

# **AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS**

THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA, hereinafter referred to as the "Contracting Parties",

RECOGNIZING that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them,

HAVE AGREED as follows:

## **Article I. Definitions**

For the purpose of this Agreement:

(a) "Cultural industries" means natural persons or enterprises engaged in any of the following activities:

(i) The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

(ii) The production, distribution, sale or exhibition of film or video recordings;

(iii) The production, distribution, sale or exhibition of audio or video music recordings;

(iv) The publication, distribution, sale or exhibition of music in print or machine readable form; or

(v) Radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

(b) "enterprise" means:

(i) Any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and

(ii) A branch of any such entity;

For further certainty, "business enterprise" means any enterprise which is constituted or organized in the expectation of economic benefit or other business purposes.

(c) "existing measure" means a measure existing at the time this Agreement enters into force;

(d) "financial institution" means any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Contracting Party in whose territory it is located;

(e) "financial service" means a service of a financial nature, including insurance, and a service incidental or auxiliary to a service of a financial nature;

(f) "intellectual property rights" means copyright and related rights, trademark rights, patent rights, rights in layout designs of semiconductor integrated circuits, trade secret rights, plant breeders' rights, rights in geographical indications and industrial design rights;

(g) "investment" means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural

person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

- (i) Movable and immovable property and any related property rights, such as mortgages, liens or pledges;
- (ii) Shares, stock, bonds and debentures or any other form of participation in an enterprise;
- (iii) Money, claims to money, and claims to performance under contract having a financial value;
- (iv) Goodwill;
- (v) Intellectual property rights;
- (vi) Rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources;

But does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

For further certainty, investment does not mean, claims to money that arise solely from:

- (i) Commercial contracts for the sale of goods or services by a national or enterprise in the territory of one Contracting Party to a national or an enterprise in the territory of the other Contracting Party; or
- (ii) The extension of credit in connection with a commercial transaction, such as trade financing, where the original maturity of the loan is less than three years.

Without prejudice to subparagraph (ii) immediately above, a loan to an enterprise where the enterprise is an affiliate of the investor shall be considered an investment.

For the purpose of this Agreement, an investor shall be considered to control an investment if the investor has the power to name a majority of its directors or otherwise to legally direct the actions of the enterprise which owns the investment.

Any change in the form of an investment does not affect its character as an investment.

For greater clarity, returns shall be considered a component of investment. For the purpose of this Agreement, "returns" means all amounts yielded by an investment, as defined above, covered by this Agreement and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income.

(h) "investor" means:

- (i) Any natural person possessing the citizenship of one Contracting Party who is not also a citizen of the other Contracting Party; or
- (ii) Any enterprise as defined by paragraph (b) of this Article, incorporated or duly constituted in accordance with applicable laws of one Contracting Party;

Who owns or controls an investment made in the territory of the other Contracting Party.

For the purpose of this Agreement, in the case of Canada, the term "natural person possessing the citizenship of one Contracting Party" shall include a natural person permanently residing in Canada in accordance with the laws of Canada, including the provisions of the Immigration Act of Canada or any statute replacing it in whole or in part (the "Act"), and without limiting the generality of the foregoing shall include a natural person who:

- (a) Has been granted landing within the meaning of the Act;
- (b) Has not become a Canadian citizen; and
- (c) Has not ceased to be a permanent resident of Canada pursuant to the provisions of the Act.

(i) "measure" includes any law, regulation, procedure, requirement, or practice;

(j) "state enterprise" means an enterprise that is governmentally-owned or controlled through ownership interests by a government;

(k) "territory" means the territory and air space of each Contracting Party, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea, over which each Contracting Party exercises, in

accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such area;

(l) "senior managerial personnel" means persons who hold positions of trust, including managers, directors, administrators, superintendents, and general chiefs of companies.

## **Article II. Promotion and Protection of Investments**

(1) Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.

(2) Each Contracting Party shall accord investments of the other Contracting Party:

(a) Fair and equitable treatment in accordance with principles of international law; and

(b) Full protection and security.

## **Article III. Establishment of Investment**

1. Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by:

(a) Investors or prospective investors of any third State;

(b) Its own investors or prospective investors.

For the purpose of this Agreement, "prospective investor" means any natural person or enterprise of one Contracting Party who actually has carried out concrete steps toward making an investment in the territory of the other Contracting Party.

2. A Contracting Party may adopt or maintain exceptions to the obligation stated in paragraph (1) above, in the sectors, measures, or with respect to the matters specified in Sections I, II, III and VI of Annex I of this Agreement.

## **Article IV. Treatment of Established Investment**

With respect to investments and the enjoyment, use, management, conduct, operation, expansion, and sale or other disposition thereof, each Contracting Party shall accord treatment no less favourable than that which, in like circumstances, it grants in respect of:

(a) Investments in its territory of investors of a third State;

(b) Investments in its territory of its own investors.

## **Article V. Management, Directors and Entry of Personnel**

1. A Contracting Party may not require that an enterprise of that Contracting Party, that is an investment under this Agreement, appoint to senior management positions individuals of any particular nationality.

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

3. Subject to its laws, regulations and policies relating to the entry of aliens, each Contracting Party shall grant temporary entry to citizens of the other Contracting Party employed by an enterprise or a subsidiary or affiliate thereof, in a capacity that is senior managerial or executive or requires specialized knowledge. For further certainty, however, nothing in this Article shall be interpreted as an authorization to carry on a professional practice in the territory of a Contracting Party.

## **Article VI. Performance Requirements**

Neither Contracting Party may impose, in connection with permitting the establishment or acquisition of an investment, or enforce in connection with the subsequent regulation of that investment, any of the requirements set forth in the World Trade Organization Agreement on Trade-Related Investment Measures contained in the Final Act Embodying the Results of

the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994.

## **Article VII. Compensation for Losses**

Investors of one Contracting Party who suffer losses because their investments on the territory of the other Contracting Party are affected by an armed conflict, a national emergency or a natural disaster on that territory, shall be accorded by such latter Contracting Party, in respect of restitution, indemnification, compensation or other settlement, treatment no less favourable than that which it accords in respect of investments of its own investors or investments of investors of any third State.

## **Article VIII. Expropriation**

1. Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the fair market value of the investment expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier. Such compensation shall be payable:

(a) In Canada, from the date of expropriation with interest at a normal commercial rate;

(b) In Costa Rica, from the date of dispossession in accordance with Article 11 of the Expropriation Act No. 7495 of May 3, 1995 (hereinafter referred to as the "Expropriation Act"), with interest at the average deposit rate prevailing in the national banking system;

Without delay and shall be effectively realizable and freely transferable. Valuation criteria to determine fair market value shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, including, in the case of Costa Rica, Article 22 of the Expropriation Act.

2. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment in accordance with the principles set out in this Article.

3. The provisions of this Article apply to taxation measures unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure in question is not an expropriation.

## **Article IX. Transfer of Funds**

1. Each Contracting Party shall permit all transfers relating to an investment covered by this Agreement, including returns, to be made freely and without delay. Without limiting the generality of the foregoing, such transfers include:

(a) Funds in repayment of loans related to an investment;

(b) The proceeds of the total or partial liquidation of any investment;

(c) Wages and other remuneration accruing to a citizen of the other Contracting Party who was permitted to work in connection with an investment in the territory of the other Contracting Party;

(d) Any compensation owed to an investor by virtue of Articles VII or VIII of this Agreement.

2. Transfers shall be effected without delay in any convertible currency. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer.

## **Article X. Subrogation**

1. If a Contracting Party or any agency thereof makes a payment to any of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Contracting Party shall recognize the validity of the subrogation in favour of such Contracting Party or agency thereof to any right or title held by the investor.

2. A Contracting Party or any agency thereof which is subrogated to the rights of an investor in accordance with paragraph (1) of this Article, shall be entitled in all circumstances, subject only to reasonable procedural requirements, to the same

rights as those of the investor in respect of the investment concerned and its related returns. Such rights may be exercised by the Contracting Party or any agency thereof or by the investor if the Contracting Party or any agency thereof so authorizes.

## **Article XI. Taxation Measures**

1. Except where express reference is made thereto, nothing in this Agreement shall apply to taxation measures. For further certainty, nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention or existing tax laws. In the event of any inconsistency between the provisions of this Agreement and any such convention or law, the provisions of that convention or law shall apply to the extent of the inconsistency.
2. An investor claiming that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment, shall be entitled to submit such a claim to arbitration in accordance with the provisions of Article XII, unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor, jointly determine that such claim is without foundation and consequently, there are no grounds for submitting such claim to arbitration under Article XII.
3. An investor may submit a claim relating to taxation measures covered by this Agreement to arbitration under Article XII only if the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in Article VIII(3) or paragraph (2) of this Article within six months of being notified in accordance with the relevant Article.
4. The taxation authorities referred to in Articles VIII(3) and paragraph (2) of this Article shall be the following until notice in writing to the contrary is provided to the other Contracting Party:

(a) For Canada:

The Assistant Deputy Minister, Tax Policy, of the Department of Finance of Canada;

(b) For Costa Rica:

The Director of the Department of Direct Tax Office, Ministry of Treasury of Costa Rica.

## **Article XII. Settlement of Disputes between an Investor and the Host Contracting Party**

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.
2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). The investor will bear the burden of proof to demonstrate:
  - (a) That it is an investor as defined by Article I of this Agreement; Article I of this Agreement;
  - (b) That the measure taken or not taken by the Contracting Party is in breach of this Agreement; and
  - (c) That the investor has incurred loss or damage by reason of, or arising out of, that breach.

For the purpose of this Agreement, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:

(a) The investor has consented in writing thereto;

(b) The investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;

(c) Not 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; and

(d) In cases where Costa Rica is a party to the dispute, no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement.

4. The dispute may be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 18 March, 1965 ("ICSID Convention"), if both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

(b) The Additional Facility Rules of ICSID, if either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

(c) An ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in case neither Contracting Party is a member of ICSID, or if ICSID declines jurisdiction.

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

6.

(a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or any relevant provision of Annex II, shall satisfy the requirements for:

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

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

(b) Any arbitration under this Article shall be held in a State that is a party to the New York Convention, and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of that Convention.

7. A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement, the applicable rules of international law, and with the domestic law of the host State to the extent that the domestic law is not inconsistent with the provisions of this Agreement or the principles of international law.

8. An investor of one Contracting Party may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Contracting Party that is a party to the dispute, according to the latter's domestic legislation, prior to the institution of the arbitral proceeding.

9. A tribunal may award, separately or in combination, only:

(a) Monetary damages and any applicable interest;

(b) Restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

10. An award of arbitration shall be final and binding and shall be enforceable in the territory of each of the Contracting Parties.

11. Any proceedings under this Article are without prejudice to the rights of the Contracting Parties under Articles XIII. Without limiting the generality of the foregoing, however, it is agreed that neither Contracting Party shall give diplomatic protection, or bring an international claim in respect of specific loss or damage suffered by an investor of that Contracting Party, where such loss or damage is, or has been, the subject matter of arbitration under this Article, unless the other Contracting Party fails to comply with the award rendered in such arbitration.

## **Article XIII. Disputes between the Contracting Parties**

1. Either Contracting Party may request consultations on the interpretation or application of this Agreement. The other Contracting Party shall give sympathetic consideration to the request. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled amicably through

consultations.

2. If a dispute cannot be settled through consultations, it shall, at the request of either Contracting Party, be submitted to an arbitral panel for decision.

3. An arbitral panel shall be constituted for each dispute. Within two months after receipt through diplomatic channels of the request for arbitration, each Contracting Party shall appoint one member to the arbitral panel. The two members shall then select a national of a third State who, upon approval by the two Contracting Parties, shall be appointed Chairman of the arbitral panel. The Chairman shall be appointed within four months after the receipt, through diplomatic channels, of the request for arbitration.

4. If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or is prevented from discharging the said function, the Member of the International Court of Justice next in seniority, who is not a national of either Contracting Party, shall be invited to make the necessary appointments.

5. The arbitral panel shall determine its own procedure. The arbitral panel shall reach its decision by a majority of votes. Such decision shall be final and binding on both Contracting Parties. Unless otherwise agreed, the decision of the arbitral panel shall be rendered within six months of the appointment of the Chairman in accordance with paragraphs (3) or (4) of this Article.

6. Each Contracting Party shall bear the costs of its own member of the panel and of its representation in the arbitral proceedings; the costs related to the Chairman and any remaining costs shall be borne equally by the Contracting Parties. The arbitral panel may, however, in cases where it considers appropriate, including when it is of the view that one Contracting Party has acted in bad faith, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both contracting Parties. Such decision shall be made unanimously and shall include a written explanation of the arbitral panel's reasons.

7. The Contracting Parties shall, within sixty (60) days of the decision of a panel, reach agreement on the manner in which to implement the decision of the panel. If the Contracting Parties fail to reach agreement, the Contracting Party bringing the dispute shall be entitled to compensation or to suspend benefits of equivalent value to those awarded by the panel.

## **Article XIV. Transparency**

1. Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them.

2. Upon request by either Contracting Party, information shall be exchanged on the measures of the other Contracting Party that may have an impact on new investments or investments covered by this Agreement.

## **Article XV. Application and Entry Into Force**

1. This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement. For further certainty, this Agreement does not create rights regarding actions taken and completed prior to its entry into force.

2. The two Annexes hereto shall form integral parts hereof.

3. Each Contracting Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications.

4. This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XIV inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at San Jose, this 18th day of March 1998, in two originals, in the English, French and Spanish languages, each version being equally authentic.

FOR THE GOVERNMENT OF CANADA

Sergio Marchi

Minister of International Trade

FOR THE GOVERNMENT OF COSTA RICA

José Manuel Salazar

Minister of International Trade

## **Annex I**

### **General and Specific Exceptions**

#### **Special Provisions**

### **I. Mfn Exceptions**

1. Articles III(1)(a) and IV(a) shall not apply to treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement:

(a) Establishing, strengthening or expanding a free trade area, customs union, common market or economic union;

(b) Negotiated within the framework of the World Trade Organization, or any successor organization (including in particular the GATT and the General Agreement on Trade in Services (GATS)), and containing obligations and rights relating to trade in services; or GATT and the General Agreement on Trade in Services (GATS)), and containing obligations and rights relating to trade in services; or

(c) Relating to:

(i) Aviation;

(ii) Telecommunications transport networks and telecommunications transport services;

(iii) Fisheries;

(iv) Maritime matters, including salvage; or

(v) Financial services.

2. Article III (1)(a) does not apply in respect of financial services.

3. Articles III (1)(a) and IV(a) do not apply in respect of customs brokerage.

### **II. National Treatment Exceptions**

1. Articles III (1)(b), IV(b), V(1), V(2) and VI do not apply to:

(a) Any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;



(b) Any existing non-conforming measures maintained within the territory of a Contracting Party; the continuation or prompt renewal of any such non-conforming measure or any measure referred to in paragraph (a) above; any amendment to such non-conforming measure or any measure referred to in paragraph (a) above, to the extent that such amendment does not decrease the conformity of the measure as it existed immediately before the amendment with those obligations;

(c) The right of each Contracting Party to make or maintain exceptions within the following sectors or matters:

Canada:

Social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);

Services in any other sector;

Residency requirements for ownership of oceanfront land;

Measures implementing the Northwest Territories Oil and Gas Accords;

Government securities — acquisition, sale or other disposition by nationals of the other Contracting Party of bonds, treasury bills or other kinds of debt securities issued by the Government of Canada, a province or local government.

Costa Rica:

Government or social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);

Services in any other sector;

Concessions in the maritime land zone, as defined by Costa Rican law;

Export promotion programs.

2. The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that it may rely on to limit national treatment obligations in accordance with paragraph (1)(b) hereof.

3. Nothing in this Agreement shall prevent either Contracting Party from maintaining its state monopolies existing on the date of entry into force of this Agreement. The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing their existing state monopolies.

### **III. General Exceptions and Exemptions**

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

2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures:

(a) Necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) Necessary to protect human, animal or plant life or health; or

(c) Relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

3. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as:

(a) The protection of investors, depositors, financial market participants, policy holders, policy claimants, or persons to whom a fiduciary duty is owed by a financial institution;

(b) The maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) Ensuring the integrity and stability of a Contracting Party's financial system.

4. Investments in cultural industries are exempt from the provisions of this Agreement.

5. The provisions of Articles II, III, IV, V and VI of this Agreement do not apply to:

(a) Procurement by a government or state enterprise;

(b) Subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance;

(c) Any measure denying investors of the other Contracting Party and their investments any rights or preferences provided to the aboriginal peoples of a Contracting Party; or

(d) Any current or future foreign aid program to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits.

6. Subject to the provisions contained in the Agreements concluded under the World Trade Organization, including, in particular, Article XIII of the GATT 1994, nothing in this Agreement shall affect the authority of one Contracting Party to decide whether or not to negotiate with the other Contracting Party, or with any third State, quantitative export restrictions, nor its authority to allocate them.

7. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of the latter Contracting Party, and to investments of its investors, if investors of a third State own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

#### **IV. Exceptions to Specific Obligations**

1. In respect of intellectual property rights, a Contracting Party may derogate from Article IV in a manner that is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh, April 15, 1994.

2. The provisions of Article VIII do not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh, April 15, 1994.

#### **V. Special Provisions Relating to Transfers**

1. Notwithstanding the provisions of Article IX, a Contracting 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;

(e) Ensuring the satisfaction of judgments in adjudicatory proceedings; or

(f) Ensuring the payment of income tax obligations.

2. Neither Contracting Party may require its investors to transfer, or penalize its investors that fail to transfer, the returns attributable to investments in the territory of the other Contracting Party.

3. Paragraph (2) shall not be construed to prevent a Contracting Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in paragraph (1).

4. Notwithstanding the provisions of Article IX, and without limiting the applicability of paragraph (1) above, a Contracting Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.

## **VI. Exclusions from Dispute Settlement (establishment)**

1. Decisions of a Contracting Party as to whether or not to permit establishment of a new business enterprise, or acquisition of an existing business enterprise or a share of such enterprise, by investors or prospective investors of the other Contracting Party shall not be subject to dispute settlement under Article XII of this Agreement. Article XII of this Agreement.

2. Further to paragraph (1), decisions by a Contracting Party pursuant to a pre-existing non-conforming measure described in Article II(1)(b) of this Annex as to whether or not to permit an acquisition shall, in addition, not be subject to dispute settlement under Article XIII of this Agreement.

Annex II

Specific Rules re Article XII

Settlement of Disputes between an Investor and the Host Contracting Party

### **I. Prudential Measures**

1. Where an investor submits a claim to arbitration under Article XII, and the disputing Contracting Party invokes Article III(3) or V(4) of Annex I, the tribunal established pursuant to Article XII shall, at the request of that Contracting Party, seek a report in writing from the Contracting Parties on the issue of whether and to what extent the said paragraphs are a valid defence to the claim of the investor. The tribunal may not proceed pending receipt of a report under this Article.

2. Pursuant to a request received in accordance with paragraph (1), the Contracting Parties shall proceed in accordance with Article XIII to prepare a written report, either on the basis of agreement following consultations, or by means of an arbitral panel. The consultations shall be between the financial services authorities of the Contracting Parties. The report shall be transmitted to the tribunal, and shall be binding on the tribunal.

3. Where, within seventy (70) days of the referral by the tribunal to the Contracting Parties, no request for the establishment of a panel pursuant to paragraph (2) has been made and no report has been received by the tribunal, the tribunal may proceed to decide the matter.

4. Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute.

### **II. Damage Incurred by a Controlled Enterprise**

1. A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case:

(a) Any award shall be made to the affected enterprise;

(b) The consent to arbitration of both the investor and the enterprise shall be required;

(c) Both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind; and

(d) The investor may not make a claim 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 it has incurred loss or damage.

2. Notwithstanding paragraph (1)(a) above, where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:

(a) A consent to arbitration by the enterprise under paragraph (1)(b) above; and

(b) A waiver from the enterprise under paragraph (1)(c) above.