

**NAFTA:
Legal Text and
Interpretive Materials**

Edited by
Barry Appleton

Volume 3

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ISBN # 0-314-95418-X

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Chapter 18

Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001)

§ 18:1 Generally

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven proceeding, and, subject to the application of Article 1120(2), the Parties in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunal.
2. In the application of the foregoing:
 - (a) In accordance with Article 1120(2), the Parties agree that nothing in the relevant NAFTA provisions imposes a general duty of confidentiality on the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunal, apart from the limited specific exceptions set out expressly in those rules.
 - (b) Each Party agrees to make available to the other in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to:
 - (i) confidential business information;
 - (ii) information which is privileged or otherwise protected from disclosure under the domestic law; and
 - (iii) information which the Party is not permitted to disclose under its domestic law.

Chapter 20

Publicly Available NAFTA Negotiating History (Travaux Préparatoires)

- § 20:1 December 1, 1991
- § 20:2 January 16, 1992
- § 20:3 February 13, 1992
- § 20:4 February 21, 1992
- § 20:5 March 06, 1992
- § 20:6 April 03, 1992
- § 20:7 April 15, 1992
- § 20:8 May 01, 1992
- § 20:9 May 13, 1992
- § 20:10 May 22, 1992
- § 20:11 June 04, 1992
- § 20:12 June 15, 1992
- § 20:13 July 10, 1992
- § 20:14 July 22, 1992
- § 20:15 August 04, 1992
- § 20:16 August 04, 1992
- § 20:17 August 11, 1992
- § 20:18 August 22, 1992
- § 20:19 August 26, 1992
- § 20:20 August 27, 1992
- § 20:21 August 28, 1992
- § 20:22 August 30, 1992
- § 20:23 August 31, 1992
- § 20:24 September 01, 1992
- § 20:25 September 03, 1992
- § 20:26 September 04, 1992
- § 20:27 September 04, 1992
- § 20:28 September 04, 1992
- § 20:29 September 05, 1992
- § 20:30 September 06, 1992
- § 20:31 September 07, 1992
- § 20:32 September 11, 1992
- § 20:33 September 20, 1992
- § 20:34 October 02, 1992
- § 20:35 October 03, 1992

§ 20:36	October 04, 1992
§ 20:37	October 07, 1992
§ 20:38	October 07, 1992
§ 20:39	December 10, 1992
§ 20:40	December 17, 1992
§ 20:41	March 21, 1993
§ 20:42	April 23, 1993
§ 20:43	Final

§ 20:1 December 1, 1991

Investment

Article 2101: Scope and Coverage

1. Subject to paragraphs 2, 3 and 4, this Chapter shall apply to any measure of a Party affecting investment in its territory by an investor of the other Parties.

Article XX12: Coverage and Post-termination Coverage

1. This Chapter shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

Article 401: SCOPE

1. This Part shall apply to any measure of a Party affecting investors, service providers, or other persons of any other Party in respect of:

- a) the establishment;
- b) the acquisition;
- c) the conduct and operation; or
- d) the sale;

of business enterprises in or into its territory.

2. This Chapter shall not apply to any measure taken pursuant to a restriction [expressly] mandated by the Constitution of a Party.

3. This Chapter shall not apply to any measure affecting investments related to:

Article 403: SPECIFIC EXCEPTIONS

3. This Part shall not apply to:

- a) the provision of financial services or insurance; or
- b) financial services, except as provided in Annex 403.3(b);
- b) government procurement.
- (c) public procurement, except as provided in Part 3;

4. Except as otherwise provided, the provisions of subpara-

graph (c) of Article 2103 shall apply to any measure affecting investments related to the provision of services if such services are covered by Chapters [].

(a) services listed in Annex 403.3(a);

Article 2102: National Treatment

Except as otherwise provided in this Chapter, each Party shall grant to investors of the other Parties treatment no less favourable than that granted in like circumstances to its investors with respect to measures affecting:

Article XX01: Establishment and Treatment of Investment

1. Each Party shall accord nondiscriminatory treatment¹ to nationals and companies of another Party in the making of investments in its territory, and in the management, control, operation, maintenance, or disposition of such investments.

2. Each Party shall accord nondiscriminatory treatment to investments in its territory of nationals or companies of another Party, and activities associated therewith.

Article 402: NATIONAL TREATMENT

1. Further to Article 105, and for greater certainty,

Article 105: NATIONAL TREATMENT

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

a) the establishment of business enterprises in its territory;

a) the establishment; (of business enterprises in or into its territory)

b) the acquisition of business enterprises in its territory;

b) the acquisition; (of business enterprises in or into its territory).

c) the conduct and operation of business enterprises in its territory; and

c) the conduct and operation; (of business enterprises in or into its territory) or.

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

- d) the sale of business enterprises in its territory.
- d) the sale; (of business enterprises in or into its territory).

Article 2103: Provincial and State Measures

The provisions of this Chapter regarding the treatment of investors shall mean, with respect to a province or state, treatment no less favorable than that granted by such province or state to any investor of that province or state.

Article XX11: Application to Political Subdivisions

2. The treatment accorded by a Party

- a) under Article XX01.1 with respect to nationals and companies of another Party; and
- b) under Article XX02.2 with respect to the investments (and associated activities of those nationals and companies)

shall, in any state or political subdivision, be no less favorable than the treatment accorded by such state or political subdivision to its residents, or companies legally constituted under its laws, or their investments in its territory.

Article 105: NATIONAL TREATMENT

2. The provisions of this Article shall mean, with respect to measures of a province or state, treatment no less favourable than the most favourable treatment accorded by such province or state to any like goods, services and service providers, investors and suppliers, as the case maybe, of the Party of which it forms a part.

Article 2104: Performance Requirements

1. Except as provided in Annex 2104.1, no Party shall impose on an investor of the other Parties, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a requirement to:

Article XX02: Trade-Related Performance Requirements

1. No Party shall apply, or condition the receipt of an incentive on, any trade-related performance requirement connected with the making, maintenance, or operation of investments of nationals and companies of a Party or a non-Party. Trade-related performance requirements include requirements or commitments to:

Article 404: PERFORMANCE REQUIREMENTS

1. No Party shall impose on an investor of another Party, as a term or condition of permitting an investment in its territory, or

in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a requirement to:

- a) export a given level or percentage of goods or services;
- a) export a given level or percentage of goods or services;
- (a) export a given level or percentage of goods or services;
- b) substitute goods or services from the territory of such Party for imported goods or services;
- b) substitute goods or services from the territory of such Party for imported goods or services;
- c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or grant a preference to goods or services produced in such territory; or
- (b) substitute goods or services from the territory of such Party for imported goods or services;
- c) purchase goods or services in the territory of such Party or from suppliers located in such territory, or accord a preference to goods or services located in such territory;
- (c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or accord a preference to goods or services produced in such territory;
- d) achieve a given level or percentage of domestic content.
- d) achieve a given level or percentage of domestic content; or . . .
- (d) achieve a given level or percentage of domestic content; or . . .

2. No Party shall prohibit or otherwise restrict an investor established in the territory of another Party from:

- a) exporting goods and services from such territory to a non-party country;
- b) importing to such territory goods and services from a non-party country; or
- c) using goods and services originating in a non-party country.

Article 407: EXTRATERRITORIALITY

1. No party shall prohibit one of its investors on the territory of another Party from exporting goods and services from such territory to a third country, from importing to such territory goods and services from a third country or from using goods and services originating in a third country.

3. For purposes of paragraphs 1 and 2, a Party "imposes" a requirement or commitment on an investor when it requires, as a matter of law, a particular act or omission of an investor.

4. For purposes of this Article, a Party "imposes" a requirement or commitment on an investor when it requires particular action of an investor or when, after the date of the entry into force of this Agreement for that Party, it enforces any undertaking or commitment described in this Part given to that Party after the date this Agreement enters into force for that Party.

Article 2105: Monitoring

1. Each Party may require investors of the other Parties who make or have made an investment in its territory to submit to it routine information respecting such investment. The Parties shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position.

10. Nothing in this Chapter shall preclude a Party from:

a) prescribing special formalities in connection with the making of investments by nationals or companies of another Party, or

b) requiring nationals or companies of another Party to provide routine information respecting such investments for informational and statistical purposes, provided

such formalities and requirements do not impair the substance of any of the rights set forth in this Chapter.

4. Notwithstanding the provisions of Article 105, a Party may require an investor, service provider, or other person of another Party to submit to it routine information solely for information or for statistical purposes. Such Party shall protect such business information from disclosure that would prejudice the investor's competitive position.

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

Article 2106: Transfers

1. Subject to paragraph 2, a Party shall not prevent an investor of another Party from transferring:

Article XX05: Transfers Relating to Investments

1. Each Party shall permit all transfers related to investments in its territory of nationals and companies of another Party to be made freely and without delay. Such transfers include:

Article 406: TRANSFERS

1. Subject to Article 505 and paragraphs 2 and 4, no Party shall prevent an investor or service provider of another Party

from transferring the returns on an investment or service or from otherwise making international payments and transfers.

a) any profits from an investment, including dividends;

b) any royalties, fees, interest and other earnings from an investment; or

a) returns;²

c) any proceeds from the sale of all or any part of an investment or from the partial or complete liquidation of such investment.

e) proceeds from the sale or liquidation of all or any part of an investment.

2. A Party may, through the equitable, non-discriminatory and bona fide application of its laws, prevent any transfer referred to in paragraph 1 if such transfer is inconsistent with any measure of general application relating to:

3. Notwithstanding the provisions of paragraphs 1 and 2, a Party may adopt and enforce laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, a Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable and good faith application of its law.

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

a) exchange controls or preferential exchange rates arrangements;

b) bankruptcy, insolvency or the protection of the rights of creditors;

. . . protect the rights of creditors . . .

(a) bankruptcy, insolvency or the protection of the rights of creditors;

c) issuing, trading or dealing in securities;

(b) issuing, trading or dealing in securities;

d) criminal or penal offences;

(c) criminal or penal offenses;

e) reports of currency transfers;

(a) requiring reports of currency transfer;

(d) reports of currency transfers;

²"Return" means an amount derived from an investment of nationals or companies of a Party, including profit, dividend, interest, capital gain, royalty payment, management fee, technical assistance or other fee, or returns in kind.

- f) withholding taxes; or
- (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers.
- (e) withholding taxes; (or)
- g) ensuring the satisfaction of judgments in judicial proceedings.
- ... ensure the satisfaction of judgments in adjudicatory proceedings . . .
- (f) ensuring the satisfaction of judgments in adjudicatory proceedings.

Article 2107: Existing Legislation and Transition Measures

1. The provisions of Articles 2102, 2103, 2104 and 2106 of this Chapter shall not apply to:

Article 103: EXTENT OF OBLIGATIONS

2. Notwithstanding paragraph 1, except in respect of Part 2 and as otherwise provided herein the obligations of this Agreement shall not apply to:

- a) a non-conforming provision of any existing measure;
- (a) a non-conforming provision of any existing measure;
- b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or
- (b) the continuation or prompt renewal or a non-conforming provision of any existing measure; or
- c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of Articles 2102, 2103, 2104 or 2106.
- (c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with the obligations of this Agreement.

Article 2108: Disputes

Disputes arising from the interpretation and application of this Chapter shall not be subject to the dispute settlement provisions of this Agreement.

Article XX07: Settlement of Disputes between a Party and a National or Company of Another Party

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of another Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment

authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Chapter with respect to an investment.

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

- a) to the courts or administrative tribunals of the Party that is a party to the dispute;
- b) in accordance with any applicable previously-agreed dispute settlement procedures; or
- c) in accordance with the terms of paragraph 3.

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

- i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention;
- ii) to the Additional Facility of the Centre, if the Centre is not available;
- iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or
- iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

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

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3, shall satisfy the requirement for:

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

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

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

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

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the national or company 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.

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

Article XX08: Settlement of Disputes Between Parties

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

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

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

Article 2109: National Security

A Party may deny the application of this Chapter to investors of the other Parties for reasons of national security.

Article XX09: Public Order and National Security

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

[Note: This provision is self-judging.]

Article 110: NATIONAL SECURITY

1. Nothing in this Agreement shall be construed:

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

(b) to prevent any Party from imposing any measure which it determines in directly related and essential to:

(i) supplying a military establishment of a Party with arms, ammunition or implements of war, or enabling fulfilment of a critical defence contract of a Party;

(ii) responding to a situation of armed conflict involving the Party taking the measure;

(iii) implementing international agreements relating to the non-proliferation of nuclear, chemical or biological weapons, other nuclear explosive devices, or chemical or biological agents;

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

(c) to prevent any Party from taking measures in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. Any determination made under paragraph 1(b) shall be published promptly in the official journal of that Party.

3. The Party refusing to furnish or allow access to any information under paragraph 1(a) or imposing any measure under paragraphs 1(b) or (c) shall ensure that such action constitutes the means that least infringes on the rights and reasonable expectations of the Parties under this Agreement and is no broader in scope or duration than necessary.

4. Except in cases of emergency, the Party proposing to take any measure under paragraphs 1(b) or (c) shall consult with the other Parties prior to taking such measure; and in any even-

shall consult upon request in accordance with the provisions of Part 6.

Article 2110: Definitions

For purposes of this Chapter;

DEFINITIONS

As used in this Chapter, the following terms shall have the following meanings:

DEFINITIONS

For the purposes of this Part.

acquisition with respect to:

acquisition with respect to:

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

(a) a business enterprise carried on by an entity, means an acquisition, as a result of one or more transactions, of the ultimate direct or indirect control of the entity through the acquisition of the ownership of voting interests; or

b) any business enterprise, means an acquisition, as a result of one or more transactions, of the ownership of all or substantially all of the assets of the business enterprise used in carrying on the business.

(b) any business enterprise, means an acquisition, as a result of one or more transactions, of the ownership of all or substantially all of the assets of the business enterprise used in carrying on the business;

agency

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

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

a) a place of business;

(a) a place of business;

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

(b) an individual or individuals employed or self-employed in connection with the business; and

c) assets used in carrying on the business.

(c) assets used in carrying on the business;

NOTE: A part of a business enterprise that is capable of being

carried on as a separate business enterprise is itself a business enterprise.

NOTE: A part of a business enterprise that is capable of being carried on as a separate business enterprise is itself a business enterprise;

Constitution of a Party

control or controlled, with respect to:

control or controlled, with respect to:

a) a business enterprise carried on by an entity, means

(a) a business enterprise carried on by an entity, means

i) the ownership of all or substantially all of the assets used in carrying on the business enterprise, and

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

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

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

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

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

entity means a corporation, partnership, trust or joint venture.

entity means a corporation, partnership, trust or joint venture;

establishment means a start-up of a new business enterprise and the activities related thereto.

establishment means a start-up of a new business enterprise and the activities related thereto;

investment means:

investment means:

a) the establishment of a new business enterprise, or

(a) the establishment of a new business enterprise; or

b) the acquisition of a business enterprise; and includes:

(b) the acquisition of a business enterprise; and includes:

c) as carried on, the new business enterprise so established

or the business enterprise so acquired, and controlled by the investor who has made the investment; and

(c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and

d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor.

(d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor;

1. "Investment" means every kind of investment, including investment consisting or taking the form of:³

a) equity;

b) a company or shares of stock or other interests in a company or interests in the assets thereof;

c) loans (other than the extension of short term credit), bonds or debt securities;

d) service or investment contracts;

e) a claim to money or a claim to performance having economic value;

f) tangible or intangible property;

g) intellectual property which includes rights relating to:

i) literary and artistic works, including sound recordings,

ii) inventions,

iii) industrial designs,

iv) semiconductor mask works,

v) trade secrets, know-how, and confidential business information, and

vi) trademarks, service marks, and trade names; and

h) any right conferred by law or contract, or any license or permit pursuant to law.

investor of a Party means:

6. "Investments of nationals or companies of a Party" mean investments owned or controlled directly or indirectly by nationals or companies of such Party.

investor of a Party means:

a) [such Party or agency thereof];

(a) such Party or agency thereof;

³To "make investments" includes establishing a new investment, acquiring all or part of an existing investment, and expanding an existing investment (Paragraph 7 of the definitions in the U.S. text).

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

c) a national of such Party;

(c) a national of such Party;

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

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

i) [such Party or one or more agencies thereof],

(i) such Party or one or more agencies thereof;

ii) [one or more provinces or states of such Party or one or more agencies thereof],

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

iii) one or more nationals of such Party,

(iii) one or more nationals of such Party;

iv) [one or more entities described in paragraph (e)], or

(iv) one or more entities described in paragraph (e); or

v) any combination of persons or entities described in [(i), (ii)], (iii) [and (iv)]; or

(v) any combination of persons or entities described in (i), (ii), (iii) and (iv); or

e) an entity that is not ultimately controlled directly or indirectly through the ownership of voting interests where a majority of the voting interests of such entity are owned by:

(e) an entity that is not ultimately controlled directly or indirectly through the ownership of voting interests where a majority of the voting interests of such entity are owned by:

i) persons described in subparagraph[s] (d) [(i), (ii) and] (iii),

(i) persons described in subparagraphs (d) (i), (ii) and] (iii);

ii) entities incorporated or otherwise duly constituted in the territory of such Party and, in the case of entities that carry on business, carrying on a business enterprise located in the territory of such Party, other than any such entity in respect of which it is established that nationals of a third country control such entity or own a majority of the voting interests of such entity, or

(ii) entities incorporated or otherwise duly constituted in the territory of such Party and, in the case of entities that carry on business, carrying on a business enterprise located in the territory of such Party, other than any such entity in respect of which it is established that nationals of a third country control such entity or own a majority of the voting interests of such entity; or

iii) [any combination of persons or entities described in (i) and (ii)];

(iii) any combination of persons or entities described in (i) and (ii);

that makes or has made an investment.

that makes or has made an investment;

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

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

investor of a non-party country means an investor other than an investor of a Party, that makes or has made an investment.

investor of a third country means an investor other than an investor of a Party, that makes or has made an investment;

joint venture means an association of two or more persons or entities where the relationship among those associated persons or entities does not, under the laws in force in the territory of the Party in which the investment is made, constitute a corporation, a partnership or a trust and where all those associated persons or entities own or will own assets of a business enterprise, or directly or indirectly own or will own voting interests in an entity that carries on a business enterprise.

joint venture means an association of two or more persons or entities where the relationship among those associated persons or entities does not, under the laws in force in the territory of the Party in which the investment is made, constitute a corporation,

a partnership or a trust and where all those associated persons or entities own or will own assets of a business enterprise, or directly or indirectly own or will own voting interests in an entity that carries on a business enterprise;

law

located in the territory of a Party means, with respect to a business enterprise, a business enterprise that is, or in the case of an establishment will be, carried on in the territory of such Party and has, or in the case of an establishment will have therein:

located in the territory of a Party means, with respect to a business enterprise, a business enterprise that is, or in the case of an establishment will be, carried on in the territory of such Party and has, or in the case of an establishment will have therein:

a) a place of business;

(a) a place of business;

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

(b) an individual or individuals employed or self-employed in connection with the business; and

c) assets used in carrying on the business.

(c) assets used in carrying on the business;

measure shall have the same meaning as in Article 201, except that it shall also include any published policy.

measure includes any law, regulation, procedure, requirement or practice, including any published policy;

ownership means beneficial ownership and with respect to assets also includes the beneficial ownership of a leasehold interest in such assets.

ownership means beneficial ownership and with respect to assets also includes the beneficial ownership of a leasehold interest in such assets;

person [means a Party or agency thereof, a province or state of a Party or agency thereof, or] a national of a Party.

person means a Party or agency thereof, a province or state of a Party or agency thereof, or a national of a Party;

voting interest with respect to

voting interest with respect to

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

(a) a corporation with share capital, means a voting share;

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

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

c) a partnership, trust, joint venture or other organization means an ownership interest in the assets thereof that entitles the owner to receive a share of the profits and to share in the assets on dissolution.

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

voting share means a share in the capital of a corporation to which is attached a voting right ordinarily exercisable at meetings of shareholders of the corporation and to which is ordinarily attached a right to receive a share of the profits, or to share in the assets of the corporation on dissolution, or both.

voting share means a share in the capital of a corporation to which is attached a voting right ordinarily exercisable at meetings of share-holders of the corporation and to which is ordinarily attached a right to receive a share of the profits, or to share in the assets of the corporation on dissolution, or both.

Other provisions

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Article XX01: Establishment and Treatment of Investment

1. . . . In particular, no Party shall (a) impose on a national or company of another Party a requirement that a minimum level of equity in an investment by such national or company (other than nominal qualifying shares for directors or incorporators of corporations) be held by nationals of such Party; or

Article 402: NATIONAL TREATMENT

1. Further to article 105, and for greater certainty,

(a) no Party shall impose on an investor of another Party a requirement that a minimum level of equity, other than nominal qualifying shares for directors or incorporators of corporations be held by its nationals in a business enterprise located in its territory;

(b) require a national or company of another Party, by reason of its nationality, to sell or otherwise dispose of an investment (or any part thereof) in its territory.

(b) no Party shall require an investor of another Party by reason of nationality to sell or dispose of the whole or any part of an investment made in its territory; and

3. With the approval of all other Parties, a Party may maintain limited exceptions to the obligations of paragraphs 1 and 2 provided that any exception to national treatment, other than in the maritime sector, shall not be a greater departure from such obligations than required by or specified in domestic law in force on the date of signature of this Agreement. In the event that the relevant domestic law is liberalized to conform more closely to the obligations of paragraphs 1 and 2, it may not thereafter be made more restrictive. Where a Party takes an exception to national treatment it shall nonetheless accord most favored nation treatment unless specified otherwise in Annex A. A brief description of all exceptions and the laws on they are based shall be set forth in Annex A.

4. Investments of nationals and companies of a Party in the territory of another Party shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

5. Without prejudice to paragraph 4, nationals or companies of a Party whose investments suffer losses in the territory of another Party owing to war or other armed conflict, revolution, insurrection or other similar events shall be accorded at least nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

6. [Temporary entry provision deleted; it will be addressed elsewhere in NAFTA]

7. A Party shall not require that companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments of nationals or companies of another Party, engage as top managerial personnel individuals of any particular nationality.

8. Each Party shall provide nationals and companies of another Party with an effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

9. The most favored nation provisions of this Chapter shall not apply to advantages accorded by a Party by virtue of the Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade.

10. . . .

11. Each Party reserves the right to deny to a company of another Party the advantages of this Chapter if:

- a) nationals of any non-Party own or control such company and such company has no substantial business activities in the territory of the Party under whose laws it is constituted; or
- b) such company is owned or controlled by nationals of a non-Party with which the denying Party does not maintain normal economic relations.

Article 403: SPECIFIC EXCEPTIONS

1. Subject to prior notification and consultation in accordance with Part 6, a Party may deny the benefits of this Part to investors or service providers if it establishes that they originate from a country which is not a Party to this Agreement.
2. The Party denying benefits pursuant to paragraph 1 shall have the burden of establishing that such action is in accordance with that paragraph.
3. . . .

Article XX02: Trade-Related Performance Requirements

-
- e) require that an investment's imports be related to the volume, value or proportion of its exports, or that an investment's exports be related to the volume, value or proportion of its import.

Article 404: PERFORMANCE REQUIREMENTS

-
- (e) relate the volume or value of its purchases of imported products or services to the volume or value of its products or services sold for export.

[Article XX03: State Enterprises]

[Provisions to be provided; may be included elsewhere in the NAFTA text.]

Article 410: STATE ENTERPRISES

Each Party shall ensure that state enterprises engaged in nonregulated commercial activities in competition with private enterprises:

- (a) be subject to domestic competition law and policies in respect of such activities; and
- (b) be given the same treatment under domestic competition law and policies as such private enterprises in respect of such activities.

Article XX04: Expropriation and Compensation

1. Investments of nationals or companies of a Party in the ter-

ritory of another Party shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article XX01.

Article 405: EXPROPRIATION

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

- (a) for a public purpose;
- (b) in accordance with due process of law;
- (c) on a non-discriminatory basis; and
- (d) upon payment of prompt, adequate and effective compensation at fair market value.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

Article XX05: Transfers Relating to Investments

1. . . .

- a) . . .
- b) compensation pursuant to Article XX04;
- c) payments arising out of an investment dispute as defined in Article XX07;
- d) payments made under a contract entered into by an investment, including payments made pursuant to a loan agreement; and
- e) . . .

2. Except as provided in Article XX04.2, a Party shall permit transfers to be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, a Party may adopt and enforce laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, a Party may protect the rights of credi-

tors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable and good faith application of its law.

Article XX06: Transparency

1. Each Party shall make public promptly all laws, regulations, procedures and administrative rulings of general application, and adjudicatory decisions that pertain to or affect investments.

Article 603: PUBLICATION

Each Party shall ensure that any measures of general application respecting any matter covered by this Agreement shall be published promptly or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

2. Each Party shall, to the extent possible, publish in advance and allow opportunity for comment on, any law, regulation, procedure, or administrative ruling of general application that it proposes to adopt respecting the matters covered by this Chapter.

Article 604: NOTIFICATION

1. Each Party shall, to the maximum extent practicable, with respect to any proposed or actual measure that might materially affect the operation of this Agreement:

(a) publish a notice in its official journal at an early stage in such a manner as to enable interested persons and Parties to become acquainted with the measure;

(b) provide written notice to the other Parties as far in advance as possible of the implementation of the measure;

(c) provide upon the request of any Party information and respond to questions pertaining to the measure, whether or not previously notified; and

(d) allow reasonable time between publication and entry into force of the measure to permit interested persons and other Parties to make comments in writing, discuss these comments upon request of any Party, and take the comments and the results of the discussions into account.

2. Paragraph 1 shall not apply in urgent circumstances, provided that the Party:

(a) immediately notifies the other Parties of the measure, together with a brief indication of the objective and rationale of the measure, including the nature of the urgency;

(b) provides to other Parties upon request copies of the measure in its final form; and

(c) allows the other Parties to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

3. The provisions of this Article shall not require any Party to provide confidential information, the disclosure of which would prejudice legitimate commercial interests.

Article XX10: Taxation

Issues of non-discrimination arising under Article XX01 of this Chapter and involving taxation shall be resolved under the criteria and procedures of the convention for the avoidance of double taxation between the Parties involved.

Article 112: TAXATION

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

2. Nothing in this Agreement shall affect:

(a) the right of any Party to adopt or maintain any measure designed to prevent the avoidance of tax by producers, service providers, investors and suppliers of any other Party or to impose non-resident withholding taxes on payments made to producers, service providers, investors and suppliers of any other Party; or

(b) rights and obligations under any international taxation agreement, as may be specified in a Party's instrument of ratification or accession.

Article XX11: Application to Political Subdivisions

1. The obligations of this Chapter shall apply to the political subdivisions of the Parties.

Article 103: EXTENT OF OBLIGATIONS

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

Article XX12: Coverage and Post-termination Coverage

1. . . .

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

DEFINITIONS

2. "Company" means any kind of corporation, company, association, partnership, sole proprietorship or other organization whether or not organized for pecuniary gain.

3. "Company of a Party" means a company legally constituted under the laws and regulations of a Party or a political subdivision thereof.

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

5. "National of a Party" means a natural person who is a national of a Party under its applicable law.

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

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

10. "Most favored nation treatment" means treatment no less favorable than that accorded by a Party, in like circumstances, to nationals or companies of any third party or to investments of such nationals or companies.

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

12. "Return" means an amount derived from an investment of nationals or companies of a Party, including profit, dividend, interest, capital gain, royalty payment, management fee, technical assistance or other fee, or returns in kind.

13. "Activities associated with an investment" or "associated activities" include the making, management, control, operation, maintenance and disposition of investments; the making, performance and enforcement of contracts; the acquisition, use, protection, enforcement and disposition of property of all kinds including intellectual property rights; the borrowing of funds; and the purchase, issuance, and sale of equity shares and other securities.

Canada only

Article 401: SCOPE

1. . . .

2. This Part shall apply to any measure of a self-regulatory organization whose mandate is conferred by the Party, or by its state, provincial or local governments.

Article 402: NATIONAL TREATMENT

1. . . .

(a) . . .

(b) . . .

(c) no Party shall introduce any measure, including any measure requiring the establishment or commercial presence by a person of another Party in its territory, as a condition for the provision of a service, in a manner inconsistent with Article 106.

2. Further to Article 105, the Parties shall implement:

(a) the provisions of Annex 402.1 regarding transportation;

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

(b) the provisions of Annex 402.2 regarding telecommunications services;

(c) the provisions of Annex 402.3 regarding other measures affecting services; and

(d) the provisions of Annex 402.4 regarding measures affecting investors of the Other Parties.

Article 403: SPECIFIC EXCEPTIONS

1. . . .

2. . . .

3. This Part shall not apply to:

(a) . . .

(b) . . .

(c) . . .

(d) public entities, to the extent such entities conduct activities:

(i) in pursuit of monetary, fiscal or exchange rate policy; or

(ii) for the account or with the guarantee or using the financial resources of the Party;

except when those activities are permitted to be carried out by service providers in competition with such public entities;

(e) public or private entities in respect of their activities forming part of a statutory system of social security, health care, education, day care, or public retirement plans;

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

(g) the specific measures of the Parties listed in Annex 403.3(f); and

(h) subject to Article 106, any subsidy.

4. . . .

Article 404: PERFORMANCE REQUIREMENTS

1. . . .

(a) . . .

(b) . . .

(c) . . .

(d)

(e) . . .

2. Further to Article 106, no Party shall impose on an investor of a non-Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a commitment to meet any of the requirements described in paragraph 1 where meeting such a requirement could have a significant impact on trade between two or more of the Parties.

3. Nothing in this Part shall prevent a Party from imposing requirements on an investor of another Party in connection with the grant of a subsidy to such investor.

4. . . .

Article 406: TRANSFERS

1. . . .

2. . . .

(a) . . .

(b) . . .

(c) . . .

(d) . . .

(e) . . .

(f) . . .

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

4. Paragraph 3 shall not be construed as preventing a Party from taxing its investors on their share of any income, earnings or profits attributable to a business carried on or an investment made in another Party, provided that the tax so charged does not

exceed the tax that would be so charged if such income, earnings or profits were repatriated, without any further tax on the repatriation, to its investors.

Article 407: EXTRATERRITORIALITY

1. . . .

2. No Party may prescribe new laws or enforce existing laws 80 as to require investors or service providers to act, in the territory of another Party, in a manner that conflicts with the laws of such other Party.

Article 408: MONOPOLIES

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

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

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

a) notify the other Parties;

b) upon request, engage in consultations; and

c) endeavor to minimize or eliminate any nullification or impairment of benefits under this Agreement that might otherwise be caused by the designation.

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

Article 409: TECHNOLOGY CONSORTIA

No Party may enact or apply any measure in respect of participation in or treatment of any combination, consortium, or other group of business enterprises including respecting access to technology, in a manner that would violate Article 105 or Article 106.

Article 411: COMPETITION

1. The Parties recognize the contribution that competition laws and policies can make to the fulfilment of the object and purpose of this Agreement.

2. To that end, each Party agrees to:

a) enact and enforce, within [] years of the entry into force of this Agreement for that Party, transparent competi-

tion laws, policies and procedures consistent with the governing principles of this Agreement, that have as their objective the control of anti-competitive agreements, mergers, monopolies, pricing practices and abuse of dominant position; and

b) pursue negotiations with the other Parties to expand and enhance international agreements and arrangements for mutual legal assistance, notification, consultation, and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

3. In the enforcement of their respective competition laws and policies in those cases involving persons, assets, or practices located, or occurring, in the territory of any other Party, each Party shall, upon request, advise such other Party of the results of its assessment of the following factors:

a) the relative significance of the anti-competitive activities involved and of conduct within the enforcing Party's territory as compared to conduct within such other Party's territory;

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

c) the related significance of the effects of the enforcement activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

e) the degree of conflict or consistency between the enforcement activities and the other Party's law or articulated economic policies; and

f) the extent to which enforcement activities of such other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

4. The Commission shall establish a Competition Policy Committee to consider and make recommendations [no later than] on:

a) the impact of competition law and policy on trade within the free trade area;

b) the impact of trade law and regulation on competition within the free trade area; and

c) the potential for reliance on competition laws and policies to discipline anti-competitive transborder pricing practices and market segmentation.

DEFINITIONS

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

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

§ 20:2 January 16, 1992

CHAPTER 21 — INVESTMENT

Chapter XX — Investment

PART 4 — INVESTMENT AND CONDUCT OF BUSINESS OPERATIONS

SCOPE, COVERAGE AND DURATION

Article Y01: Scope ^{USA}[and Post Termination Coverage]

1. ^{MEX}[Subject to paragraphs 3, 4 and 5,] ^{CDA} ^{MEX}[this ^{MEX} [Chapter] ^{CDA} [Part] shall apply to any measure of a Party affecting] ^{MEX}[investment in its territory by an investor of the other Parties] ^{CDA}[investors or service providers of any other Party in respect of:

- a) the establishment;
- b) the acquisition;
- c) the conduct and operation; or
- d) the sale;

of business enterprises in or into its territory.]

^{USA}[2. This Chapter shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter. With respect to investments made prior to the date of termination of this Agreement and to which this Chapter otherwise applies, the provisions of all of this Chapter shall thereafter continue to be effective for a further period often years from such date of termination.]

^{MEX}[3. This Chapter shall not apply to any measure taken pursuant to a restriction expressly mandated by the Constitution of a Party.]

^{MEX} ^{CDA}[4. This ^{MEX} [Chapter] ^{CDA} [Part] shall not apply to:

- a) the provision of financial services or insurance ^{CDA}[except as provided in Annex Y01.4(a)];

U.S.: Note 2 — While financial services will be covered in the financial services chapter, certain provisions of the investment chapter may apply to financial services by cross-reference in the financial services chapter.