

**INVEST.811**

**Watergate Daily Update  
Investment**

**DRAFT**

**CONFIDENTIAL  
August 11, 1992 (7:30 p.m.)**

**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.

2. A Party 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 [financial services except as provided in the Chapter on Financial Services.]<sup>1</sup>

4. Nothing in this Chapter shall be construed to prevent a Party from providing functions or services such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

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 another Chapter of this Agreement with respect to a measure related to an investment, the provisions of the other Chapter shall prevail to the extent of the inconsistency.

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<sup>1</sup> Further coordination with financial services is necessary.

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 enterprise 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. For greater certainty, a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor or investment of another Party pursuant to Article XXX (national security) shall not be subject to Articles \_\_\_\_\_ (investor-state dispute settlement) or Chapter \_\_\_\_\_ (general dispute settlement).

9. A 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, shall not be subject to the dispute settlement provisions of this Agreement.<sup>2</sup>

#### **Article 2102: Environmental Measures**

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. The Parties recognize that it is inappropriate to encourage investment, including the establishment, acquisition, expansion, or retention of investment, by relaxing domestic health, safety or

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<sup>2</sup> Placement to be decided.

environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, the Party may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

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(For Article 2119 on Dispute Settlement)

An arbitral tribunal may, at the request of one or more of the disputing Parties or acting on its own initiative, and in accordance with the applicable rules, appoint one or more experts to report to it in writing on any factual issues concerning environmental or other related scientific matters.<sup>3</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 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 in respect of such investments' establishment, acquisition, expansion, management, conduct, and operation. (NB: "sale and disposition" not necessary here.)

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, and their investments, of the Party of which it forms a part.

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<sup>3</sup> To be moved to Dispute Settlement and conformed with Chapter 23.

4. 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 another Party 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 in respect of such investments' establishment, acquisition, expansion, management, conduct, and operation. (NB: "sale or disposition" not needed here.)
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, management, conduct and 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 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**

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.

**Article 2108: Exceptions<sup>4</sup>**

1. Articles 2103, 2104, 2105, 2107 and 2109 shall not apply to:

- a) a non-conforming provision of any existing measure that is maintained by a Party at the federal level as described in Annex A or I;
- b) a non-conforming provision of any existing measure that is maintained by a state or province, as described by a Party in Annex A within two years after the entry into force of this Agreement;
- c) a non-conforming provision of any existing measure that is maintained by a local government;
- d) the continuation or prompt renewal of any such nonconforming provision; or

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<sup>4</sup> Appropriate GATT XX and public order language to be developed and placement to be determined.

- e) an amendment to such nonconforming provision to the extent that the amendment does not decrease the conformity of the provision, as it existed immediately before the amendment, with Articles 2103, 2104, 2105, 2107 and 2109.<sup>5</sup>
2. a) 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.
- b) Notwithstanding paragraph (a), a Party shall not require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of its investment existing at the time such measure becomes effective.<sup>6</sup>
3. 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>7</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 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

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<sup>5</sup>Annex A to contain paramouncy clause for legal citation.

<sup>6</sup> US is checking.

<sup>7</sup> Consult with IPR group whether general inconsistency paragraph makes this paragraph unnecessary.

is confidential from disclosure that would prejudice the investor's or the investment's competitive position. Nothing in this [Chapter]<sup>8</sup> shall preclude a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.

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

- a) procurement of goods or services by a Party or by an enterprise owned or controlled by a Party; and
- b) subsidies and grants provided by a Party or by an enterprise owned or controlled by a Party, including government-supported loans, guarantees and insurance.

**Article 2109: Performance Requirements**

1. A Party shall not impose the following requirements, or enforce any commitment or undertaking, 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) to transfer technology, production process or other

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<sup>8</sup> Related to question of general exceptions.

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) 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>9</sup>

3. A Party shall not 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, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its 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;

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>9</sup> To be reconsidered after morals clause (2108.a) is agreed upon.

- a) paragraphs 1(a)-(c), and 3(a)-(b) shall not apply in respect to export promotion and foreign aid programs;
- b) paragraphs 1(b)-(c), 1(f), 1(g), and 3(a)-(c) shall not apply in respect to procurement of goods or services by a Party or by an enterprise owned or controlled by a Party<sup>10</sup>;

<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..]<sup>11</sup>

6. The provisions of paragraphs 1 or 3 shall not apply to any requirements other than those listed in those paragraphs.

#### **Article 2110: Transfers**

1. Subject to paragraphs 3 and 5 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

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<sup>10</sup> This paragraph must be made consistent with Government Procurement chapter.

<sup>11</sup>Advantages provided by waivers of border measures, such as tariffs and quotas, should be disciplined by market access rules.

- e) payments arising out of an investment dispute as defined in Article 2114.

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 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.

6. 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 paragraph 3.

#### **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 a Party elects to pay 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, limitation or creation of intellectual property rights to the extent that it is consistent with the provisions of Chapter \_\_\_\_ (Intellectual Property).<sup>12</sup>

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<sup>12</sup>Consult with IPR group whether general inconsistency paragraph makes this parragraph unnecessary.

**Article 2112: State Enterprises<sup>13</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, shall ensure that any state enterprise and any other enterprise<sup>14</sup> owned or controlled through ownership interest by a Party acts in a manner that is not inconsistent with the Party's obligations under this Chapter, whenever such 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; and

3. Each Party shall ensure that a state enterprise that it maintains or establishes accords nondiscriminatory treatment to investments in the Party's territory of investors of another Party in the sale of its goods or services<sup>15</sup>.

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<sup>13</sup> Paragraph 3 could be placed with generic monopolies provision.

<sup>14</sup>Includes government monopolies. May need to be cross-referenced with other Chapters. Subject to investor-state dispute settlement.

<sup>15</sup>this provision not subject to investor-state dispute settlement. Canada limits this paragraph to Crowns and provincial equivalents.

**Articles 2113-2127: SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN  
INVESTOR OF ANOTHER PARTY<sup>16</sup>**

**Article 2113: 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 2114: Investment Dispute**

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<sup>16</sup> This Part is without prejudice to the rights and obligations of the Parties as set out in Chapter 23.

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>17</sup>

**Article 2115: 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 interpretation of the Commission on this question. The Commission shall have 60 days to submit its interpretation in writing to the tribunal.<sup>18</sup>

2. If the Commission submits to the tribunal an agreed interpretation,<sup>19</sup> the interpretation shall be binding on the tribunal. If the Commission fails to submit an agreed interpretation or fails to submit an agreed interpretation within such 60 day period, the tribunal shall decide the issue of interpretation of the exception.<sup>20</sup>

**Article 2116: Consultation and Negotiation**

The parties to an investment dispute should first attempt to settle the dispute through consultation or negotiation. Consultation or

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<sup>17</sup> The Parties will endeavour to develop language to the effect that regulation does not in itself constitute expropriation (placement of language to be determined by the Lawyers' Group.)

<sup>18</sup> The role of the Commission under this Article is unrelated to Chapter 23.

<sup>19</sup> U.S. acceptance conditional on confirmation that agreed interpretation requires agreement of all three Parties.

<sup>20</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.

negotiation under this Article shall not constitute the initiation of domestic proceedings for purposes of Article 2117.

**Article 2117: 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 2119;

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>21</sup>

**Article 2118: 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 2119: 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

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<sup>21</sup> The Lawyers' Group will develop wording to make this provision generic and will decide where, outside the Investment Chapter, to place the provision.

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 2120: 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 and its investment's right to initiate or

continue before any administrative tribunal or court [under the domestic law]<sup>22</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>23</sup>

#### Article 2121: 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>22</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>23</sup> The final drafting must make it clear that article 2117(1)(a) addresses a domestic cause of action under the NAFTA and article 2120(4)(b) addresses domestic law other than the NAFTA.

It must also be clear that "declaratory" and "extraordinary relief" do not include relief that involves the payment of damages.

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 2122: 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 2119 and experienced in international law and investment.

**Article 2123: Consolidation**

1. The Secretariat of the Commission shall maintain a public register of submissions to arbitration under Article 2119 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 2122. 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 2122, 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 2119 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>24</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 2119 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 2124: General Provisions Applicable to Arbitrations under Articles 2119 or 2123**

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<sup>24</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.

1. Notice: A disputing Party shall deliver to the other Parties:
  - a) written notice of an arbitration initiated under Article 2119 or 2123 within 30 days of initiation of the arbitration; and
  - b) copies of all pleadings filed in the arbitration.
2. Participation by a Party: On written notice to the disputing parties, a Party may make submissions to an arbitration tribunal established under Article 2119 or 2123 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>25</sup>
4. Place of Arbitration: Unless the disputing parties agree otherwise, an arbitration proceeding under Article 2119 or 2123 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 2119 or 2123 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>26</sup> or to protect the tribunal's

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<sup>25</sup> Wording must be developed to ensure that confidentiality is respected.

<sup>26</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.

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 2119 or 2123 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 tribunal established under Article 2119 or 2123 shall not order a Party to pay punitive damages.

7. Standing: An investment may not initiate an arbitration proceeding under this Part.

An investor of a Party that owns or controls an investment that is an enterprise of another Party may initiate an arbitration proceeding under this Part for loss or damage to, or incurred by, its investment.

The tribunal shall order that any resulting relief be for the benefit of the investment without prejudice to any interest that non-controlling or minority shareholders may have in the relief under the applicable domestic law.<sup>27</sup>

#### **Article 2125: 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 2126: Finality and Enforcement of Award**

1. A final award made in an arbitration proceeding under Article 2119 or 2123 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

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<sup>27</sup> Final drafting must reflect that non-controlling or minority shareholders may not bring separate claims arising out of the same breach.

made in an arbitration proceeding under Article 2119 or 2123 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(1). 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) a recommendation that the defaulting Party 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 revise, 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 2119 or 2123.

**Article 2127: Receipts under Insurance or Guarantee Contracts**

In any proceeding under this Part 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.

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

For purposes of this Part:

- 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.

Mexican Text Referred to in Footnote 24

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 cause its investment to 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 2119 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 2119 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 2119.

### DEFINITIONS

For purposes of this Chapter:

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

**enterprise** of a Party means an enterprise constituted or organized under the laws and regulations of a Party or a political subdivision thereof.<sup>28</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** 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 be completed by financial services);<sup>29</sup>
- e) interests arising from the commitment of capital or

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<sup>28</sup> We are checking this definition with the Lawyers' Group.

<sup>29</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.

other resources in [or into]<sup>30</sup> 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 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 (d) 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.

**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party.<sup>32</sup>

**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that makes or has made an investment.<sup>33</sup>

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<sup>30</sup> Checking to see if necessary.

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

<sup>32</sup>Text needs to be conformed to ensure that, where appropriate, references to "investment" become references to investments of investor of a Party.

<sup>33</sup>The Parties will explore a means of ensuring that this definition does not create obligations contrary to national laws governing foreign missions.

**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.

**owned or controlled** means<sup>34</sup>

**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 that 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.]

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<sup>34</sup>to be defined if necessary

PROVISIONS TO BE PLACED OUTSIDE OF INVESTMENT CHAPTER

**Article XXXX: National Security**

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

- a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
- b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests:
  - i) relating to the traffic in arms, ammunition, and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment;
  - ii) taken in time of war or other emergency in international relations; or
  - iii) relating to the implementation of national policies or international agreements 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 XXXX: Competition** <sup>35</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

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<sup>35</sup> Final placement to be determined by lawyers group.

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<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. 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 Articles 2113-2127.

4. Article xxxx: Trade and Competition Committee. The Commission shall establish a Working Group on Trade and Competition, comprising representatives of the Parties, to report, and to make recommendations on further work as appropriate, to the Commission within five years after the entry into force of the Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area.

5.<sup>36</sup>The Parties further agree to consult on:

- (a) the potential to develop more effective rules and disciplines concerning the use of government subsidies; and
- (b) the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization.

**Chapter \_\_\_\_ (General Provisions)**

**Article \_\_\_\_ : TAXATION**

1. GENERAL EXCLUSION

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

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<sup>36</sup>To be included in a new paragraph Article XX06.2 (trade remedies text)

Agreement, the provisions of this Article shall prevail.

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 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. APPLICATION OF PROVISIONS RELATING TO TRADE IN GOODS

- (a) Subject to those provisions of Annex 407 (Market Access) that relate to taxation measures, 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 this Agreement as are necessary to give effect to Article 401, shall apply to the taxes of the Parties to the same extent as does Article III of the General Agreement on Tariffs and Trade; and
- (b) Article 413 of this Agreement relating to export taxes shall apply to taxes of the Parties.

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

Subject to paragraph 2,

- (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 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 or

most favoured nation obligations in Chapters -----, ----  
-- and ----- of this Agreement relating to Cross  
Border Trade in Services, Financial Services, and  
Investment, respectively, shall apply to all other taxes  
of the Parties;

except that nothing in those Chapters shall apply to

- (c) impose most favoured nation obligations with respect to advantages accorded by a Party pursuant to a tax convention or any other agreement or arrangement relating wholly or mainly to taxation;
- (d) a non-conforming provision of any existing taxation measure;
- (e) the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;
- (f) an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, as it existed immediately prior to the amendment, with any of the provisions of this Agreement;
- (g) an excise tax on insurance premiums introduced by Mexico to the extent that the tax would, if levied by Canada or the United States of America, be excluded from the application of the above mentioned Chapters by reason of subparagraph (d), (e) or (f); or
- (h) any new taxation measure aimed at ensuring the equitable and effective imposition or collection of taxes except where the measure arbitrarily discriminates between persons, goods or services of the Parties or arbitrarily restricts benefits accorded under this Agreement.

5. APPLICATION OF PROVISIONS RELATING TO PERFORMANCE REQUIREMENTS

Subject to paragraph 2, paragraphs 3, 4, and 5 of Article 2109 [performance requirements] of the Investment Chapter shall apply to taxes of the Parties except that, in applying that Article to a taxation measure, that Article shall be read without prejudice to any rights and obligations of the Parties under paragraph 3 of this Article and Article 401 of this Agreement.

6. EXPROPRIATION

Article 2111 of the Investment Chapter (Expropriation) shall apply to a claim by a Party or an investor of a Party that a measure expressed as a taxation measure constitutes an expropriation except where, in the case of a claim made by such an investor, it has been determined pursuant to this paragraph that the measure is not an expropriation. Before an investor of a Party may bring such a claim, the issue of whether the measure is not an expropriation shall be referred, for determination, to the competent authorities described in the tax convention, if any, between the relevant Parties. If there is no such tax convention or if the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months after the referral, the investor may bring the claim under Articles 2113-2127 (Investor-State Arbitration) that the measure is an expropriation.<sup>2</sup>

7. WITHHOLDING TAX

Without limiting the application of the foregoing, and for greater certainty, Article 2110(Transfers) shall not limit the right of a party to impose or collect a tax by withholding or other means.

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[1] Provisions concerning forced repatriations in the transfers section vis-a-vis taxation are rendered redundant by reason of this provision. This provision should take precedence over paragraph 2 of the provisions 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.

[2] A cross-reference to this provision may be required in the expropriation provision in the Investment Chapter.

[3] FTA transitional rules required. It is contemplated by Canada and USA that this Agreement is to override FTA vis-a-vis tax.

[4] It is not intended that existing non-conforming tax measures be listed.