

INVEST.522

Washington Composite
Investment

DRAFT

CONFIDENTIAL
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INVESTMENT

SCOPE, COVERAGE AND DURATION

1. ^{USA}[Unless otherwise provided,] this Chapter shall apply to measures¹ 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; ^{MEX USA}[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.]

2. ^{USA}[With respect to investments established prior to the date of termination of this Agreement and to which this Chapter otherwise applies, the provisions of all of this Chapter shall thereafter continue to be effective for a further period of ten years from such date of termination.]

3. ^{MEX CDA}[This Chapter shall not apply to:

^{MEX}[a) any measure taken pursuant to a restriction expressly mandated by the Constitution of a Party.]²

b) the provision of financial services or insurance ^{CDA}[except as provided in the Chapter on Financial Services;]

U.S. Note 1 - While financial services will be covered in the financial services chapter, certain provisions of the investment chapter may apply to financial services by cross-reference in the financial services chapter.

c) government procurement³ ^{CDA}[except as provided in the Chapter on Government Procurement;]

d) ^{MEX CDA}[services listed in Annex Y01.3(c)]

e) ^{CDA}[public or private entities in respect of their activities forming part of a statutory system of social

¹ US agrees on the condition the definition of "measure" includes single actions.

² Mexico will supply new language for this provision.

³ The US is considering covering procurement by federal governments from entities controlled by nationals of a Party.

security, health care, education, day care, or public retirement plans;]⁴

f) ^{CDA}[measures of a Party, imposed in connection with the initial privatization of a state enterprise, that limit the rights of an investor of another country to own or control such enterprise;]

g) ^{CDA}[subject to Article 106 (Nullification or Impairment of Benefits), any subsidy.]

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

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

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

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

ENVIRONMENTAL MEASURES

1. ^{MEX USA}[The Parties affirm that this Chapter shall not be construed to prevent the adoption or enforcement of any measure, otherwise consistent with this Chapter, that a Party deems appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.]

⁴ Mexico is considering on joining Canada in this issue.

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, ^{USA} ^{MEX}[management,] conduct, operation and sale or other disposition of investments in its territory.

c) 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. 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 ^{USA} ^{MEX}[accord] ^{CAN}[grant] 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 ^{USA} ^{MEX}[management,] operation and sale or other disposition of its investment in its territory.

3. Non-Discriminatory Treatment

^{CAN}[For greater certainty,] 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(a), (b), and (c) and 2 (a) and (b). ^{USA MEX}["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}[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.]

7. The most favored nation obligations of this Chapter shall not apply to advantages accorded by a Party by virtue of the Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade ^{CDA}[and other matters as set forth in Annex ____.]

8. ^{CDA}[a) A Party may maintain exceptions from the obligations of paragraphs 1 and 2 in respect of:

- i) a non-conforming provision of any existing measure;⁵
- ii) the continuation or prompt renewal of such a non-conforming provision of any existing measure; or
- iii) an amendment to such a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with the obligations of this Agreement.

b) A Party shall describe in detail in Annex A the non-conforming provisions of existing domestic measures as of the date of signature of this Agreement for which exceptions are taken under paragraph (a), except that, for non-conforming state or provincial measures, a Party shall have two years

⁵ ^{CDA}[Existing measure will be defined to mean any measure law in force on the date of the signature of the Agreement]

from the entry into force of this Agreement to complete its detailed description.]

^{MEX USA}[a) The obligations of paragraphs 1, 2, 3 and 6 shall not apply to :

i) a non-conforming provision of any existing measure 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.

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.⁶]

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.

9. ^{MEX USA}[Where a Party has or takes a measure covered in Annexes A and B it shall nonetheless accord most favored nation treatment unless set forth in the respective annex.]

10. ^{MEX USA}[Nothing in this Chapter shall preclude a Party from prescribing special formalities in connection with the making of

⁶ For non-conforming provisions of measures which exist on the date of signature of the Agreement, and which are described in Annex A, citations to relevant laws or regulations shall be regarded as dispositive.

investments by nationals or companies of another Party provided such formalities do not impair the substance of any of the rights set forth in this Chapter.]⁷

11. ^{CDA}[No Party shall require the establishment of an investment or a commercial presence by a person of another Party in its territory as a condition for the provision of a service in a manner inconsistent with Article (on nullification and impairment).]

12. ^{CDA}[The Parties shall implement the provisions of Annex _____ regarding measures affecting investors of the other Parties.]

⁷ Examples of such "special formalities," which do not impair the substance of the rights set out in the Chapter, include the incorporation requirements described in the paper submitted by the United States on _____, the requirements on "qualifying" to do business in states of the United States, and those state residency requirements which are consistent with the Constitution of the United States.

PROVINCIAL AND STATE MEASURES

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

^{CDA}[1. The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state, provincial and local governments.]

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

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

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

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

^{CDA}[2. The provisions of this Article shall mean, with respect to measures of a province or state, treatment no less favorable than the most favorable treatment accorded by such province or state to investors, in like circumstances, of the Party of which it forms a part.]

PERFORMANCE REQUIREMENTS⁸

1. ^{MEX CDA}[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 ^{USA}[a Party or a non-Party] ^{MEX CDA}[another Party]:

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

e) ^{MEX USA}[act as the exclusive supplier of the goods or services it produces to a specific market or region.]

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

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

a) export a given level of percentage of goods or services;

⁸ A draft text for discussion purposes only.

⁹ e.g., tax, autos, excluded services, energy, environment, aboriginal programs, financial services, etc.

- b) ^{CDA}[achieve a given level or percentage of domestic content;]
- c) ^{CDA}[substitute goods or services from the territory of such Party for imported goods or services.]
3. ^{MEX} ^{CDA}[No Party shall prohibit or otherwise restrict an investor established in the territory of another Party from:
- a) exporting goods and services from such territory to a non-party country;
- b) importing to such territory goods and services from a non-party country; or
- c) using goods and services originating in a non-party country.]
4. ^{CDA}[For purposes of this Article, a Party "imposes" a requirement on an investor when it requires particular action of an investor or when, after the date of the entry into force of this Agreement for that Party, it enforces any undertaking or commitment described in this Part given to that Party after the date this Agreement enters into force for that Party.]
5. ^{CDA}[Further to Article 106 (Nullification and Impairment), no Party shall impose on an investor of a non-Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a commitment to meet any of the requirements described in paragraph 1 where meeting such a requirement could have a significant impact on trade between two or more of the Parties.]
6. ^{MEX} ^{CDA}[Nothing in this Agreement shall prevent a Party from imposing requirements on an investor of another Party in respect of activities not listed in paragraph 1.]

^{USA}[PERFORMANCE REQUIREMENTS - DRAFT U.S. DISCUSSION PAPER

1. Except as provided in Annex _____, no Party shall apply, in connection with permitting the establishment or acquisition of an investment in its territory of an investor of a Party or non-Party, or after the date of entry into force of this Agreement in connection with the regulation of the conduct or operation of an investment located in its territory of an investor of a Party or non-Party, any of the following requirements ^{CDA}[enforceable under domestic law or administrative ruling]:

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- 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 substitute goods or services from the territory of such Party for imported goods or services¹⁰;
- d) 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;
- e) to relate in any way the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- f) 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;
- g) ^{USA} ^{MEX}[transfer a particular technology, production process or other proprietary knowledge to a national or entity in its territory, ^{USA}[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;]]
 - h) ^{USA} ^{MEX}[act as the exclusive supplier of the goods or services it produces to a specific, or world market or region.]

2. Except as provided in Annex _____, no Party, after the date of entry into force of this Agreement, shall condition the receipt or continued receipt of an incentive, in connection with investments in its territory of investors of a Party or non-Party, on any of the following requirements:

- a) prescribe in any way the purchase or use of goods of domestic origin or from domestic producers;
- b) ^{USA}[achieve a given level or percentage of domestic

¹⁰ US would be willing to delete this paragraph.

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, or world market, or region.]

A Party may nonetheless condition the receipt of an incentive on commitments to locate an investment or employ workers in its territory, construct or expand particular facilities, or to spend the incentive in its territory.

^{USA} ^{MEX} [Eligibility criteria for purposes of government procurement or export promotion programs shall not be considered violations of paragraphs 2(a) and 2(b).]

3. ^{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 in such territory to a non-party country;

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

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

4. ^{CDA} ^{MEX} [Nothing in this Chapter including the principle of non-discrimination shall prevent a Party from imposing requirements on an investor of a Party or non-Party in respect of activities not listed in paragraphs 1 or 2.]

^{CDA} [**PERFORMANCE REQUIREMENTS** - DRAFT CANADIAN DISCUSSION PAPER

1. No Party shall apply, in connection with the establishment, acquisition expansion, conduct or operation of an investment in its territory, any of the following requirements enforceable under domestic law or administrative ruling:

a) export a given level or percentage of goods or services;

- b) achieve a given level or percentage of domestic content;
- c) substitute goods or services from the territory of such Party for imported goods or services;
- d) purchase or use goods or services of domestic origin or from domestic producers or service providers, or accord a preference to goods or services produced in such territory;
- e) 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;
- f) 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;
- g) ^{USA} ^{MEX} [transfer, import or use a particular technology, production process or other proprietary knowledge or;
- h) ^{USA} ^{MEX} [act as the exclusive supplier of the goods or services it produces to a specific market or region.]

2. No Party shall apply, as a condition for the receipt of an incentive on the establishment, acquisition, expansion, conduct or operation of an investment in its territory, any of the following requirements enforceable under domestic law or administrative ruling:

- a) export a given level or percentage of goods;
- b) achieve a given level or percentage of domestic content;
- c) substitute goods from the territory of such Party for imported goods;
- d) purchase or use goods of domestic origin or from domestic producers, or otherwise accord a preference to goods produced in such territory;
- e) 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;
- f) restrict domestic sales of goods that such investment produces by limiting such sales in any way to the volume or value of its exports or foreign exchange earnings;
- g) ^{USA} ^{MEX} [transfer, import or use a particular technology,

production process or other proprietary knowledge or;

h) ^{USA} ^{MEX} [act as the exclusive supplier of the goods or services it produces to a specific market or region.]

3. ^{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.

4. ^{CDA} [The provisions of this Article shall not apply to:

a) measures related to government procurement;

b) 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;

c) measures listed in Annex ____.]

5. ^{MEX} ^{CDA} [Nothing in this Chapter including the principle of non-discrimination shall prevent a Party from imposing requirements on an investor of a Party or non-Party in respect of activities not listed in paragraphs 1 or 2.]]

MONITORING

1. 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. Such Party shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position.

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

TRANSFERS

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

- a) profits, dividends, interest, capital gains, royalty payments, management, technical assistance and other fees, ^{MEX USA}[returns in kind,] and other amounts derived from an investment ^{CDA}[or service];
- b) proceeds from the sale of all or any part of an investment ^{CDA}[or service] or from the partial or complete liquidation of an investment ^{CDA}[or service];
- c) payments made under a contract entered into by an investor, or investment, ^{CDA}[or service provider], including payments made pursuant to a loan agreement;
- d) compensation pursuant to {Article on expropriation}; and
- e) payments arising out of an investment dispute ^{MEX USA}[as defined in {Article on dispute settlement}.]

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

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

- a) ^{CDA}[restrictions applied by a Party to persons of another Party on the making of payments and transfers for current international transactions which conform with Article VIII of the Articles of Agreement of the International Monetary Fund;]
- b) bankruptcy, insolvency or the protection of the rights of creditors;
- c) issuing, trading or dealing in securities;
- d) criminal or penal offenses;

- e) reports of currency transfers;
- f) imposing taxes by such means as a withholding tax; or
- g) ensuring the satisfaction of judgments in adjudicatory proceedings.

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

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

STATE ENTERPRISES

^{CDA}[**STATE ENTERPRISES**

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.

3. Where a state enterprise of a Party is engaged in competition with investments of investors of another Party in the relevant market within the territory of that Party or any part thereof, that Party shall accord to investments of investors of the other Party, treatment no less favorable than that accorded, in like circumstances, to investors of any other private persons.]

^{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.

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

EXPROPRIATION AND COMPENSATION

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

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

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

DISPUTE SETTLEMENT

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

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

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

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

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

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

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

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

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

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

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. a) 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.

b) A Party may give diplomatic protection, or bring an international claim for money damages or restitution of property, if such other Party shall have failed to abide by and comply with the award pursuant to the New York Convention.

c) Diplomatic protection, for purposes of this paragraph shall not include state-to-state dispute settlement pursuant to Article ___ of this Agreement, or informal diplomatic exchanges for the sole purposes of facilitating settlement of a dispute.

Provision for the Investment Chapter that might be taken into the General provisions:

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

^{USA}[SETTLEMENT OF DISPUTES BETWEEN PARTIES]

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

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

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

CANADA ADDITIONAL EQUIVALENCES

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

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

NATIONAL SECURITY

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

Note: This provision is self-judging.]

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

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

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Investment

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TAXATION

[Being negotiated as a generic issue]

EXTRA-TERRITORIALITY

^{MEX CDA}[1. No Party may prescribe new laws or enforce existing laws so as to require investors or service providers to act, in the territory of another Party, in a manner that conflicts with the laws of such other Party.]

MONOPOLIES

^{CDA}[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 of 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.]

TECHNOLOGY CONSORTIA

^{MEX CDA}[1. 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).]

^{CDA}[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.

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

COMPETITION POLICY

^{CDA}[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;

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.
6. The Commission shall establish a Competition Policy Committee to consider and make recommendations (no later than) on:
- a) the impact of competition law and policy on trade within the free trade area;
 - b) the impact of trade law and regulation on competition within the free trade area;
 - c) the potential for reliance on competition laws and policies to discipline anti-competitive transborder pricing practices and market segmentation.¹¹

¹¹ 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.

DEFINITIONS

For purposes of this Chapter:

National means a natural person who is a national of a country under its applicable law.

^{CDA}[**State enterprise** means for Canada a Crown Corporation within the meaning on the Financial Administration Act. For the U.S. and Mexico].

^{USA}[**State enterprise** means an entity of a Party that is owned, or controlled through ownership interests, directly or indirectly, by such Party or any agency or instrumentality thereof.]

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

- a) a place of Business;
- b) an individual or individuals employed or self-employed in connection with the Business; and
- c) assets used in carrying on the business, and

^{CDA}[that involves a financial commitment for the purpose of commercial gain.]

Entity means any corporation, trust, partnership, sole proprietorship, joint venture or other association ^{MEX USA}[whether or not for profit, and whether privately-owned or governmentally-owned]

^{CDA}[**National treatment** means treatment of investors of another Party no less favorable than that accorded by a Party in like circumstances to its own investors.]

^{CDA}[**Most favored nation treatment** means treatment of investors of another Party no less favorable than that accorded by a Party in like circumstances to investors of a Party or a non-Party.]

^{CDA}[**Monopoly** means any entity, or group of entities acting in concert to effect a common purpose, that in any relevant market, is the sole provider of a good or service;

Relevant market means the market of the good or service within the territory of a Party, or any part thereof, which is the subject of the maintained or designated monopoly.]

control means

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

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

^{CDA} [**Investment of an investor** of a Party means an investment that is owned or controlled directly or indirectly by an investor of such Party¹².

Investment consists of:

- a) a business enterprise located in the territory of another Party;
- b) equity or debt securities of a business enterprise located in the territory of another Party, or in any interest in such enterprise that entitles the owner to share the income or profits or to share in the assets on dissolution.
- c) real estate or other tangible property located in the territory of another Party, [or intangible property excluding intellectual property, located in the territory of another Party,] that is acquired in the expectation of or used for the purpose of commercial gain;
- d) a loan to a business enterprise located in the territory of another Party made or guaranteed by an affiliate of such business enterprise (but not including a loan through a bank or other financial institution as defined in Chapter (on Financial Services), whether or not such loan is guaranteed by one of the affiliated business enterprises).
- e) interests arising from the commitment of significant capital in the territory of another Party to a major project or permanent commercial presence in that territory related to (i) contracts involving the presence of the investor's property in the territory of another Party (such as concession agreements, turnkey or construction contracts) or (ii) contracts where remuneration depends substantially on the production, revenues or profits of a business enterprise.

¹² 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.

3. For greater clarity, investment excludes the following kind of interests:

- a) claims to money which arise solely from:
 - (i) commercial contracts for the sale of goods or services by a national or entity in the territory of one Party to a business enterprise in the territory of another Party;
 - (ii) the extension of credit in connection with a commercial transaction (e.g. trade financing); or
 - (iii) any other claims to money

and which do not involve the kinds of interests in paragraph 2.

- b) any loan to a business enterprise other than a loan between affiliated business enterprises described in paragraph 2 d).
- c) bonds, treasury bills, or any other kind of debt, security issued by a Party, including those issued by State, Provincial or local governments of a Party.

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

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

2. Investment includes the following kinds of interests:

- a) equity or debt securities of a business enterprise, or any interest in such enterprise that entitles the owner to share in the income or profits or to share in the assets on dissolution;
- b) real estate or other property (tangible or intangible) acquired in the expectation of used for the purpose of economic benefit or other business purposes;
- c) a loan to a business enterprise made or guaranteed by an affiliate of such business enterprise ^{USA}[and any other loan to a business enterprise if the mean repayment period exceeds three years];

d) interests arising from the commitment of capital or other resources to economic activity in the territory of another Party. ^{USA}[such as under (i) contracts involving the presence of the investor's property in the territory of another Party (e.g., concession agreements, turnkey or construction contracts), (ii) contracts where the remuneration depends substantially on the production, revenues or profits of a business enterprise or (iii) government-issued permits to engage in such economic activity.]

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

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

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

c) any other claim to money;

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

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

^{MEX}[5. Notwithstanding paragraphs 2 to 4, investment does not include any loan made or guaranteed, in any form, by a bank or other financial institution as defined in Chapter (financial services).]

Investor of a Party means a national or entity of such Party.

^{CDA}[**investor of a Party** means:

a) such Party or agency thereof;

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

c) a national of such Party;

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

i) such Party or one or more agencies thereof;

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

- iii) one or more nationals of such Party;
 - iv) one or more entities described in paragraph (e); or
 - v) any combination of persons or entities described in (i), (ii), (iii) and (iv); or
- e) an entity that is not ultimately controlled directly or indirectly through the ownership of voting interests where a majority of the voting interests of such entity are owned by:
- i) persons described in subparagraphs (d) (i), (ii) and (iii);
 - ii) entities incorporated or otherwise duly constituted in the territory of such Party and, in the case of entities that carry on business, carrying on a business enterprise located in the territory of such Party, other than any such entity in respect of which it is established that nationals of a third country control such entity or own a majority of the voting interests of such entity; or
 - iii) any combination of persons or entities described in (i) and (ii);

that makes or has made an investment;

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

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

^{MEX CDA}[**joint venture** means an association of two or more persons or entities where the relationship among those associated persons or entities does not, under the laws in force in the territory of the Party in which the investment is made, constitute a corporation, a partnership or a trust and where all those associated persons or entities own or will own assets of a business enterprise, or

directly or indirectly own or will own voting interests in an entity that carries on a business enterprise;]

measures includes "any law, regulation, procedure, requirement or practice." It should be noted that this definition is not exhaustive of the forms that measures may take.

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

^{MEX CDA}[**person** means a natural person or an enterprise

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

^{CDA} [CANADIAN GENERIC ANNEX]

ADDITIONAL CANADIAN EQUIVALENCES

From Canadian Protocol, Part 2: SPECIFIC COMMITMENTS AND EXCEPTIONS

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

Article 111: General Exceptions

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

- a) necessary to protect public order, safety or public morals;
- b) necessary to protect human, animal or plant life or health or the environment in its territory, or to enforce generally agreed international environmental or conservation rules or standards;
- c) relating to the products or services of prison labor;
- d) imposed for the protection of national treasures of artistic, historic or archaeological value;
- e) necessary for fiduciary or consumer protection reasons;
- f) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to the avoidance of fraudulent or deceptive practices;

provided that such measure is:

- g) consistent with Article 106; and
- h) is the least trade-restrictive necessary for securing the protection required.

Article 106: Nullification and Impairment of Benefits

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

- a) constitute a means of arbitrary or unjustifiable

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discrimination between its goods, services and service providers, investors and suppliers and those of any other Party;

b) ...

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

SPECIFIC COMMITMENTS AND EXCEPTIONS

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

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

b) maritime cabotage regulations providing a Commonwealth preference;

c) Canada-United States reciprocal salvage rights;

d) (to be negotiated)].