

INVESTMENT

SCOPE, COVERAGE AND DURATION

1. This Chapter shall apply to measures affecting:

a) investments (of investors of a Party) in the territory of another party existing at the time of entry into force as well as to investments made or acquired thereafter; and

b) investors of a Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in the territory of another Party.

c) CDA USA [all investments in the territory of any Party as provided in Article ____ (performance requirements).]

2. USA MEX [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 USA [ten] MEX [three] years from such date of termination, in the territory of the Party terminating the Agreement.]

3. This Chapter shall not apply to:

MEX [a) any measure taken pursuant to a restriction expressly mandated by the Constitution of a Party.]¹

b) USA MEX [the provision of financial services or insurance CDA [except as provided in the Chapter on Financial Services;]]²

c) government procurement CDA [except as provided in the Chapter on Government Procurement;] USA [of goods and services supplied by investments in its territory controlled by nationals of a non-Party and procurement by states, provinces or political subdivisions of a Party];

d) CDA [This chapter shall not apply to any subsidy provided by a Party or by any political sub-division or state enterprise thereof, except as otherwise provided in Article (on Performance Requirements).]

¹ Mexico will supply new language for this provision.

² U.S. Note - 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.

1 e) ^{CDA}[as between Canada, the United States of America, and
2 the United States of Mexico, cultural industries as defined in
3 article 2012 of the U.S.-Canada Free Trade Agreement.]^{3]}

4 ^{CDA}[f) the cross-border provision of a service,
5 notwithstanding any requirement for the posting of a bond or
6 other financial security and notwithstanding that said
7 security remains subject to this Chapter.]

8 4. ^{MEX}[Nothing in this Chapter prevents a Party through its
9 executive, legislative and judicial bodies, from providing services
10 or functions such as public welfare services and services forming
11 part of a statutory system of social security, public health care,
12 public education, and public retirement plans to its citizens.]

13 5. The provisions of this Chapter shall also apply to the
14 Telecommunications Annex. In the event of any inconsistency
15 between the provisions of this Chapter and that Annex, the
16 provisions of the Annex shall prevail to the extent of the
17 inconsistency.⁴

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

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

24 b) such entity is owned or controlled by nationals of a non-
25 Party ^{USA}[with which the denying Party does not maintain normal
26 economic relations.] ^{CAN}[in respect of whose investors or
27 investments the denying Party imposes specific restrictions or
28 with which such Party does not maintain normal economic
29 relations] ^{MEX}[such entity is owned or controlled by nationals

30 ³ ADDITIONAL CANADIAN EQUIVALENCES

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

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

35 ⁴ U.S. agrees with intent of the provision but needs to check legal
36 drafting.

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, management⁷, conduct, operation and sale or other disposition of investments in its territory.

c) ^{MEX USA} [The treatment accorded by a Party under this paragraph with respect to investors of another Party and their investments shall, in any state or political subdivision⁸, be no less favorable than the treatment accorded by such state or political subdivision⁸ to its residents, or entities legally constituted under its laws, or their investments in its territory.]

c) ^{CDA} [The treatment accorded by a Party under this paragraph shall mean, with respect to measures of a province or state, treatment no less favorable than the most favorable treatment accorded by such province or state to investors (and to their investments), in like circumstances, of the Party of which it forms a part.]

d) 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.

⁷ Canada agrees on the condition that the Parties agree to an acceptable definition of "management".

⁸ The US and Mexico agree to adopt the term which the Lawyers' Group agree to use throughout the Agreement.

2. MFN 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, management⁷, operation and sale or other disposition of its investment in its territory.

3. Non-Discriminatory Treatment

The treatment that a Party shall accord to investments ^{USA} MEX[and associated activities] of another Party and to investors of that Party shall be the better of the treatment required by paragraphs 1 or 2. ("Nondiscriminatory treatment")]

4. Minimum Standard of Treatment

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

5. 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.

6. ^{MEX USA}[Subject to Chapter ____ (Temporary entry), 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}[However, a Party may require that certain members of an entity's board of directors be nationals, provided such requirements do not materially impair the ability of investors of another Party to control their investments.]]

7. a) The obligations of paragraphs 1, 2, 3 and 6 shall not apply to :

1 i) a non-conforming provision of any existing measure⁹
2 which is maintained by a Party at the federal level, and
3 which that Party, as of the date of the signature of this
4 Agreement, has described in Annex A;

5 ii) a non-conforming provision of any existing measure
6 which is maintained by a state or province of a Party,
7 and which that Party described in Annex A within two
8 years after the entry into force of this Agreement; or

9 iii) a non-conforming provision of any existing measure
10 which is maintained by a local government of a Party.

11 b) A Party may promptly renew such a non-conforming
12 provision of any existing measure, or amend such a non-
13 conforming provision of any existing measure, to the extent
14 that the renewal or amendment does not decrease its conformity
15 with the obligations of this Chapter. No such measure which
16 has been renewed or amended may be further renewed or amended
17 so as to decrease its conformity at the time of the renewal or
18 amendment with the obligations of this Chapter.

19 c) The obligations of paragraphs 1, 2, 3 and 6 shall
20 nonetheless apply to the extent to which a Party has
21 undertaken in Annex A to bring such non-conforming measures in
22 closer conformity with those obligations during the term of
23 this Agreement.

24 d) As a further departure from the obligations of paragraphs
25 1 and 2, which should occur only in the most limited
26 circumstances, a Party, by the date of signature of this
27 Agreement, may identify in Annex B activities or sectors in
28 respect of which it maintains non-conforming provisions of
29 existing measures and in respect of which it shall be
30 permitted to impose non-conforming measures in the future.

31 e) A Party may also maintain exceptions from the obligations
32 of paragraphs 1, 2 and 3, which are specifically provided for
33 in Article 2203 (of the Chapter on Intellectual Property).¹⁰

34 8. Notwithstanding the foregoing, where a Party imposes or
35 maintains a measure covered in Annexes A or B it shall nonetheless
36 accord most favored nation treatment unless stated otherwise in

37 ⁹ Existing measure will be defined to mean any measure in force on the date
38 of the signature of the Agreement.

39 ¹⁰ This paragraph has been agreed upon by the Intellectual Property group,
40 but has not yet been discussed or agreed upon by the Investment group.

1 such Annex. The most favored nation obligations of paragraph 2
2 shall not apply to:

3 a) advantages accorded by a Party by virtue of the Party's
4 binding obligations under any multilateral international
5 agreement under the framework of the General Agreement on
6 Tariffs and Trade; and

7 b) advantages accorded pursuant to ^{USA}[agreements]
8 ^{MEXCDA}[sectors] listed on Annex .

9 9. Nothing in this Chapter shall preclude a Party from
10 prescribing special formalities, ^{USA}[such as requirements that
11 investors be residents of a Party or investments be legally
12 constituted under the laws and regulations of a Party or a
13 political subdivision thereof,] in connection with the
14 establishment of investments by investors of another Party,
15 provided such formalities do not impair the substance of any of the
16 rights set forth in this Chapter.

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

26 11. ^{CDA}[The mere fact that a Party requires a service provider of
27 another Party to post a bond or other form of financial security
28 before providing a service into its territory does not make this
29 Chapter applicable to the provision of that cross-border service.
30 The provisions of this Chapter shall however apply as regards that
31 Party's treatment of the posted bond or financial security.]

32 12. ^{USA}[a) As a further exception to (provision on national
33 treatment)¹¹, and only in respect of sectors reserved for the state
34 on the date of entry into force of this Agreement,

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

39 ¹¹ This section would be inserted in the "treatment" section in a way which
would capture the "ratchet."

(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.¹²¹³

12. 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 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.

¹³ Mexico is considering joining the U.S. on this provision.

CDA [NATIONALITY OF MANAGERS AND DIRECTORS]

1. With respect to entities constituted under its laws or regulations, which form an investment of an investor of another Party, a Party shall not require that:

a) individuals of any particular nationality be appointed to senior management positions; or

b) more than a simple majority of the Board of Directors of a business enterprise, or any committee thereof, be of any particular nationality, resident in the territory of that Party.

2. Notwithstanding paragraph 1, a Party may impose nationality and residency requirements for any or all members of senior management or Boards of Directors pursuant to measures listed in Annex A.

3. For greater certainty, the provisions of this Article are subject to the applicable immigration laws and regulations of a Party.]

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 ^{USA CDA}[a Party or non-Party] ^{MEX}[another Party], 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

1 investments in its territory of investors of CDA USA[a Party or
2 non-Party] MEX[another Party], on any of the following requirements
3 CDA[enforceable under domestic law or administrative ruling]:

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

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

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

11 d) restrict domestic sales of goods or services that such
12 investment produces by limiting such sales in any way to the
13 volume or value of its exports or foreign exchange earnings;

14 e) USA MEX[to act as the exclusive supplier of the goods or
15 services it produces to a specific, regional or world market.]

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

20 4. The provisions of CDA[this Article] USA MEX[paragraphs 2(a) and
21 2(b)] shall not apply to:

22 a) USA MEX[eligibility criteria for purposes of government
23 procurement or export promotion programs;]

24 b) measures related to government procurement;

25 c) CDA[the provision of subsidies consistent with Article XVI
26 of the GATT and the Agreement on the Interpretation and
27 Application of Article VI, XVI and XXIII of the GATT,
28 including any amendments, modifications or successor
29 agreements thereto;]

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

32 a) exporting goods and services originating from such
33 territory to a non-party country, unless pursuant to a measure
34 of general application consistent with Article __ (on export
35 restrictions);

36 b) importing to such territory goods and services
37 originating from a non-party; or

1 c) using goods and service originating in a non-party
2 country.]

3 6. MEX CDA [Nothing in this Chapter including the principle of
4 non-discrimination shall prevent a Party from imposing requirements
5 on an investor of a Party or non-Party in respect of activities not
6 listed in paragraphs 1 or 2.] ^{USA} [The provisions of paragraphs 1 or
7 2 shall not apply to any requirements other than those listed in
8 paragraphs 1(a)-(g) and 2(a)-(e).]