

# **Agreement between the Government of Canada and the Government of Romania for the promotion and reciprocal protection of investments**

THE GOVERNMENT OF CANADA and THE GOVERNMENT OF ROMANIA, 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) "confidential information" means confidential business information and information that is privileged or otherwise protected from disclosure;

(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;

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

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

(e) "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;

(f) "intellectual property rights" means copyright and related rights, trademark rights, patent rights, rights in layout designs of semiconductor integrated circuits, trade secrets 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 investor 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 rights, such as mortgages, liens or pledges,

(ii) Shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture,

(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;

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

(h) "investor" means

In the case of Canada:

(i) Any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws, or

(ii) Any enterprise incorporated or duly constituted in accordance with applicable laws of Canada,

Who makes the investment in the territory of Romania; and

In the case of Romania:

(i) Any natural person who, according to the Romanian law, is considered to be its citizen and who does not possess the citizenship of Canada, or

(ii) Any legal person, including any company, corporation, business association or other organization, which is constituted or otherwise duly organized, under the Romanian law and has its seat, together with real economic activities in the territory of Romania,

Who makes the investment in the territory of Canada;

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

(j) "public entity" means a central bank or monetary authority of a Contracting Party, or of a monetary union of which it is a member, or of any financial institution owned or controlled by a Contracting Party;

(k) "returns" means all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income irrespective of the form in which returns are paid;

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

(m) "territory" means:

- in respect of Canada, the territory of Canada, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea, over which Canada exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of natural resources of such areas,

- in respect of Romania, the territory of Romania, including the territorial sea and the economic exclusive zone over which Romania exercises, in accordance with internal and international law, sovereignty, sovereign rights and jurisdiction.

## **Article II. Establishment, Acquisition and Protection of Investment**

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.(a) Each Contracting Party shall accord investments or returns of investors of the other Contracting Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

(b) The concepts of "fair and equitable treatment" and "full protection and security" in subparagraph (a) do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

(c) A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this paragraph.

3. 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) Its own domestic investors or prospective investors; or
- (b) Investors or prospective investors of any third state.

4.(a) Decisions by either Contracting Party, pursuant to measures not inconsistent with this Agreement, as to whether or not to permit an acquisition shall not be subject to the provisions of Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party) or XV (Disputes between the Contracting Parties) of this Agreement.

(b) Decisions by either Contracting Party 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 in accordance with its laws and regulations shall not be subject to the provisions of Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party) of this Agreement.

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

### **Article III. Most-favoured-nation (MFN) Treatment and National Treatment after Establishment**

1. Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third state.

2. Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third state.

3. Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments.

### **Article IV. Exceptions**

1. Paragraph 3 of Article II (Establishment, Acquisition and Protection of Investment), Article III (Most-Favoured-Nation (MFN) Treatment and National Treatment after Establishment), and paragraphs 1 and 2 of Article V (Other Measures) do not apply to:

(a)(i) Any existing non-conforming measures maintained within the territory of a Contracting Party. For further certainty, it is acknowledged that natural persons who do not have Romanian citizenship, as well as legal persons who do not have Romanian nationality and a registered office in Romania, shall be able to acquire land in Romania through acts inter vivos, subject to the fulfillment of the conditions provided by the Constitution and the internal Romanian legislation in force; and

(ii) 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) The continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a);

(c) An amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with those obligations;

(d) The right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in Annex A of this Agreement.

2. The National Treatment and Most-Favoured-Nation Treatment provisions of this Agreement do not apply to advantages accorded by a Contracting Party pursuant to its obligations as a member of a customs, economic or monetary union, a common market or a free trade area.

3. The Contracting Parties understand the obligations of a Contracting Party as a member of a customs, economic or monetary union, a common market or a free trade area to include obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union, common market or free trade area.

4. Subparagraph 3(b) of Article II (Establishment, Acquisition and Protection of Investment) and paragraphs 1 and 2 of Article III (Most-Favoured-Nation (MFN) Treatment and National Treatment after Establishment) do not apply to treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement relating to:

(a) Aviation;

(b) Fisheries;

(c) Maritime matters, including salvage; or

(d) Financial services.

## **Article V. Other Measures**

1.(a) 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.

(b) A Contracting Party may require, in accordance with its laws and regulations, 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.

2. Neither Contracting Party may impose any of the following requirements in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:

(a) To export a given level or percentage of goods;

(b) To achieve a given level or percentage of domestic content;

(c) To purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(e) To transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or acting in a manner not inconsistent with other provisions of this Agreement.

3. The provisions of paragraph 2 shall not be interpreted to prohibit Romania from adopting or maintaining performance requirements necessary to meet Romania's obligations as a member of the European Union pursuant to measures that are adopted or maintained by the European Union with respect to the production, processing and trade of agricultural and processed agricultural products.

4. The prohibition on performance requirements set forth in paragraph 2 does not extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a marketing organization for agricultural products and its market stabilizing effects.

5. 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 who seek to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial or executive.

## **Article VI. Miscellaneous Exceptions**

1.(a) In respect of intellectual property rights, a Contracting Party may derogate from Article III (Most-Favoured-Nation (MFN) Treatment and National Treatment after Establishment) in a manner that is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994.

(b) The provisions of Article VIII (Expropriation) 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.

2. The provisions of Articles II (Establishment, Acquisition and Protection of Investment) and III (Most-Favoured-Nation (MFN) Treatment and National Treatment after Establishment), and paragraphs 1, 2 and 5 of Article V (Other Measures) 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 investment any rights or preferences provided to the aboriginal peoples of Canada; or

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

3. Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:

(a) 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;

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

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

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

(e) 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.

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

Investors of one Contracting Party who suffer losses because their investments or returns in the territory of the other Contracting Party are affected by an armed conflict, a national emergency or a natural disaster in 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 to its own investors or to investors of any third state.

## **Article VIII. Expropriation**

1. Investments or returns 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 genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.

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 Contracting Party, of its case and of the valuation of its investment or returns in accordance with the principles set out in this Article.

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

1. Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns. Without limiting the generality of the foregoing, each Contracting Party shall also guarantee to the investor the unrestricted transfer of:

(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; and

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

2. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, 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 offences;

(d) Reports of transfers of currency or other monetary instruments; or

(e) Ensuring the satisfaction of judgments in adjudicatory proceedings.

4. 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.

5. Paragraph 4 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 subparagraphs 3(a) through 3(e).

6. Notwithstanding paragraph 1, a Contracting Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the "WTO Agreement") and as set out in paragraph 3.

## **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 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. Investment In Financial Services**

1. 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.

2. Notwithstanding paragraphs 1, 2 and 4 of Article IX (Transfer of Funds) and without limiting the applicability of paragraph 3 of Article IX (Transfer of Funds), 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 or provider, 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.

3.(a) Where an investor submits a claim to arbitration under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party), and the disputing Contracting Party invokes paragraphs 1 or 2 above, the tribunal established pursuant to Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party) 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 paragraph.

(b) Pursuant to a request received in accordance with subparagraph 3(a), the Contracting Parties shall proceed in accordance with Article XV (Disputes between the Contracting Parties) 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.

(c) Where, within 70 days of the referral by the tribunal, no request for the establishment of an arbitral panel pursuant to subparagraph 3(b) 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.

5. Subparagraph 3(b) of Article II (Establishment, Acquisition and Protection of Investment) does not apply in respect of financial services.

## **Article XII. Taxation Measures**

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency.

3. Subject to paragraph 2, a claim by an investor 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 considered a claim for breach of this Agreement 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 the measure does not contravene such agreement.

4. Article VIII (Expropriation) may be applied to a taxation measure 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 is not an expropriation. Article VIII (Expropriation) may be applied to a taxation measure 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 is not an expropriation.

5. If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs 3 and 4 within six months after being notified, the investor may submit its claim for resolution under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party).

## **Article XIII. 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. For the purposes of this paragraph 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. It is agreed, subject to the provisions of this Article, that the Contracting Parties encourage investors to make use of domestic courts and tribunals for the resolution of disputes.

3. An investor may submit a dispute as referred to in paragraph 1 to arbitration in accordance with paragraph 4 only if: 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) If the matter involves taxation, the conditions specified in paragraph 5 of Article XII (Taxation Measures) have been fulfilled; and paragraph 5 of Article XII (Taxation Measures) have been fulfilled; and

(d) 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.

4. The dispute may, at the election of the investor concerned, 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, done at Washington on 18 March 1965 (hereinafter referred to as the "ICSID Convention"), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

(b) The Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as the "Additional Facility Rules of ICSID"), provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

(c) The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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 the consents given under paragraph 12, 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 of ICSID, and

(ii) 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 on 10 June 1958 (hereinafter referred to as the "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 1 of that Convention.

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

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation.

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 XIV (Consultations and Exchange of Information) and XV (Disputes between the Contracting Parties).

12.(a) A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person constituted or duly organized under the 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:

(i) Any award shall be made to the affected enterprise,

(ii) The consent to arbitration of both the investor and the enterprise shall be required,

(iii) 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

(iv) 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.

(b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required: subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:

(i) A consent to arbitration by the enterprise under sub-subparagraph 12(a)(ii), and

(ii) A waiver from the enterprise under sub-subparagraph 12(a)(iii).

13. With respect to:

(a) Financial institutions of a Contracting Party; and

(b) Investors of a Contracting Party, and investments of such investors, in financial institutions in the other Contracting Party's territory,

Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party) applies only in respect of claims that the other Contracting Party has breached an obligation under Article VIII (Expropriation), Article IX (Transfer of Funds) or paragraph 1 or 2 of Article XVIII (Final Provisions and Entry into Force).

## **Article XIV. Consultations and Exchange of Information**

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. 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, investments or returns covered by this Agreement.

2. The consultations provided for by this Article shall include consultations concerning any steps that a Contracting Party may consider are necessary to ensure compatibility between this Agreement and the Treaty Establishing the European Community. Treaty Establishing the European Community.

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

1. 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 two months from the date of appointment of the other two members of the arbitral panel.

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 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 arbitral 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 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.

7. The Contracting Parties shall, within 60 days of the decision of an arbitral panel, reach agreement on the manner in which to resolve their dispute. Such agreement shall normally implement the decision of the arbitral 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 arbitral panel.

## **Article XVI. Transparency**

1. 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 do not conform to the obligations in paragraph 3 of Article II (Establishment, Acquisition and Protection of Investment), Article III (Most-Favoured-Nation (MFN) Treatment and National Treatment after Establishment) or paragraphs 1 and 2 of Article V (Other Measures).

2. 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.

## **Article XVII. Application and General Exceptions**

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.

2. 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.

3. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:

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

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

(c) For the conservation of living or non-living exhaustible natural resources.

4.(a) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures that restrict transfers where the Contracting Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with subparagraph (b).

(b) Measures referred to in subparagraph (a) shall be equitable, neither arbitrary nor unjustifiably discriminatory, in good faith, of limited duration and may not go beyond what is necessary to remedy the balance of payments situation. A Contracting Party that imposes measures under this Article shall inform the other Contracting Party forthwith and present as soon as possible a time schedule for their removal. Such measures shall be taken in accordance with other international

obligations of the Contracting Party concerned, including those under the WTO Agreement and the Articles of Agreement of the International Monetary Fund.

5. Nothing in this Agreement shall prejudice measures of general application, that are neither arbitrary nor unjustifiably discriminatory, taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Contracting Party's obligations under paragraph 2 of Article V (Other Measures) or Article IX (Transfer of Funds).

6. Nothing in this Agreement shall be construed:

(a) To require any Contracting Party 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 Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests:

(i) Relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) Taken in time of war or other emergency in international relations, or

(iii) Relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

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

7. Nothing in this Agreement shall be construed to require a Contracting Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Contracting Party's law protecting Cabinet confidences, personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.

8. Any measure adopted by a Contracting Party in conformity with a decision adopted, extended or modified by the World Trade Organization pursuant to Articles IX:3 or IX:4 of the WTO Agreement shall be deemed to be also in conformity with this Agreement. An investor purporting to act pursuant to Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party) of this Agreement may not claim that such a conforming measure is in breach of this Agreement.

## **Article XVIII. Final Provisions and Entry Into Force**

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such Contracting Party and to investments of such investor if investors of a third state own or control the enterprise and the denying Contracting Party adopts or maintains measures with respect to the third state that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprises or to its investments.

2. Subject to prior notification and consultation in accordance with this Agreement, a Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such Contracting Party and to investments of such 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 Contracting Party under whose law it is constituted.

3. All references in this Agreement to measures of a Contracting Party shall include measures applicable in accordance with European Union law in the territory of that Contracting Party pursuant to its membership in the European Union. References to "serious balance of payments difficulties, or the threat thereof," shall include serious balance of payments difficulties, or the threat thereof, in the economic or monetary union of which a Contracting Party is a member.

4. A Contracting Party's essential security interests may include interests deriving from its membership in a customs, economic or monetary union, a common market or a free trade area.

5. The Contracting Parties agree that the issue of whether a measure of a Contracting Party is consistent with this Agreement is a matter to be resolved exclusively under the dispute settlement procedures of this Agreement.

6. 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.

Upon the entry into force of this Agreement, the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, done at Bucharest on the 17 April 1996, shall be terminated except that its provisions shall continue to apply to any dispute between either Contracting Party and an investor of the other Contracting Party that has been submitted to arbitration pursuant to that Agreement by the investor prior to the date that this Agreement enters into force. Apart from any such dispute, this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force.

7. 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 XVII inclusive of this Agreement shall remain in force for a period of 15 years.

8. The Annexes shall form an integral part of this Agreement.

DONE in duplicate at , this day of 2009, in the English, French and Romanian languages, all texts being equally authentic.

FOR THE GOVERNMENT OF CANADA

FOR THE GOVERNMENT OF ROMANIA

## **ANNEX A**

1. In accordance with subparagraph 1(d) of Article IV (Exceptions), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:

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

(b) Services in any other sector;

(c) Government securities - as described in SIC 8152;

(d) Residency requirements for ownership of oceanfront land;

(e) Measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.

2. In accordance with subparagraph 1(d) of Article IV (Exceptions), Romania reserves the right to make and maintain exceptions in the sectors or matters listed below: subparagraph 1(d) of Article IV (Exceptions), Romania reserves the right to make and maintain exceptions in the sectors or matters listed below:

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

(b) Services in any other sector, including those consistent with the Romanian offer from Uruguay Round.

3. For the purpose of this Annex, "SIC" means, with respect to Canada, Standard Industrial Classification numbers as set out in Statistics Canada Standard Industrial Classification, fourth edition, 1980. Statistics Canada Standard Industrial Classification, fourth edition, 1980.

## **ANNEX B. Clarification of Indirect Expropriation**

Article VIII (Expropriation) of this Agreement states that:

Investments or returns 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...

The Contracting Parties confirm their shared understanding that:

(a) The concept of "measures having an effect equivalent to nationalization or expropriation" can also be termed "indirect expropriation." Indirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

(b) The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) The severity of the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,

(ii) The extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations, and

(iii) The character of the measure or series of measures, including their purpose and rationale; and

(c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

## **ANNEX C. Settlement of Disputes between an Investor and the Host Contracting Party**

### **I. Public Access to Hearings and Documents**

1. Hearings held under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party) shall be open to the public. To the extent necessary to ensure the protection of confidential information, the tribunal may hold portions of hearings in camera.

2. The tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

3. All documents submitted to, or issued by, the tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.

4. Notwithstanding paragraph 3, any tribunal award under this Agreement shall be publicly available, subject to the deletion of confidential information.

5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

6. The Contracting Parties may share with officials of their respective sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

7. The tribunal shall not require a Contracting Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Contracting Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

8. To the extent that a tribunal's confidentiality order designates information as confidential and a Contracting Party's law on access to information requires public access to that information, the Contracting Party's law on access to information shall prevail. However, a Contracting Party should endeavour to apply its law on access to information so as to protect information designated confidential by the tribunal.

### **II. Participation by the Non-Disputing Contracting Party**

1. The non-disputing Contracting Party shall be entitled, at its cost, to receive from the disputing Contracting Party a copy of:

(a) The evidence that has been tendered to the tribunal;

(b) Copies of all pleadings filed in the arbitration; and

(c) The written argument of the disputing parties.

2. The non-disputing Contracting Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Contracting Party.

3. On written notice to the disputing parties, the non-disputing Contracting Party may make submissions to a tribunal on a question of interpretation of this Agreement.

4. The non-disputing Contracting Party shall have the right to attend any hearings held under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party), whether or not it makes submissions to the tribunal.

### III. Submissions by a Non-Disputing Party

1. Any non-disputing party that is a person of a Contracting Party, or has a significant presence in the territory of a Contracting Party, that wishes to file a written submission with the tribunal (the "applicant") shall apply for leave from the tribunal to file such a submission, in accordance with the applicable Guidelines set out in Part IV of this Annex. The applicant shall attach the submission to the application.

2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the tribunal.

3. The tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.

4. In determining whether to grant leave to file a non-disputing party submission, the tribunal shall consider, among other things, the extent to which:

(a) The non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) The non-disputing party submission would address a matter within the scope of the dispute;

(c) The non-disputing party has a significant interest in the arbitration; and

(d) There is a public interest in the subject-matter of the arbitration.

5. The tribunal shall ensure that:

(a) Any non-disputing party submission avoids disrupting the proceedings; and

(b) Neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

6. The tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Contracting Party may, pursuant to the provisions of Part II of this Annex (Participation by the Non-Disputing Contracting Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.

7. A tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.

8. Access to hearings and documents by non-disputing parties that file applications under these procedures will be governed by the provisions of Part I of this Annex (Public Access to Hearings and Documents). Part I of this Annex (Public Access to Hearings and Documents).

### IV. Guidelines for Submissions by a Non-Disputing Party

1. The application for leave to file a non-disputing party submission shall:

(a) Be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;

(b) Be no longer than five typed pages;

(c) Describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

- (d) Disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
- (e) Identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
- (f) Specify the nature of the interest that the applicant has in the arbitration;
- (g) Identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
- (h) Explain, by reference to the factors specified in paragraph 4 of Part III of this Annex (Submissions by a Non-Disputing Party), why the tribunal should accept the submission; and paragraph 4 of Part III of this Annex (Submissions by a Non-Disputing Party), why the tribunal should accept the submission; and
- (i) Be made in a language of the arbitration.

2. The submission filed by a non-disputing party shall:

- (a) Be dated and signed by the person filing the submission;
- (b) Be concise, and in no case longer than 20 typed pages, including any appendices;
- (c) Set out a precise statement supporting the applicant's position on the issues; and
- (d) Only address matters within the scope of the dispute.

## **ANNEX D. Explanatory Note**

For greater certainty, "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the customary international law minimum standard of treatment of aliens; and "full protection and security" requires the level of police protection required under the customary international law minimum standard of treatment of aliens.