

INVEST.903

Lawyers' Revision
Investment

DRAFT

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Chapter Eleven

Section A - Investment

Article 1101: Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party existing at the time of entry into force of this Agreement as well as to investments made or acquired thereafter by such investors; and
- (c) with respect to Article 1106, all investments in the territory of the Party existing at the time of entry into force of this Agreement as well as to investments made or acquired thereafter.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.¹

3. This Chapter shall not apply to [... the Chapter on Financial Services.]^{2 3}

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not

¹ To the extent that a Party permits investment in the activities set out in Annex C, such investments will be entitled to the protection of this Chapter.

² Relationship to Financial Services to be resolved.

³ Mexico does not agree to subject the Mexican monetary policy to the dispositions on the Investment Chapter.

inconsistent with this Chapter.

TREATMENT OF INVESTORS AND INVESTMENTS

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that which it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that which it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded in like circumstances by such state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party shall:

- (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
- (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that which it accords, in like circumstances, to investors of another Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that which it accords, in

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like circumstances, to investments of investors of another Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Article 1104: Non-discriminatory Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103 ("non-discriminatory treatment").

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108 (8) (b), each Party shall accord to investors of another Party and to investments of investors of another Party, non-discriminatory treatment with respect to measures it maintains or adopts relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 shall not apply to existing measures related to subsidies or grants that are inconsistent with Article 1102.

Article 1106: Performance Requirements

1. A Party shall not impose the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.¹

2. A requirement that an investment use a technology to meet generally applicable health, safety or environmental standards-related measures, as defined in Article 915, shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102, 1103 and 1104 shall apply to such requirements.

3. A Party shall not condition the receipt or continued receipt of an advantage, in connection with investments in its territory of investors of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- (b) to achieve a given level or percentage of domestic content;

¹ U.S. proposed the following language:

"The Parties confirm their understanding that Article 1106 (1) (g) refers to requirements, commitments, or undertakings that an investor supply its production of particular goods, or its provision of particular services, to a specific region or world market, exclusively from the territory of the Party."

- (c) to 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; or
- (d) to restrict sales of goods or services in its territory that such investment produces or provides by limiting such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with investments in its territory of investors of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirements other than the requirements listed in those paragraphs.

Article 1107: Senior Management and Boards of Directors

1. A Party shall not require that an enterprise of the Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of the Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 1108: Reservations and Exceptions ¹

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

- (a) any existing non-conforming measure that is maintained by:

¹ GATT XX, nullification and impairment and public order to be resolved.

- (i) a Party at the federal level, as described in its Schedule to Annex I or III,
 - (ii) a state or province, for two years after the entry into force of this Agreement; and thereafter, as described by a Party in its Schedule to Annex I, or
 - (iii) a local government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.
2. A Party shall have two years from the entry into force of this Agreement to describe in its Schedule to Annex I any existing non-conforming measure maintained by a state or province.
3. A Party shall not be required to describe in its Schedule to Annex I any existing non-conforming measure that is maintained by a local government.
4. To the extent indicated by a Party in its Schedule to Annex II, Articles 1102, 1103, 1106 and 1107 do not apply to any measure adopted or maintained by a Party with respect to the sectors, subsectors or activities as described therein.
5. Any measure adopted by a Party in a manner consistent with paragraph 4 shall not require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
6. Articles 1102 and 1103 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 1703 (Intellectual Property) as specifically provided for in that Article.
7. Article 1103 does not apply to treatment accorded by a Party pursuant to agreements or with respect to sectors described in Annex IV.
8. Articles 1102, 1103 and 1107 do not apply to:
- (a) procurements of goods or services by a Party or a state enterprise; or

- (b) subsidies and grants, including government-supported loans, guarantees and insurance provided by a Party or a state enterprise.

9. The provisions of:

- (a) paragraphs 1(a), (b), (c) and (f), and 3(a) and (b) of Article 1106 do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
- (b) paragraphs 1(b), (c), (f) and (g), and 3(a) and (b) of Article 1106 do not apply with respect to procurement of goods or services by a Party or a state enterprise; and¹
- (c) paragraphs 3(a) and (b) of Article 1106 do not apply to requirements imposed by an importing Party related to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

Article 1109: Transfers

1. Each Party shall permit all transfers and international payments ("transfers") relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

- (a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind, and other amounts derived from the investment;
- (b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (d) payments made pursuant to Article 1110 ; and
- (e) payments arising out of an investment dispute as defined

¹ Under discussion.

in Article 11XX.

2. Each 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. No Party shall require its investors to transfer, or penalize its investors who fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, an investment in the territory of another Party.

4. Notwithstanding paragraphs 1, 2 and 3, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities;
- (c) criminal or penal offenses;
- (d) reports of transfers of currency or other monetary instruments; or
- (e) ensuring the satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.

6. A Party may restrict the transfers of returns in kind only in circumstances in which it could otherwise restrict such transfers under this Agreement.

Article 1110: 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 a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;

- (c) in accordance with due process of law and the general principles of treatment provided in Article 1105; and
 - (d) upon payment of compensation in accordance with paragraphs 2 to 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known 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.
 3. Compensation shall be paid without delay and be fully realizable.
 4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment thereof.
 5. If a Party elects to pay in a currency other than a G7 currency, the amount paid shall be no less than the equivalent of the amount of compensation owed on the date of expropriation converted into a G7 currency at the market rate of exchange prevailing on that date, plus accrued interest at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of actual payment.
 6. Upon payment, compensation shall be freely transferable as provided in Article 1109.
 7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or the revocation, limitation or creation of intellectual property rights to the extent that such issuance, revocation, limitation or creation is consistent with Chapter 17 (Intellectual Property).

Article 1111: Special Formalities and Information Requirements

1. Nothing in Article 1102 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investors be residents of the Party or that investments be legally constituted

under the laws and regulations of the Party, provided that such formalities do not impair the substance of the benefits of any of the provisions in this Chapter.¹

2. Notwithstanding Articles 1102 and 1103, a Party may require, from an investor of another Party or its investment, routine business information, to be used solely for informational or statistical purposes, concerning that investment in its territory. The Party shall protect such business information as is confidential from disclosure that would prejudice the investor's or the investment's competitive position. Nothing in this paragraph shall preclude a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.

Article 1112: Relationship to Other Chapters

1. In the event of any inconsistency between a provision of this Chapter and a provision of another Chapter, the provision of the other Chapter shall prevail to the extent of the inconsistency.²

2. A requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter shall apply to that Party's treatment of the posted bond or financial security.

Article 1113: Denial of Benefits

Each Party reserves the right to deny to an investor of another Party that is an enterprise of such Party and to investments of such investor the benefits of this Chapter if investors of a non-Party own or control the enterprise and:³

¹ The Parties agree to work on a footnote that will consider Mexico's concern on non-discriminatory concessions, licences, and authorizations and the US concern with respect to residency and incorporation requirements.

² This provision to be reviewed in light of other Chapters.

³ US will consult on notification and consultation with respect to shell companies.

- (a) the enterprise has no substantial business activities in the territory of the Party under whose laws it is constituted or organized;
- (b) the denying Party does not maintain diplomatic relations with the non-Party; or
- (c) the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.¹

Article 1114: Environmental Measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Articles 1115-1128: SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN INVESTOR OF ANOTHER PARTY²

¹ US proposes to add "or to its investments" at the end of the Article.

² This Part is without prejudice to the rights and obligations of the Parties as set out in Chapter 20.

Article 1115: Purpose

This Part¹ establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 1116: Investment Dispute

Investment dispute means a dispute between a Party and an investor of another Party in which the investor alleges that the Party has breached

- (a) a provision of this Chapter, or
- (b) paragraph 3(a) of Article 2602 (Monopolies) or paragraph 2 of Article 2603 (State Enterprises), where the alleged breach pertains to the obligation of this Chapter,²

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.³

Article 1117: Consultation and Negotiation

The parties to an investment dispute should first attempt to settle the dispute through consultation or negotiation. Consultation or negotiation under this Article shall not constitute the initiation of domestic proceedings for purposes of Article 1117.

Article 1118: Fora for Resolving an Investment Dispute

1. If an investment dispute cannot be settled by consultation or

¹ The use of the word part would depend on the final structure of this Chapter.

² Language to be reviewed.

³ The Parties will endeavor to develop language to the effect that regulation does not in itself constitute expropriation (placement of language to be determined by the Lawyers' Group.)

negotiation, the investor may choose either to:

- (a) initiate proceedings under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party with a right of action under its domestic law for an alleged breach of this Chapter; or
- (b) submit the investment dispute to arbitration under Article 1119;

and the choice, once made by the investor, shall be exclusive.

2. A Party shall not provide a right of action under its domestic law against any other Party for an alleged breach of this Agreement.¹

Article 1119: Limitation Period

An investor shall not be entitled to submit an investment dispute to arbitration if more than three years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

Article 1120: Arbitration Fora

1. Provided that six months have elapsed since the date on which the investment dispute arose, the investor may submit the dispute to arbitration under:

- (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
- (b) the Additional Facility Rules of ICSID, provided that the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.

¹ The Lawyers' Group will develop wording to make this provision generic and will decide where, outside the Investment Chapter, to place the provision.

2. The Secretary General of ICSID shall serve as appointing authority for an arbitration under the UNCITRAL Arbitration Rules.

3. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Part.

Article 1121: Consent to Arbitration

1. Each Party hereby consents to the submission of an investment dispute between that Party and an investor of another Party for settlement by arbitration in accordance with the provisions of this Part.

2. The submission by an investor of an investment dispute to arbitration under this Part, together with the consent given by each Party in paragraph 1, shall satisfy the requirement of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
- (b) Article II of the New York Convention for an agreement in writing; and
- (c) Article I of the Inter-American Convention for an agreement.

3. Any dispute submitted by an investor for arbitration under this Part 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.

4. By submitting the dispute to arbitration, the investor:

- (a) consents to arbitration in accordance with the provisions of this Part; and
- (b) waives its and its investment's right to initiate or continue before any administrative tribunal or court [under the domestic law]¹ of any Party any proceedings with respect to the measure of the disputing Party that

¹ Choice between reference to administrative tribunal or court, on the one hand, or "under the domestic law", on the other, to be made during scrubbing.

is alleged to be a breach of this Chapter, except for proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party.¹

Article 1122: Notice

An investor shall give to the disputing Party written notice of its intention to submit an investment dispute to arbitration at least ninety days before the dispute is submitted, which notice shall specify:

- (a) the names and addresses of the parties to the dispute;
- (b) the provisions of this Chapter alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim; and
- (d) the relief sought and the approximate amount of compensation claimed.

Article 1123: Selection or Appointment of Presiding Arbitrator²

¹ The final drafting must make it clear that article 1117(1)(a) addresses a domestic cause of action under the NAFTA and article 1120(4)(b) addresses domestic law other than the NAFTA.

It must also be clear that "declaratory" and "extraordinary relief" do not include relief that involves the payment of damages.

In the case of Mexico, it is agreed that an investor must elect, at the end of the administrative process, either to submit his dispute to arbitration under the NAFTA or initiate judicial proceedings or administrative tribunal proceedings under Mexican domestic law. If the investor is successful in amparo proceedings, he may then submit the issue of compensation to arbitration under the NAFTA or, if Mexico creates a cause of action for a violation of the NAFTA, submit the issue of compensation to a court. Placement of this exception will be subject to determination of placement of other exceptions currently in the Investment Chapter. See attached Mexican text.

² Canada will redraft this Article to address the problem with the appointment of arbitrators and establish a particular mechanism for appointing arbitrators.

1. Unless the disputing parties select the presiding arbitrator:
 - (a) the presiding arbitrator shall be selected or appointed in accordance with the applicable arbitration rules from the list of presiding arbitrators described in paragraph 2; and
 - (b) in the event that no such presiding arbitrator is available to serve, the Secretary-General of ICSID shall appoint from the ICSID Panel of Arbitrators a presiding arbitrator who is not a national of any of the Parties.

2. As of the entry into force of this Agreement, the Parties shall have jointly designated, without regard to nationality, thirty presiding arbitrators meeting the qualifications of the rules referred to in Article 1119 and experienced in international law and investment.

Article 1124: Consolidation

1. The Secretariat of the Commission shall maintain a public register of submissions to arbitration under Article 1119 and requests made under paragraph 2.

2. A disputing party that seeks an order under paragraph 4 may request the Secretary General of ICSID to establish an arbitration tribunal and shall specify in the request:
 - (a) the name of the disputing party or parties against which the order is sought;
 - (b) the nature of the order sought; and
 - (c) the grounds on which the order is sought.

A disputing party that seeks an order under paragraph 4 shall give to the disputing party or parties against which the order is sought a copy of the request.

3. Within 60 days of receipt of the request, the Secretary General of ICSID shall establish an arbitration tribunal consisting of three arbitrators. The presiding arbitrator shall be selected from the roster described in Article 1122. In the event that no such presiding arbitrator is available to serve, the Secretary-General of ICSID shall appoint a presiding arbitrator, who is not a national of any of the Parties from the ICSID Panel of Arbitrators. The two other members shall be selected from the

roster described in Article 1122, or to the extent not available from that roster, from the ICSID Panel of Arbitrators, or to the extent not available from that panel, in the discretion of the Secretary General, provided that one member shall be a national of the disputing Party and one member shall be a national of the Party whose investors are disputing parties. The arbitration tribunal shall conduct itself in accordance with the UNCITRAL Arbitration Rules.

4. Where it appears to the arbitration tribunal that arbitrations have been initiated under Article 1119 that have a question of law or fact in common, the tribunal may, in the interests of fair and efficient resolution of the disputes, and after hearing from the interested parties¹, order that the arbitration tribunal shall:

- (a) assume jurisdiction over, and hear and determine together, all or part of the investment disputes in accordance with the UNCITRAL Arbitration Rules; or
- (b) assume jurisdiction over, and hear and determine, one or more of the investment disputes the determination of which it believes would assist in the resolution of the others, in accordance with the UNCITRAL Arbitration Rules.

5. An arbitration tribunal established under Article 1119 shall not have jurisdiction to decide an investment dispute, or a part of an investment dispute, over which an arbitration tribunal established under this Article has assumed jurisdiction.

Article 1125: General Provisions Applicable to Arbitrations under Articles 1120 or 1123

1. Notice: A disputing Party shall deliver to the other Parties:
- (a) written notice of an arbitration initiated under Article 1119 or 1123 within 30 days of initiation of the arbitration; and
 - (b) copies of all pleadings filed in the arbitration.

¹ This term is in contemplation of language that will give a disputing party who is not named in an application for an order under paragraph 4 the right to cross-apply to the tribunal established under paragraph 3 to be added in an order made under paragraph 4.

2. Participation by a Party: On written notice to the disputing parties, a Party may make submissions to an arbitration tribunal established under Article 1119 or 1123 on a question of interpretation of this Agreement.

3. Documents: A Party shall be entitled to receive from the disputing Party at the cost of the requesting Party:

- (a) a copy of the evidence that has been tendered to the arbitration tribunal; and
- (b) a copy of the written argument of the disputing parties.¹

4. Place of Arbitration: Unless the disputing parties agree otherwise, an arbitration proceeding under Article 1119 or 1123 shall be held in the territory of a Party which is a party to the New York Convention, selected in accordance with:

- (a) the Additional Facility Rules if the arbitration is under those rules or the ICSID Arbitration Rules; or
- (b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.

5. Report from an Expert: At the request of a disputing party or, unless the disputing parties, disapprove, on its own initiative, an arbitration tribunal may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in an arbitration, subject to such terms and conditions as the disputing parties may agree.

6. Interim Measures of Protection: An arbitration tribunal established under Article 1118 or 1122 may take such measures as it deems necessary to preserve the respective rights of the disputing parties, or to insure that the tribunal's jurisdiction is made fully effective. Such measures may include, but are not limited to, orders to preserve evidence² or to protect the tribunal's

¹ Wording must be developed to ensure that confidentiality is respected.

² This is to be drafted so that the federal government of Canada will not be the subject of an order to preserve evidence that is in the possession or control of a subnational government.

jurisdictional exclusivity. An interim measure of protection may not include an order of attachment or an order to enjoin the application of the measure alleged to be the breach of the Chapter. For purposes of this paragraph, an order includes a recommendation.

7. Final Relief: An arbitration tribunal established under Article 1118 or 1122 may award only monetary damages or restitution of property. An award providing for restitution shall also provide that a Party may pay compensation in lieu thereof. An arbitration tribunal established under Article 1118 or 1122 shall not order a Party to pay punitive damages.

8. Standing: An investment may not initiate an arbitration proceeding under this Part.

An investor of a Party that owns or controls an investment that is an enterprise of another Party may initiate an arbitration proceeding under this Part for loss or damage to, or incurred by, its investment.

The tribunal shall order that any resulting relief be for the benefit of the investment without prejudice to any interest that non-controlling or minority shareholders may have in the relief under the applicable domestic law.¹

Article 1126: Interpretation of Annexes ... (Constitution), ... (National Treatment) and ... (Unbound)

1. Where a disputing Party asserts as a defence that the measure alleged to be a breach of this Chapter is within the scope of an exception set forth in Annex ... (Mexican Constitution), Annex ... (National Treatment) or Annex ... (Unbound), on request of the disputing Party, the arbitration tribunal shall request the interpretation of the Commission on this question. The Commission shall have 60 days to submit its interpretation in writing to the tribunal.²

2. If the Commission submits to the tribunal an agreed

¹ Final drafting must reflect that non-controlling or minority shareholders may not bring separate claims arising out of the same breach.

² The role of the Commission under this Article is unrelated to Chapter 23.

interpretation,¹ the interpretation shall be binding on the tribunal. If the Commission fails to submit an agreed interpretation or fails to submit an agreed interpretation within such 60 day period, the tribunal shall decide the issue of interpretation of the exception.²

Article 1127: Governing Law

An arbitration tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

Article 1128: Finality and Enforcement of Award

1. A final award made in an arbitration proceeding under Article 1118 or 1122 is binding on the disputing parties but shall have no binding force except between the disputing parties and in respect of the particular case.

2. A disputing Party shall abide by and comply with a final award made in an arbitration proceeding under Article 1118 or 1122 without delay, but shall not be required to abide by or comply with an award that is not final.

3. If a Party fails to abide by or comply with the terms of a final award under this Part, the Commission provided for in Chapter 23 shall, upon delivery of a request by any other Party whose investor was party to the investment dispute, establish an arbitration panel under Article 2309(1). The requesting Party may seek in such proceedings:

- (a) a determination that the failure to abide by and comply with the terms of the final award is inconsistent with the obligations of this Agreement; and

¹ U.S. acceptance conditional on confirmation that agreed interpretation requires agreement of all three Parties.

² The Parties agree that trilateral agreement on interpretation of a provision of the NAFTA will be binding on an investor/state arbitration tribunal, and will draft language accordingly with appropriate location to be determined by the Lawyers' Group.

- (b) a recommendation that the defaulting Party abide by and comply with the terms of the final award.

4. Paragraph 3 is without prejudice to an investor's rights to seek enforcement under the ICSID Convention, the New York Convention or the Inter-American Convention.

5. For the purposes of this Article, an arbitration award made under the ICSID Convention is final if:

- (a) 120 days have elapsed from the date the award was rendered and no party to the dispute has requested revision or annulment of the award; or
- (b) revision or annulment proceedings have been completed.

6. For the purposes of this Article, an arbitration award made under the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules is final if:

- (a) 3 months have elapsed from the date the award was rendered and no party to the dispute has commenced a proceeding to revise, set aside or annul the award; or
- (b) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

7. Each Party undertakes to provide in its territory for the enforcement of an arbitration award made under Article 1118 or 1122.

Article 1129: Receipts under Insurance or Guarantee Contracts

In any proceeding under this Part 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.

Definitions: Note: to be moved to the general definitions section.

For purposes of this Part:

- (a) "disputing party" means the investor or the disputing Party, and "disputing parties" means the investor and

the disputing Party;

- (b) "disputing Party" means the Party alleged to have breached a provision of this Chapter;
- (c) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;
- (d) "ICSID" means the International Centre for Settlement of Investment Disputes;
- (e) "Inter-American Convention" means the Inter-American Convention on International Commercial Arbitration, done at Panama, [Month] [Day], 1975;
- (f) "New York Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;
- (g) "UNCITRAL Arbitration rules" means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976;
- (h) "parties" means the disputing party and the disputing Party.

Mexican Text Referred to in Footnote 24

1. If an investment dispute cannot be settled by consultation or negotiation, the investor may choose either of the following:

- (a) assertion of rights under domestic law:

The investor may initiate (or cause its investment to initiate) proceedings under the domestic law of the disputing Party, based on rights and obligations other than those established in this Chapter; or

- (b) assertion of right under this Chapter:

The investor may either:

- (i) submit the investment dispute to arbitration under Article 1119 on rights and obligations established in this Chapter, or

- (ii) initiate (or cause its investment to initiate) proceedings based on such rights and obligations under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party or their investments with a right of action under its domestic law for an alleged breach of this Chapter.

2. The choice of forum under paragraph 1, once made by the investor shall be exclusive, with the following exceptions:

- [(a) simultaneous pursuit of extraordinary relief and damages in different fora:]

Submission of a dispute to arbitration under Article 1119 shall not preclude an investor from seeking, in an administrative tribunal or court of the disputing Party, injunctive, declaratory or other extraordinary relief based on rights and obligations other than those established in this Chapter. In such circumstances, no determination of damages shall be made by the arbitration tribunal until the determination regarding such extraordinary relief has been made; and

- (b) [sequential pursuit of extraordinary relief and damages in different fora:]

An investor that succeeds in obtaining final injunctive, declaratory or other extraordinary relief in an administrative tribunal or court of the disputing Party (based on rights and obligations in this Chapter or otherwise) may subsequently submit the issue of compensation to arbitration under Article 1119.

Article 11XX: Definitions

For purposes of this Chapter:

enterprise means an "enterprise" as defined in Article 201, except that it shall also include a branch;¹

enterprise of a Party means an enterprise constituted or organized

¹ Mexico is considering branches in this definition.

under the laws and regulations of a Party, including a branch;¹

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;

G7 Currency means the currency of Canada, Germany, France, Italy, Japan, the United States, or the United Kingdom of Great Britain and Northern Ireland;

investment means:

- (a) an enterprise;
- (b) equity or debt securities of an enterprise, or an interest in an enterprise that entitles the owner to share in the income or profits or to share in the assets on dissolution;
- (c) real estate or other property (tangible or intangible) acquired in the expectation or used for the purpose of economic benefit or other business purposes;
- (d) a loan (to be completed by Financial Services;)² or
- (e) interests arising from the commitment of capital or other resources in territory of a Party to economic activity in such territory, such as under:
 - (i) contracts involving the presence of an investor's property in the territory of the Party (including turnkey or construction contracts, or concessions), or
 - (ii) contracts where the remuneration depends substantially on the production, revenues or profits of an enterprise;

but does not include,

- (f) claims to money which arise solely from:

¹ We are checking this definition with the Lawyers' Group.

² This language must be coordinated with the Financial Services Group, which may wish to include as "investments" a loan by a Bank to provide capital to its subsidiary.

- (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of one Party to an enterprise in the territory of another Party; or
- (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by paragraph (d); or
- (g) any other claims to money;

which do not involve the kinds of interests set out in paragraphs (a) through (e);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, makes or has made an investment;

investor of a non-Party means an investor other than an investor of a Party, that makes, seeks to make or has made an investment;

state enterprise means an enterprise that is owned, or controlled through ownership interests, by a Party.¹

PROVISIONS TO BE PLACED OUTSIDE OF INVESTMENT CHAPTER

2. [For greater certainty,]² a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party or its investment pursuant to this Article shall not be subject to Articles ____ (investor-state dispute settlement) or Chapter _____ (general dispute settlement).³

¹ To be discussed in the context of the Investment Chapter.

² Under discussion.

³ To be discussed.

[(Insert in investor-state Article:

Without prejudice to the applicability or non-applicability of this Article to other actions taken by a Party pursuant to Article ____ (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party or its investment pursuant to that Article shall not be subject to this Article.

(insert in General dispute Settlement Chapter:

Without prejudice to the applicability or non-applicability of this Chapter to other actions taken by a Party pursuant to Article ____ (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party or its investment pursuant to that Article shall not be subject to this Chapter.]¹

¹ US proposals to be discussed.