

1 **INVEST.415**
2 **Ottawa Composite**
3 **Investment**

F I N A L

CONFIDENTIAL
April 15, 1992

4
5 **INVESTMENT**

6
7 **SCOPE, COVERAGE AND DURATION**

8
9 1. This Chapter shall apply to investments (of investors of a
10 Party) in the territory of another party existing at the time of
11 entry into force as well as to (any such) investments made or
12 acquired thereafter. ^{USA}[With respect to investments established
13 prior to the date of termination of this Agreement and to which
14 this Chapter otherwise applies, the provisions of all of this
15 Chapter shall thereafter continue to be effective for a further
16 period of ten years from such date of termination.]

17
18 1. ^{CDA}[This Part shall apply to any measure of a Party affecting
19 investors or service providers of any other Party in respect of:

- 20
21 a) the establishment;
22
23 b) the acquisition;
24
25 c) the conduct and operation; or
26
27 d) the sale;

28
29 of business enterprises in or into its territory.]

30
31 2. ^{MEX CDA}[This ^{MEX}[Chapter] ^{CDA}[Part] shall not apply to:

- 32
33 a) ^{MEX}[any measure taken pursuant to a restriction
34 expressly mandated by the Constitution of a Party.]
35
36 b) the provision of financial services or insurance
37 ^{CDA}[except as provided in Annex Y01.4(a)];

38
39 **U.S.:Note 1 - While financial services will be covered in**
40 **the financial services chapter, certain provisions of the**
41 **investment chapter may apply to financial services by**
42 **cross-reference in the financial services chapter.**

- 43
44 c) government procurement ^{CDA}[except as provided in Part 3
45 (Internal Measures)];
46
47 d) ^{CDA}[services listed in Annex Y01.3(c)]
48
49 e) public entities, to the extent such entities conduct
50 activities:
51
52 (i) in pursuit of monetary, fiscal or exchange rate
53 policy; or

- 1
2 (ii) for the account or with the guarantee or using
3 the financial resources of the Party;
4
5 ^{CDA}[except when those activities are permitted to be
6 carried out by service providers in competition with
7 such public entities];
8
9 f) ^{CDA}[public or private entities in respect of their
10 activities forming part of a statutory system of
11 social security, health care, education, day care, or
12 public retirement plans;]
13
14 g) ^{CDA}[measures of a Party, imposed in connection with the
15 initial privatization of a state enterprise, that
16 limit the rights of an investor of another country to
17 own or control such enterprise;]
18
19 h) ^{CDA}[the specific measures of the Parties listed in
20 Annex Y01.3 (f); and]
21
22 i) ^{CDA}[subject to Article 106 (Nullification or Impairment
23 of Benefits), any subsidy.]
24
25 j) ^{CDA}[as between Canada, the United States of America,
26 and the United States of Mexico, cultural industries
27 as defined in article 2012 of the U.S.-Canada Free
28 Trade Agreement.]]
29
30 3. ^{MEX}[Except as otherwise provided, the provisions of
31 subparagraph (c) of Article Y02 shall apply to any measure
32 affecting investments related to the provision of services if such
33 services are covered by Chapters ____.]
34
35 4. ^{CDA}[This Part shall apply to any measure of a self-regulatory
36 organization whose mandate is conferred by the Party, or by its
37 state, provincial or local governments.]

1 **ADDITIONAL CANADIAN EQUIVALENCES**

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

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

9
10 ^{CDA}[**Article 111: General Exceptions**

11
12 Nothing in this Agreement shall be construed to prevent the
13 adoption or enforcement by any Party of measures:

- 14
15 a) necessary to protect public order, safety or public
16 morals;
- 17
18 b) necessary to protect human, animal or plant life or
19 health or the environment in its territory, or to
20 enforce generally agreed international environmental
21 or conservation rules or standards;
- 22
23 c) relating to the products or services of prison labor;
- 24
25 d) imposed for the protection of national treasures of
26 artistic, historic or archaeological value;
- 27
28 e) necessary for fiduciary or consumer protection
29 reasons;
- 30
31 f) necessary to secure compliance with laws or
32 regulations which are not inconsistent with the
33 provisions of this Agreement, including those relating
34 to the avoidance of fraudulent or deceptive practices;

35
36 provided that such measure is:

- 37
38 g) consistent with Article 106; and
- 39
40 h) is the least trade-restrictive necessary for securing
41 the protection required.]

42
43 ^{CDA}[**Article 106: Nullification and Impairment of Benefits**

44
45 1. No measure shall be implemented or applied by any Party in a
46 manner that would:

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

13 ^{CDA} [Article 103(2): Extent of Obligations
14

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

- 19
20 a) a non-conforming provision of any existing measure;
21
22 b) the continuation or prompt renewal of a non-conforming
23 provision of any existing measure; or
24
25 c) an amendment to a non-conforming provision of any
26 existing measure to the extent that the amendment does
27 not decrease its conformity with the obligations of
28 this Agreement.]

TREATMENT OF INVESTMENTS

1
2
3 1. ^{MEX USA}[Each Party shall accord nondiscriminatory treatment¹ to
4 an investor of another Party in the establishment, acquisition,
5 expansion, management, conduct, operation and sale or other
6 disposition of investments in its territory. ^{MEX USA}[In particular,
7 ^{CDA}[Further to Article 105 and for greater certainty] no Party shall

8
9 a) impose on an investor of another Party a requirement
10 that a minimum level of equity in an business
11 enterprise in its territory be held by its nationals,
12 other than nominal qualifying shares for directors or
13 incorporators of corporations; or

14
15 b) require an investor of another Party, by reason of its
16 nationality, to sell or otherwise dispose of an
17 investment in its territory ^{CDA}[and...(see para. 13
18 below on non-establishment).]

19
20 2. ^{MEX USA}[A Party's failure to accord nondiscriminatory
21 treatment to an investment in its territory of an investor of
22 another Party, and activities associated therewith, shall be a
23 breach of that Party's obligation under paragraph 1.]

24
25 3. ^{MEX USA}[Investments of investors of a Party in the territory
26 of another Party shall at all times be accorded fair and equitable
27 treatment and shall enjoy full protection and security ^{USA}[, all in
28 accordance with international law.]

29
30 4. Without prejudice to paragraph 4, investors of a Party whose
31 investments suffer losses in the territory of another Party owing
32 to conflict or civil strife shall be accorded at least
33 nondiscriminatory treatment by such other Party as regards any
34 measures it adopts in relation to such losses.

35
36 5. ^{MEX USA}[A Party shall not require that entities which are
37 legally constituted under the applicable laws or regulations of one
38 Party, and which are investments of investors of another Party,
39 engage as top managerial personnel individuals of any particular
40 nationality.]

41

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

1 6. ^{USA CAN}[Each Party shall provide investors of another Party
2 with an effective means of asserting claims and enforcing rights
3 with respect to investments], ^{USA}[investment agreements, and
4 investment authorizations.]
5

6 7. ^{MEX USA}[The most favored nation obligations of this Chapter
7 shall not apply to advantages accorded by a Party by virtue of the
8 Party's binding obligations under any multilateral international
9 agreement under the framework of the General Agreement on Tariffs
10 and Trade.]
11

12 8. ^{USA MEX}[Each Party reserves the right to deny to an entity of
13 another Party the advantages of this Chapter if:
14

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

20 b) such entity is owned or controlled by nationals of a
21 non Party with which the denying Party does not
22 maintain normal economic relations.]
23

24 9. ^{MEX}[The Parties are excepted from the obligations of this
25 Article as set forth in Annexes 2102.1 and 2012.2. Any such
26 exceptions shall not be a greater departure from the obligations of
27 this Article than required by or specified in domestic law in force
28 on the date of signature or this Agreement. In the event that the
29 relevant domestic law is liberalized to conform more closely to the
30 obligations of paragraphs 1 and 2, it may not thereafter be made
31 more restrictive. Where a Party takes an exception to national
32 treatment it shall nonetheless accord most favored treatment.]
33

34 10. ^{USA}[A Party may maintain existing measures, and impose
35 measures in the future, which depart from the obligations of
36 paragraphs 1 and 2, but only in respect of the activities set out
37 in Annex _____. Any future departures from those obligations in
38 respect of those activities shall not apply to investments existing
39 at the time the measure becomes effective.]
40

41 11. ^{USA}[A Party may maintain existing measures departing from the
42 obligations of paragraphs 1 and 2 as set out in Annex _____. Such
43 measures shall either:
44

45 a) not be a greater departure from such obligations than
46 required by or specified in domestic law in force on
47 the date of signature of this Agreement; and that law

1 shall be briefly described; or

2
3 b) be described in detail in the Annex itself.

4
5 In the event that the relevant domestic law is liberalized to
6 conform more closely to the obligations of paragraphs 1 and 2, such
7 measures may not thereafter be made more restrictive.]

8
9 12. ^{USA}[Where a Party has or takes a measure covered in Annexes
10 _____ and _____ it shall nonetheless accord most favored nation
11 treatment unless set forth in the respective Annex.]

12
13 13. ^{CDA}[No Party shall require the establishment of an investment
14 or a commercial presence by a person of another Party in its
15 territory as a condition for the provision of a service in a manner
16 inconsistent with Article 106.]

17
18 14. ^{CDA}[Further to Article 105, the Parties shall implement:

19
20 a) the provisions of Annex 402.1 regarding
21 transportation;

22
23 [to be revisited in the light of transportation discussions,
24 to determine if these obligations are best placed in Part 3,
25 in connection with standards related measures]

26
27 b) the provisions of Annex 402.2 regarding
28 telecommunications services;

29
30 c) the provisions of Annex 402.3 regarding other measures
31 affecting services; and

32
33 d) the provisions of Annex 402.4 regarding measures
34 affecting investors of the other Parties.]

35
36 ^{CDA}[**Article 403: Specific Exceptions**

37
38 15. Subject to prior notification and consultation in accordance
39 with Part 6, a Party may deny the benefits of this Part to
40 investors or service providers if it establishes that they
41 originate from a country which is not a Party to this Agreement.

42
43 16. The Party denying benefits pursuant to paragraph 15 shall
44 have the burden of establishing that such action is in accordance
45 with that paragraph.]

1 **ADDITIONAL CANADIAN COMMENT AND EQUIVALENCES**

2
3 ^{CDA}**[Article 105: National Treatment**

4
5 1. Each Party shall accord to the goods, services and service
6 providers, investors and suppliers of the other Parties treatment
7 no less favorable than that accorded to its own like goods,
8 services and service providers, investors and suppliers in respect
9 of all matters covered by this Agreement, except as otherwise
10 provided in this Agreement.]

11
12 ^{CDA}**[Article 108: Most Favored Nation Treatment**

13
14 2. Subject to the specific exceptions listed in a Party's
15 instrument of ratification or accession, each Party shall,
16 immediately and unconditionally, accord to the goods, services and
17 service providers, investors and suppliers of all other Parties
18 treatment no less favorable than that accorded by it to the like
19 goods, services and service providers, investors and suppliers of
20 any other country or international entity, whether or not that
21 country or entity is a Party to this Agreement, in respect of all
22 matters covered by this Agreement.]

23
24 3. Derogations from MFN treatment are provided in the Protocols
25 of the Canadian draft. For example:

26
27 **SPECIFIC COMMITMENTS AND EXCEPTIONS**

28
29 2. ^{CDA}[Regarding Article 108 of the Agreement, the
30 most-favoured-nation treatment set out therein shall not apply to:

- 31
32 a) bilateral air agreements to which Canada is a party;
33
34 b) maritime cabotage regulations providing a Commonwealth
35 preference;
36
37 c) Canada-United States reciprocal salvage rights;]
38
39 d) (to be negotiated)

1 PROVINCIAL AND STATE MEASURES

2
3 1. ^{MEX USA}[The obligations of this Chapter shall apply to the
4 ^{USA}[political subdivisions] of the Parties.]

5
6 2. ^{MEX USA}[The treatment accorded by a Party

7
8 a) under Article ____ with respect to nationals and
9 entities of another Party; and

10
11 b) under Article ____ with respect to the investments
12 (and associated activities of those nationals and
13 companies)

14
15 shall, in any state ^{USA}[or political subdivision], be no less
16 favorable than the treatment accorded by such state ^{USA}[or political
17 subdivision] to its residents, or entities legally constituted
18 under its laws, or their investments in its territory.]

19
20 **ADDITIONAL CANADIAN COMMENT AND EQUIVALENCES**

21
22 ^{CDA}[**Article 103: Extent of Obligations**

23
24 4. The Parties shall ensure that all necessary measures are
25 taken in order to give effect to the provisions of this Agreement,
26 including their observance, except as otherwise provided in this
27 Agreement, by state, provincial and local governments.]

28
29 ^{CDA}[**Article 105: National Treatment**

30
31 2. The provisions of this Article shall mean, with respect to
32 measures of a province or state, treatment no less favorable than
33 the most favorable treatment accorded by such province or state to
34 any like goods, services and service providers, investors and
35 suppliers, as the case may be, of the Party of which it forms a
36 part.]

PERFORMANCE REQUIREMENTS¹

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

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

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

2. ^{CDA}[Except as provided in Annex _____, ^{2*}], no Party shall require, in connection with the establishment, acquisition, expansion, conduct or operation of investments in its territory of

¹ A draft text for discussion purposes only.

² e.g., tax, autos, excluded services, energy, environment, aboriginal programs, financial services, etc.

1 an investor of ^{USA}[a Party or a non-Party] ^{MEX CDA}[another Party] that
2 such investment:

- 3
4 a) export a given level of percentage of goods or
5 services;
6
7 b) ^{CDA}[achieve a given level or percentage of domestic
8 content;]
9
10 c) ^{CDA}[substitute goods or services from the territory of
11 such Party for imported goods or services.]
12

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

- 15
16 a) exporting goods and services from such territory to a
17 non-party country;
18
19 b) importing to such territory goods and services from a
20 non-party country; or
21
22 c) using goods and services originating in a non-party
23 country.]
24

25 4. ^{CDA}[For purposes of this Article, a Party "imposes" a
26 requirement on an investor when it requires particular action of an
27 investor or when, after the date of the entry into force of this
28 Agreement for that Party, it enforces any undertaking or commitment
29 described in this Part given to that Party after the date this
30 Agreement enters into force for that Party.]
31

32 5. ^{CDA}[Further to Article 106 (Nullification and Impairment),
33 no Party shall impose on an investor of a nonParty, as a term or
34 condition of permitting an investment in its territory, or in
35 connection with the regulation of the conduct or operation of a
36 business enterprise located in its territory, a commitment to meet
37 any of the requirements described in paragraph 1 where meeting such
38 a requirement could have a significant impact on trade between two
39 or more of the Parties.]
40

41 6. ^{MEX CDA}[Nothing in this Agreement shall prevent a Party from
42 imposing requirements on an investor of another Party in respect of
43 activities not listed in paragraph 1.]
44
45

1 MONITORING

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

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

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

TRANSFERS

1
2
3 1. Subject to paragraph 3 ^{MEX CDA}[and paragraphs 4 and 5] a Party
4 shall permit all transfers and international payments (hereinafter
5 "transfers") relating to an investment in ^{CDA}[or provision of a
6 service in or into] its territory of an investor ^{CDA}[or service
7 provider] of another Party to be made freely and without delay.
8 Such transfers include:

- 9
10 a) profits, dividends, interest, capital gains, royalty
11 payments, management, technical assistance and other
12 fees, ^{USA MEX}[returns in kind,] and other amounts derived
13 from an investment ^{CDA}[or service];
14
15 b) proceeds from the sale of all or any part of an
16 investment ^{CDA}[or service] or from the partial or
17 complete liquidation of an investment ^{CDA}[or service];
18
19 c) payments made under a contract entered into by an
20 investor, ^{MEX USA}[or investment,] ^{CDA}[or service
21 provider], including payments made pursuant to a loan
22 agreement;
23
24 d) compensation pursuant to {Article on expropriation};
25 and
26
27 e) payments arising out of an investment dispute ^{USA}[as
28 defined in {Article on dispute settlement}.]
29

30 2. ^{USA}[Except as provided in paragraph 2 of {Article on
31 expropriation} and] subject to paragraph 3, a Party shall permit
32 transfers to be made in a freely usable currency at the market rate
33 of exchange prevailing on the date of transfer with respect to spot
34 transactions in the currency to be transferred.
35

36 3. A Party may, through the equitable and good faith
37 application of its laws, prevent any transfer referred to in
38 paragraph 1 if such transfer is inconsistent with any measure of
39 general application relating to:

- 40
41 (a) ^{CDA}[restrictions applied by a Party to persons of
42 another Party on the making of payments and transfers
43 for current international transactions which conform
44 with Article VIII of the Articles of Agreement of the
45 International Monetary Fund;]
46
47 b) bankruptcy, insolvency or the protection of the rights

- 1 of creditors;
2
3 c) issuing, trading or dealing in securities;
4
5 d) criminal or penal offenses;
6
7 e) reports of currency transfers;
8
9 f) imposing ^{USA}[income] taxes by such means as a
10 withholding tax ^{USA}[applicable to dividends or other
11 transfers;] or
12
13 g) ensuring the satisfaction of judgments in adjudicatory
14 proceedings.
15
16 4. ^{MEX CDA}[No Party shall require its investors to repatriate, or
17 penalize its investors who fail to repatriate, the income, earnings
18 or profits attributable to any investment in another Party or to
19 any businesses carried on in another Party either directly by the
20 investors or indirectly through a business enterprise established
21 in that other Party.]
22
23 5. ^{MEX CDA}[Paragraph 4 shall not be construed as preventing a
24 Party from taxing its investors on their share of any income,
25 earnings or profits attributable to a business carried on or an
26 investment made in another Party, provided that the tax so charged
27 does not exceed the tax that would be so charged if such income,
28 earnings or profits were repatriated, without any further tax on
29 the repatriation, to its investors.]

1 STATE ENTERPRISES

2
3 ^{CDA}[Article 410: State Enterprises

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

- 8
9 a) be subject to domestic competition law and policies in
10 respect of such activities; and
11
12 b) be given the same treatment under domestic competition
13 law and policies as such private enterprises in
14 respect of such activities.]

15
16 1. ^{USA}[The provisions of this Chapter, and in particular the
17 obligation to accord nondiscriminatory treatment to investments in
18 the territory of a Party of investors of another Party, shall apply
19 to the state enterprises of a Party.

20
21 2. Further to Article (concerning nondiscriminatory
22 treatment), where a state enterprise of a Party is in competition,
23 within the territory of such Party, with an investment of an
24 investor of another Party, and where there are no other investments
25 of investors of that Party which are not state enterprises in
26 competition with the state enterprise, that Party shall accord the
27 investment of the investor of the other Party treatment no less
28 favorable than that which it provides its state enterprise. Where
29 investments of investors of that Party which are not state
30 enterprises also compete with the state enterprise, the investment
31 of the investor of the other Party shall be accorded treatment no
32 less favorable than that provided such other investments.]

EXPROPRIATION AND COMPENSATION

1
2
3 1. No Party shall directly or indirectly nationalize or
4 expropriate an investment of an investor of another Party in its
5 territory or take any measure or series of measures tantamount to
6 expropriation or nationalization of such an investment
7 ("expropriation"), except:

- 8
9 a) for a public purpose;
10
11 b) on a nondiscriminatory basis;
12
13 c) in accordance with due process of law ^{USA}[and the
14 general principles of treatment provided for in
15 Article ----]; and
16
17 d) upon payment of ^{USA} ^{CDA}[prompt, adequate and effective]
18 compensation.
19

20 2. Compensation shall be equivalent to the fair market value
21 of the expropriated investment immediately before the expropriatory
22 action was taken or became known, whichever is earlier. Valuation
23 criteria shall include going concern value, asset value (including
24 declared tax value of tangible property), and other criteria, as
25 appropriate to determine fair market value. Compensation shall be
26 paid without delay; include interest at a commercially reasonable
27 rate from the date of expropriation; be fully realizable; and be
28 freely transferable at the prevailing market rate of exchange on
29 the date of ^{USA}[expropriation.] ^{MEX} ^{CDA}[transfer].
30

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

1 DISPUTE SETTLEMENT

2
3 ^{MEX}[Article ____ : Dispute Settlement

4
5 1. (Definition of an investment dispute)

6
7 2. In the event of an investment dispute, the investor may send
8 written notice to the Party with which it has the dispute ("the
9 host government"), setting forth the provision or provisions of
10 this Chapter which it believes has been breached and the facts on
11 which its assertion is based. The investor shall simultaneously
12 send a copy of this written notice to the Party of which it is a
13 national ("the home government"). The two Parties shall thereupon
14 immediately refer the matter to dispute resolution under Chapter
15 23.]

16
17 ^{MEX}[Article ____: Domestic Judicial Enforcement of the Rights of
18 Investors

19
20 1. Each Party shall provide investors of the other Parties
21 access to an impartial judicial system with authority to enforce
22 the rights of investors established under this Agreement.]

23
24 **CANADA ADDITIONAL EQUIVALENCES**

25
26 (From Canadian Protocol, Part 2: Specific Commitments and
27 Exceptions):

28
29 [22. Notwithstanding anything in the Agreement, the provisions of
30 Part 6 shall not apply to any Decision by Canada following a review
31 under the Investment Canada Act, with respect to whether or not to
32 permit an acquisition that is subject to review.]

33
34 ^{USA}[Article XX07: Settlement of Disputes between a Party and a
35 National or Company of Another Party

36
37 1. For purposes of this Article, an investment dispute is a
38 dispute between a Party and a national or company of another Party
39 arising out of or relating to (a) an investment agreement between
40 that Party and such national or company; (b) an investment
41 authorization granted by that Party's foreign investment authority
42 (if any such authorization exists) to such national or company; or
43 (c) an alleged breach of any right conferred or created by this
44 Chapter with respect to an investment.

45
46 2. In the event of an investment dispute, the parties to the
47 dispute should initially seek a resolution through consultation and

1 negotiation. If the dispute cannot be settled amicably, the
2 national or company concerned may choose to submit the dispute for
3 resolution:

- 4
5 a) to the courts or administrative tribunals of the Party
6 that is a party to the dispute;
7
8 b) in accordance with any applicable previously agreed
9 dispute settlement procedures; or
10
11 c) in accordance with the terms of paragraph 3.

12
13 3. a) Provided that the national or company concerned has
14 not submitted the dispute for resolution under
15 paragraph 2 (a) or (b) and that six months have
16 elapsed from the date on which the dispute arose, the
17 national or company concerned may choose to consent in
18 writing to the submission of the dispute for
19 settlement by binding arbitration:

20
21 (i) to the International Centre for the Settlement of
22 Investment Disputes ("Centre") established by the
23 Convention on the Settlement of Investment Disputes
24 between States and Nationals of other States, done at
25 Washington, March 18, 1965 ("ICSID Convention"),
26 provided that the Party is a party to such Convention;

27
28 (ii) to the Additional Facility of the Centre, if the
29 Centre is not available;

30
31 (iii) in accordance with the Arbitration Rules of the
32 United Nations Commission on International Trade Law;
33 or

34
35 (iv) to any other arbitration institution, or in
36 accordance with any other arbitration rules, as may be
37 mutually agreed between the parties to the dispute.

- 38
39 b) Once the national or company concerned has so
40 consented, either party to the dispute may initiate
41 arbitration in accordance with the choice so specified
42 in the consent.

43
44 4. Each Party hereby consents to the submission of any
45 investment dispute for settlement by binding arbitration in
46 accordance with the choice specified in the written consent of the
47 national or company under paragraph 3. Such consent, together with

1 the written consent of the national or company when given under
2 paragraph 3, shall satisfy the requirement for:

3
4 a) written consent of the parties to the dispute for
5 purposes of Chapter II of the ICSID Convention
6 (Jurisdiction of the Centre) and for purposes of the
7 Additional Facility Rules; and

8
9 b) an "agreement in writing" for purposes of Article II
10 of the United Nations Convention on the Recognition
11 and Enforcement of Foreign Arbitral Awards, done at
12 New York, June 10, 1958 ("New York Convention").

13
14 5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of
15 this Article shall be held in a state that is a party to New York
16 Convention.

17
18 6. Any arbitral award resulting from an arbitration under
19 paragraphs 3(a)(ii), (iii) or (iv) of this Article shall be final
20 and binding on the parties to the dispute. Each Party undertakes to
21 carry out without delay the provisions of any such award and to
22 provide in its territory for its enforcement.

23
24 7. In any proceeding involving an investment dispute, a Party
25 shall not assert, as a defense, counterclaim, right of set off or
26 otherwise, that the national or company concerned has received or
27 will receive, pursuant to an insurance or guarantee contract,
28 indemnification or other compensation for all or part of its
29 alleged damages.

30
31 8. For purposes of an arbitration held under paragraph 3 of
32 this Article, any company legally constituted under the applicable
33 laws and regulations of a Party or a political subdivision thereof
34 but that, immediately before the occurrence of the event or events
35 giving rise to the dispute, was an investment of nationals or
36 companies of another Party, shall be treated as a national or
37 company of such other Party, including in accordance with Article
38 25(2)(b) of the ICSID Convention.]

39
40 ^{USA}[**Article XX08: Settlement of Disputes Between Parties**

41
42 1. Any dispute between Parties concerning the interpretation or
43 application of this Chapter which is not resolved through
44 consultations or other diplomatic channels, shall be submitted,
45 upon the request of a Party, for binding decision in accordance
46 with the applicable rules of international law to an arbitral
47 tribunal composed of three arbitrators.

- 1
2 2. In the absence of an agreement by the Parties to the
3 contrary, the arbitration rules of the United Nations Commission on
4 International Trade Law (UNCITRAL) shall apply. The appointing
5 authority referenced in those rules shall be the Secretary General
6 of the Centre.
7
8 3. Fees and expenses of the arbitrators and appointing
9 authority, and other costs of the proceedings, shall be borne
10 equally by the Parties. Each Party shall bear the cost of its legal
11 representation.]

1 NATIONAL SECURITY

2
3 ^{MEX}[Article 2109: National Security

4
5 1. A Party may deny the application of this Chapter to
6 investors of the other Parties for reasons of national security.]

7
8 ^{USA}[1. Nothing in this Chapter shall preclude the application by a
9 Party of measures necessary for the maintenance of public order,
10 the fulfillment of its obligations under the United Nations Charter
11 with respect to the maintenance or restoration of international
12 peace or security, or the protection of its own essential security
13 interests.

14
15 Note: This provision is self-judging.]

16
17 ^{CDA}[Article 110: National Security

18
19 1. Nothing in this Agreement shall be construed to prevent:

20
21 a) any Party from refusing to furnish or allow access to
22 any information the disclosure of which it determines
23 to be contrary to its essential security interests;

24
25 b) any Party from imposing any measure affecting goods,
26 services, service providers, suppliers or investors of
27 a Party which it determines is directly related and
28 essential to:

29
30 i) supplying a military establishment of a Party with
31 arms, ammunition or implements of war, or enabling
32 fulfillment of a critical defence contract of a Party;

33
34 ii) responding to a situation of armed conflict
35 involving the Party taking the measure;

36
37 iii) implementing international agreements relating
38 to the nonproliferation of nuclear, chemical or
39 biological weapons, other nuclear explosive devices,
40 or chemical or biological agents;

41
42 iv) responding to direct threats of disruption in
43 the supply of nuclear materials for defence purposes.

44
45 c) any Party from taking action in pursuance of its
46 obligations under the United Nations Charter for the
47 maintenance of international peace and security.

1
2 2. The Party relying on paragraphs a) - c) shall ensure that
3 its action or measure is that which least infringes the rights or
4 any reasonable expectations of the other Parties under this
5 Agreement, and is no broader in scope or duration than necessary.
6

7 3. Any determination made under paragraph 1(b) shall be
8 published promptly in the official journal of that Party. Any
9 determination made under paragraph 1(a) or action taken under
10 paragraph 1(c) shall, where appropriate, be similarly published.
11

12 4. Except in cases of emergency, the Party proposing to impose
13 any measure under paragraph 1(b), or proposing to take action under
14 1(c) shall consult with the other Parties prior to imposing such
15 measure or taking such action.
16

17 5. If a Party considers that any action or measure taken by
18 another Party under this Article constitutes a disguised
19 restriction on trade or investment or otherwise nullifies or
20 impairs any benefit reasonably expected under this Agreement, it
21 may request consultations. Such consultations shall be held
22 promptly. The Party whose action or measure is the subject of the
23 consultations shall give full and sympathetic consideration to the
24 view of the complaining Party and shall explain, in as much detail
25 as is consistent with its assessment of its security interests, the
26 reasons for the measure. Where appropriate following such
27 consultations, such Party shall re-consider whether its action or
28 the application of its measure could be altered in any way, in
29 order to minimize the infringement of rights and benefits otherwise
30 secured by this Agreement.
31

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

1 TAXATION

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

7
8 ^{CDA}[**Article 112: Taxation**

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

13
14 2. Nothing in this Agreement shall affect:

- 15
16 a) the right of any Party to adopt or maintain any
17 measure designed to prevent the avoidance of tax by
18 producers, service providers, investors and suppliers
19 of any other Party or to impose nonresident
20 withholding taxes on payments made to producers,
21 service providers, investors and suppliers of any
22 other Party; or
23
24 b) rights and obligations under any international
25 taxation agreement, as may be specified in a Party's
26 instrument of ratification or accession.]

1 EXTRA-TERRITORIALITY

2
3 ^{CDA}[Article 407: Extra-territoriality
4 ...
5 2. No Party may prescribe new laws or enforce existing laws so
6 as to require investors or service providers to act, in the
7 territory of another Party, in a manner that conflicts with the
8 laws of such other Party.]

1 MONOPOLIES

2
3 ^{CDA}[Article 408: Monopolies

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

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

13
14 3. Prior to designating a monopoly, a Party shall:

15
16 a) notify the other Parties;

17
18 b) upon request, engage in consultations; and

19
20 c) endeavour to minimize or eliminate any nullification
21 or impairment of benefits under this Agreement that
22 might otherwise be caused by the designation.

23
24 4. Each Party shall ensure that, where it permits the monopoly
25 supply of goods or services, the monopoly does not in its
26 territory, either directly or through an affiliated company engage
27 in anti-competitive practices in areas outside its monopoly.]

1 TECHNOLOGY CONSORTIA

2
3 ^{CDA}[Article 409: Technology Consortia

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

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

COMPETITION POLICY^{CDA}[New Article 411: Competition

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

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

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

4. The Parties recognize that effective competition law enforcement in the free trade area requires cooperation and coordination among national authorities. For the purpose of implementing such coordination and cooperation, the Parties agree to pursue negotiations on a trilateral basis to create, expand or enhance international agreements and arrangements for mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

5. In the enforcement of their respective competition laws and policies in those cases involving persons, assets, or practices located, or occurring, in the territory of any of the other Parties, each Party shall, in addition to any obligations incorporated in agreements reached pursuant to section 4 (above), assess, and be prepared to advise the other Parties of the results of its assessment of, the following factors:

- a) the relative significance of the anti-competitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
- b) the presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;

- 1
2 c) the relative significance of the effects of the
3 enforcement activities on the enforcing Party's
4 interests as compared to the effects on the other
5 Party's interests;
6
7 d) the existence or absence of reasonable expectations
8 that would be furthered or defeated by the enforcement
9 activities;
10
11 e) the degree of conflict or consistency between the
12 enforcement activities and the other Party's law or
13 articulated economic policies; and
14
15 f) the extent to which enforcement activities of such
16 other Party with respect to the same persons,
17 including judgements or undertakings resulting from
18 such activities, may be affected.
19
20 6. The Commission shall establish a Competition Policy
21 Committee to consider and make recommendations (no later than) on:
22
23 a) the impact of competition law and policy on trade
24 within the free trade area;
25
26 b) the impact of trade law and regulation on competition
27 within the free trade area;
28
29 c) the potential for reliance on competition laws and
30 policies to discipline anti-competitive transborder
31 pricing practices and market segmentation.¹

¹ Paragraph 6 and the Mexican equivalent for Working Group review of removal of barriers to competition is under consideration in the Lawyers' Group in consultation with the Trade Remedies Group.

1 DEFINITIONS

2
3 USA DEFINITIONS WITHOUT MEXICAN EQUIVALENTS

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

7
8 5. **National of a Party** means a natural person who is a national
9 of a Party under its applicable law.

10
11 8. **State enterprise** means a company of a Party that is owned,
12 or controlled through ownership interests, directly or indirectly,
13 by such Party or any agency or instrumentality thereof.

14
15 9. **National treatment** means treatment no less favorable than
16 that accorded by a Party, in like circumstances, to nationals or
17 companies of such Party or to investments of such nationals or
18 companies, as the case may be.

19
20 10. **Most favored nation treatment** means treatment no less
21 favorable than that accorded by a Party, in like circumstances, to
22 nationals or companies of any other party or to investments of such
23 nationals or companies.

24
25 11. **Nondiscriminatory treatment or nondiscriminatory basis** means
26 treatment, or treatment on a basis, no less favorable than the
27 better of national treatment or most favored nation treatment.

28
29 CANADIAN DEFINITIONS WITHOUT MEXICAN EQUIVALENTS

30
31 **enterprises** means any juridical entity involving a financial
32 commitment for the purpose of commercial gain;

33
34 **monopoly** means a sole provider of a good or service;
35 service provider of a Party means any business enterprise legally
36 constituted or organized under the law of that Party;

37
38 **DEFINITIONS**

39
40 ^{MEX}[For purposes of this Chapter;]

41
42 ^{USA}[As used in this Chapter, the following terms shall have the
43 following meanings:]

44
45 ^{CDA}[For the purposes of this Part,]

46
47 ^{MEX CDA}[**acquisition** with respect to:

INVEST.415

1
2 a) a business enterprise carried on by an entity, means
3 an acquisition, as a result of one or more
4 transactions, of the ultimate direct or indirect
5 control of the entity through the acquisition of the
6 ownership of voting interests; or
7

8 b) any business enterprise, means an acquisition, as a
9 result of one or more transactions, of the ownership
10 of all or substantially all of the assets of the
11 business enterprise used in carrying on the business;]
12

13 MEX [agency]

14
15 MEX CDA [business enterprise means a business that has, or in the case
16 of an establishment thereof will have:

17
18 a) a place of business;

19
20 b) an individual or individuals employed or self-employed
21 in connection with the business; and
22

23 c) assets used in carrying on the business;
24

25 **NOTE: A part of a business enterprise that is capable of being**
26 **carried on as a separate business enterprise is itself a business**
27 **enterprise;]**
28

29 MEX [Constitution of a Party]

30
31 MEX CDA [control or controlled, with respect to:

32
33 a) a business enterprise carried on by an entity, means
34

35 (i) the ownership of all or substantially all of the
36 assets used in carrying on the business enterprise;
37 and
38

39 (ii) includes, with respect to an entity that
40 controls a business enterprise in the manner described
41 in subparagraph (i), the ultimate direct or indirect
42 control of such entity through the ownership of voting
43 interests; and
44

45 b) a business enterprise other than a business enterprise
46 carried on by an entity, means the ownership of all or
47 substantially all of the assets used in carrying on

- 1 the business enterprise;]
- 2
- 3 ^{CDA}[**entity** means a corporation, partnership, trust or joint
- 4 venture;]
- 5
- 6 ^{MEX USA}[**Entity** means any kind of corporation, company, association,
- 7 partnership, sole proprietorship or other organization whether or
- 8 not organized for pecuniary gain.
- 9
- 10 ^{MEX USA}[**Entity of a Party** means a entity legally constituted under
- 11 the laws and regulations of a Party or a political subdivision
- 12 thereof.]
- 13
- 14 ^{MEX CDA}[**establishment** means a startup of a new business enterprise
- 15 and the activities related thereto;]
- 16
- 17 ^{CDA}[**investment** means:
- 18
- 19 a) the establishment of a new business enterprise; or
- 20
- 21 b) the acquisition of a business enterprise; and
- 22 includes:
- 23
- 24 c) as carried on, the new business enterprise so
- 25 established or the business enterprise so acquired,
- 26 and controlled by the investor who has made the
- 27 investment; and
- 28
- 29 d) the share or other investment interest in such
- 30 business enterprise owned by the investor provided
- 31 that such business enterprise continues to be
- 32 controlled by such investor or the investor continues
- 33 to own a significant minority interest in such
- 34 business enterprise.]
- 35
- 36 1. ^{MEX USA}[**Investment** of an investor of a Party means an
- 37 investment owned or controlled directly or indirectly by an
- 38 investor or such Party.
- 39
- 40 2. Investment includes the following kinds of interests:
- 41
- 42 a) equity or debt securities of a business enterprise, or
- 43 any interest in such enterprise that entitles the
- 44 owner to share in the income or profits or to share in
- 45 the assets on dissolution;
- 46
- 47 b) real estate or other property (tangible or intangible)

- 1 acquired in the expectation or used for the purpose of
2 economic benefit or other business purposes;
3
- 4 c) a loan to a business enterprise made or guaranteed by
5 an affiliate of such business enterprise ^{USA}[and any
6 other loan to a business enterprise if the mean
7 repayment period exceeds three years];
8
- 9 d) interests arising from the commitment of capital or
10 other resources to economic activity in the territory
11 of another Party such as under (i) contracts involving
12 the presence of the investor's property in the
13 territory of another Party (e.g., concession
14 agreements, turnkey or construction contracts), (ii)
15 contracts where the remuneration depends substantially
16 on the production, revenues or profits of a business
17 enterprise ^{USA}[or (iii) government-issued permits to
18 engage in such economic activity.]
19
- 20 3. Claims to money which arises solely from:
21
- 22 a) commercial contracts for the sale of goods or services
23 by a national or entity in the territory of one Party
24 to a business enterprise in the territory of another
25 Party;
26
- 27 b) the extension of credit in connection with a
28 commercial transaction (e.g., trade financing) other
29 than a loan covered by paragraph 2(c); or
30
- 31 c) any other claims to money,
32
- 33 and which do not involve the kinds of interests in paragraph 2
34 shall not be considered investments.
35
- 36 4. "Equity or debt securities" includes voting and non-voting
37 shares, bonds, convertible debentures, stock options and warrants.]
38
- 39 ^{USA}[**Investments of nationals or companies of a Party** means
40 investments owned or controlled directly or indirectly by nationals
41 or companies of such Party.]
42
- 43 ^{MEX} ^{USA}[**Investor of a Party** means a national or company of such
44 party.]
45
- 46 ^{CDA}[**investor of a Party** means:
47

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

42 that makes or has made an investment;
43

44 **NOTE: For purposes of paragraph (e), in respect of individuals each**
45 **of whom holds not more than one percent of the total number of the**
46 **voting interests of an entity the voting interests of which are**
47 **publicly traded, it shall be presumed, in the absence of evidence**

1 to the contrary, that those voting interests are owned by nationals
2 of such Party on the basis of a statement by a duly authorized
3 officer of the entity that, according to the records of the entity,
4 those individuals have addresses in the territory of such Party and
5 that the signatory to the statement has no knowledge or reason to
6 believe that those voting interests are owned by individuals who
7 are not nationals of such Party;]

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

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

20
21 MEX [law]

22
23 MEX CDA [located in the territory of a Party means, with respect to a
24 business enterprise, a business enterprise that is, or in the case
25 of an establishment will be, carried on in the territory of such
26 Party and has, or in the case of an establishment will have
27 therein:

- 28
29 a) a place of business;
- 30
31 b) an individual or individuals employed or self-employed
32 in connection with the business; and
- 33
34 c) assets used in carrying on the business;]

35
36 MEX CDA [measure MEX [shall have the same meaning as in article 201,
37 except that it shall also include] CDA [includes any law, regulation,
38 procedure, requirement or practice, including] any published
39 policy;]

40
41 MEX CDA [ownership means beneficial ownership and with respect to
42 assets also includes the beneficial ownership of a leasehold
43 interest in such assets;]

44
45 MEX CDA [person means a Party or agency thereof, a province or state
46 of a Party or agency thereof, or] a national of a Party.]

1 voting interest with respect to
2

3 a) a corporation with share capital, means a voting
4 share;

5
6 b) a corporation without share capital, means an
7 ownership interest in the assets thereof that entitles
8 the owner to rights similar to those enjoyed by the
9 owner of a voting share; and

10
11 c) a partnership, trust, joint venture or other
12 organization means an ownership interest in the assets
13 thereof that entitles the owner to receive a share of
14 the profits and to share in the assets on dissolution;
15 and]

16
17 ^{CDA}[**significant minority interest** means the interest of an investor
18 who:

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

21
22 b) has a right to influence, or does in fact influence,
23 the direction, management or conduct of the business
24 enterprise beyond those rights ordinarily conferred on
25 the owners of voting interests by law.

26
27 ^{MEX CDA}[**voting share** means a share in the capital of a corporation to
28 which is attached a voting right ordinarily exercisable at meetings
29 of shareholders of the corporation and to which is ordinarily
30 attached a right to receive a share of the profits, or to share in
31 the assets of the corporation on dissolution, or both.]