

**INVEST.810**

**Watergate Daily Update  
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.

<sup>MEX</sup>[ 2. A Party (Mexico) has the right to perform exclusively the economic activities set forth in Annex I and to refuse to permit the establishment of investment in such activities.]

3. This Chapter shall not apply to:

a) [financial services except as provided in the Chapter on Financial Services;]<sup>1</sup>

b) <sup>CDA</sup>[except as provided in the Chapter on Government Procurement]; and

4. Nothing in this Chapter<sup>2</sup> shall be construed to prevent a 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

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<sup>1</sup> U.S. Note - Further coordination with financial services may be necessary.

<sup>2</sup> Canada doing redraft. A generic provision may be needed to address the subject matter of this provision.

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.<sup>3</sup>

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

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) nationals of any non-Party own or control such enterprises and:

i) the denying Party does not maintain diplomatic relations with the non-Party; or

ii) the denying Party has imposed measures against the non-Party that prohibit transactions with such enterprise or that would be violated or circumvented by the activities of such enterprise.

8. Article \_\_\_\_\_ (national security) shall apply to the provisions of this Chapter. For greater clarity, any action a Party takes under Article \_\_\_\_\_ (national security) which restricts or prohibits acquisitions by investors or investments of another Party shall not be subject to Articles \_\_\_\_\_ (investor-state dispute settlement) or Chapter \_\_\_\_\_ (general dispute settlement).

**Article 2102: Environmental Measures<sup>4</sup>**

#### 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, management, conduct, operation and sale or other disposition of investments in its

<sup>3</sup> Issues of overlap need to be addressed.

<sup>4</sup> This language is being negotiated in a separate group.

territory.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that which it accords, in like circumstances, to investments of its own investors <sup>USA</sup>[and in particular] in respect of the establishment, acquisition, expansion, management, conduct, and operation of such investments.

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 most favorable treatment accorded by such state or province in like circumstances to investors of the Party of which it forms a part.

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.

<sup>CDA MEX</sup>[Article 2104: **Most-Favored-Nation Treatment**

1. Each Party shall accord to investments of an investor of another Party <sup>USA MEX</sup>[, 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, management, operation and sale or other disposition of its investment in its territory.]

<sup>CDA MEX</sup>[Article 2105: **Non-Discriminatory Treatment**

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The treatment that a Party shall accord to investments <sup>USA</sup>  
<sup>MEX</sup>[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. <sup>MEX USA</sup>[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 individuals<sup>5</sup> of any particular nationality.

2. <sup>CDA</sup>[With respect to an enterprise of a Party which is an  
investment of an investor of another Party, and subject to  
applicable immigration laws and regulations, a Party:

a) shall not require that individuals of any particular  
nationality be appointed to senior management positions;

b) may require a majority of the Board of Directors, or  
any committee thereof, be of any particular nationality, or  
resident in the territory of that Party, provided such a  
requirement would not materially impair the ability of that  
investor to control its investments.

<sup>USA</sup>[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.]

<sup>MEX USA</sup>[3. For greater certainty, the provisions of this

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<sup>5</sup> Although the Lawyers' Group favors use of "national person" rather than  
"individual", that usage would appear awkward in these paragraphs.

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

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, 2105 and 2107.

Note: taken from the services chapter.

3. Articles 2103, 2104, 2105 2107 [, and 2109] shall not apply to measures a Party maintains or adopts with respect to the sectors or subjects inscribed by it in Annex B. <sup>MEX USA</sup>[However, any measure so maintained or adopted with respect to the sectors or subjects inscribed by it in Annex B may not require an investor of another Party to sell or otherwise dispose of investment existing at the time such measure becomes effective. The foregoing is without prejudice to the right of a Party designate a monopoly in a manner consistent with Article \_\_\_\_\_ (monopolies) and other obligations of the Agreement.]<sup>6</sup>

<sup>6</sup>Canada is still considering this provision in relation to its social services exception.

4. A Party may also maintain exceptions from the obligations of Articles 2103, 2104, 2105 and 2107 , which are specifically provided for in Article 2203 (of the Chapter on Intellectual Property).

<sup>CDA MEX</sup>[5. 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].]

6. 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 [impair the benefits] of any of the provisions set forth in this Chapter.

7. 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 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]<sup>7</sup> shall preclude a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.

8. <sup>USA</sup>[a) As a further exception to (provision on national treatment)<sup>8</sup>, 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

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<sup>7</sup> Canada is considering use of "Chapter."

<sup>8</sup> This section would be inserted in the "treatment" section in a way which would capture the "ratchet."

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.<sup>9]</sup><sup>10</sup>

9. <sup>CDA</sup>[ 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 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 entity<sup>11</sup> 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.]

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

<sup>USA MEX</sup>[a) federal government procurement of goods and services supplied by investments of investors of another Party

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<sup>9</sup> 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.

<sup>10</sup> Mexico is considering joining the U.S. on this provision.

<sup>11</sup> Note that "entity" (rather than "enterprise") is retained here. Presumably it need not be defined.

if such investments are controlled by nationals of a non-Party;]

<sup>USA</sup>[b) procurement of goods and services by political subdivisions of a Party; and]

c) any subsidy or grant <sup>MEX USA</sup> [, insurance or loan program] provided by a Party or state enterprise thereof.

#### Article 2109: Performance Requirements

1. Except as provided in Annex \_\_\_\_\_, no Party shall impose the following requirements, or enforce any commitment <sup>USA</sup> [or undertaking] in <sup>CDA</sup> [relation thereto], in connection with the establishment, acquisition, expansion, conduct or operation of an investment of an investor of a Party or non-Party in its territory:

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) <sup>USA MEX</sup> [to transfer technology, production process or other proprietary knowledge to a national or enterprise in its territory, except when the requirement is imposed by a court or administrative tribunal to remedy an alleged violation of competition laws.

g) <sup>USA MEX</sup> [to act as the exclusive supplier of the goods or services it produces to a specific region or world market.]

2. A requirement that an investment use a technology to meet generally applicable health, safety or environmental standards shall not be considered inconsistent with paragraph 1(f). For

greater clarity, Articles 2103, 2104, and 2105 shall apply to such requirements.

<sup>CDA</sup>[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.]

3. Except as provided in Annex \_\_\_\_, no Party shall condition the receipt or continued receipt of an advantage, in connection with investments in its territory of investors of a Party or non-Party, on compliance with any of the following requirements:

- a) to purchase or use goods or <sup>USA</sup>[services] from investments controlled by their nationals<sup>12</sup>:
- b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- c) to achieve a given level or percentage of domestic content;
- 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 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;
- f) <sup>USA MEX</sup>[to act as the exclusive supplier of the goods or services it produces to a specific, regional or world market.]

4. For greater clarity, the provisions of paragraph 3 do not apply to conditions related to the receipt of an advantage that an investor or investment locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. The provisions of:

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<sup>12</sup> U.S. proposes taking an exception for historically socially disadvantaged minority groups.

a) paragraphs 1(a)-(c), and 3(a)-(c) shall not apply in respect to export promotion and foreign aid programs;

b) paragraphs 1(b)-(c), 1(f), <sup>CDA</sup>[1(g)], and 3(a)-(c) shall not apply in respect to government procurement, including purchases by state enterprises;

<sup>USA</sup>[d] paragraph 3(b) shall not apply to conditions related to the content of goods to qualify for preferential tariffs or quotas..]

6. The provisions of paragraphs 1 or 3 shall not apply to any requirements other than those listed in paragraphs 1(a)-(g) and 3(a)-(f).

#### Article 2110: Transfers

1. Subject to paragraph 3 and paragraph 5<sup>13</sup> 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 .<sup>14</sup>

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.

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<sup>13</sup> It may be desirable to refer to the tax article.

<sup>14</sup> Canada agrees subject to overall agreement on dispute settlement.

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 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.

5. 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 <sup>MEX CDA</sup> [or to any businesses carried on in another Party either directly by the investors or indirectly through a business enterprise established in that other Party.]

6. <sup>USA</sup> [Paragraph 5 shall not be construed as preventing a Party from imposing any measure consistent with Articles 2103, 2104, and 2105, and relating to activities listed in paragraphs 3(a)-(e).]

**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 taking ("date of expropriation"), and shall not reflect any change in value occurring because the expropriatory taking had become known earlier. 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.

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

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation 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 expropriation 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, <sup>CDA MEX</sup>[limitation or creation] of intellectual property rights to the extent that it is consistent with the provisions of Chapter \_\_\_\_ (Intellectual Property).

**Article 2115: State Enterprises<sup>15</sup>**

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

2. Each Party through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes:

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<sup>15</sup> Canadian proposal and paragraph 2 of U.S. proposal would be placed with generic monopolies provision.

a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement, whenever such state enterprise exercises any regulatory administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges;

b) accords nondiscriminatory treatment to investments in the Party's territory of investors of another Party in the sale of its goods or services; and

<sup>CDA</sup>[c) where engaged in non-regulated commercial activities in competition, in the relevant market within the territory of the Party, with investments of investors of another Party, does not engage in anti-competitive practices that adversely affect investments of investors of another Party.]

<sup>USA</sup>[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.<sup>16</sup>

2. Where a Party owns and controls, at the federal level, state enterprises that are not monopolies, it shall not by provision of subsidies or otherwise, take measures to support such state enterprises in conduct that results in serious prejudice to investors of another Party, contrary to such investors' reasonable expectations. This provision shall not apply where such conduct is authorized by law to fulfill a public purpose and is reasonably related thereto. The term "public purpose" does not include the deliberate disadvantaging of investors of another Party or country.]

**Article 2116: Monopolies<sup>17</sup>**

[SEE SUBGROUP TEXT]

**Article 2117: Technology Consortia**

<sup>MEX CDA</sup>[1. No Party shall maintain or introduce any measure that

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<sup>16</sup> 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..

<sup>17</sup> U.S. proposal would be placed outside the investment chapter.

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.]

**SETTLEMENT OF DISPUTES BETWEEN A PARTY  
AND AN INVESTOR OF ANOTHER PARTY.**

**Article 2119: Purpose**

This Part establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

**Article 2120: Investment Dispute**

Investment dispute means a dispute between a Party and an investor of another Party in which the investor alleges that the Party has breached a provision of this Chapter and that the investor has incurred loss or damage by reason of, or arising out of, that breach. <sup>Mex</sup>[An investment dispute does not include an alleged breach of this Chapter where the measure constituting the alleged breach is authorized by another provision of this Agreement.<sup>18</sup>

[Mexico Proposed Article: Where it is alleged that a Party has breached a provision of this Chapter it shall be a defense that the measure is authorized by another provision of this Agreement.]

**Article 2121: Interpretation of Annexes ... (Constitution), ... (National Treatment) and ... (Unbound)**

1. Where a disputing Party asserts as a defence that the measure alleged to be a breach of this Chapter is within the scope of an exception set forth in Annex ... (Mexican Constitution), Annex ... (National Treatment or Annex ... (Unbound), on request of the disputing Party, the arbitration tribunal shall request the

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<sup>18</sup> The U.S. and Canada agree that the bracketed language will be replaced by article 2135 subject to agreement on language to the effect that regulation does not in itself constitute expropriation (placement of language to be determined by the Lawyers' Group.)

interpretation of the Commission on this question. The Commission shall have 60 days to submit its interpretation in writing to the tribunal.<sup>19</sup>

2. If the Commission agree on an interpretation,<sup>20</sup> it shall be binding on the tribunal. If the Commission fails to agree or fails to submit an interpretation within such 60 day period, the tribunal shall decide the issue of interpretation of the exception.]<sup>21</sup>

**Article 2122: Consultation and Negotiation**

The parties to an investment dispute should first attempt to settle the dispute through consultation or negotiation. Consultation or negotiation under this Article shall not constitute the initiation of domestic proceedings for purposes of Article 2123.

**Article 2123: Fora for Resolving an Investment Dispute**

1. If an investment dispute cannot be settled by consultation or negotiation, the investor may choose either to:

a) initiate proceedings under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party with a right of action under its domestic law for an alleged breach of this Chapter; or

b) submit the investment dispute to arbitration under Article 2125;

and the choice, once made by the investor, shall be exclusive.

2. A Party shall not provide a right of action under its domestic law against any other Party for an alleged breach of this Agreement.<sup>22</sup>

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<sup>19</sup> The role of the Commission under this Article is unrelated to Chapter 23.

<sup>20</sup> It is recognized that the Commission is an "it", which issues an interpretation rather than an agreed interpretation, the U.S. considers it important to build into this article the concept of agreement.

<sup>21</sup> The Parties agree that trilateral agreement on interpretation of a provision of the NAFTA will be binding on an investor/state arbitration tribunal, and will draft language accordingly with appropriate location to be determined by the Lawyers' Group.

<sup>22</sup> The Lawyers' Group will develop wording to make this provision generic and will decide where, outside the Investment Chapter, to place the provision.

**Article 2124: Limitation Period**

An investor shall not be entitled to submit an investment dispute to arbitration if more than three years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

**Article 2125: Arbitration Fora**

1. Provided that six months have elapsed since the date on which the investment dispute arose, the investor may submit the dispute to arbitration under:

a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor is a party to the ICSID Convention; or

c) the UNCITRAL Arbitration Rules.

2. The Secretary General of ICSID shall serve as appointing authority for an arbitration under the UNCITRAL Arbitration Rules.

3. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Part.

**Article 2126: Consent to Arbitration**

1. Each Party hereby consents to the submission of an investment dispute between that Party and an investor of another Party for settlement by arbitration in accordance with the provisions of this Part.

2. The submission by an investor of an investment dispute to arbitration under this Part, together with the consent given by each Party in paragraph 1, shall satisfy the requirement of:

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

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

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

3. Any dispute submitted by an investor for arbitration under this Part 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.

4. By submitting the dispute to arbitration, the investor:

a) consents to arbitration in accordance with the provisions of this Part; and

b) waives its right to initiate or continue before any administrative tribunal or court [under the domestic law]<sup>23</sup> of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of this Chapter, except for proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party.<sup>24</sup>

#### Article 2127: Notice

An investor shall give to the disputing Party written notice of its intention to submit an investment dispute to arbitration at least ninety days before the dispute is submitted, which notice shall specify:

a) the names and addresses of the parties to the dispute;

b) the provisions of this Chapter alleged to have been breached and any other relevant provisions;

c) the issues and the factual basis for the claim; and

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<sup>23</sup> Choice between reference to administrative tribunal or court, on the one hand, or "under the domestic law", on the other, to be made during scrubbing.

<sup>24</sup> The final drafting must make it clear that article 2122(1)(a) addresses a domestic cause of action under the NAFTA and article 2126(4)(b) addresses domestic law other than the NAFTA.

In the case of Mexico, it is agreed that an investor must elect, at the end of the administrative process, either to submit his dispute to arbitration under the NAFTA or initiate judicial proceedings or administrative tribunal proceedings under Mexican domestic law. If the investor is successful in amparo proceedings, he may then submit the issue of compensation to arbitration under the NAFTA or, if Mexico creates a cause of action for a violation of the NAFTA, submit the issue of compensation to a court. Placement of this exception will be subject to determination of placement of other exceptions currently in the Investment Chapter. See attached Mexican text.

d) the relief sought and the approximate amount of compensation claimed.

**Article 2128: Selection or Appointment of Presiding Arbitrator**

1. Unless the disputing parties select the presiding arbitrator:

a) the presiding arbitrator shall be selected or appointed in accordance with the applicable arbitration rules from the list of presiding arbitrators described in paragraph 2; and

b) in the event that no such presiding arbitrator is available to serve, the Secretary-General of ICSID shall appoint from the ICSID Panel of Arbitrators a presiding arbitrator who is not a national of any of the Parties.

2. As of the entry into force of this Agreement, the Parties shall have jointly designated, without regard to nationality, thirty presiding arbitrators meeting the qualifications of the rules referred to in Article 2125 and experienced in international law and investment.

**Article 2129: Consolidation**

1. The Secretariat of the Commission shall maintain a public register of submissions to arbitration under Article 2125 and requests made under paragraph 2.

2. A disputing party that seeks an order under paragraph 4 may request the Secretary General of ICSID to establish an arbitration tribunal and shall specify in the request:

a) the name of the disputing party or parties against which the order is sought;

b) the nature of the order sought; and

c) the grounds on which the order is sought.

A disputing party that seeks an order under paragraph 4 shall give to the disputing party or parties against which the order is sought a copy of the request.

3. Within 60 days of receipt of the request, the Secretary General of ICSID shall establish an arbitration tribunal consisting of three arbitrators. The presiding arbitrator shall be selected from the roster described in Article 2128. In the event that no

such presiding arbitrator is available to serve, the Secretary-General of ICSID shall appoint a presiding arbitrator, who is not a national of any of the Parties from the ICSID Panel of Arbitrators.

The two other members shall be selected from the roster described in Article 2128, or to the extent not available from that roster, from the ICSID Panel of Arbitrators, or to the extent not available from that panel, in the discretion of the Secretary General, provided that one member shall be a national of the disputing Party and one member shall be a national of the Party whose investors are disputing parties. The arbitration tribunal shall conduct itself in accordance with the UNCITRAL Arbitration Rules.

4. Where it appears to the arbitration tribunal that arbitrations have been initiated under Article 2125 that have a question of law or fact in common, the tribunal may, in the interests of fair and efficient resolution of the disputes, and after hearing from the interested parties<sup>25</sup>, order that the arbitration tribunal shall:

- a) assume jurisdiction over, and hear and determine together, all or part of the investment disputes in accordance with the UNCITRAL Arbitration Rules; or
- b) assume jurisdiction over, and hear and determine, one or more of the investment disputes the determination of which it believes would assist in the resolution of the others, in accordance with the UNCITRAL Arbitration Rules.

5. An arbitration tribunal established under Article 2125 shall not have jurisdiction to decide an investment dispute, or a part of an investment dispute, over which an arbitration tribunal established under this Article has assumed jurisdiction.

**Article 2130: General Provisions Applicable to Arbitrations under Articles 2125 or 2129**

1. Notice: A disputing Party shall deliver to the other Parties:

- a) written notice of an arbitration initiated under Article 2125 or 2129 within 30 days of initiation of the arbitration; and
- b) copies of all pleadings filed in the arbitration.

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<sup>25</sup> This term is in contemplation of language that will give a disputing party who is not named in an application for an order under paragraph 4 the right to cross-apply to the tribunal established under paragraph 3 to be added in an order made under paragraph 4.

2. Participation by a Party: On written notice to the disputing parties, a Party may make submissions to an arbitration tribunal established under Article 2125 or 2129 on a question of interpretation of this Agreement.

3. Documents: A Party shall be entitled to receive from the disputing Party at the cost of the requesting Party:

- a) a copy of the evidence that has been tendered to the arbitration tribunal; and
- b) a copy of the written argument of the disputing parties.<sup>26</sup>

4. Place of Arbitration: Unless the disputing parties agree otherwise, an arbitration proceeding under Article 2125 or 2129 shall be held in the territory of a Party which is a party to the New York Convention, selected in accordance with:

- a) the Additional Facility Rules if the arbitration is under those rules or the ICSID Arbitration Rules; or
- b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.

5. Interim Measures of Protection: An arbitration tribunal established under Article 2125 or 2129 may take such measures as it deems necessary to preserve the respective rights of the disputing parties, or to insure that the tribunal's jurisdiction is made fully effective. Such measures may include, but are not limited to, orders to preserve evidence<sup>27</sup> or to protect the tribunal's jurisdictional exclusivity. An interim measure of protection may not include an order of attachment or an order to enjoin the application of the measure alleged to be the breach of the Chapter. For purposes of this paragraph, an order includes a recommendation.

6. Final Relief: An arbitration tribunal established under Article 2125 or 2129 may award only monetary damages or restitution of property. An award providing for restitution shall also provide that a Party may pay compensation in lieu thereof. An arbitration

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<sup>26</sup> Wording must be developed to ensure that confidentiality is respected.

<sup>27</sup> This is to be drafted so that the federal government of Canada will not be the subject of an order to preserve evidence that is in the possession or control of a subnational government.

tribunal established under Article 2125 or 2129 shall not order a Party to pay punitive damages.

**Article 2131: Governing Law**

An arbitration tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

**Article 2132: Finality and Enforcement of Award**

1. A final award made in an arbitration proceeding under Article 2125 or 2129 is binding on the disputing parties but shall have no binding force except between the disputing parties and in respect of the particular case.

2. A disputing Party shall abide by and comply with a final award made in an arbitration proceeding under Article 2125 or 2129 without delay, but shall not be required to abide by or comply with an award that is not final.

3. If a Party fails to abide by or comply with the terms of a final award under this Part, the Commission provided for in Chapter 23 shall, upon delivery of a request by any other Party whose investor was party to the investment dispute, establish an arbitration panel under Article 2309(2). The requesting Party may seek in such proceedings:

- a) a determination that the failure to abide by and comply with the terms of the final award is inconsistent with the obligations of this Agreement; and
- b) the disposition of the dispute that requires the defaulting Party to abide by and comply with the terms of the final award.

4. Paragraph 3 is without prejudice to an investor's rights to seek enforcement under the ICSID Convention, the New York Convention or the Inter-American Convention.

5. For the purposes of this Article, an arbitration award made under the ICSID Convention is final if:

- a) 120 days have elapsed from the date the award was rendered and no party to the dispute has requested revision or annulment of the award; or
- b) revision or annulment proceedings have been completed.

6. For the purposes of this Article, an arbitration award made under the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules is final if:

- a) 3 months have elapsed from the date the award was rendered and no party to the dispute has commenced a proceeding to revise, set aside or annul the award; or
- b) a court has dismissed or allowed an application to set aside, set aside or annul the award and there is no further appeal.

7. Each Party undertakes to provide in its territory for the enforcement of an arbitration award made under Article 2125 or 2129.

**Article 2133: Receipts under Insurance or Guarantee Contracts**

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.

**Article 2134: Companies Incorporated Under the Laws of a Party**

For purposes of an arbitration proceeding under this Part, 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.

Definitions: Note: to be moved to the general definitions section.

For purposes of this Article:

- a) "disputing party" means the investor or the disputing Party, and "disputing parties" means the investor and the disputing Party;
- b) "disputing Party" means the Party 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) "ICSID" means the International Centre for Settlement of Investment Disputes;
- e) "Inter-American Convention" means the Inter-American Convention on International Commercial Arbitration, done at Panama, [Month] [Day], 1975;
- 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 Arbitration rules" means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976;
- h) "parties" means the disputing party and the disputing Party.

Article 2135

In the event of any inconsistency between the provisions of this Chapter and another Chapter with respect to a measure related to an investment, the <sup>CDA</sup> <sup>MEX</sup>[rights and] obligations of the other Chapter shall prevail to the extent of the inconsistency.<sup>28</sup>

Article 2136

<sup>CDA</sup> <sup>MEX</sup>[Nothing in this Part prejudices the right of a Party to invoke Chapter 23 OR Nothing in Part X of Chapter 21 prejudices the right of a Party to invoke this Chapter (Chapter 23).]

August 9, 1992.

**Article 2123: Fora for resolving an Investment Dispute**

1. If an investment dispute cannot be settled by consultation or negotiation, the investor may choose either of the following:

- (a) assertion of rights under domestic law:

The investor may initiate (or casue its investment to

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<sup>28</sup>

Placement to be determined by the Lawyers' Group.

initiate) proceedings under the domestic law of the disputing Party, based on rights and obligations other than those established in this Chapter; or

(b) assertion of right under this Chapter:

The investor may either:

(i) submit the investment dispute to arbitration under Article 2125 on rights and obligations established in this Chapter, or

(ii) initiate (or cause its investment to initiate) proceedings based on such rights and obligations under the domestic law of the disputing Party, where the disputing Party has provided investors of another Party or their investments with a right of action under its domestic law for an alleged breach of this Chapter.

2. The choice of forum under paragraph 1, once made by the investor shall be exclusive, with the following exceptions:

[(a) simultaneous pursuit of extraordinary relief and damages in different fora:]

Submission of a dispute to arbitration under Article 2125 shall not preclude an investor from seeking, in an administrative tribunal or court of the disputing Party, injunctive, declaratory or other extraordinary relief based on rights and obligations other than those established in this Chapter. In such circumstances, no determination of damages shall be made by the arbitration tribunal until the determination regarding such extraordinary relief has been made; and

(b) [sequential pursuit of extraordinary relief and damages in different fora:]

An investor that succeeds in obtaining final injunctive, declaratory or other extraordinary relief in an administrative tribunal or court of the disputing Party (based on rights and obligations in this Chapter or otherwise) may subsequently submit the issue of compensation to arbitration under Article 2125.

#### DEFINITIONS

For purposes of this Chapter:

**INVEST.810**

<sup>MEX USA</sup>[**enterprise** of a Party means an enterprise constituted or organized under the laws and regulations of a Party or a political subdivision thereof.]<sup>29</sup>

**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 <sup>USA MEX</sup>[means the following:

- 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 <sup>USA</sup>[or guaranteed] by an enterprise that is not a financial institution as defined in Chapter \_\_\_\_ (financial services);<sup>30</sup>
- 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.

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

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<sup>29</sup> We are checking this definition with the Lawyers' Group.

<sup>30</sup> 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.

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 paragraph<sup>31</sup>; 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 national or an enterprise 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 <sup>CDA</sup>[for Canada a Crown Corporation within the meaning of the Financial Administration Act (Canada) or a Crown corporation within the meaning of any comparable provincial legislation or this is incorporated under other applicable provincial legislation; and for the U.S. and Mexico....] <sup>USA</sup>[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.] <sup>CDA</sup>[except a state enterprise designated as a governmental monopoly.]

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<sup>31</sup> "Sentence" could also be used here.

PROVISIONS TO BE PLACED OUTSIDE OF INVESTMENT CHAPTER

**Article 2113: National Security**

1. Subject to Articles \_\_\_\_ (Energy) and \_\_\_\_ (Government Procurement), nothing in this Agreement shall be construed:

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

b) to prevent any Party from 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 policy or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or]

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

**Article 2114: Competition** <sup>32</sup>

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 <sup>USA</sup>[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

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<sup>32</sup> The U.S. proposes that this Article be placed outside this investment chapter in the final text.

<sup>USA</sup>[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. <sup>CDA</sup>[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 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 <sup>USA</sup>[review or] dispute settlement pursuant to Chapter 23 (General Dispute Settlement) or Article 2119

<sup>CDA MEX</sup> [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.]<sup>33</sup>

**Article 2118: Taxation**

[SEE SUBGROUP TEXT]

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<sup>33</sup> The US has proposed a similar concept to (c) in Trade Remedies Working Group.