of a Party, that makes or has made an investment;]

33 ^{MEX CDA} [joint venture means an association of two or more persons or
34 entities where the relationship among those associated persons or
35 entities does not, under the laws in force in the territory of the
36 Party in which the investment is made, constitute a corporation, a
37 partnership or a trust and where all those associated persons or
38 entities own or will own assets of a business enterprise, or
39 directly or indirectly own or will own voting interests in an
40 entity that carries on a business enterprise;]

^{MEX} [law]

42 ^{MEX CDA} [located in the territory of a Party means, with respect to a

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

(a) a place of business;

(b) an individual or individuals employed or self-employed in connection with the business; and

(c) assets used in carrying on the business;]

^{MEX CDA}[measure ^{MEX}[shall have the same meaning as in article 201, except that it shall also include] ^{CDA}[includes any law, regulation, procedure, requirement or practice, including] any published policy;]

^{MEX CDA}[ownership means beneficial ownership and with respect to assets also includes the beneficial ownership of a leasehold interest in such assets;]

^{MEX CDA}[person means a Party or agency thereof, a province or state of a Party or agency thereof, or] a national of a Party.]

voting interest with respect to

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

(b) a corporation without share capital, means an ownership interest in the assets thereof that entitles the owner to rights similar to those enjoyed by the owner of a voting share; and

(c) a partnership, trust, joint venture or other organization means an ownership interest in the assets thereof that entitles the owner to receive a share of the profits and to share in the assets on dissolution; and]

^{CDA}[significant minority interest means the interest of an investor who:

(a) owns at least 10% of the voting interests in the business enterprise; and

(b) has a right to influence, or does in fact influence, the direction, management or conduct of the business enterprise beyond those rights ordinarily conferred on the owners of voting interests by law.

^{MEX CDA}[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

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- 1 attached a right to receive a share of the profits, or to share in
- 2 the assets of the corporation on dissolution, or both.]