

it would be an "investor" in NAFTA terms if Argentina acceded. Presumably, the "headquarters" requirement of Colônia would cover a fully incorporated subsidiary with a separate board of directors, even though the subsidiary is ultimately controlled by non-Member interests, as does the NAFTA.

NAFTA goes beyond Colônia in its prohibition of performance requirements linked to the establishment or operation of an investment in that the prohibition applies also to non-Party investors and includes a broader range of requirements than covered by either Colônia or the WTO Agreement on Trade-Related Investment Measures to which both Brazil and Argentina are parties. The NAFTA also goes beyond Colônia in that it prohibits certain performance requirements linked to "advantages" (i.e., subsidies) given to investors.

While Colônia includes investor-state dispute settlement, NAFTA is somewhat stronger in this regard as it specifies in detail the procedures to follow if a dispute is referred to arbitration under provisions of the ICSID or UNCITRAL.<sup>83</sup> These procedures include provisions governing interim protection and enforcement.

NAFTA, unlike Colônia, sets out valuation criteria for compensation to investors whose property is expropriated by the host country government.

The NAFTA provision governing the transfer of capital and profits goes beyond Colônia by prohibiting a Party to force its investors to repatriate funds associated with an investment in another Party.

In summary, NAFTA's investment provisions go beyond those of MERCOSUR, although the latter has crafted a fairly advanced instrument through the Colônia Protocol. Argentina would, on acceding to NAFTA, be bound by its MERCOSUR obligations to offer a package of investment-related liberalization guarantees to its MERCOSUR partners that is moderately more advanced than the Colônia instrument. Such an approach could be seen as positive, as it would underline the greater security of investment, including Brazilian investment, in Argentina, thereby helping to attract more.

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<sup>83</sup> ICSID means the International Centre for Settlement of Investment Disputes; UNCITRAL means the United Nations Commission on International Trade Law.