

INVEST.722

Treasury Annex Composite
Investment

DRAFT

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INVESTMENT

Article 2101: Scope and Coverage

1. This Chapter shall apply to measures of the Parties affecting:

- a) investments of investors of a Party in the territory of another Party existing at the time of entry into force of this Agreement as well as to investments made or acquired thereafter by such investors;
- b) investors of a Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in the territory of another Party; and
- c) all investments in the territory of any Party as provided in Article 2109.¹

^{MEX}[2. A Party (Mexico) has the right to exclusively perform the economic activities set forth in Annex I and to exclude foreign investment from such activities.]

3. This Chapter shall not apply to:

- a) ^{USA MEX}[measures covered by Chapter (Financial Services) except as provided in that chapter] ^{CDA}[financial services except as provided in the Chapter on Financial Services];²
- b) ^{CDA MEX}[government procurement] ^{CDA}[except as provided in the Chapter on Government Procurement]; and
- c) ^{CDA}[as between Canada, the United States of America, and the United Mexican States, cultural industries as defined in Article 2012 of the U.S.-Canada Free Trade Agreement; notwithstanding any provision of the Agreement, Article 2005 of the Canadian-United States Trade Agreement shall continue to apply as between Canada and the United States.]

4. Nothing in this Chapter³ shall be construed to prevent a

¹ Some but not all references to Articles are corrected.

² U.S. Note - Further coordination with financial services may be necessary.

³ A generic provision may be needed to address the subject matter of this provision.

Party from providing services or functions such as public welfare services and services forming part of a statutory system of social security, public health care, public education, and public retirement plans.

5. The requirement by a Party that a service provider of another Party post a bond or other form of financial security before providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter shall apply to that Party's treatment of the posted bond or financial security.

6. In the event of any inconsistency between the provisions of this Chapter and the Telecommunications Annex, the provisions of that Annex shall prevail to the extent of the inconsistency.⁴

7. Each Party reserves the right to deny to an enterprise of another Party the advantages of this Chapter if⁵:

- a) nationals of any non-Party own or control such enterprise and such enterprise has no substantial business activities in the territory of the Party under whose laws it is constituted; or
- b) such enterprise is owned or controlled by nationals of a non-Party in respect of whose investors or investments the denying Party imposes specific sanctions or with which such Party does not maintain diplomatic relations.

Article 2102: Environmental Measures⁶

1. The Parties affirm that this Chapter shall not be construed to prevent the adoption or enforcement of any measure, otherwise consistent with this Chapter, that a Party deems appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. No Party shall, as an inducement or incentive to the establishment, acquisition, or expansion, in its territory, of an investment of an investor of another Party, eliminate, waive, reduce, or otherwise derogate from measures of general application

⁴ Issues of overlap need to be addressed.

⁵ Canada is considering this paragraph in its entirety, and Mexico is considering sub-paragraph (b).

⁶ This language is being negotiated in a separate group.

necessary to protect human, animal or plant life or health or the environment in its territory, or from measures relating to the conservation of exhaustible natural resources.

TREATMENT OF INVESTMENTS

Article 2103: National Treatment

1. Each Party shall accord to an investor of another Party treatment no less favorable than that which it accords, in like circumstances, to its own investors in respect of the establishment, acquisition, expansion, management⁷, conduct, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to investments of investors of another Party ^{USA} ^{MEX}[, and activities associated therewith,] treatment no less favorable than that which it accords, in like circumstances, to investments of its own investors.

3. The treatment accorded by a Party under paragraphs 1 and 2 shall mean, with respect to a state or province, treatment no less favorable than the treatment accorded, in like circumstances, by such state or province to its residents, or enterprises legally constituted under its laws, or their investments in its territory.⁸

4. Where a state enterprise of a Party competes with investments of investors of another Party in the territory of the Party, paragraphs 1 and 2 shall mean treatment no less favorable than that accorded, in like circumstances, to privately-owned investments of investors of that Party that also compete with the state enterprise.

5. For greater certainty, no Party shall:

a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the Party's territory be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in its territory.

Article 2104: Most-Favored-Nation Treatment

1. Each Party shall accord to investments of an investor of

⁷ Canada agrees on the condition that the Parties agree to an acceptable definition of "management".

⁸ This paragraph is being considered as regards symmetry.

another Party ^{USA} ^{MEX}[, and activities associated therewith,] treatment no less favorable than that which it accords, in like circumstances, to the investments of an investor of any other Party or of a non-Party.

2. Each Party shall accord to an investor of another Party treatment no less favorable than that which it accords, in like circumstances, to investors of any other Party or non-Party in respect of its establishment, acquisition, expansion, conduct, management⁹, operation and sale or other disposition of its investment in its territory.

Article 2105: Non-Discriminatory Treatment

The treatment that a Party shall accord to investments ^{USA} ^{MEX}[and associated activities] of another Party and to investors of that Party shall be the better of the treatment required by Articles 2103 or 2104. ("Nondiscriminatory treatment")

Article 2106: Minimum Standard of Treatment

1. Each Party shall accord at all times to the investments in its territory of investors of another Party full protection and security, fair and equitable treatment, and in all other respects as well, treatment in accordance with international law.

2. Without prejudice to paragraph 1, each Party shall accord investors of a Party, whose investments suffer losses in the territory of another Party owing to conflict or civil strife, at least nondiscriminatory treatment as regards any measures it adopts in relation to such losses.

Article 2107: Senior Management and Boards of Directors

1. ^{MEX} ^{USA}[Subject to Chapter ____ (Temporary entry), a Party shall not require that enterprises which are legally constituted under the applicable laws or regulations of one Party, and which are investments of investors of another Party, engage as top managerial personnel individuals¹⁰ of any particular nationality.

2. ^{CDA} With respect to an enterprise of a Party which is an investment of an investor of another Party, a Party shall not require:

⁹ Canada agrees on the condition that the Parties agree to an acceptable definition of "management."

¹⁰ Although the Lawyers' Group favors use of "national person" rather than "individual", that usage would appear awkward in these paragraphs.

a) that individuals of any particular nationality be appointed to senior management positions; or

b) more than a simple majority of the Board of Directors of a enterprise, or any committee thereof, be of any particular nationality, or resident in the territory of that Party, provided such requirements do not materially impair the ability of investors of another Party to control their investments.

^{USA}[However, a Party may require that certain members of an enterprise's board of directors be nationals, provided such requirements do not materially impair the ability of investors of another Party to control their investments.]

3. For greater certainty, the provisions of this paragraph are subject to the applicable immigration laws and regulations of a Party.]

Article 2108: Exceptions

1. Articles 2103, 2104, 2105, and 2107 shall not apply to:

a) a non-conforming provision of any existing measure which is maintained by a Party at the federal level and described in Annex A;

b) a non-conforming provision of any existing measure which is maintained by a state or province, and which a Party describes in Annex A within two years after the entry into force of this Agreement;

c) a non-conforming provision of any existing measure which is maintained by a local government; or

d) nationality and residency requirements for members of senior management or Boards of Directors imposed by a Party in accordance with such measures as are specified in Annex A.

2. A Party may promptly renew such a non-conforming provision of any existing measure, or amend such a non-conforming provision of any existing measure, to the extent that the renewal or amendment does not decrease its conformity with the obligations of this Chapter. No such measure which has been renewed or amended may be further renewed or amended so as to decrease its conformity at the time of the renewal or amendment with the obligations of this Chapter.

2. A Party may continue or promptly renew any such non-conforming measures, and may amend any such measure to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 2103, 2104, and 2105.

Note: taken from the services chapter.

3. The obligations of paragraphs 1, 2, 3 and 6 shall nonetheless apply to the extent to which a Party has undertaken in Annex A to bring such non-conforming measures into closer conformity with those obligations during the term of this Agreement.¹¹

4. Articles 2103, 2104 and 2105 shall not apply to measures a Party maintains or adopts with respect to the sectors or subjects inscribed by it in Annex B. ^{USA}[However, any such future measure may not require an investor of another Party to sell or otherwise dispose of investment existing at the time such measures become effective.]

5. A Party may also maintain exceptions from the obligations of Articles 2103, 2104 and 2105, which are specifically provided for in Article 2203 (of the Chapter on Intellectual Property).¹²

6. Notwithstanding Article 2104, a Party need not accord most-favored-nation treatment to investors of another Party or their investments with respect to advantages accorded by that Party pursuant to agreements or sectors listed in Annex [MFN].

7. Nothing in this Chapter shall preclude a Party from prescribing special formalities, such as requirements that investors be residents of a Party or investments be legally constituted under the laws and regulations of a Party or a political subdivision thereof, in connection with the establishment of investments by investors of another Party, provided such formalities do not derogate from the substance of any of the provisions set forth in this Chapter.

8. Notwithstanding Articles 2103, 2104, and 2105, a Party may require, from an investor of another Party or its investment, routine business information, to be used solely for informational

¹¹ The references to Articles 2103, etc. have not been included pending decision on whether or how to draft this paragraph.

¹² This paragraph has been agreed upon by the Intellectual Property group, but has not yet been discussed or agreed upon by the Investment group.

or statistical purposes, concerning that investment in its territory. Such Party shall protect such business information that is confidential from disclosure that would prejudice the investor's or the investment's competitive position. Nothing in this [Chapter]¹³ shall preclude a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.

9. ^{USA}[a] As a further exception to (provision on national treatment)¹⁴, and only in respect of sectors reserved for the state on the date of entry into force of this Agreement,

i) a Party, when privatizing an enterprise owned by it in such a sector, may sell all or a portion of its equity interests to its nationals; and

ii) a Party, when permitting private investment in such a sector, may require that a specified level of equity in enterprises in that sector be held by its nationals.

b) For state enterprises not in sectors reserved to the state at the date of entry into force of this Agreement, but carrying on an activity on the date of entry into force of this Agreement, a Party may limit the initial acquisition of its interests in the enterprise to its nationals. However, once the Party's interests have been sold, the obligations of paragraph 1 (national treatment) shall apply.¹⁵¹⁶

10. ^{CDA}[Notwithstanding paragraph 1,

a) a Party, when selling or disposing of its equity interest in a enterprise owned or controlled by the Party at the time of entry into force of this Agreement, may impose limitations on the ownership or control of such enterprise by an investor of another Party;

b) a Party, when selling or disposing of its equity

¹³ Canada is considering use of "Chapter."

¹⁴ This section would be inserted in the "treatment" section in a way which would capture the "ratchet."

¹⁵ Requirements that equity interests be held by nationals -- for state enterprises not in sectors reserved to the state at the date of entry into force of this Agreement, but which a Party establishes or acquires subsequent to the date of entry into force of this Agreement -- would be governed by Annexes A or B.

¹⁶ Mexico is considering joining the U.S. on this provision.

interest in a enterprise established or acquired by the Party after the entry into force of this Agreement, may impose limitations on the initial acquisition of those interests by an investor of another Party. Once the Party's interests have been sold or disposed of, the provision of paragraph 1 shall apply to any subsequent sale or disposition;

c) a Party may impose limitations on the participation of investors or investments of another Party in the provision of a service delivered by a government or governmental entity¹⁷ when such limitations are imposed at the time:

i) the Party privatizes the delivery of that service;

ii) the Party permits commercial participation of private enterprises , whether concurrently or not with the governmental entity, in the delivery of that service.]

11. ^{CDA}^{USA}[Articles 2103, 2104, and 2105 shall not apply to:]

^{USA}[[a) federal government procurement of goods and services supplied by investments of investors of another Party if such investments are controlled by nationals of a non-Party;]

b) procurement of goods and services by political subdivisions of a Party; and

^{CDA}[c) any subsidy or grant or ^{USA}[insurance or loan program] provided by a Party or state enterprise thereof;]

^{USA}[[12. The provisions of this Article apply in respect of matters addressed in Articles 2109, 2110, 2111.] ¹⁸

¹⁷ Note that "entity" (rather than "enterprise") is retained here. Presumably it need not be defined.

¹⁸ This provision emphasizes that the non-discrimination provisions are a "floor" that would apply even when there are exceptions to the performance requirements or the transfers Article, and if a country paid more to its nationals for expropriated property than it would pay investors of the other Parties.

Article 2109: Performance Requirements

1. Except as provided in Annex ____, no Party shall apply ^{USA}
^{MEX}[or enforce], in connection with the establishment, acquisition,
expansion, conduct or operation of an investment in its territory
of an investor of a Party or non-Party, any of the following
requirements ^{CDA}[enforceable under domestic law or administrative
ruling]:

- a) to export a given level or percentage of goods or services;
- b) to achieve a given level or percentage of domestic content;
- c) to purchase, use or accord a preference to goods or services produced in its territory, or to purchase goods or services from producers or service providers in its territory;
- d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- e) to restrict sales of goods or services in its territory that such investment produces by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- f) ^{USA MEX}[to transfer technology, production process or other proprietary knowledge to a national or enterprise in its territory, except:
 - i) when the requirement is imposed by a court or administrative tribunal to remedy an alleged violation of competition laws; or
 - ii) where the requirement is necessary or appropriate to protect health, safety or the environment;]
- g) ^{USA MEX}[to act as the exclusive supplier of the goods or services it produces to a specific region or world market.]

^{CDA}[2. Notwithstanding paragraph 1, a Party may nonetheless condition the establishment or acquisition of an investment, and its subsequent conduct or operation, on commitments to locate production, carry out research and development, train or employ workers, construct or expand particular facilities in its territory.]

2. Except as provided in Annex ____, no Party shall condition the receipt or continued receipt of an incentive ^{USA}[or advantage], in connection with investments in its territory of investors of a Party or non-Party, on any of the following requirements ^{CDA}[enforceable under domestic law or administrative ruling]:

- a) to purchase or use goods ^{USA}[or services] of domestic origin or from domestic producers, or otherwise accord a preference to goods produced ^{USA}[or services supplied] in such territory;
- b) to achieve a given level or percentage of domestic content;
- c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- d) to restrict domestic sales of goods or services that such investment produces by limiting such sales in any way to the volume or value of its exports or foreign exchange earnings;
- e) ^{USA MEX}[to act as the exclusive supplier of the goods or services it produces to a specific, regional or world market.]

3. Nothing in paragraph 2 shall preclude a party from conditioning the receipt of an incentive ^{USA}[or advantage] on commitments to locate production, produce a service, train or employ workers, construct or expand particular facilities, carry out research and development, or spend the incentive, in its territory.

4. The provisions of ^{CDA}[this Article] ^{USA MEX}[paragraphs 2(a) and 2(b)] shall not apply to:

- a) ^{USA MEX}[eligibility criteria for purposes of export promotion programs;]
- b) measures related to government procurement, ^{CDA}[including purchases by state enterprises];
- c) ^{CDA}[the provision of subsidies consistent with Article XVI of the GATT and the Agreement on the Interpretation and Application of Article VI, XVI and XXIII of the GATT, including any amendments, modifications or successor agreements thereto;]

5. ^{CDA MEX}[No Party shall prohibit or otherwise restrict an investor established in the territory of another Party from:

a) exporting goods and services originating from such territory to a non-Party , unless pursuant to a measure of general application consistent with Article ___ (on export restrictions);

b) importing to such territory goods and services originating from a non-Party; or

c) using goods and services originating in a non-Party ¹⁹.]

6. The provisions of paragraphs 1 or 2 shall not apply to any requirements other than those listed in paragraphs 1(a)-(g) and 2(a)-(e).

¹⁹ As per instructions from the Lawyers' Group.

Article 2110: Transfers

1. Subject to paragraph 3 ^{MEX CDA}[and paragraph 5²⁰] each Party shall permit all transfers and international payments (hereinafter "transfers") relating to an investment in its territory of an investor of another Party to be made freely and without delay. Such transfers include:

- a) profits, dividends, interest, capital gains, royalty payments, management, technical assistance and other fees, returns in kind, and other amounts derived from an investment;
- b) proceeds from the sale of all or any part of an investment or from the partial or complete liquidation of an investment;
- c) payments made under a contract entered into by an investor, or its investment, including payments made pursuant to a loan agreement;
- d) compensation pursuant to Article 2111 ; and
- e) payments arising out of an investment dispute as defined in Article 2119 .²¹

2. Subject to paragraph 3, each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

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

- 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 currency transfers; or
- e) ensuring the satisfaction of judgments in adjudicatory

²⁰ It may be desirable to refer to the tax article.

²¹ Canada agrees subject to overall agreement on dispute settlement.

proceedings.

4. Notwithstanding paragraphs 1, 2, and 3 of this Article, a Party may maintain or adopt restrictions on the transfer of "returns in kind" (goods and services) that are otherwise in conformity with this Agreement.²²

5. ^{MEX CDA}[No Party shall require its investors to repatriate, or penalize its investors who fail to repatriate, the income, earnings or profits attributable to any investment in another Party or to any businesses carried on in another Party either directly by the investors or indirectly through a enterprise established in that other Party.]

Article 2111: Expropriation and Compensation

1. No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take any measure or measures tantamount to expropriation or nationalization of such an investment ("expropriation"), except:

- a) for a public purpose;
- b) on a nondiscriminatory basis;
- c) in accordance with due process of law and the general principles of treatment provided in Article 2106 ; and
- d) upon payment of compensation in accordance with paragraphs 2 to 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("date of expropriation"). Valuation criteria shall include going concern value, asset value (including declared tax value of tangible property), and other criteria, as appropriate to determine fair market value. Valuation shall not reflect any change occurring because the expropriatory action had become known prior to the date of expropriation.

3. Compensation shall be paid without delay and be fully realizable.

^{4~~23~~}. If payment is made in a G7 currency, compensation shall

²² U.S. agrees that paragraph 1 should not prohibit general export controls, but reserves the right to modify the language.

²³ Mexico is considering this paragraph and paragraph 5.

include interest at a commercially reasonable rate for that currency from the ^{USA}[date of expropriation] ^{CDA}[effective date of taking of the investment by the public authority ("date of possession)] until the date of actual payment thereof.

5. If payment is made in a currency other than a G7 currency, the amount paid shall be no less than the equivalent of the amount of compensation owed on the date of expropriation converted into a G7 currency at the market rate of exchange prevailing on that date, plus accrued interest at a commercially reasonable rate for that G7 currency from the date of ^{USA}[expropriation] ^{CDA}[possession] until the date of actual payment.

6. Upon payment, compensation shall be freely transferable at the prevailing market rate of exchange on the date of transfer.

7. The provisions of this Article do not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or the revocation, ^{CDA MEX}[limitation or creation] of intellectual property rights to the extent that it is consistent with the provisions of Chapter ____ (Intellectual Property).

Article 2112: Extra-territoriality

^{MEX CDA}[No Party may prescribe new laws or enforce existing laws so as to require investors or service providers to act, in the territory of another Party, in a manner that conflicts with the laws of such other Party.]

Article 2113: National Security

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

Note: This provision is self-judging.]

^{CDA}[1. Nothing in this Agreement shall be construed to prevent:

- a) any Party from refusing to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
- b) any Party from imposing any measure affecting goods, services, service providers, suppliers or investors of a Party which it determines is directly related and essential to:
 - i) supplying a military establishment of a Party with arms, ammunition or implements of war, or enabling fulfillment of a critical defence contract of a Party;
 - ii) responding to a situation of armed conflict involving the Party taking the measure;
 - iii) implementing international agreements relating to the nonproliferation of nuclear, chemical or biological weapons, other nuclear explosive devices, or chemical or biological agents;
 - iv) responding to direct threats of disruption in the supply of nuclear materials for defence purposes.
- c) any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Party relying on paragraphs a) - c) shall ensure that its action or measure is that which least infringes the rights or any reasonable expectations of the other Parties under this Agreement, and is no broader in scope or duration than necessary.

3. Any determination made under paragraph 1(b) shall be published promptly in the official journal of that Party. Any determination made under paragraph 1(a) or action taken under paragraph 1(c) shall, where appropriate, be similarly published.

4. Except in cases of emergency, the Party proposing to impose any measure under paragraph 1(b), or proposing to take action under 1(c) shall consult with the other Parties prior to imposing such measure or taking such action.]

^{MEX CDA}[5. If a Party considers that any action or measure taken by another Party under this Article constitutes a disguised restriction on trade or investment or otherwise nullifies or impairs any benefit reasonably expected under this Agreement, it may request consultations. Such consultations shall be held promptly. The Party whose action or measure is the subject of the consultations shall give full and sympathetic consideration to the view of the complaining Party and shall explain, in as much detail as is consistent with its assessment of its security interests, the reasons for the measure. Where appropriate following such consultations, such Party shall re-consider whether its action or the application of its measure could be altered in any way, in order to minimize the infringement of rights and benefits otherwise secured by this Agreement.]

^{CDA}[6. No Party may invoke the provisions of this Article to derogate from the requirement to pay compensation for an expropriation in accordance with Article ____ or to permit the transfer of an investment and returns, in accordance with Article ____.]

Article 2114: Competition ²⁴

1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct, and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objects and purposes of this Agreement. To this end the Parties ^{USA}[Parties' authorities] shall consult from time to time about the effectiveness of measures undertaken by each Party.

2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competitive law enforcement in the Free Trade Area. The Parties ^{USA}[Parties' authorities] shall also cooperate on issues of competition law enforcement and consult on issues of common concern which may include mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the Free Trade Areas.

3. ^{CDA}[In the enforcement of their respective competition laws and policies in those cases involving persons, assets, or practices located, or occurring, in the territory of any of the other Parties, each Party shall assess, and, if requested by a Party, be prepared to advise that Party of the results of its assessment of, the following factors:

- a) the relative significance of the anti-competitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
- b) the presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
- c) the relative significance of the effects of the enforcement activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
- d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- e) the degree of conflict or consistency between the enforcement activities and the other Party's law or

²⁴ The U.S. proposes that this Article be placed outside this investment chapter in the final text.

articulated economic policies; and

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

4. The obligations of this Article shall not be subject to ^{USA}[review or] dispute settlement pursuant to Chapter 23 (General Dispute Settlement) or Article 2119

^{CDA MEX} [5. The Commission shall establish a Competition Policy Committee to consider and make recommendations (no later than ____)
on:

a) the impact of competition law and policy on trade within the Free Trade Area;

b) the impact of trade law and regulation on competition within the Free Trade Area;]

c) the potential for reliance on competition laws and policies to discipline anti-competitive transborder pricing practices and market segmentation.]²⁵

²⁵ The US has proposed a similar concept to (c) in Trade Remedies Working Group.

Article 2115: State Enterprises

^{CDA}[DRAFT DISCUSSION PAPER

1. Nothing in this Agreement shall prevent a Party from maintaining or establishing a state enterprise.

2. The Party maintaining or establishing a state enterprise shall ensure, whether regulatory supervision, administrative control or the application of other measures, including where appropriate, through the application of its domestic competition laws, that the state enterprise:

a) in the provision of its goods or services in the territory of the Party, accord nondiscriminatory treatment to investments of investors of another Party;

b) where engaged in non-regulated commercial activities in competition, in the relevant market within the territory of such Party or any part thereof, with investments of investors of another Party, does not engage in anti-competitive practices that adversely affect investments of investors of another Party.

^{USA}[1. This Chapter, and in particular the obligation to accord nondiscriminatory treatment to investments in the territory of a Party of investors of another Party, shall apply to the state enterprises of a Party.]²⁶

Article 2116: Monopolies²⁷

^{CDA}[1. Nothing in this Agreement shall prevent a Party from maintaining or designating a monopoly.

2. Prior to designating a monopoly, and where the designation may affect interests of persons another Party, a Party shall:

a) notify the other Parties;

b) upon request, engage in consultations; and

c) endeavor to minimize or eliminate any unnecessary

²⁶ Mexico can agree to this provision if placed outside the Investment Chapter and only in respect of non-discriminatory treatment when buying and selling goods or services..

²⁷ U.S. proposal would be placed outside the investment chapter.

nullification or impairment of benefits under this Agreement that might otherwise be caused by the designation.

3. A Party designating a monopoly shall ensure that the monopoly does not engage in discrimination in its sales in the relevant market against investments of investors of another Party, contrary to this Agreement.

4. A Party maintaining or designating a monopoly shall ensure that the monopoly in its territory, either directly or through an affiliated company, does not use its monopoly position to engage in anti-competitive practices, whether through cross-subsidization with its operations in its relevant market or otherwise, in areas outside the relevant market.]

^{USA}[1. Each Party shall ensure, through regulatory supervision, administrative control, or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates;

a) acts in a manner consistent with the Party's obligations under this Agreement whenever such monopoly exercises any regulatory, administrative, or other governmental authority granted to it by the Party, such as the power to grant or apply for import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

b) acts solely in accordance with commercial considerations in its purchase and sale of the monopoly good or service, including with regard to price, quality, marketability, transportation and other terms and conditions of purchase and sale;

c) provides non-discriminatory treatment to persons, to investments of investors, to goods, and to services of another Party in its purchases and sale of the monopoly good or service; and

d) does not use its monopoly position to engage, either directly or through its dealings with an affiliated enterprise, in anticompetitive practices in a non-monopolized market that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization, or predatory conduct.

2. Subject to Articles _____ (Nullification and Impairment, _____ (Expropriation), and Annex 9.1:3 (Liberalization of Energy Investment and Regulatory Measures), nothing in this Agreement

shall prevent a Party from designating a monopoly.

3. Prior to designating a monopoly, and where the designation may affect interests of persons of another Party, a Party shall:

- a) notify the other Parties in writing; and
- b) endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits under this Agreement.

For purposes of this Article:

in accordance with commercial considerations means consistent with normal business practices of privately-held firms in that industry;

designate means to establish, designate or authorize, or to expand the scope of a monopoly franchise to cover an additional good or service, after entry into force of this Agreement;

discriminatory provision includes provision that treats an affiliated enterprise more favorably than an unaffiliated enterprise, or that treats once class of enterprises more favorably than another, in like circumstances;

government monopoly means any monopoly that is substantially owned, or controlled through ownership interests, by the federal government of a Party or by another such monopoly;

monopoly means an entity, including any consortium or government agency that, in any relevant market in the territory of a Party, is the sole provider or purchaser of a good or service; and

non-discriminatory treatment means the better of national or most-favored-nation treatment.]

Article 2117: Technology Consortia

^{MEX CDA}[1. No Party shall maintain or introduce any measure that limits or prevents an investor of another Party from participating in a technology consortium or other group of business enterprises with respect to the development of or access to technology (in a manner inconsistent with Articles 2103, 2104 and 2105.

2. For greater certainty, the terms and conditions for participation in a technology consortia including financial and technology resources shall be determined by the members of the consortia.]

Article 2118: Taxation

1. GENERAL EXCLUSION: INCOME TAX AND RELATED MEASURES

Except as provided for in this Article, nothing in this Agreement shall apply to taxes of the Parties. In the event of an ambiguity or conflict between this Article and any other provision of this Agreement, the provisions of this Article shall apply.²⁸

2. TAX CONVENTIONS

Without limiting the application of Paragraph 1, nothing in this Agreement shall affect the rights and obligations under any convention for the avoidance of double taxation (in this Article referred to as a "tax convention") or other international agreement or arrangement, or domestic legislation implementing such agreement or arrangement, related wholly or mainly to those taxes, and, in the event of an inconsistency between the provisions of this Agreement and any such convention, agreement, arrangement, or legislation, the provisions of the convention, agreement, arrangement, or legislation, shall prevail to the extent of the inconsistency.

3. APPLICATIONS OF PROVISIONS RELATING TO TRADE IN GOODS

Article 401 of this Agreement incorporating by reference rights and obligations of the Parties relating to trade in goods under Article III of the General Agreement on Tariffs and Trade, and such other provisions of the Agreement as are necessary to give effect to Article 401, shall apply to taxes of the Parties to the same extent as does Article III of the General Agreement on Tariffs and Trade.

4. APPLICATIONS OF PROVISIONS RELATING TO INVESTMENT AND TRADE IN SERVICES

Subject to paragraphs 2 and 5,

a) provisions imposing national treatment obligations in Chapters ____ and ____ of this Agreement relating to Cross Border Trade in Services and Financial Services, respectively, shall apply to taxes of the Parties on income or capital gains

²⁸ Provisions concerning forced repatriations in the transfers sections vis-a-vis taxation are rendered redundant by reason of this provision. This provision should take precedence over paragraph 2 of the provision headed "Scope" in Chapter/Annex XX - Financial Services and any other similar provisions. This provision assumes that tariffs and customs duties are not considered to be taxes within the ambit of this Article.

or on the taxable capital of corporations, including the Assets Tax established by the Assets Tax Law of Mexico, that relate to the purchase or consumption of particular services, and

b) provisions imposing national treatment obligations and most favoured nation obligations in Chapters ____ and ____ of this Agreement relating to Cross Border Trade in Services and Financial Services, respectively, shall apply to all other taxes of the Parties,

^{CDA USA}[except that nothing in those Chapters shall apply to:

c) impose most favoured nation obligations to advantages accorded by a Party pursuant to a tax convention or any other agreement or arrangement between two or more parties, relating wholly or mainly to taxation;

d) a non-conforming provisions of any existing taxation measure;

e) the continuation or prompt renewal of a non-conforming provisions of any existing taxation measure;

f) an amendment to a non-conforming provision of any existing taxation measure to the extent the amendment does not decrease its conformity with any of the provisions of this Agreement; or

g) any new such taxation measure aimed at ensuring the equitable ^{USA}[or] ^{CDA}[and] effective imposition of collection of taxes except where the measure arbitrarily discriminates between persons of the Parties or arbitrarily restricts benefits accorded under this Agreement.]

5. ^{CDA USA}[APPLICATIONS OF PROVISIONS RELATING TO PERFORMANCE REQUIREMENTS

Subject to paragraph 2, paragraphs 2, 3, and 4 of Article ____ (performance requirements) of the Investment Chapter shall apply to the taxes of the Parties, ^{CDA}[except that

a) in applying that Article to a taxation measure, that Article shall be read without reference to the words "or services" and "or services supplied" as they appear in paragraph 2 thereof, and

b) in applying that Article to a taxation measure that relates to trade in goods between the Parties, that Article

shall be read without reference to the words "or export development programs" in paragraph 4 thereof.]

6. EXPROPRIATION

^{CDA MEX}[Article ____ of the Investment Chapter (Expropriation) shall apply to a claim by a Party or an investor of such Party that the measure expressed as a taxation measures constitutes an expropriation or nationalization except where its has been determined pursuant to this paragraph that a taxation measure of a Party is a bona-fide tax. Before an investor or a Party may bring such a claim, however, the issue of whether the measure is a bona-fide tax shall be referred for determination by the competent authorities under the tax convention, if any, between the Parties. If this is no such tax convention of if the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to resolve it within a period of six months after the referral, or such other period as may be agreed upon by the Parties, ^{CDA USA}[the investor or the Party] ^{MEX}[the Party may bring such a claim under the appropriate dispute settlement provisions of this Agreement.]²⁹

6.1 ^{USA}[EXPROPRIATION

A claim by a Party or an investor of such Party that a tax measure of another Party constitutes an expropriation shall be resolved under Article ____ of the Investment Chapter. The issue of whether such tax is discriminatory shall be referred for resolution to the competent authorities under a Tax Convention between the Parties. If the competent authorities do not agree to consider the issue, or having agreed to consider it, fail to resolve it within a reasonable period of time, the issue shall be resolved, together with all other issues of the expropriation, under Article ____ of the Investment Chapter.]²²

7. WITHHOLDING TAX

Without limiting the application of the foregoing, and for greater certainty, notwithstanding Article ____ (Transfers) a party may impose or collect a tax by withholding or other means.

²⁹ A cross reference may be required in the expropriation provision of the Investment Chapter.

Notes:

1. FTA transitional rules required. It is contemplated by Canada and USA that this Agreement is to override FTA vis-a-vis tax.
2. It is not intended that exiting non-conforming tax measures be listed.
3. Canada's position is that paragraphs 4, 5, and 6 are not severable.

Article 2119: DISPUTE SETTLEMENT

^{USA}[1. The provisions of this article reflect the desirability of a mechanism for the settlement of investment disputes that assures equal treatment between investors of the Parties in accordance with the principle of international reciprocity and that assures that the Parties to the dispute are afforded due process before an impartial tribunal.

2. For purposes of this Article, an investment dispute means a dispute between a Party and an investor of another Party involving an alleged breach of any provision of this Chapter. An investment dispute shall not include an alleged breach of this Chapter where the very measure constituting the alleged breach is itself expressly permitted by another Chapter.

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

- a) to the courts or administrative tribunals of the Party that is a Party to the dispute; or
- b) in accordance with the terms of paragraph 4.

The choice made by the investor shall be exclusive. If the investor chooses to submit the dispute for resolution in accordance with paragraph 4, the investor may seek as final relief only monetary damages or restitution of property.

4. Provided that the investor concerned has not submitted the dispute for resolution under paragraph 3 (a) and that six months have elapsed from the date on which the dispute arose, the investor concerned may submit the dispute for settlement by binding arbitration:

- a) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party concerned is a party to such Convention;
- b) to the Additional Facility of the Centre, if the Centre is not available; or
- c) in accordance with arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

5. Notwithstanding paragraphs 3 and 4, the investor and the Party to the dispute may mutually agree to arbitration in accordance with other arbitration rules or before another arbitration institution.

6. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice made by the investor under paragraph 4. Such consent, together with this submission of the dispute by the investor under paragraph 4 or 5 shall satisfy the requirement for:

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

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

c) an "agreement" for purposes of Article I of the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention".)

Any such investment dispute shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

7. Unless the parties to an investment dispute agree otherwise the place of any arbitration under paragraphs 4 or 5 of this Article shall be in the territory of a Party to this Agreement that is a party to the New York Convention, such place to be selected in accordance with the applicable arbitration rules.

8. The arbitral tribunal constituted pursuant to paragraph 4 or 5 shall decide the dispute in accordance with the provisions of this Agreement and applicable rules of international law.

9. [Subject to the applicable provisions of the New York Convention, the Inter-American Convention, and the ICSID Convention],

a) any arbitral award resulting from an arbitration under paragraphs 4 or 5 of this Article shall be final and binding on the parties to the dispute; and

b) each Party undertakes to carry out without delay the

provisions of any such award and to provide for its enforcement.

10. In an arbitration held pursuant to paragraphs 4 or 5, the Tribunal may determine any incidental or additional claims or counterclaims arising directly out of the acts or measures constituting the alleged breach of this Chapter, except as the parties to the investment dispute otherwise agree. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

11. For purposes of an arbitration held under paragraph 4 or 5 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of another Party, shall be treated as an investor of such other Party, including in accordance with Article 25(2)(b) of the ICSID Convention.

12. No Party shall give diplomatic protection, or bring an international claim for money damages or restitution of property, in respect of the investment dispute which one of its investors shall have submitted to arbitration under this Article, unless such other Party shall have failed to abide by and comply with the award pursuant to the New York Convention. Diplomatic protection, for purposes of this paragraph shall not include state-to-state dispute settlement pursuant to Article ___ of this Agreement, or informal diplomatic exchanges for the sole purposes of facilitating settlement of a dispute.

Provision for the Investment Chapter that might be taken into the General provisions:

A Party shall have a defense to a claim under Article ___ to the extent that the very measure constituting the alleged breach of this Chapter is itself expressly authorized by another Chapter.]

^{USA}[SETTLEMENT OF DISPUTES BETWEEN PARTIES

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

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

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

^{CDA}[ARTICLE XX07: SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN INVESTOR OF ANOTHER PARTY.

1. The provisions of this Article reflect the desirability of a mechanism for the settlement of investment disputes that assures equal treatment between investors of the Parties to this Agreement in accordance with the principle of international reciprocity and that assures that the parties to the dispute are afforded due process before an impartial tribunal.

2. Definitions

For purposes of this Article,

(a) "disputing parties", in relation to an investment dispute, means the investor and the disputing Party;

(b) "disputing Party", in relation to an investment dispute, means the Party to this Agreement alleged to have breached a provision of this Chapter;

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

(d) "Inter-American Convention" means the Inter-American Convention on International Commercial Arbitration, done at Panama, [Month] [Day], 1975;

(e) "investment dispute" means a dispute between a Party to this Agreement and an investor of another Party whereby the investor alleges that the first-mentioned Party has breached a provision of this Chapter and that it has suffered loss or damage by reason of, or arising out of, that breach, but does not include a dispute with respect to

(i) measures that are inconsistent with this Chapter

but that are authorized by other provisions of this Agreement,

(ii) non-conforming provisions of measures covered by Articles ... and Annexes ... ; or

(iii) an alleged breach of any right to the security of the person of an investor;

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

(g) "UNCITRAL" means the United Nations Commission on International Trade Law.

3. Negotiation

In the event of an investment dispute, the disputing parties should attempt first to settle the dispute by consultation and negotiation.

4. Arbitration

(1) If an investment dispute cannot be settled by consultation and negotiation, the investor may, subject to subparagraphs (2) to (4), submit the dispute for settlement by arbitration:

(a) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the ICSID Convention, provided that the disputing Party and the Party of the Investor are parties to that Convention;

(b) to the Additional Facility of the Centre, if the disputing Party is not a Party to the ICSID Convention; or

(c) in accordance with the UNCITRAL Arbitration Rules.

(2) The investor may submit the investment dispute to arbitration under subparagraph (1) on condition that the investor

(a) waive his rights to initiate or continue before any court or administrative tribunal of the disputing Party any proceedings in respect of a breach of the domestic law of that Party and in which the matter at issue is substantially the same as the matter at issue in the arbitration proceeding;

(b) waive execution under the New York Convention of any

arbitral award made in an arbitration proceeding initiated under subparagraph (1), except in a country that is both a Party to the New York Convention and a Party to this Agreement; and

(c) agrees that the defending Party can establish an arbitral panel under paragraph 8 or 9.

(3) An investor who intends to submit an investment dispute to arbitration under subparagraph (1) shall give notice of his intention to the disputing Party at least ninety days before that proceeding is initiated, which notice shall

(a) designate precisely the parties to the dispute and state the address of each;

(b) set forth the provisions of this Agreement alleged to have been breached and any other relevant provisions; and

(c) contain information concerning the issues in dispute and an indication of the amount involved.

(4) An investor is not entitled to initiate arbitration under subparagraph (1) if

(a) less than six months have elapsed since the date on which the investment dispute arose;

(b) more than two years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach that is at issue in the dispute; or

(c) the disputing Party has requested the establishment of an arbitral panel in accordance with paragraph 8 or 9.

(5) An arbitration proceeding under subparagraph (1) is initiated on the date, as applicable, on which

(a) the notice of registration of the request to institute arbitration proceedings has been dispatched by the Secretary-General of the Centre in accordance with paragraph (3) of Article 36 of the ICSID Convention;

(b) the certificate of registration of the notice for arbitration has been dispatched by the Secretary-General of the Centre in accordance with of Article 4 of Schedule C of the Additional Facility Rules; or

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

5. (1) An investor of a Party shall not have a right of action under the domestic law of another Party for any breach of this Agreement by that other Party.

(2) If an arbitration proceeding is initiated in respect of an investment dispute, the investor shall cease to have any right to initiate before any court or administrative tribunal of the disputing Party any proceedings in respect of a breach of the domestic law of that Party in which the matter at issue is substantially the same as the matter at issue in the arbitration proceeding.

6. An arbitral tribunal to which an investment dispute is referred for arbitration in accordance with paragraph 4 may decline to address an issue, reserve its decision on an issue, or stay the proceedings before the tribunal, pending decision by any other arbitral tribunal or panel on the same issue.

7. A disputing Party may, within ninety days after service of a notice under subparagraph 4(3) in respect of the investment dispute,

(a) request the establishment of an arbitral panel in accordance with paragraph 8, if it considers that any actual or proposed measure or other matter that is at issue in the dispute, or at issue in the dispute and in other investment disputes in which it is a disputing Party, might significantly affect the operation of this Agreement; or

(b) request the establishment of an arbitral panel in accordance with paragraph 9, if it considers that the dispute, or the dispute and other investment disputes in which it is a disputing Party, raises important issues of public policy or that the dispute and other investment disputes in which it is a disputing Party should be consolidated.

8. (1) A disputing Party may request the [North American] Trade Commission to establish an arbitral panel in accordance with Article 2309.

(2) The request shall state the measure or other matter that the disputing Party considers might significantly affect the operation of this Agreement, indicate the provisions of this Agreement that are considered relevant, and be delivered by the disputing Party to the other Parties and to its Section of the Secretariat.

(3) Subject to Article 2313, the terms of reference for the arbitral panel shall be

(a) to examine, in light of the relevant provisions of this Agreement, the measure or other matter referred to the Commission as set out in the request; and

(b) to make such findings, determinations, and disposition as provided in Article 2317(2).

(4) Except as modified by this paragraph, the provisions of Chapter 23 apply to an arbitration proceeding that is initiated under this paragraph.

(5) An arbitration proceeding is initiated under this paragraph on the date of delivery of the request to the Commission.

(6) An arbitral tribunal established pursuant to paragraph 4 shall cease, on the date on which an arbitration proceeding is initiated under this paragraph, to have jurisdiction with respect to any matter at issue in the proceeding before it that is also at issue in the proceeding before the arbitral panel established pursuant to this paragraph pending determination of the matter by the panel established pursuant to this paragraph.

(7) The determination and disposition of the arbitral panel, or a settlement by the Parties with respect to any measure or other matter at issue in the proceeding before the panel, is binding on any arbitral tribunal established pursuant to paragraph 4 to which the same matter is or has been referred for arbitration.

9. (1) A disputing Party may request the Secretary of the International Chamber of Commerce to establish an arbitral panel.

(2) An arbitral panel shall consist of three arbitrators appointed by the Secretary.

(3) The disputing Party shall give notice of its request to establish an arbitral panel to all known claimants and to the Party or Parties of the claimants.

(4) The disputing Party shall refer to the arbitral panel such issues as it considers appropriate and the panel shall determine and dispose of those issues.

(5) The disputing Party, the claimants and the Party or Parties of the claimants shall have the right to be parties to the proceeding before the arbitral panel.

(6) No arbitral tribunal or panel established pursuant to paragraph 4, 8 or 10 shall have jurisdiction to decide any issue that is also at issue before an arbitral panel established pursuant to this paragraph pending decision by the panel established pursuant to this paragraph.

(7) The determination and disposition of the arbitral panel, or the settlement by the Parties on the issue or issues before it, is binding on the parties to the proceeding before the panel and on any arbitral panel or tribunal established pursuant to paragraph 4, 8 or 10 to which the same issue or issues is or have been referred for arbitration.

(8) Except as modified by this paragraph, the provisions of the UNCITRAL Arbitration Rules apply mutandis mutatis to an arbitration proceeding that is initiated under this paragraph.

10. Notwithstanding paragraphs 3 to 9, the disputing parties may agree to submit the investment dispute to arbitration in accordance with other arbitration rules or before any other arbitration institution.

10a. An arbitral tribunal or panel established pursuant to paragraph 4, 9 or 10

(b) may not order provisional measures; and

(c) may award only monetary compensation or restitution of property.

11. General

Unless the disputing parties agree otherwise, an arbitration proceeding under paragraph 4, 9 or 10 shall be held in the territory of any Party to this Agreement that is a Party to the New York Convention, such place to be selected in accordance with the applicable arbitration rules.

12. (1) An arbitral tribunal or panel established pursuant to paragraph 4, 9 or 10 shall decide the issue or issues in the proceeding before it in accordance with the provisions of this Agreement and applicable rules of international law.

(2) Subject to subparagraphs 8(7) and 9(7), the decision of an arbitral tribunal or panel established pursuant to this Article shall have no binding force except between the parties to the proceeding and in respect of the particular case.

13. (1) The award granted by an arbitral tribunal or panel established pursuant to this Article shall be subject to judicial review under the law of the place where the arbitration proceeding is held [or, in the alternative, review by an extraordinary panel under this Agreement].

(2) No arbitral tribunal or panel established pursuant to this Article shall order a Party to pay punitive or aggravated damages or to return property that is not owned and controlled by that Party.

(3) Where an arbitral tribunal or panel established pursuant to paragraph 4, 9 or 10 orders a Party to return property, it shall also order that the Party may pay compensation in lieu thereof.

(4) Costs in any arbitration proceeding under this Article and interest on any award shall be governed by arbitral law of the place where the proceeding is held.

14. (1) In any arbitration proceeding under paragraph 4, 9 or 10, the arbitral tribunal

(a) may take into account amounts that a competent domestic authority has ordered the investor to pay to the disputing Party and that are counterclaimed by that Party; and

(b) shall deduct from an award amounts paid by the defending Party under a contract of indemnity.

(2) Subject to subparagraph 14(1)(b), in any proceeding under this Article involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

14b. An award made under this Article shall be enforceable under [in accordance with] the New York Convention in a country that is both a Party to the New York Convention and a Party to this Agreement.

15. Subject to subparagraph 13(1) and the applicable provisions of the New York Convention, the Inter-American Convention and the ICSID Convention,

(a) any arbitral award granted in an arbitration proceeding under paragraphs 4, 9 or 10 is final on the parties to the arbitration proceeding; and

(b) each Party to this Agreement undertakes to carry out without delay the provisions of any arbitral award granted against it in any arbitration proceeding under paragraph 4, 9 or 10 and to provide for the enforcement of arbitral awards granted in arbitration proceedings under those paragraphs.

16. For purposes of an arbitration proceeding under paragraph 4, 9 or 10, any company that is legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of another Party, shall be treated as an investor of such other Party, including in accordance with Article 25(2)(b) of the ICSID Convention.

17. (1) Subject to this Article, each Party hereby consents to the submission of any investment dispute between that Party and any investor of another Party for settlement by arbitration in accordance with paragraph 4.

(2) The submission of an investment dispute for settlement by arbitration in accordance with paragraph 4, together with the consent given by each Party in subparagraph (1), shall satisfy:

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

(b) the requirement of Article II of the New York Convention for an agreement in writing; and

(c) the requirement of Article I of the Inter-American Convention for an agreement.

(3) For purposes of Article I of the New York Convention and Article I of the Inter-American Convention, the submission of any investment dispute for settlement by arbitration in accordance with paragraph 4 shall be considered to arise out of a commercial relationship or transaction.

(4) For greater certainty, subparagraph (3) shall not affect any claim of immunity made by any Party to this Agreement with respect to the enforcement of any arbitral award.

18. (1) No Party shall give diplomatic protection, or bring an international claim for money damages or restitution of property, in respect of any investment dispute that an investor of that Party

has submitted to arbitration under paragraph 4, 9 or 10, unless the other Party concerned has failed to abide by and comply with the New York Convention in respect of an award granted in the arbitration proceeding.

(2) For purposes of subparagraph (1), "diplomatic protection" does not include state-to-state dispute settlement pursuant to Chapter 23 or informal diplomatic exchanges for the sole purposes of facilitating settlement of a dispute.

19. Notwithstanding anything in the Agreement, the provisions of this Article and Chapter 23 (Dispute Settlement) shall not apply to any Decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review.]

DEFINITIONS

For purposes of this Chapter:

^{MEX USA}[**enterprise** of a Party means an enterprise constituted or organized under the laws and regulations of a Party or a political subdivision thereof.]³⁰

G7 Currency means the currency of Canada, Germany, France, Italy, Japan, the United States of America, or the United Kingdom of Great Britain and Northern Ireland.

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party, and ^{USA MEX}[includes the following kinds of interests] ^{CDA}[consists of].³¹

- a) an enterprise;
- b) equity or debt securities of an enterprise, or any interest in such enterprise that entitles the owner to share in the income or profits or to share in the assets on dissolution;
- c) real estate or other property (tangible or intangible) acquired in the expectation or used for the purpose of economic benefit or other business purposes;
- d) a loan to an enterprise made ^{USA}[or guaranteed] by an enterprise that is not a financial institution as defined in Chapter ____ (financial services);³²
- e) interests arising from the commitment of capital or other resources in or into the territory of another Party to economic activity in such territory, such as under (i) contracts involving the presence of the investor's property in the territory of another Party (e.g., concession agreements, turnkey or construction contracts), or (ii) contracts where the remuneration depends substantially on the production, revenues or profits of an enterprise.

³⁰ We are checking this definition with the Lawyers' Group.

³¹ Agreed texts are merged.

³² This language must be coordinated with the Financial Services Group, which may wish to include as "investments" a loan by a Bank to provide capital to its subsidiary.

For greater clarity,

a) claims to money which arise solely from:

i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of one Party to an enterprise in the territory of another Party; or

ii) the extension of credit in connection with a commercial transaction (e.g., trade financing) other than a loan covered by subparagraph (c) of the preceding paragraph³³; or

b) any other claim to money;

which do not involve the kinds of interests in the preceding paragraph shall not be considered investments.

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants.

investor of a Party means

(a) a national of such Party, or

(b) an enterprise of such Party ^{CDA}[that is controlled in fact, directly or indirectly, by nationals of such Party],

that makes or has made an investment.

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

most-favored-nation treatment shall mean the treatment accorded pursuant to Article 2104.

state enterprise means ^{CDA}[for Canada a Crown Corporation within the meaning of the Financial Administration Act, and for the U.S. and Mexico....] ^{USA}[an enterprise of a Party that is owned, or controlled through ownership interests, directly or indirectly, by such Party or any agency or instrumentality thereof.

³³ "Sentence" could also be used here.