

Watergate Daily Update  
Investment

DRAFT

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August 4, 1992

## 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.

MEX[ 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) CDA [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 the posted bond or financial security.

<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.

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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 territory.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that which it

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

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

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1 accords, in like circumstances, to investments of its own investors  
2 USA[and in particular] in respect of the establishment, acquisition,  
3 expansion, management, conduct, and operation of such investments.

4 3. The treatment accorded by a Party under paragraphs 1 and  
5 2 shall mean, with respect to a state or province, treatment no  
6 less favorable than the most favorable treatment accorded by such  
7 state or province in like circumstances to investors of the Party  
8 of which it forms a part.

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

15 5. For greater certainty, no Party shall:

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

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

24 CDA MEX [Article 2104: Most-Favored-Nation Treatment

25 1. Each Party shall accord to investments of an investor of  
26 another Party <sup>USA MEX</sup> [and activities associated therewith,]  
27 treatment no less favorable than that which it accords, in like  
28 circumstances, to the investments of an investor of any other Party  
29 or of a non-Party.

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

36 CDA MEX [Article 2105: Non-Discriminatory Treatment

37 The treatment that a Party shall accord to investments <sup>USA</sup>  
38 MEX [and associated activities] of another Party and to investors of  
39 that Party shall be the better of the treatment required by  
40 Articles 2103 or 2104. ("Nondiscriminatory treatment")]

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

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

**Article 2107: Senior Management and Boards of Directors**

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

2. ~~USA~~ 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.

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

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

**Article 2108: Exceptions**

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

<sup>1</sup> Although the Lawyers' Group favors use of "national person" rather than "individual", that usage would appear awkward in these paragraphs.

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

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

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

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

18 2. A Party may continue or promptly renew any such non-  
19 conforming measures, and may amend any such measure to the extent  
20 that the amendment does not decrease the conformity of the measure,  
21 as it existed immediately before the amendment, with Articles 2103,  
22 2104, 2105 and 2107.

23 Note: taken from the services chapter.

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

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

38 <sup>CDA MEX</sup> 5. Notwithstanding Article 2104, a Party need not  
39 accord most-favored-nation treatment to investors of another Party

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

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1 or their investments with respect to advantages accorded by that  
2 Party pursuant to agreements or sectors listed in Annex [MFN].]

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

11 7. Notwithstanding Articles 2103, 2104, and 2105, a Party  
12 may require, from an investor of another Party or its investment,  
13 routine business information, to be used solely for informational  
14 or statistical purposes, concerning that investment in its  
15 territory. Such Party shall protect such business information that  
16 is confidential from disclosure that would prejudice the investor's  
17 or the investment's competitive position. Nothing in this  
18 [Chapter]<sup>7</sup> shall preclude a Party from otherwise obtaining or  
19 disclosing information in connection with the equitable and good  
20 faith application of its laws.

21 8. <sup>USA</sup>(a) As a further exception to (provision on  
22 national treatment)<sup>8</sup>, and only in respect of sectors reserved for  
23 the state on the date of entry into force of this Agreement,

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

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

30 b) For state enterprises not in sectors reserved to the  
31 state at the date of entry into force of this Agreement, but  
32 carrying on an activity on the date of entry into force of this  
33 Agreement, a Party may limit the initial acquisition of its  
34 interests in the enterprise to its nationals. However, once the

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

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

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Party's interests have been sold, the obligations of paragraph 1 (national treatment) shall apply.<sup>9</sup>]<sup>10</sup>

9. CDA[ Notwithstanding paragraph 1,

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

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

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

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

<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.

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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 or undertakings in 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>USAMEX</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>USAMEX</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



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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:

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

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

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

**Article 2110: Transfers**

7  
8 1. Subject to paragraph 3 and paragraph 5<sup>13</sup> each Party shall  
9 permit all transfers and international payments (hereinafter  
10 "transfers") relating to an investment in its territory of an  
11 investor of another Party to be made freely and without delay. Such  
12 transfers include:

13 a) profits, dividends, interest, capital gains, royalty  
14 payments, management, technical assistance and other fees,  
15 returns in kind, and other amounts derived from an investment;

16 b) proceeds from the sale of all or any part of an  
17 investment or from the partial or complete liquidation of an  
18 investment;

19 c) payments made under a contract entered into by an  
20 investor, or its investment, including payments made pursuant  
21 to a loan agreement;

22 d) compensation pursuant to Article 2111 ; and

23 e) payments arising out of an investment dispute as defined  
24 in Article 2119 .<sup>14</sup>

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

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

33 a) bankruptcy, insolvency or the protection of the rights of  
34 creditors;

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

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

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- 1           b)    issuing, trading or dealing in securities;  
2           c)    criminal or penal offenses;  
3           d)    reports of currency transfers; or  
4           e)    ensuring the satisfaction of judgments in adjudicatory  
5           proceedings.

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

10          5.    No Party shall require its investors to repatriate, or  
11          penalize its investors who fail to repatriate, the income, earnings  
12          or profits attributable to any investment in another Party, ~~nor~~  
13          to any businesses carried on in another Party either directly by  
14          the investors or indirectly through a business enterprise  
15          established in that other Party.]

16          (6) ~~USA~~ [Paragraph 5 shall not be construed as preventing a Party  
17          from imposing any measure consistent with Articles 2103, 2104, and  
18          2105, and relating to activities listed in paragraphs 3(a)-(e).]

19          Article 2111: Expropriation and Compensation

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

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

31          2.    Compensation shall be equivalent to the fair market value  
32          of the expropriated investment immediately before the expropriatory  
33          taking ("date of expropriation"), and shall not reflect any change  
34          in value occurring because the expropriatory taking had become  
35          known earlier. Valuation criteria shall include going concern  
36          value, asset value (including declared tax value of tangible

Original

5. <sup>MEX USA</sup> [Each Party reserves the right to deny to an entity of another Party the advantages of this Chapter if:

- a) nationals of any non Party own or control such entity and such entity has no substantial business activities in the territory of the Party under whose laws it is constituted;]  
USA [or
- b) such entity is owned or controlled by nationals of a non Party with which the denying Party does not maintain normal economic relations.]

Draft #2

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) such enterprise is owned or controlled by nationals of a non-Party in respect of whose investors or investments the denying Party imposes specific [prohibition] sanctions or with which such Party does not maintain diplomatic relations.

Draft #3

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.

N E W**Article 2121: Interpretation of Annexes I (Constitution) and III (Unbound)**

1. Where a disputing Party asserts as a defense that the measure alleged to be a breach of this Chapter is covered by an exception set forth in Annex I or III, the arbitral tribunal shall request the joint interpretation of all the Parties as to whether the exception in question is correctly relied upon by the disputing Party. The Parties shall have 60 days to submit their joint interpretation in writing to the tribunal.

2. If all Parties agree upon a joint interpretation, it shall be binding on the tribunal. If the Parties fail to agree or fail to submit their joint interpretation within such 60 day period, the tribunal shall decide the issue of interpretation of the exception.