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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.<sup>1</sup>
3. This Chapter shall not apply to [... the Chapter on Financial Services.]<sup>2 3</sup>

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

<sup>2</sup> Relationship to Financial Services to be resolved.  
US proposes the following language "This Chapter does not apply to Financial Services except to the extent provided in Chapter 14."

Canada first proposes to eliminate Financial Services;  
Mexico and Canada propose the following language "This Chapter does not apply to any measure to which Chapter 14 applies except as specifically provided therein."

<sup>3</sup> Mexico does not agree to subject the Mexican monetary policy to the dispositions of the Investment Chapter.

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 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 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.<sup>1</sup>
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;

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<sup>1</sup> U.S. proposed the following language:

"(g) to supply its production of a good or its provision of a service to a specific region or world market exclusively from the Parties territory."

Canada does not agree on having a footnote

- (b) to achieve a given level or percentage of domestic content;
  - (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 relating 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 <sup>1</sup>**

1. Articles 1102, 1103, 1106 and 1107 do not apply to:
  - (a) any existing non-conforming measure that is maintained by:

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<sup>1</sup> GATT XX and nullification and impairment 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 date of 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 date of 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; and<sup>1</sup>
  - (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 in Article 11XX.
2. Each Party shall permit transfers to be made in a freely usable currency at the market rate

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<sup>1</sup> Under discussion.



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.<sup>1</sup>

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

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.<sup>1</sup>

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:<sup>2</sup>

- (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

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<sup>1</sup> This provision to be reviewed in light of other Chapters.

<sup>2</sup> US will consult on notification and consultation with respect to shell companies.

if the benefits of this Chapter were accorded to the enterprise.<sup>1</sup>

#### **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.

#### **SECTION B - SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN INVESTOR OF ANOTHER PARTY<sup>2</sup>**

##### **Article 1115: Purpose**

This Section 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.

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<sup>1</sup> US proposes to add "or to its investments" at the end of the Article.

<sup>2</sup> This Part is without prejudice to the rights and obligations of the Parties as set out in Chapter 23.

**Article 1116: Claim by an Investor of a Party on Behalf of Itself**

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

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

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

**Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise<sup>1</sup>**

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached:

- (a) a provision of Section A of this Chapter; or
- (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

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

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events which

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<sup>1</sup> The Parties agree that neither an investor nor an enterprise should receive double recovery. To the extent necessary, this concept will be built into the final text.

gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established pursuant to Article 1125, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

#### **Article 1118: Settlement of a Claim Through Consultation and Negotiation**

The disputing parties should first attempt to settle a claim through consultation or negotiation.

#### **Article 1119: Notice of Intent to Submit a Claim to Arbitration**

The disputing investor shall give to the disputing Party written notice<sup>1</sup> of its intention to submit a claim to arbitration at least ninety days before the claim is submitted, which notice shall specify:

- (a) the name and address of the disputing investor;
- (b) the provisions of this Agreement 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 damages claimed.

#### **Article 1120: Submission of a Claim to Arbitration**

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

- (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

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<sup>1</sup> In the case of each Party, it is necessary to say where notice and other documentation should be sent.

- (b) the Additional Facility Rules of ICSID, provided that either 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.
2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

**Article 1121: Conditions Precedent to Submission of a Claim to Arbitration**

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
- (a) the investor consents to arbitration in accordance with the provisions of this Section; and
  - (b) both the investor and an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, waive their right to initiate or continue before any administrative tribunal or court under the domestic law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party.
2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
- (a) consent to arbitration in accordance with the provisions of this Section; and
  - (b) waive their right to initiate or continue before any administrative tribunal or court under the domestic law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party.
3. A consent and waiver required by this Article shall be in writing, shall be given to the disputing Party, and shall be included in the submission of a claim to arbitration.

**Article 1122: Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration in accordance with the provisions of this Section.
2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration in accordance with the provisions of this Section shall satisfy the requirement of:
  - (a) Chapter II of the ICSID Convention (Jurisdiction of the Center) 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.

**Article 1123: Number of Arbitrators and Method of Appointment**

Subject to Article 1125, and unless the disputing parties agree otherwise, the Tribunal shall consist of three arbitrators. One arbitrator shall be appointed by each of the disputing parties. The third, who shall be the presiding arbitrator, shall be appointed by agreement of the disputing parties.

**Article 1124: Constitution of Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator**

1. The Secretary-General of ICSID shall serve as appointing authority for an arbitration under this Section.
2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, at the request of either disputing party:
  - (a) shall appoint the arbitrator or arbitrators not yet appointed in his discretion, except for the presiding arbitrator; and
  - (b) shall appoint the presiding arbitrator in accordance with paragraph 3.
3. The Secretary-General shall appoint the presiding arbitrator from the list of presiding



arbitrators described in paragraph 4.<sup>1</sup> In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint a presiding arbitrator who is not a national of any of the Parties from the ICSID Panel of Arbitrators.

4. As of the date of 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 1120 and experienced in international law and investment.

5. Subject to paragraph 8, where a disputing investor submits a claim to arbitration under the ICSID Convention or the Additional Facility Rules, each Party agrees:

- (a) to the appointment by the investor of a national of the Party of the investor as an arbitrator; and
- (b) to the appointment by the Secretary-General of a national of the Party of the investor as an arbitrator or as a presiding arbitrator.<sup>2</sup>

6. Subject to paragraph 8, a disputing investor described in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the Additional Facility Rules, only on the following conditions:

- (a) where the disputing Party appoints a national of the disputing Party as an arbitrator, the investor agrees in writing to the appointment; and
- (b) where the Secretary-General appoints a national of the disputing Party as an arbitrator or as a presiding arbitrator<sup>3</sup>, the investor agrees in writing to the appointment.

7. Subject to paragraph 8, a disputing investor described in paragraph 1 of Article 1117 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the Additional Facility Rules, only on the following conditions:

- (a) where the disputing Party appoints a national of the disputing Party as an arbitrator, the investor and the enterprise agree in writing to the appointment; and

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<sup>1</sup> Where an appointment is made in these circumstances, the issue of nationality of the presiding arbitrator remains to be resolved.

<sup>2</sup> See footnote 4.

<sup>3</sup> See footnote 4.

- (b) where the Secretary-General appoints a national of the disputing Party as an arbitrator or as a presiding arbitrator,<sup>1</sup> the investor and the enterprise agree in writing to the appointment.<sup>2</sup>
8. A disputing party:
- (a) in the case of a claim submitted to arbitration under the ICSID Convention, may propose, under Article 57 of the Convention, the disqualification of a member of the Tribunal on account of any fact indicating a manifest lack of the qualities required by paragraph 1 of Article 14 of the Convention; and
  - (b) in the case of a claim submitted to arbitration under the Additional Facility Rules, may propose, under Article 14 of the Rules, the disqualification of a member of the Tribunal on account of any fact indicating a manifest lack of the qualities required by Article 9 of the Rules.<sup>3</sup>

#### Article 1125: Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules, and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.
2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal:
  - (a) shall assume jurisdiction over, and hear and determine together, all or part of the claims; or
  - (b) shall assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

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<sup>1</sup> See footnote 4.

<sup>2</sup> Canada and Mexico are prepared to have the Additional Facility (and later ICSID) operate in the NAFTA only on the condition that they may appoint nationals to an Additional Facility or ICSID arbitration panel.

<sup>3</sup> This is necessary only if there is a real concern that agreement to appointment under paragraphs 5 through 7 would constitute a waiver of the grounds for challenge.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General of ICSID to establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing parties against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

4. The disputing party shall give to the disputing Party or disputing parties against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General of ICSID shall establish a Tribunal consisting of three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster described in paragraph 4 of Article 1124. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint a presiding arbitrator, who is not a national of any of the Parties, from the ICSID Panel of Arbitrators. The Secretary-General shall appoint the two other members from the roster described in paragraph 4 of Article 1124, and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of the Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing party that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the party's name and address;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

7. A disputing party described in paragraph 6 shall give a copy of its request to the parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.<sup>1</sup>

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<sup>1</sup> This does not address the status of an Article 1120 Tribunal pending decision on whether [INVEST2.904](#)

9. A disputing Party shall give to the Secretariat of the Commission, within 15 days of receipt by the disputing Party, a copy of:

- (a) a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention;
- (b) a notice for arbitration made under Article 2 of the Additional Facility Rules; or
- (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

10. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 3 of this Article:

- (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
- (b) within 15 days of making the request, in the case of a request made by the disputing Party.

11. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 6 of this Article within 15 days of receipt of the request.

12. The Secretariat of the Commission shall maintain a public register consisting of the documents referred to in paragraphs 9, 10 and 11 of this Article.

**Article 1126: Notice**

A disputing Party shall deliver to the other Parties:

- (a) written notice of a claim that has been submitted to arbitration within 30 days from the date that the claim is submitted; and
- (b) copies of all pleadings filed in the arbitration.

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to consolidate by a consolidation Tribunal, and does not address the effect of an order under paragraph 2(b). To be considered.

**Article 1127: Participation by a Party**

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

**Article 1128: 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 Tribunal; and
- (b) a copy of the written argument of the disputing parties.<sup>1</sup>

**Article 1129: Place of Arbitration**

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration 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.

**Article 1130: Governing Law**

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

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<sup>1</sup> Wording must be developed to ensure that confidentiality is respected.

### **Article 1131: Interpretation of Annexes**

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 I (Bound), Annex II (Unbound), Annex III (Mexican Constitution) or Annex IV (MFN), on request of the disputing Party, the 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.<sup>1</sup>

2. If the Commission submits to the Tribunal an agreed interpretation, 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.<sup>2</sup>

### **Article 1132: Report from an Expert**

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, 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 a proceeding, subject to such terms and conditions as the disputing parties may agree.

### **Article 1133: Interim Measures of Protection**

A Tribunal may take such measures as it deems necessary to preserve the respective rights of the disputing parties, or to ensure that the Tribunal's jurisdiction is made fully effective. Such measures may include, but are not limited to, orders to preserve evidence in the possession or control of a disputing party, or to protect the Tribunal's jurisdiction. 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 Section A of this Chapter, paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises). For purposes of this paragraph, an order includes a recommendation.

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<sup>1</sup> The role of the Commission under this Article is unrelated to Chapter 23.

<sup>2</sup> 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.

**Article 1134: Final Award**

1. Where a Tribunal makes a final award against a Party, the Tribunal may award only:
  - (a) monetary damages, and any applicable interest; or
  - (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages, and any applicable interest, in lieu of restitution.
2. Subject to paragraph 1, where a claim is made under paragraph 1 of Article 1117:
  - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
  - (b) an award of monetary damages, and any applicable interest, shall provide that the sum be paid to the enterprise; and
  - (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.
3. A Tribunal may not order a Party to pay punitive damages.

**Article 1135: Finality and Enforcement of Award**

1. An award made by a Tribunal 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. Subject to paragraph 3, a disputing party shall abide by and comply with an award without delay.<sup>1</sup>
3. A disputing party may not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention:
    - (i) 120 days have elapsed from the date the award was rendered and no

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<sup>1</sup> Original idea included only a final award, subject to review. If it includes interim awards, must also be subject to review.

- disputing party has requested revision or annulment of the award, or
- (ii) revision or annulment proceedings have been completed, and
- (b) in the case of a final award under the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules:
- (i) 3 months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
  - (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
5. Each Party undertakes to provide for the enforcement in its territory of an award.<sup>1</sup>
6. If a Party fails to abide by or comply with the terms of a final award under this Section, the Commission provided for in Chapter 20 shall, upon delivery of a request by any other Party whose investor was party to the investment dispute, establish a panel under Article 2008(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
  - (b) a recommendation that the defaulting Party abide by or comply with the terms of the final award.
7. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 6.
8. A claim that is submitted to arbitration 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.<sup>2</sup>

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<sup>1</sup> This should not place on a Party an extra-territorial obligation.

<sup>2</sup> Query whether this should be accomplished by Canada and the U.S. removing the commercial reservation.



### Article 1136: General

1. Time when a Claim is Submitted to Arbitration: A claim is submitted to arbitration under this Section when:

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

2. Receipts under Insurance or Guarantee Contracts: In an arbitration under this Section, 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.

### Article 1137: 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.

### Article 1138: Definitions

For purposes of this Chapter:

**disputing Party** means a Party against which a claim is made under this Section;

**disputing party** means the disputing investor or the disputing Party;

**disputing parties** means the disputing investor and the disputing Party;

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

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branch;<sup>1</sup>

**enterprise of a Party** means an enterprise constituted or organized under the laws and regulations of a Party, including a branch;<sup>2</sup>

**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;

**ICSID Convention** means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;

**ICSID** means the International Center for Settlement of Investment Disputes;

**Inter-American Convention** means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;

**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);<sup>3</sup> 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:

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<sup>1</sup> Mexico is considering branches in this definition.

<sup>2</sup> We are checking this definition with the Lawyers' Group.

<sup>3</sup> 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) 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:
  - (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.<sup>1</sup>

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

**Tribunal** means an arbitration tribunal established under Article 1120 or 1125.

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<sup>1</sup> To be discussed in the context of the Investment Chapter.

**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;

**Annex 11XX.1**

1. An investor of another Party may not allege that Mexico has breached:
  - (a) a provision of Section A of this Chapter; or
  - (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal.

2. Where an enterprise of Mexico that is a juridical person that an investor of another Party owns or controls directly or indirectly alleges in proceedings before a Mexican court or administrative tribunal that Mexico has breached:
  - (a) a provision of Section A of this Chapter; or
  - (b) paragraph 3(a) of Article 1502 (Monopolies) or paragraph 2 of Article 1503 (State Enterprises) where the alleged breach pertains to the obligations of this Chapter;

the investor may not allege the breach in an arbitration under this Section.

**PROVISIONS TO BE PLACED OUTSIDE OF INVESTMENT CHAPTER**

2. [For greater certainty,]<sup>1</sup> 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).<sup>2</sup>

[(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.]<sup>3</sup>

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<sup>1</sup> Under discussion.

<sup>2</sup> To be discussed.

<sup>3</sup> US proposals to be discussed.