

6 INVESTMENT

8 SCOPE, COVERAGE AND DURATION

- 10 1. This Chapter shall apply to measures affecting:
- 11 a) investments (of investors of a Party) in the territory of another party
- 12 existing at the time of entry into force as well as to investments made or acquired
- 13 thereafter; and
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- 15 b) investors of a Party in the establishment, acquisition, expansion,
- 16 management, conduct, operation and sale or other disposition of investments in
- 17 the territory of another Party.
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- 19 c) all investments in the territory of any Party as provided in Article ____
- 20 (performance requirements).
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- 23 2. USA MEX[With respect to investments established prior to the date of termination of
- 24 this Agreement and to which this Chapter otherwise applies, the provisions of all of this
- 25 Chapter shall thereafter continue to be effective for a further period of USA[ten] MEX[three]
- 26 years from such date of termination, in the territory of the Party terminating the
- 27 Agreement.]
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- 29 3. This Chapter shall not apply to:
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- 31 a) MEX[any measure taken pursuant to a restriction expressly mandated by the
- 32 Constitution of a Party.]¹
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- 34 b) USA MEX[measures covered by Chapter (Financial Services) except as
- 35 provided in that chapter] CDA[financial services except as provided in the Chapter
- 36 on Financial Services;]²
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- 38 c) CDA MEX[government procurement] CDA[except as provided in the Chapter
- 39 on Government Procurement;] ;
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- 41 d) CDA[This chapter shall not apply to any subsidy provided by a Party or by
- 42 any political sub-division or state enterprise thereof, except as otherwise provided
- 43 in Article (on Performance Requirements).]
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- 45 e) CDA[as between Canada, the United States of America, and the United
- 46 Mexican States, cultural industries as defined in article 2012 of the U.S.-Canada
- 47 Free Trade Agreement.]
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1 Mexico will supply new language for this provision.

2 U.S. Note - Further coordination with financial services may be necessary.

1 4. Nothing in this Chapter prevents a Party through its executive, legislative and
2 judicial bodies, from providing services or functions such as public welfare services and
3 services forming part of a statutory system of social security, public health care, public
4 education, and public retirement plans to its citizens.

5 5. The mere fact that a Party requires a service provider of another Party to post a
6 bond or other form of financial security before providing a service into its territory does
7 not make this Chapter applicable to the provision of that cross-border service. The
8 provisions of this Chapter shall however apply as regards that Party's treatment of the
9 posted bond or financial security.

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11 6. The provisions of this Chapter shall also apply to the Telecommunications Annex.
12 In the event of any inconsistency between the provisions of this Chapter and that Annex,
13 the provisions of the Annex shall prevail to the extent of the inconsistency.³

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15 7. Each Party reserves the right to deny to an entity of another Party the advantages
16 of this Chapter if:

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

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22 b) such entity is owned or controlled by nationals of a non-Party in respect of
23 whose investors or investments the denying Party imposes specific sanctions or
24 with which such Party does not maintain normal diplomatic relations.

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26 **ENVIRONMENTAL MEASURES⁴**

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28 1. The Parties affirm that this Chapter shall not be construed to prevent the adoption
29 or enforcement of any measure, otherwise consistent with this Chapter, that a Party
30 deems appropriate to ensure that investment activity in its territory is undertaken in a
31 manner sensitive to environmental concerns.

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33 2. No Party shall, as an inducement or incentive to the establishment, acquisition, or
34 expansion, in its territory, of an investment of an investor of another Party, eliminate,
35 waive, reduce, or otherwise derogate from measures of general application necessary to
36 protect human, animal or plant life or health or the environment in its territory, or from
37 measures relating to the conservation of exhaustible natural resources.

³ U.S. agrees with intent of the provision but needs to check legal drafting.

⁴ The Parties need further consultations before agreeing to these provisions.

TREATMENT OF INVESTMENTS

1. National Treatment

- a) Each Party shall accord to investments of investors of another Party USA MEX[, and activities associated therewith,] treatment no less favourable than that which it accords, in like circumstances, to investments of its own investors.
- b) Each Party shall accord to an investor of another Party treatment no less favourable than that which it accords, in like circumstances, to its own investors in respect of the establishment, acquisition, expansion, management⁵, conduct, operation and sale or other disposition of investments in its territory.
- c) The treatment accorded by a Party under this paragraph with respect to investors of another Party and their investments shall be, with respect to a state or province, no less favorable than the treatment accorded, in like circumstances, by such state or province to its residents, or entities legally constituted under its laws, or their investments in its territory.⁶
- d) Where a state enterprise of a Party engages in competition with investments of investors of another Party in the territory of that Party, that Party need only accord to such investments treatment no less favorable than that accorded, in like circumstances, to privately-owned investments of investors of that Party that also compete with the state enterprise.
- e) For greater certainty, no Party shall
 - i) impose on an investor of another Party a requirement that a minimum level of equity in a business enterprise in its territory be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
 - ii) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in its territory.

2. Most Favored Nation Treatment

- a) Each Party shall accord to investments of an investor of another Party USA MEX[, and activities associated therewith,] treatment no less favourable than that which it accords, in like circumstances, to the investments of an investor of any other Party or of a non-Party.
- b) Each Party shall accord to an investor of another Party treatment no less favourable than that which it accords, in like circumstances, to investors of any other Party or non-Party in respect of its establishment, acquisition, expansion, conduct, management⁵, operation and sale or other disposition of its investment in its territory.

⁵ Canada agrees on the condition that the Parties agree to an acceptable definition of "management".

⁶ Canada reserves the right to change its position on this paragraph pending further domestic consultations.

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2 ("Most favored nation treatment")
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4 3. Non-Discriminatory Treatment
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6 The treatment that a Party shall accord to investments ^{USA MEX}[and associated
7 activities] of another Party and to investors of that Party shall be the better of the
8 treatment required by paragraphs 1 or 2. ("Nondiscriminatory treatment")
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10 4. Minimum Standard of Treatment
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12 Each Party shall accord at all times to the investments in its territory of investors
13 of another Party full protection and security, fair and equitable treatment, and in all other
14 respects as well, treatment in accordance with international law.
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16 5. Without prejudice to paragraph 3, investors of a Party whose investments suffer
17 losses in the territory of another Party owing to conflict or civil strife shall be accorded at
18 least nondiscriminatory treatment by such other Party as regards any measures it adopts
19 in relation to such losses.
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21 6. ^{MEX USA}[Subject to Chapter ____ (Temporary entry), a Party shall not require that
22 entities which are legally constituted under the applicable laws or regulations of one
23 Party, and which are investments of investors of another Party, engage as top managerial
24 personnel individuals of any particular nationality. ^{USA}[However, a Party may require
25 that certain members of an entity's board of directors be nationals, provided such
26 requirements do not materially impair the ability of investors of another Party to control
27 their investments.]]
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29 6. ^{CDA}[a)With respect to entities constituted under its laws or regulations, which
30 form an investment of an investor of another Party, a Party or political
31 subdivision thereof shall not require that:
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33 i) individuals of any particular nationality be appointed to senior
34 management positions; or
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36 ii) more than a simple majority of the Board of Directors of a business
37 enterprise, or any committee thereof, be of any particular nationality,
38 resident in the territory of that Party or a political subdivision thereof,
39 provided such requirements do not materially impair the ability of
40 investors of another Party to control their investments.
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42 b) Notwithstanding subparagraph (a), a Party may impose nationality and
43 residency requirements for any or all members of senior management or
44 Board^s of Directors pursuant to measures listed in Annex A.
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46 c) For greater certainty, the provisions of this paragraph are subject to the
47 applicable immigration laws and regulations of a Party.]
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49 7. a) The obligations of paragraphs 1, 2, 3 and 6 shall not apply to :
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- i) a non-conforming provision of any existing measure⁷ which is maintained by a Party at the federal level, and which that Party, as of the date of the signature of this Agreement, has described in Annex A;
 - ii) a non-conforming provision of any existing measure which is maintained by a state or province of a Party, and which that Party described in Annex A within two years after the entry into force of this Agreement; or
 - iii) a non-conforming provision of any existing measure which is maintained by a local government of a Party.
- b) A Party may promptly renew such a non-conforming provision of any existing measure, or amend such a non-conforming provision of any existing measure, to the extent that the renewal or amendment does not decrease its conformity with the obligations of this Chapter. No such measure which has been renewed or amended may be further renewed or amended so as to decrease its conformity at the time of the renewal or amendment with the obligations of this Chapter.
- c) The obligations of paragraphs 1, 2, 3 and 6 shall nonetheless apply to the extent to which a Party has undertaken in Annex A to bring such non-conforming measures in closer conformity with those obligations during the term of this Agreement.
- d) As a further departure from the obligations of paragraphs 1 and 2, which should occur only in the most limited circumstances, a Party, by the date of signature of this Agreement, may identify in Annex B activities or sectors in respect of which it maintains non-conforming provisions of existing measures and in respect of which it shall be permitted to impose non-conforming measures in the future. USA[However, any such future measure may not require an investor of another Party to sell or otherwise dispose of investment existing at the time such measures become effective.]
- e) A Party may also maintain exceptions from the obligations of paragraphs 1, 2 and 3, which are specifically provided for in Article 2203 (of the Chapter on Intellectual Property).⁸
8. a) In maintaining a measure identified in Annex A or imposing a measure as permitted in Annex B, unless stated otherwise in the relevant Annex, a Party shall accord to investors, or investments of investors, of another Party, most favored nation treatment.

⁷ Existing measure will be defined to mean any measure in force on the date of the signature of the Agreement.

⁸ This paragraph has been agreed upon by the Intellectual Property group, but has not yet been discussed or agreed upon by the Investment group.

b) Notwithstanding subparagraph (a) or the obligations of paragraph 2, a Party need not accord most favored nation treatment to another Party with respect to advantages accorded by a Party pursuant to:

i) that Party's obligations under any multilateral international agreement made under the framework of the General Agreement of Tariffs and Trade; or

ii) agreements or sectors listed in Annex ____ (MFN).

9. Nothing in this Chapter shall preclude a Party from prescribing special formalities, such as requirements that investors be residents of a Party or investments be legally constituted under the laws and regulations of a Party or a political subdivision thereof, in connection with the establishment of investments by investors of another Party, provided such formalities do not derogate from the substance of any of the provisions set forth in this Chapter.

10. Notwithstanding paragraphs 1, 2 and 3 a Party may require routine information, to be used solely for informational or statistical purposes, concerning an investment of an investor of another Party in its territory. Such Party shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position. Nothing in this paragraph shall preclude a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.

11.

USA[a] As a further exception to (provision on national treatment)⁹, and only in respect of sectors reserved for the state on the date of entry into force of this Agreement,

(i) a Party, when privatizing an enterprise owned by it in such a sector, may sell all or a portion of its equity interests to its nationals; and

(ii) a Party, when permitting private investment in such a sector, may require that a specified level of equity in business enterprises in that sector be held by its nationals.

b) For state enterprises not in sectors reserved to the state at the date of entry into force of this Agreement, but carrying on an activity on the date of entry into force of this Agreement, a Party may limit the initial acquisition of its interests in the enterprise to its nationals. However, once the Party's interests have been sold, the obligations of paragraph 1 (national treatment) shall apply.^{10,11}

⁹ This section would be inserted in the "treatment" section in a way which would capture the "ratchet."

¹⁰ Requirements that equity interests be held by nationals -- for state enterprises not in sectors reserved to the state at the date of entry into force of this Agreement, but which a Party establishes or acquires subsequent to the date of entry into force of this Agreement -- would be governed by Annexes A or B.

¹¹ Mexico is considering joining the U.S. on this provision.

11. CDA[Notwithstanding paragraph 1,

- a) a Party, when selling or disposing of its equity interest in a business enterprise owned or controlled by the Party at the time of entry into force of this Agreement, may impose limitations on the ownership or control of such business enterprise by an investor of another Party;
- b) a Party, when selling or disposing of its equity interest in a business enterprise established or acquired by the Party after the entry into force of this Agreement, may impose limitations on the initial acquisition of those interests by an investor of another Party. Once the Party's interests have been sold or disposed of, the provision of paragraph 1 shall apply to any subsequent sale or disposition;
- c) a Party may impose limitations on the participation of investors or investments of another Party in the provision of a service delivered by a government or governmental entity when such limitations are imposed at the time:
 - i) the Party privatizes the delivery of that service;
 - ii) the Party permits commercial participation of private entities, whether concurrently or not with the governmental entity, in the delivery of that service.]

12. USA[The obligations of paragraphs 1, 2, and 3 shall not apply to:

- a) federal government procurement of goods and services supplied by investments of investors of another Party if such investments are controlled by nationals of a non-Party;
- b) procurement of goods and services by states and provinces of a Party; and
- c) government subsidies, grant, insurance and loan programs.]

PERFORMANCE REQUIREMENTS

1. Except as provided in Annex ____, no Party shall apply USA MEX[or enforce], in connection with the establishment, acquisition, expansion, conduct or operation of an investment in its territory of an investor of a Party or non-Party¹², any of the following requirements CDA[enforceable under domestic law or administrative ruling]:

- a) to export a given level or percentage of goods or services;
- b) to achieve a given level or percentage of domestic content;
- c) to purchase or use goods or services of domestic origin or from domestic producers or service providers, or otherwise accord a preference to goods or services produced in such territory;
- d) 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;
- e) to restrict domestic sales of goods or services that such investment produces by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- f) USA MEX[transfer a particular technology, production process or other proprietary knowledge to a national or entity in its territory, except:
 - i) when imposed by a court or administrative tribunal to remedy an alleged violation of competition laws; or
 - ii) where necessary or appropriate to protect health, safety or the environment;]
- g) USA MEX[act as the exclusive supplier of the goods or services it produces to a specific region or world market.]

CDA[2. Notwithstanding paragraph 1, a Party may nonetheless condition the establishment or acquisition of an investment, and its subsequent conduct or operation, on commitments to locate production, carry out research and development, train or employ workers, construct or expand particular facilities in its territory.]

2. Except as provided in Annex ____, no Party shall condition the receipt or continued receipt of an incentive, in connection with investments in its territory of investors of CDA USA[a Party or non-Party] MEX[another Party], on any of the following requirements CDA[enforceable under domestic law or administrative ruling]:

- a) purchase or use goods USA[or services] of domestic origin or from domestic producers, or otherwise accord a preference to goods produced USA[or services supplied] in such territory;

¹² Mexico agrees provided that Mexico can impose requirements on non-Parties to export to non-Party countries.

- b) achieve a given level or percentage of domestic content;
- c) 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;
- d) restrict domestic sales of goods or services that such investment produces by limiting such sales in any way to the volume or value of its exports or foreign exchange earnings;
- e) USA MEX[to act as the exclusive supplier of the goods or services it produces to a specific, regional or world market.]

3. Notwithstanding paragraph 2, a Party may nonetheless condition the receipt of an incentive on commitments to locate production, produce a service, train or employ workers, construct or expand particular facilities, conduct R&D, or spend the incentive, in its territory.

4. The provisions of CDA[this Article] USA MEX[paragraphs 2(a) and 2(b)] shall not apply to:

- a) measures related to government procurement, including purchases by state enterprises¹³;
- b) USA MEX[eligibility criteria for purposes export promotion programs;]
- b) CDA[the provision of subsidies consistent with Article XVI of the GATT and the Agreement on the Interpretation and Application of Article VI, XVI and XXIII of the GATT, including any amendments, modifications or successor agreements thereto;]

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

- a) exporting goods and services originating from such territory to a non-party country, unless pursuant to a measure of general application consistent with Article ___ (on export restrictions);
- b) importing to such territory goods and services originating from a non-party; or
- c) using goods and service originating in a non-party country.]

6. The provisions of paragraphs 1 or 2 shall not apply to any requirements other than those listed in paragraphs 1(a)-(g) and 2(a)-(e).

¹³ U.S. believes the clarification for state enterprises is unnecessary.

TRANSFERS

1. Subject to paragraph 3 MEX CDA [and paragraphs 5 and 6] a Party shall permit all transfers and international payments (hereinafter "transfers") relating to an investment in its territory of an investor 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, returns in kind, and other amounts derived from an investment;
- b) proceeds from the sale of all or any part of an investment or from the partial or complete liquidation of an investment;
- c) payments made under a contract entered into by an investor, or investment, including payments made pursuant to a loan agreement;
- d) compensation pursuant to {Article on expropriation}; and
- e) payments arising out of an investment dispute as defined in Article ____ (dispute settlement).¹⁴

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

4. Notwithstanding paragraphs 1, 2, and 3 of this Article, a Party may maintain or adopt restrictions on the transfer of "returns in kind" (goods and services) that are otherwise in conformity with the provisions of this Agreement.¹⁵

¹⁴ Canada agrees subject to overall agreement on dispute settlement.

¹⁵ U.S. agrees that paragraph 1 should not prohibit general export controls, but reserves the right to modify the language.

1 5. MEX CDA[No Party shall require its investors to repatriate, or penalize its investors
2 who fail to repatriate, the income, earnings or profits attributable to any investment in
3 another Party or to any businesses carried on in another Party either directly by the
4 investors or indirectly through a business enterprise established in that other Party.]
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6 6. MEX CDA[Paragraph 5 shall not be construed as preventing a Party from taxing its
7 investors on their share of any income, earnings or profits attributable to a business
8 carried on or an investment made in another Party, provided that the tax so charged does
9 not exceed the tax that would be so charged if such income, earnings or profits were
10 repatriated, without any further tax on the repatriation, to its investors.]
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12 7. MEX[Nothing in this Agreement shall affect the rights and obligations of the
13 Parties under the Articles of Agreement of the International Monetary Fund, including
14 the use of exchange actions which are in conformity with such Articles of Agreement,
15 provided that a Party shall not impose restrictions on any capital transactions
16 inconsistently with its specific commitments under this Agreement regarding such
17 transactions.]

EXPROPRIATION AND COMPENSATION

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

- a) for a public purpose;
- b) on a nondiscriminatory basis;
- c) in accordance with due process of law and the general principles of treatment provided in paragraph 3 Article (on treatment of investment); and
- d) upon payment of compensation in accordance with paragraphs 2-6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken CDA[or became known, whichever is earlier¹⁶]. ("Date of Expropriation") 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. USA[Valuation shall not reflect any change occurring because the expropriatory action had become known prior to the date of expropriation.]

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment thereof.

5. If payment is made in a currency other than a G7 currency, the amount paid shall be no less than the equivalent of the amount of compensation owed on the date of expropriation converted into a G7 currency at the market rate of exchange prevailing on that date, plus accrued interest at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of actual payment.

6. Upon payment, compensation shall be freely transferable at the prevailing market rate of exchange on the date of transfer.

7. The provisions of this Article do not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or the revocation, CDA MEX[limitation or creation] of intellectual property rights to the extent that it is consistent with the provisions of Chapter ____ (Intellectual Property).¹⁷

¹⁶ Subject to language on 30 day notification of intent to expropriate.

¹⁷ This paragraph has been agreed upon by the Intellectual Property group, but has not yet been discussed or agreed upon by the Investment group.

1 **EXTRA-TERRITORIALITY**
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- 3 1. MEX CDA[No Party may prescribe new laws or enforce existing laws so as to
4 require investors or service providers to act, in the territory of another Party, in a manner
5 that conflicts with the laws of such other Party.]

NATIONAL SECURITY

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

Note: This provision is self-judging.]

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

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

2. The Party relying on paragraphs a) - c) shall ensure that its action or measure is that which least infringes the rights or any reasonable expectations of the other Parties under this Agreement, and is no broader in scope or duration than necessary.

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

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

MEX CDA[5. If a Party considers that any action or measure taken by another Party under this Article constitutes a disguised restriction on trade or investment or otherwise nullifies or impairs any benefit reasonably expected under this Agreement, it may request consultations. Such consultations shall be held promptly. The Party whose action or measure is the subject of the consultations shall give full and sympathetic consideration to

1 the view of the complaining Party and shall explain, in as much detail as is consistent
2 with its assessment of its security interests, the reasons for the measure. Where
3 appropriate following such consultations, such Party shall re-consider whether its action
4 or the application of its measure could be altered in any way, in order to minimize the
5 infringement of rights and benefits otherwise secured by this Agreement.]

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7 CDA[6. No Party may invoke the provisions of this Article to derogate from the
8 requirement to pay compensation for an expropriation in accordance with Article ____ or
9 to permit the transfer of an investment and returns, in accordance with Article ____.]

COMPETITION POLICY¹⁸

1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objects and purposes of this Agreement. To this end the Parties USA[Parties' authorities] shall consult from time to time about the effectiveness of measures undertaken by each Party.

2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competitive law enforcement in the Free Trade Area. The Parties USA[Parties' authorities] shall also cooperate on issues of competition law enforcement and consult on issues of common concern which may include mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the Free Trade Areas.

3. CDA[In the enforcement of their respective competition laws and policies in those cases involving persons, assets, or practices located, or occurring, in the territory of any of the other Parties, each Party shall assess, and, if requested by a Party, be prepared to advise that Party of the results of its assessment of, the following factors:

- a) the relative significance of the anti-competitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
- b) the presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
- c) the relative significance of the effects of the enforcement activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
- d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- e) the degree of conflict or consistency between the enforcement activities and the other Party's law or articulated economic policies; and
- f) the extent to which enforcement activities of such other Party with respect to the same persons, including judgements or undertakings resulting from such activities, may be affected.]

4. The obligations of this Article shall not be subject to dispute settlement pursuant to Chapter 23 (General Dispute Settlement) or Article ____ (Investment Dispute Settlement).

COMPETITION POLICY COMMITTEE

CDA MEX [1. The Commission shall establish a Competition Policy Committee to consider and make recommendations (no later than ____) on:

¹⁸ The U.S. proposes that this Article be placed outside this investment chapter in the final text.

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- a) the impact of competition law and policy on trade within the Free Trade Area;
- b) the impact of trade law and regulation on competition within the Free Trade Area;]
- c) the potential for reliance on competition laws and policies to discipline anti-competitive transborder pricing practices and market segmentation.]¹⁹

¹⁹ The US has proposed a similar concept to (c) in Trade Remedies Working Group.

STATE ENTERPRISES

CDA[DRAFT DISCUSSION PAPER

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

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

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

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

MONOPOLIES²⁰

CDA[1. 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 another Party, a Party shall:

- a) notify the other Parties;
- b) upon request, engage in consultations; and
- c) endeavor to minimize or eliminate any unnecessary nullification or impairment of benefits under this Agreement that might otherwise be caused by the designation.

3. A Party designating a monopoly shall ensure that the monopoly does not engage in discrimination in its sales in the relevant market against investments of investors of another Party, contrary to this Agreement.

4. A Party maintaining or designating a monopoly shall ensure that the monopoly in its territory, either directly or through an affiliated company, does not use its monopoly position to engage in anti-competitive practices, whether through cross-subsidization with its operations in its relevant market or otherwise, in areas outside the relevant market.]

²⁰ U.S. proposal would be placed outside the investment chapter.

1 USA[1. Each Party shall ensure, through regulatory supervision, administrative control, or
2 the application of other measures, that any privately-owned monopoly that it designates
3 and any government monopoly that it maintains or designates;
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- 5 a) acts in a manner consistent with the Party's obligations under this Agreement
6 whenever such monopoly exercises any regulatory, administrative, or other
7 governmental authority granted to it by the Party, such as the power to grant
8 or apply for import or export licenses, approve commercial transactions, or
9 impose quotas, fees, or other charges;
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11 b) acts solely in accordance with commercial considerations in its purchase and
12 sale of the monopoly good or service, including with regard to price, quality,
13 marketability, transportation and other terms and conditions of purchase and
14 sale;
15
16 c) provides non-discriminatory treatment to persons, to investments of investors,
17 to goods, and to services of another Party in its purchases and sale of the
18 monopoly good or service; and
19
20 d) does not use its monopoly position to engage, either directly or through its
21 dealings with an affiliated enterprise, in anticompetitive practices in a non-
22 monopolized market that adversely affect an investment of an investor of
23 another Party, including through the discriminatory provision of the
24 monopoly good or service, cross-subsidization, or predatory conduct.
25

26 2. Subject to Articles _____ (Nullification and Impairment, _____ (Expropriation),
27 and Annex 9.1:3 (Liberalization of Energy Investment and Regulatory Measures),
28 nothing in this Agreement shall prevent a Party from designating a monopoly.
29

30 3. Prior to designating a monopoly, and where the designation may affect interests of
31 persons of another Party, a Party shall:
32

- 33 a) notify the other Parties in writing; and
34
35 b) endeavor to introduce such conditions on the operation of the monopoly as
36 will minimize or eliminate any nullification or impairment of benefits under
37 this Agreement.
38

39 For purposes of this Article:
40

41 **in accordance with commercial considerations** means consistent with normal business
42 practices of privately-held firms in that industry;
43

44 **designate** means to establish, designate or authorize, or to expand the scope of a
45 monopoly franchise to cover an additional good or service, after entry into force of this
46 Agreement;
47

48 **discriminatory provision** includes provision that treats an affiliated enterprise more
49 favorably than an unaffiliated enterprise, or that treats once class of enterprises more
50 favorably than another, in like circumstances;
51

- 1 **government monopoly** means any monopoly that is substantially owned, or controlled
- 2 through ownership interests, by the federal government of a Party or by another such
- 3 monopoly;
- 4 **monopoly** means an entity, including any consortium or government agency that, in any
- 5 relevant market in the territory of a Party, is the sole provider or purchaser of a good or
- 6 service; and
- 7
- 8 **non-discriminatory treatment** means the better of national or most-favored-nation
- 9 treatment.

TECHNOLOGY CONSORTIA

MEX CDA[1.

- a) No Party shall maintain or introduce any measure that limits or prevents an investor of another Party from participating in a technology consortium or other group of business enterprises respecting the development of or access to technology (in a manner that would violate Article (on national treatment) or Article (on nullification and impairment).
- b) For greater certainty, the terms and conditions for participation in a technology consortia including financial and technology resources shall be determined by the members of the consortia.]

1 TAXATION

2
3 1. GENERAL EXCLUSION: INCOME TAX AND RELATED MEASURES

4
5 Except as provided for in this Article, nothing in this Agreement shall apply to
6 taxes of the Parties. In the event of an ambiguity or conflict between this Article
7 and any other provision of this Agreement, the provisions of this Article shall
8 apply.²¹

9
10 2. TAX CONVENTIONS

11
12 Without limiting the application of Paragraph 1, nothing in this Agreement shall
13 affect the rights and obligations under any convention for the avoidance of double
14 taxation (in this Article referred to as a "tax convention") or other international
15 agreement or arrangement, or domestic legislation implementing such agreement
16 or arrangement, related wholly or mainly to those taxes, and, in the event of an
17 inconsistency between the provisions of this Agreement and any such convention,
18 agreement, arrangement, or legislation, the provisions of the convention,
19 agreement, arrangement, or legislation, shall prevail to the extent of the
20 inconsistency.

21
22 3. APPLICATIONS OF PROVISIONS RELATING TO TRADE IN GOODS

23
24 Article 401 of this Agreement incorporating by reference rights and obligations of
25 the Parties relating to trade in goods under Article III of the General Agreement
26 on Tariffs and Trade, and such other provisions of the Agreement as are necessary
27 to give effect to Article 401, shall apply to taxes of the Parties to the same extent
28 as does Article III of the General Agreement on Tariffs and Trade.

29
30 4. APPLICATIONS OF PROVISIONS RELATING TO INVESTMENT AND
31 TRADE IN SERVICES

32
33 Subject to paragraphs 2 and 5,

- 34
35 a) provisions imposing national treatment obligations in Chapters ____ and ____
36 of this Agreement relating to Cross Border Trade in Services and Financial
37 Services, respectively, shall apply to taxes of the Parties on income or capital
38 gains or on the taxable capital of corporations, including the Assets Tax
39 established by the Assets Tax Law of Mexico, that relate to the purchase or
40 consumption of particular services, and
41
42 b) provisions imposing national treatment obligations and most favoured nation
43 obligations in Chapters ____ and ____ of this Agreement relating to Cross
44 Border Trade in Services and Financial Services, respectively, shall apply to
45 all other taxes of the Parties,
46

21 Provisions concerning forced repatriations in the transfers sections vis-a-vis taxation are rendered
redundant by reason of this provision. This provision should take precedence over paragraph 2 of the
provision headed "Scope" in Chapter/Annex XX - Financial Services and any other similar provisions.
This provision assumes that tariffs and customs duties are not considered to be taxes within the ambit of
this Article.

CDA USA[except that nothing in those Chapters shall apply to:

- c) impose most favoured nation obligations to advantages accorded by a Party pursuant to a tax convention or any other agreement or arrangement between two or more parties, relating wholly or mainly to taxation;
- d) a non-conforming provisions of any existing taxation measure;
- e) the continuation or prompt renewal of a non-conforming provisions of any existing taxation measure;
- f) an amendment to a non-conforming provision of any existing taxation measure to the extent the amendment does not decrease its conformity with any of the provisions of this Agreement; or
- g) any new such taxation measure aimed at ensuring the equitable USA[or] CDA[and] effective imposition of collection of taxes except where the measure arbitrarily discriminates between persons of the Parties or arbitrarily restricts benefits accorded under this Agreement.]

5. CDA USA[APPLICATIONS OF PROVISIONS RELATING TO PERFORMANCE REQUIREMENTS

Subject to paragraph 2, paragraphs 2, 3, and 4 of Article ____ (performance requirements) of the Investment Chapter shall apply to the taxes of the Parties, CDA[except that

- a) in applying that Article to a taxation measure, that Article shall be read without reference to the words "or services" and "or services supplied" as they appear in paragraph 2 thereof, and
- b) in applying that Article to a taxation measure that relates to trade in goods between the Parties, that Article shall be read without reference to the words "or export development programs" in paragraph 4 thereof.]

6. EXPROPRIATION

CDA MEX[Article ____ of the Investment Chapter (Expropriation) shall apply to a claim by a Party or an investor of such Party that the measure expressed as a taxation measures constitutes an expropriation or nationalization except where its has been determined pursuant to this paragraph that a taxation measure of a Party is a bona-fide tax. Before an investor or a Party may bring such a claim, however, the issue of whether the measure is a bona-fide tax shall be referred for determination by the competent authorities under the tax convention, if any, between the Parties. If this is no such tax convention or if the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to resolve it within a period of six months after the referral, or such other period as may be agreed upon by the Parties, CDA USA[the investor or the Party] MEX[the Party may bring such a claim under the appropriate dispute settlement provisions of this Agreement.]²²

²² A cross reference may be required in the expropriation provision of the Investment Chapter.

1
2 6.1 USA[EXPROPRIATION
3

4 A claim by a Party or an investor of such Party that a tax measure of another
5 Party constitutes an expropriation shall be resolved under Article ____ of the
6 Investment Chapter. The issue of whether such tax is discriminatory shall be
7 referred for resolution to the competent authorities under a Tax Convention
8 between the Parties. If the competent authorities do not agree to consider the
9 issue, or having agreed to consider it, fail to resolve it within a reasonable period
10 of time, the issue shall be resolved, together with all other issues of the
11 expropriation, under Article ____ of the Investment Chapter.]²²
12

13 7. WITHHOLDING TAX
14

15 Without limiting the application of the foregoing, and for greater certainty,
16 notwithstanding Article ____ (Transfers) a party may impose or collect a tax by
17 withholding or other means.
18

19 Notes:
20

- 21 1. FTA transitional rules required. It is contemplated by Canada and USA that this
22 Agreement is to override FTA vis-a-vis tax.
23
24 2. It is not intended that exiting non-conforming tax measures be listed.
25
26 3. Canada's position is that paragraphs 4, 5, and 6 are not severable.

DISPUTE SETTLEMENT

1
2
3 USA[1. The provisions of this article reflect the desirability of a mechanism for the
4 settlement of investment disputes that assures equal treatment between investors of the
5 Parties in accordance with the principle of international reciprocity and that assures that
6 the Parties to the dispute are afforded due process before an impartial tribunal.

7
8 2. For purposes of this Article, an investment dispute means a dispute between a
9 Party and an investor of another Party involving an alleged breach of any provision of
10 this Chapter. An investment dispute shall not include an alleged breach of this Chapter
11 where the very measure constituting the alleged breach is itself expressly permitted by
12 another Chapter.

13
14 3. In the event of an investment dispute, the parties to the dispute should initially
15 seek a resolution through consultation and negotiation. If the dispute cannot be settled
16 amicably, the investor concerned may choose to submit the dispute for resolution:

- 17
18 a) to the courts or administrative tribunals of the Party that is a Party to the
19 dispute; or
20
21 b) in accordance with the terms of paragraph 4.

22
23 The choice made by the investor shall be exclusive. If the investor chooses to submit the
24 dispute for resolution in accordance with paragraph 4, the investor may seek as final
25 relief only monetary damages or restitution of property.

26
27 4. Provided that the investor concerned has not submitted the dispute for resolution
28 under paragraph 3 (a) and that six months have elapsed from the date on which the
29 dispute arose, the investor concerned may submit the dispute for settlement by binding
30 arbitration:

- 31
32 a) to the International Centre for the Settlement of Investment Disputes
33 ("Centre") established by the Convention on the Settlement of Investment
34 Disputes between States and Nationals of other States, done at Washington,
35 March 18, 1965 ("ICSID Convention"), provided that the Party concerned is
36 a party to such Convention;
37
38 b) to the Additional Facility of the Centre, if the Centre is not available; or
39
40 c) in accordance with arbitration Rules of the United Nations Commission on
41 International Trade Law (UNCITRAL).

42
43 5. Notwithstanding paragraphs 3 and 4, the investor and the Party to the dispute may
44 mutually agree to arbitration in accordance with other arbitration rules or before another
45 arbitration institution.

46
47 6. Each Party hereby consents to the submission of any investment dispute for
48 settlement by binding arbitration in accordance with the choice made by the investor
49 under paragraph 4. Such consent, together with this submission of the dispute by the
50 investor under paragraph 4 or 5 shall satisfy the requirement for:
51

- 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;
- b) an "agreement in writing" for purposes of Article II of the United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention"); and
- c) an "agreement" for purposes of Article I of the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention").

Any such investment dispute shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

7. Unless the parties to an investment dispute agree otherwise the place of any arbitration under paragraphs 4 or 5 of this Article shall be in the territory of a Party to this Agreement that is a party to the New York Convention, such place to be selected in accordance with the applicable arbitration rules.

8. The arbitral tribunal constituted pursuant to paragraph 4 or 5 shall decide the dispute in accordance with the provisions of this Agreement and applicable rules of international law.

9. [Subject to the applicable provisions of the New York Convention, the Inter-American Convention, and the ICSID Convention],

- a) any arbitral award resulting from an arbitration under paragraphs 4 or 5 of this Article shall be final and binding on the parties to the dispute; and
- b) each Party undertakes to carry out without delay the provisions of any such award and to provide for its enforcement.

10. In an arbitration held pursuant to paragraphs 4 or 5, the Tribunal may determine any incidental or additional claims or counterclaims arising directly out of the acts or measures constituting the alleged breach of this Chapter, except as the parties to the investment dispute otherwise agree. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

11. For purposes of an arbitration held under paragraph 4 or 5 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of another Party, shall be treated as an investor of such other Party, including in accordance with Article 25(2)(b) of the ICSID Convention.

12. No Party shall give diplomatic protection, or bring an international claim for money damages or restitution of property, in respect of the investment dispute which one of its investors shall have submitted to arbitration under this Article, unless such other Party shall have failed to abide by and comply with the award pursuant to the New York Convention. Diplomatic protection, for purposes of this paragraph shall not include

1 state-to-state dispute settlement pursuant to Article ____ of this Agreement, or informal
2 diplomatic exchanges for the sole purposes of facilitating settlement of a dispute.
3 Provision for the Investment Chapter that might be taken into the General provisions:
4

5 A Party shall have a defense to a claim under Article ____ to the extent that the very
6 measure constituting the alleged breach of this Chapter is itself expressly authorized by
7 another Chapter.]
8

9 USA[SETTLEMENT OF DISPUTES BETWEEN PARTIES]

10
11 1. Any dispute between Parties concerning the interpretation or application of this
12 Chapter which is not resolved through consultations or other diplomatic channels, shall
13 be submitted, upon the request of a Party, for binding decision in accordance with the
14 applicable rules of international law to an arbitral tribunal composed of three arbitrators.
15

16 2. In the absence of an agreement by the Parties to the contrary, the arbitration rules
17 of the United Nations Commission on International Trade Law (UNCITRAL) shall apply.
18 The appointing authority referenced in those rules shall be the Secretary General of the
19 Centre.
20

21 3. Fees and expenses of the arbitrators and appointing authority, and other costs of
22 the proceedings, shall be borne equally by the Parties. Each Party shall bear the cost of
23 its legal representation.]
24

25 CDA[ARTICLE XX07: SETTLEMENT OF DISPUTES BETWEEN A PARTY AND
26 AN INVESTOR OF ANOTHER PARTY.
27

28 1. The provisions of this Article reflect the desirability of a mechanism for the
29 settlement of investment disputes that assures equal treatment between investors of the
30 Parties to this Agreement in accordance with the principle of international reciprocity and
31 that assures that the parties to the dispute are afforded due process before an impartial
32 tribunal.
33

34 2. Definitions
35

36 For purposes of this Article,
37

- 38 (a) "disputing parties", in relation to an investment dispute, means the investor
39 and the disputing Party;
40
41 (b) "disputing Party", in relation to an investment dispute, means the Party to
42 this Agreement alleged to have breached a provision of this Chapter;
43
44 (c) "ICSID Convention" means the Convention on the Settlement of Investment
45 Disputes between States and Nationals of other States, done at Washington,
46 March 18, 1965;
47
48 (d) "Inter-American Convention" means the Inter-American Convention on
49 International Commercial Arbitration, done at Panama, [Month] [Day], 1975;
50
51 (e) "investment dispute" means a dispute between a Party to this Agreement and
52 an investor of another Party whereby the investor alleges that the first-
53 mentioned Party has breached a provision of this Chapter and that it has

suffered loss or damage by reason of, or arising out of, that breach, but does not include a dispute with respect to

(i) measures that are inconsistent with this Chapter but that are authorized by other provisions of this Agreement,

(ii) non-conforming provisions of measures covered by Articles ... and Annexes ... ; or

(iii) an alleged breach of any right to the security of the person of an investor;

(f) "New York Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

(g) "UNCITRAL" means the United Nations Commission on International Trade Law.

3. Negotiation

In the event of an investment dispute, the disputing parties should attempt first to settle the dispute by consultation and negotiation.

4. Arbitration

(1) If an investment dispute cannot be settled by consultation and negotiation, the investor may, subject to subparagraphs (2) to (4), submit the dispute for settlement by arbitration:

(a) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the ICSID Convention, provided that the disputing Party and the Party of the Investor are parties to that Convention;

(b) to the Additional Facility of the Centre, if the disputing Party is not a Party to the ICSID Convention; or

(c) in accordance with the UNCITRAL Arbitration Rules.

(2) The investor may submit the investment dispute to arbitration under subparagraph (1) on condition that the investor

(a) waive his rights to initiate or continue before any court or administrative tribunal of the disputing Party any proceedings in respect of a breach of the domestic law of that Party and in which the matter at issue is substantially the same as the matter at issue in the arbitration proceeding;

(b) waive execution under the New York Convention of any arbitral award made in an arbitration proceeding initiated under subparagraph (1), except in a country that is both a Party to the New York Convention and a Party to this Agreement; and

- 1 (c) agrees that the defending Party can establish an arbitral panel under paragraph
2 8 or 9.
3

4 (3) An investor who intends to submit an investment dispute to arbitration
5 under subparagraph (1) shall give notice of his intention to the disputing Party at least
6 ninety days before that proceeding is initiated, which notice shall
7

- 8 (a) designate precisely the parties to the dispute and state the address of each;
9
10 (b) set forth the provisions of this Agreement alleged to have been breached and
11 any other relevant provisions; and
12
13 (c) contain information concerning the issues in dispute and an indication of the
14 amount involved.
15

16 (4) An investor is not entitled to initiate arbitration under subparagraph (1) if
17

- 18 (a) less than six months have elapsed since the date on which the investment
19 dispute arose;
20
21 (b) more than two years have elapsed since the date on which the investor first
22 acquired, or should have first acquired, knowledge of the alleged breach that
23 is at issue in the dispute; or
24
25 (c) the disputing Party has requested the establishment of an arbitral panel in
26 accordance with paragraph 8 or 9.
27

28 (5) An arbitration proceeding under subparagraph (1) is initiated on the date,
29 as applicable, on which
30

- 31 (a) the notice of registration of the request to institute arbitration proceedings has
32 been dispatched by the Secretary-General of the Centre in accordance with
33 paragraph (3) of Article 36 of the ICSID Convention;
34
35 (b) the certificate of registration of the notice for arbitration has been dispatched
36 by the Secretary-General of the Centre in accordance with of Article 4 of
37 Schedule C of the Additional Facility Rules; or
38
39 (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is
40 received by the disputing Party.
41

42 5. (1) An investor of a Party shall not have a right of action under the domestic
43 law of another Party for any breach of this Agreement by that other Party.
44

45 (2) If an arbitration proceeding is initiated in respect of an investment dispute,
46 the investor shall cease to have any right to initiate before any court or administrative
47 tribunal of the disputing Party any proceedings in respect of a breach of the domestic law
48 of that Party in which the matter at issue is substantially the same as the matter at issue in
49 the arbitration proceeding.
50

51 6. An arbitral tribunal to which an investment dispute is referred for arbitration in
52 accordance with paragraph 4 may decline to address an issue, reserve its decision on an

1 issue, or stay the proceedings before the tribunal, pending decision by any other arbitral
2 tribunal or panel on the same issue.

3 7. A disputing Party may, within ninety days after service of
4 a notice under subparagraph 4(3) in respect of the investment dispute,

5
6 (a) request the establishment of an arbitral panel in accordance with paragraph 8,
7 if it considers that any actual or proposed measure or other matter that is at
8 issue in the dispute, or at issue in the dispute and in other investment disputes
9 in which it is a disputing Party, might significantly affect the operation of this
10 Agreement; or

11
12 (b) request the establishment of an arbitral panel in accordance with paragraph 9,
13 if it considers that the dispute, or the dispute and other investment disputes in
14 which it is a disputing Party, raises important issues of public policy or that
15 the dispute and other investment disputes in which it is a disputing Party
16 should be consolidated.

17
18 8. (1) A disputing Party may request the [North American] Trade Commission to
19 establish an arbitral panel in accordance with Article 2309.

20
21 (2) The request shall state the measure or other matter that the disputing Party
22 considers might significantly affect the operation of this Agreement, indicate the
23 provisions of this Agreement that are considered relevant, and be delivered by the
24 disputing Party to the other Parties and to its Section of the Secretariat.

25
26 (3) Subject to Article 2313, the terms of reference for the arbitral panel shall
27 be

28
29 (a) to examine, in light of the relevant provisions of this Agreement, the measure
30 or other matter referred to the Commission as set out in the request; and

31
32 (b) to make such findings, determinations, and disposition as provided in Article
33 2317(2).

34
35 (4) Except as modified by this paragraph, the provisions of Chapter 23 apply
36 to an arbitration proceeding that is initiated under this paragraph.

37
38 (5) An arbitration proceeding is initiated under this paragraph on the date of
39 delivery of the request to the Commission.

40
41 (6) An arbitral tribunal established pursuant to paragraph 4 shall cease, on the
42 date on which an arbitration proceeding is initiated under this paragraph, to have
43 jurisdiction with respect to any matter at issue in the proceeding before it that is also at
44 issue in the proceeding before the arbitral panel established pursuant to this paragraph
45 pending determination of the matter by the panel established pursuant to this paragraph.

46
47 (7) The determination and disposition of the arbitral panel, or a settlement by
48 the Parties with respect to any measure or other matter at issue in the proceeding before
49 the panel, is binding on any arbitral tribunal established pursuant to paragraph 4 to which
50 the same matter is or has been referred for arbitration.

51
52 9. (1) A disputing Party may request the Secretary of the International Chamber
53 of Commerce to establish an arbitral panel.

(2) An arbitral panel shall consist of three arbitrators appointed by the Secretary.

(3) The disputing Party shall give notice of its request to establish an arbitral panel to all known claimants and to the Party or Parties of the claimants.

(4) The disputing Party shall refer to the arbitral panel such issues as it considers appropriate and the panel shall determine and dispose of those issues.

(5) The disputing Party, the claimants and the Party or Parties of the claimants shall have the right to be parties to the proceeding before the arbitral panel.

(6) No arbitral tribunal or panel established pursuant to paragraph 4, 8 or 10 shall have jurisdiction to decide any issue that is also at issue before an arbitral panel established pursuant to this paragraph pending decision by the panel established pursuant to this paragraph.

(7) The determination and disposition of the arbitral panel, or the settlement by the Parties on the issue or issues before it, is binding on the parties to the proceeding before the panel and on any arbitral panel or tribunal established pursuant to paragraph 4, 8 or 10 to which the same issue or issues is or have been referred for arbitration.

(8) Except as modified by this paragraph, the provisions of the UNCITRAL Arbitration Rules apply mutandis mutatis to an arbitration proceeding that is initiated under this paragraph.

10. Notwithstanding paragraphs 3 to 9, the disputing parties may agree to submit the investment dispute to arbitration in accordance with other arbitration rules or before any other arbitration institution.

10a. An arbitral tribunal or panel established pursuant to paragraph 4, 9 or 10

(b) may not order provisional measures; and

(c) may award only monetary compensation or restitution of property.

11. General

Unless the disputing parties agree otherwise, an arbitration proceeding under paragraph 4, 9 or 10 shall be held in the territory of any Party to this Agreement that is a Party to the New York Convention, such place to be selected in accordance with the applicable arbitration rules.

12. (1) An arbitral tribunal or panel established pursuant to paragraph 4, 9 or 10 shall decide the issue or issues in the proceeding before it in accordance with the provisions of this Agreement and applicable rules of international law.

(2) Subject to subparagraphs 8(7) and 9(7), the decision of an arbitral tribunal or panel established pursuant to this Article shall have no binding force except between the parties to the proceeding and in respect of the particular case.

1 13. (1) The award granted by an arbitral tribunal or panel established pursuant to
2 this Article shall be subject to judicial review under the law of the place where the
3 arbitration proceeding is held [or, in the alternative, review by an extraordinary panel
4 under this Agreement].

5
6 (2) No arbitral tribunal or panel established pursuant to this Article shall order
7 a Party to pay punitive or aggravated damages or to return property that is not owned and
8 controlled by that Party.

9
10 (3) Where an arbitral tribunal or panel established pursuant to paragraph 4, 9
11 or 10 orders a Party to return property, it shall also order that the Party may pay
12 compensation in lieu thereof.

13
14 (4) Costs in any arbitration proceeding under this Article and interest on any
15 award shall be governed by arbitral law of the place where the proceeding is held.

16
17 14. (1) In any arbitration proceeding under paragraph 4, 9 or 10, the arbitral
18 tribunal

19
20 (a) may take into account amounts that a competent domestic authority has
21 ordered the investor to pay to the disputing Party and that are counterclaimed
22 by that Party; and

23
24 (b) shall deduct from an award amounts paid by the defending Party under a
25 contract of indemnity.

26
27 (2) Subject to subparagraph 14(1)(b), in any proceeding under this Article
28 involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right
29 of set off or otherwise, that the investor concerned has received or will receive, pursuant
30 to an insurance or guarantee contract, indemnification or other compensation for all or
31 part of its alleged damages.

32
33 14b. An award made under this Article shall be enforceable under [in accordance with]
34 the New York Convention in a country that is both a Party to the New York Convention
35 and a Party to this Agreement.

36
37 15. Subject to subparagraph 13(1) and the applicable provisions of the New York
38 Convention, the Inter-American Convention and the ICSID Convention,

39
40 (a) any arbitral award granted in an arbitration proceeding under paragraphs 4, 9
41 or 10 is final on the parties to the arbitration proceeding; and

42
43 (b) each Party to this Agreement undertakes to carry out without delay the
44 provisions of any arbitral award granted against it in any arbitration
45 proceeding under paragraph 4, 9 or 10 and to provide for the enforcement of
46 arbitral awards granted in arbitration proceedings under those paragraphs.

47
48 16. For purposes of an arbitration proceeding under paragraph 4, 9 or 10, any
49 company that is legally constituted under the applicable laws and regulations of a Party or
50 a political subdivision thereof but that, immediately before the occurrence of the event or
51 events giving rise to the dispute, was an investment of nationals or companies of another
52 Party, shall be treated as an investor of such other Party, including in accordance with
53 Article 25(2)(b) of the ICSID Convention.

1
2 17. (1) Subject to this Article, each Party hereby consents to the submission of any
3 investment dispute between that Party and any investor of another Party for settlement by
4 arbitration in accordance with paragraph 4.
5

6 (2) The submission of an investment dispute for settlement by arbitration in
7 accordance with paragraph 4, together with the consent given by each Party in
8 subparagraph (1), shall satisfy:
9

10 (a) the requirement of Chapter II of the ICSID Convention (Jurisdiction of the
11 Centre) and the Additional Facility Rules for written consent of the parties;
12

13 (b) the requirement of Article II of the New York Convention for an agreement
14 in writing; and
15

16 (c) the requirement of Article I of the Inter-American Convention for an
17 agreement.
18

19 (3) For purposes of Article I of the New York Convention and Article I of the
20 Inter-American Convention, the submission of any investment dispute for settlement by
21 arbitration in accordance with paragraph 4 shall be considered to arise out of a
22 commercial relationship or transaction.
23

24 (4) For greater certainty, subparagraph (3) shall not affect any claim of
25 immunity made by any Party to this Agreement with respect to the enforcement of any
26 arbitral award.
27

28 18. (1) No Party shall give diplomatic protection, or bring an international claim
29 for money damages or restitution of property, in respect of any investment dispute that an
30 investor of that Party has submitted to arbitration under paragraph 4, 9 or 10, unless the
31 other Party concerned has failed to abide by and comply with the New York Convention
32 in respect of an award granted in the arbitration proceeding.
33

34 (2) For purposes of subparagraph (1), "diplomatic protection" does not include
35 state-to-state dispute settlement pursuant to Chapter 23 or informal diplomatic exchanges
36 for the sole purposes of facilitating settlement of a dispute.
37

38 19. Notwithstanding anything in the Agreement, the provisions of this Article and
39 Chapter 23 (Dispute Settlement) shall not apply to any Decision by Canada following a
40 review under the Investment Canada Act, with respect to whether or not to permit an
41 acquisition that is subject to review.]

1 **DEFINITIONS**

2
3 For purposes of this Chapter:

4
5 **Business enterprise** means a business²³ that has, or in the case of an establishment
6 thereof will have:

- 7
8 a) a place of business;
- 9
10 b) an individual or individuals employed or self-employed in connection with the
11 business; and
- 12
13 c) assets used in carrying on the business, and

14
15 CDA[that involves a financial commitment for the purpose of commercial gain.]

16
17 **Entity**²⁴ means any corporation, trust, partnership, sole proprietorship, joint venture or
18 other association MEX USA[whether or not for profit, and whether privately-owned or
19 governmentally-owned.]

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

23
24 **A G7 Currency** means the currency of Canada, Germany, France, Italy, Japan, the
25 United States of America, and the United Kingdom of Great Britain and Northern
26 Ireland.

27
28 1. **Investment** of an investor of a Party means an investment owned or controlled directly
29 or indirectly by an investor of such Party. CDA²⁵

30
31 2. **Investment** USA MEX[includes the following kinds of interests] CDA[consists of]:

- 32
33 a) equity or debt securities of a business enterprise, or any interest in such
34 enterprise that entitles the owner to share in the income or profits or to share
35 in the assets on dissolution;
- 36
37 b) real estate or other property (tangible or intangible) acquired in the
38 expectation or used for the purpose of economic benefit or other business
39 purposes;
- 40
41 c) a loan to a business enterprise made USA[or guaranteed] by a business
42 enterprise that is not a financial institution as defined in Chapter ____
43 (financial services);
- 44

23 The U.S. is checking whether the reference to "business" would preclude coverage of some activities of non-profit organizations.

24 Canada is checking this definition.

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

- 1 d) interests arising from the commitment of capital or other resources to
2 economic activity in the territory of another Party, such as under (i) contracts
3 involving the presence of the investor's property in the territory of another
4 Party (e.g., concession agreements, turnkey or construction contracts), or (ii)
5 contracts where the remuneration depends substantially on the production,
6 revenues or profits of a business enterprise.
7

8 3. For greater clarity, claims to money which arise solely from:
9

- 10 a) commercial contracts for the sale of goods or services by a national or entity
11 in the territory of one Party to a business enterprise in the territory of another
12 Party; or
13
14 b) the extension of credit in connection with a commercial transaction (e.g.,
15 trade financing) other than a loan covered by paragraph 2(c); or
16
17 c) any other claim to money;
18

19 and which do not involve the kinds of interests in paragraph 2 shall not be considered
20 investments.
21

22 4. "Equity or debt securities" includes voting and non-voting shares, bonds,
23 convertible debentures, stock options and warrants.]
24

25 **Investor of a Party means**

26 (a) a national of such Party, or
27

28 (b) an entity of such Party ^{CDA}[that is controlled in fact, directly or indirectly, by
29 nationals of such Party],
30

31 that makes or has made an investment.
32
33

34 **Investor of a non-Party** means an investor other than an investor of a Party, that makes
35 or has made an investment.
36

37 **Measures** includes "any law, regulation, procedure, requirement or practice." It should
38 be noted that this definition is not exhaustive of the forms that measures may take.
39 ^{CDA}[**Monopoly** means any entity, or group of entities acting in concert to effect a
40 common purpose, that in any relevant market, is the sole provider of a good or service.]
41

42 **National** means a natural person who is a national of a country under its applicable
43 law.²⁶
44

45 ^{MEX CDA}[**Ownership** includes beneficial ownership and with respect to assets also
46 includes the beneficial ownership of a leasehold interest in such assets;]
47

48 ^{MEX CDA}[**Person** means a natural person or an enterprise.]
49

²⁶ To be checked in connection with Lawyers Group definitions.

- 1 **Relevant market** means the market of the good or service within the territory of a Party,
- 2 or any part thereof, which is the subject of the maintained or designated monopoly.
- 3
- 4 **CDA**[**State enterprise** means for Canada a Crown Corporation within the meaning on the
- 5 Financial Administration Act. For the U.S. and Mexico...]
- 6
- 7 **USA**[**State enterprise** means an entity of a Party that is owned, or controlled through
- 8 ownership interests, directly or indirectly, by such Party or any agency or instrumentality
- 9 thereof.]