

3 INVESTMENT

4 Article 2101: Scope and Coverage

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

7 a) investments of investors of a Party in the territory of
8 another Party existing at the time of entry into force of this
9 Agreement as well as to investments made or acquired
10 thereafter by such investors;

11 b) investors of a Party in the establishment, acquisition,
12 expansion, management, conduct, operation and sale or other
13 disposition of investments in the territory of another Party;
14 and

15 c) all investments in the territory of any Party as provided
16 in Article 2109.

17 2. A Party has the right to perform exclusively the economic
18 activities set forth in Annex I and to refuse to permit the
19 establishment of investment in such activities.

20 3. This Chapter shall not apply to:

21 a) [financial services except as provided in the Chapter on
22 Financial Services;]¹

23 b) ^{CDA}[procurement by governments]; and

24 [4. Nothing in this Chapter² shall be construed to prevent a
25 Party from providing services or functions such as public welfare
26 services and services forming part of a statutory system of social
27 security, public health care, public education, ~~and~~ public
28 retirement plans.]

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

35 ¹ U.S. Note - Further coordination with financial services is necessary.

36 ² Canada doing redraft. A generic provision may be needed to address the
37 subject matter of this provision.

1 6. In the event of any inconsistency between the provisions
2 of this Chapter and another Chapter of this Agreement with respect
3 to a measure related to an investment, the ~~provisions~~
4 ~~obligations~~ of the other Chapter shall prevail to the extent of
5 the inconsistency.

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

8 a) nationals of any non-Party own or control such enterprise
9 and such enterprise has no substantial business activities in
10 the territory of the Party under whose laws it is constituted;
11 or

12 b) nationals of any non-Party own or control such enterprise
13 and:

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

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

20 8. For greater certainty, a decision by a Party to prohibit or
21 restrict the acquisition of an investment in its territory by an
22 investor or investment of another Party pursuant to Article XX
23 (national security) shall not be subject to Articles
24 (investor-state dispute settlement) or Chapter _____ (general
25 dispute settlement).

26 9. A decision by Canada following a review under the Investment
27 Canada Act, with respect to whether or not to permit an acquisition
28 that is subject to review, shall not be subject to the dispute
29 settlement provisions of this Agreement.⁴

30 **Article 2102: Environmental Measures**

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

36 ~~Final language being resolved in investor-state discussions.~~

37 'Placement to be decided. Should go in country-specific exceptions
38 (annexes)

1 2. The Parties recognize that it is inappropriate to encourage
2 investment, including the establishment, acquisition, expansion, or
3 retention of investment, by relaxing domestic health, safety or
4 environmental measures. Accordingly, a Party should not waive or
5 otherwise derogate from, or offer to waive or otherwise derogate
6 from, such measures as an encouragement for the establishment,
7 acquisition, expansion, or retention in its territory of an
8 investment of an investor. If a Party considers that another Party
9 has offered such an encouragement, the Party may request
10 consultations with the other Party and the two Parties shall
11 consult with a view to avoiding any such encouragement.

12 *****

13 (For Article 2119 on Dispute Settlement)

14 An arbitral tribunal may, at the request of one or more of the
15 disputing Parties or acting on its own initiative, and in
16 accordance with the applicable rules, appoint one or more experts
17 to report to it in writing on any factual issues concerning
18 environmental or other related scientific matters.*

19 TREATMENT OF INVESTMENTS

20 Article 2103: National Treatment

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

27 2. Each Party shall accord to investments of investors of
28 another Party treatment no less favorable than that which it
29 accords, in like circumstances, to investments of its own investors
30 in respect of such investments' establishment, acquisition,
31 expansion, management, conduct, and operation.

32 3. The treatment accorded by a Party under paragraphs 1 and
33 2 shall mean, with respect to a state or province, treatment no
34 less favorable than the most favorable treatment accorded by such
35 state or province in like circumstances to investors, and their
36 investments, of the Party of which it forms a part.

37 4. For greater certainty, no Party shall:

38 a) impose on an investor of another Party a requirement that
39 a minimum level of equity in an enterprise in the Party's
40 territory be held by its nationals, other than nominal

1 qualifying shares for directors or incorporators of
2 corporations; or

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

6 **Article 2104: Most-Favored-Nation Treatment**

7 1. Each Party shall accord to investments of an investor of
8 another Party treatment no less favorable than that which it
9 accords, in like circumstances, to the investments of an investor
10 of any other Party or of a non-Party in respect of such
11 investments, establishment, acquisition, expansion, management,
12 conduct, and operation.

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

19 **Article 2105: Non-Discriminatory Treatment**

20 The treatment that a Party shall accord to investments of
21 another Party and to investors of that Party shall be the better of
22 the treatment required by Articles 2103 or 2104.
23 ("Nondiscriminatory treatment")

24 **Article 2106: Minimum Standard of Treatment**

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

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

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

35 With respect to an enterprise of a Party which is an
36 investment of an investor of another Party, and subject to
37 applicable immigration laws and regulations, a Party:

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

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

6 Article 2108: Exceptions

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

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

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

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

17 d) the continuation or prompt renewal of any such
18 nonconforming provision; or

19 e) an amendment to such nonconforming provision to the
20 extent that the amendment does not decrease the conformity of
21 the provision, as it existed immediately before the amendment,
22 with Articles 2103, 2104, 2105 and 2107.

23 2. a) Articles 2103, 2104, 2105, ~~and 2107~~ shall not apply
24 to measures a Party maintains or adopts with respect to
25 the sectors or subjects inscribed by it in Annex B.

26 b) Notwithstanding paragraph (a), a Party shall not
27 require an investor of another Party, by reason of its
28 nationality, to sell or otherwise dispose of its
29 investment existing at the time such measure becomes
30 effective. ⁵

31 3. A Party may also maintain exceptions from the obligations
32 of Articles 2103, 2104, 2105 and 2107, which are specifically

33 ⁵Canada is still considering this provision in relation to its social
34 services exception.

1 provided for in Article 2203 (of the Chapter on Intellectual
2 Property).⁶

3 ~~Article 5.~~ Notwithstanding Article 2104, a Party need not
4 accord most-favored-nation treatment to investors of another Party
5 or their investments with respect to advantages accorded by that
6 Party pursuant to agreements or sectors listed in Annex [MFN].~~5~~

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

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

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

26 ~~USA MEX~~ (a) procurement of goods ^{OR} services by a Party; and]

27 [^{USA} b) government grants (including goods, services and
28 technology), cooperative agreements, research and development
29 contracts, and government-supported loans, guarantees, and
30 insurance.]

31 [Article 2108.a General Exceptions

32 Subject to the requirement that such measures are not applied
33 in a manner which would constitute a means of arbitrary or
34 unjustifiable discrimination between countries where the same
35 conditions prevail, or a disguised restriction on international
36 trade, nothing in this Agreement shall be construed to prevent the
37 adoption or enforcement by any contracting party of measures:

38 ⁶ Consult with IPR group whether general inconsistency paragraph makes this
39 paragraph unnecessary.

40 ~~1 Canada is considering use of "Chapter."~~

Watergate Daily Update
Investment

7

CONFIDENTIAL
August 9, 1992 8:00 p.m.

- 1 (a) necessary to protect public morals;
- 2 (b) necessary to protect human, animal or plant life or health;
- 3 (c) necessary to secure compliance with laws or regulations which
- 4 are not inconsistent with the provisions of this Agreement.]¹

5 Article 2109: Performance Requirements

6 1. Except as provided in Annex ____, no Party shall impose
7 the following requirements, or enforce any commitment or
8 undertaking in connection with the establishment, acquisition,
9 expansion, conduct or operation of an investment of an investor of
10 a Party or non-Party in its territory:

11 a) to export a given level or percentage of goods or
12 services;

13 b) to achieve a given level or percentage of domestic
14 content;

15 c) to purchase, use or accord a preference to goods or
16 services produced in its territory, or to purchase goods or
17 services from producers or service providers in its
18 territory;

19 d) to relate in any way the volume or value of imports to
20 the volume or value of exports or to the amount of foreign
21 exchange inflows associated with such investment;

22 e) to restrict sales of goods or services in its territory
23 that such investment produces by relating such sales in any
24 way to the volume or value of its exports or foreign exchange
25 earnings;

26 f) to transfer technology, production process or other
27 proprietary knowledge to a national or enterprise in its
28 territory, except when the requirement is imposed by a court
29 or administrative tribunal to remedy an alleged violation of
30 competition laws;

31 g) ^{USA MEX} [to act as the exclusive supplier of the goods or
32 services it produces to a specific region or world market.]

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

36 ¹To be decided if general provisions are adequate or if this precise
37 language is correct.

1, greater clarity, Articles 2103, 2104, and 2105 shall apply to such
2 requirements.⁹

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

7 a) to purchase, use or accord a preference to goods produced
8 in its territory, or to purchase goods from producers in its
9 territory;

10 b) to achieve a given level or percentage of domestic
11 content;

12 c) to relate in any way the volume or value of imports to
13 the volume or value of exports or to the amount of foreign
14 exchange inflows associated with such investment;

15 d) to restrict domestic sales of goods or services that such
16 investment produces by limiting such sales in any way to the
17 volume or value of its exports or foreign exchange earnings;

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

23 5. The provisions of:

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

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

29 USA [d) paragraph 3(b) shall not apply to conditions related
30 to the content of goods to qualify for preferential tariffs or
31 quotas..]¹⁰

32 6. The provisions of paragraphs 1 or 3 shall not apply to
33 any requirements other than those listed in paragraphs 1(a)-(g) and
34 3(a)-(e).

35 ⁹ To be reconsidered after morals clause (2108.a) is agreed upon.

36 ¹⁰Advantages provided by waivers of border measures, such as tariffs and
37 quotas, should be disciplined by market access rules.

1 Article 2110: Transfers

2 1. Subject to paragraphs³ and ~~paragraph 5~~¹¹, each Party shall
3 permit all transfers and international payments (hereinafter
4 "transfers") relating to an investment in its territory of an
5 investor of another Party to be made freely and without delay. Such
6 transfers include:

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

10 b) proceeds from the sale of all or any part of an
11 investment or from the partial or complete liquidation of an
12 investment;

13 c) payments made under a contract entered into by an
14 investor, or its investment, including payments made pursuant
15 to a loan agreement;

16 d) compensation pursuant to Article 2111 ; and

17 e) payments arising out of an investment dispute as defined
18 in Article 2119 .¹²

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

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

27 a) bankruptcy, insolvency or the protection of the rights of
28 creditors;

29 b) issuing, trading or dealing in securities;

30 c) criminal or penal offenses;

31 d) reports of currency transfers; or

32 e) ensuring the satisfaction of judgments in adjudicatory
33 proceedings.

34 ¹¹ ~~It may be desirable to refer to the tax article.~~

35 ¹² ~~Canada agree subject to overall agreement on dispute settlement.~~

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

5 5. ^{not} A No Party shall require its investors to repatriate, or
6 penalize its investors who fail to repatriate, the income, earnings
7 or profits attributable to any investment in another Party.

8 6. ~~Paragraph~~ Paragraph 5 shall not be construed as preventing a
9 Party from imposing any measure consistent with Articles 2103,
10 2104, and 2105, and relating to activities listed in paragraphs
11 3 ~~and 4~~.

12 Article 2111: Expropriation and Compensation

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

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

24 2. Compensation shall be equivalent to the fair market value
25 of the expropriated investment immediately before the expropriatory
26 taking ("date of expropriation"), and shall not reflect any change
27 in value occurring because the expropriatory taking had become
28 known earlier. Valuation criteria shall include going concern
29 value, asset value (including declared tax value of tangible
30 property), and other criteria, as appropriate to determine fair
31 market value.

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

34 4. If payment is made in a G7 currency, compensation shall
35 include interest at a commercially reasonable rate for that
36 currency from the date of expropriation until the date of actual
37 payment thereof.

1 5. If a Party elects to pay in a currency other than a G7
2 currency, the amount paid shall be no less than the equivalent of
3 the amount of compensation owed on the date of expropriation
4 converted into a G7 currency at the market rate of exchange
5 prevailing on that date, plus accrued interest at a commercially
6 reasonable rate for that G7 currency from the date of expropriation
7 until the date of actual payment.

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

10 7 The provisions of this Article do not apply to the
11 issuance of compulsory licenses granted in relation to intellectual
12 property rights, or the revocation, limitation or creation of
13 intellectual property rights to the extent that it is consistent
14 with the provisions of Chapter ____ (Intellectual Property).

15 **Article 2115: State Enterprises¹³**

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

18 2. Each Party, through regulatory control, administrative
19 supervision or the application of other measures, shall ensure that
20 any state enterprise¹⁴ ~~that it maintains or establishes:~~

21 ~~a)~~ acts in a manner that is not inconsistent with the
22 Party's obligations under this Chapter, whenever such state
23 enterprise exercises any regulatory administrative or other
24 governmental authority that the Party has delegated to it,
25 such as the power to expropriate, grant licenses, approve
26 commercial transactions, or impose quotas, fees or other
27 charges;^{2nd}

28 3. ~~b)~~ accords nondiscriminatory treatment to investments in the
29 Party's territory of investors of another Party in the sale of
30 its goods or services¹⁵; ~~and~~

31 **Article 2117: Technology Consortia**

32 ^{MEX CDA} 1. No Party shall maintain or introduce any measure that
33 limits or prevents an investor of another Party from participating

34 ¹³ Paragraph 2b could be placed with generic monopolies provision.

35 ¹⁴ Includes government monopolies. May need to be cross-referenced with other
36 Chapters. Subject to investor-state dispute settlement.

37 ¹⁵ This provision not subject to investor-state dispute settlement. Canada
38 limits this paragraph to Crowns and provincial equivalents.

1 in a technology consortium or other group of business enterprises
2 with respect to the development of or access to technology (in a
3 manner inconsistent with Articles 2103, 2104 and 2105.

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

8 **Article 2119: Dispute Settlement**

9 [SEE SUBGROUP TEXT]

10 **DEFINITIONS**

11 For purposes of this Chapter:

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

14 enterprise of a Party means an enterprise constituted or organized
15 under the laws and regulations of a Party or a political
16 subdivision thereof.¹⁶

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

* 20 investment means the following:

21 a) an enterprise;

22 b) equity or debt securities of an enterprise, or any
23 interest in such enterprise that entitles the owner to share
24 in the income or profits or to share in the assets on
25 dissolution;

26 c) real estate or other property (tangible or intangible)
27 acquired in the expectation or used for the purpose of
28 economic benefit or other business purposes;

29 d) a loan (to be completed by financial services);¹⁷

30 ¹⁶ We are checking this definition with the Lawyers' Group.

31 ¹⁷ This language must be coordinated with the Financial Services Group,
32 which may wish to include as "investments" a loan by a Bank to provide capital
33 to its subsidiary.

1 e) interests arising from the commitment of capital or other
2 resources in or into the territory of another Party to
3 economic activity in such territory, such as under (i)
4 contracts involving the presence of the investor's property in
5 the territory of another Party (e.g., concession agreements,
6 turnkey or construction contracts), or (ii) contracts where
7 the remuneration depends substantially on the production,
8 revenues or profits of an enterprise.

9 For greater clarity,

10 a) claims to money which arise solely from:

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

15 ii) the extension of credit in connection with a
16 commercial transaction (e.g., trade financing) other than
17 a loan covered by subparagraph (e) of the preceding
18 paragraph¹⁸; or

19 b) any other claim to money;

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

22 investment of an investor of a Party means an investment owned or
23 controlled directly or indirectly by an investor of such Party.

24 investor of a Party means a national or an enterprise of such
25 Party, that makes or has made an investment.

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

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

30 state enterprise means ^{CDA} [for Canada a Crown Corporation within the
31 meaning of the Financial Administration Act (Canada) or a Crown
32 corporation within the meaning of any comparable provincial
33 legislation or that is incorporated under other applicable
34 provincial legislation; and for the U.S. and Mexico....] ^{USA} [an
35 enterprise of a Party that is owned, or controlled through
36 ownership interests, directly or indirectly, by such Party or any
37 agency or instrumentality thereof.]

38 ¹⁸ "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 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 2114: Competition¹⁹

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

2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competitive law enforcement in the Free Trade Area. The Parties^{USA} [Parties' authorities] shall also cooperate on issues of

¹⁹ The U.S. proposes that this Article be placed outside this investment chapter in the final text.

Watergate Daily Update
Investment

15

CONFIDENTIAL
August 9, 1992 8:00 p.m.

1 competition law enforcement and consult on issues of common concern
2 which may include mutual legal assistance, notification,
3 consultation and exchange of information relating to the
4 enforcement of competition laws and policies in the Free Trade
5 Areas.

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

12 a) the relative significance of the anti-competitive
13 activities involved of conduct within the enforcing Party's
14 territory as compared to conduct within the other Party's
15 territory;

16 b) the presence or absence of a purpose on the part of those
17 engaged in the anti-competitive activities to affect
18 consumers, suppliers, or competitors within the enforcing
19 Party's territory;

20 c) the relative significance of the effects of the
21 enforcement activities on the enforcing Party's interests as
22 compared to the effects on the other Party's interests;

23 d) the existence or absence of reasonable expectations that
24 would be furthered or defeated by the enforcement activities;

25 e) the degree of conflict or consistency between the
26 enforcement activities and the other Party's law or
27 articulated economic policies; and

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

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

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

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

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

3 c) the potential for reliance on competition laws and
4 policies to discipline anti-competitive transborder pricing
5 practices and market segmentation.}]²⁰

6 Chapter (General Provisions)

7 Article : TAXATION

8 1. GENERAL EXCLUSION

9 Except as provided for in this Article, nothing in this
10 Agreement shall apply to taxes of the Parties. In the event
11 of an ambiguity or conflict between this Article and any other
12 provision of this Agreement, the provisions of this Article
13 shall prevail.¹

14 2. TAX CONVENTIONS

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

26 3. APPLICATION OF PROVISIONS RELATING TO TRADE IN GOODS

27 (a) Subject to those provisions of Annex 407 (Market
28 Access) that relate to taxation measures, Article
29 401 of this Agreement incorporating by reference
30 rights and obligations of the Parties relating to
31 trade in goods under Article III of the General
32 Agreement on Tariffs and Trade, and such other
33 provisions of this Agreement as are necessary to
34 give effect to Article 401, shall apply to the
35 taxes of the Parties to the same extent as does
36 Article III of the General Agreement on Tariffs and
37 Trade; and

38 ²⁰ The US has proposed a similar concept to (c) in Trade Remedies Working
39 Group.

**Watergate Daily Update
Investment**

17

**CONFIDENTIAL
August 9, 1992 8:00 p.m.**

- 1 (b) Article 413 of this Agreement relating to export taxes
2 shall apply to taxes of the Parties.
- 3 4. APPLICATION OF PROVISIONS RELATING TO INVESTMENT AND TRADE IN
4 SERVICES
- 5 Subject to paragraph 2,
- 6 (a) provisions imposing national treatment obligations in
7 Chapters ----- and ----- of this Agreement relating to
8 Cross Border Trade in Services and Financial Services,
9 respectively, shall apply to taxes of the Parties on
10 income or capital gains or on the taxable capital of
11 corporations, including the Assets Tax established by the
12 Assets Tax Law of Mexico, that relate to the purchase or
13 consumption of particular services; and
- 14 (b) provisions imposing national treatment obligations or
15 most favoured nation obligations in Chapters -----, -----
16 - and ----- of this Agreement relating to Cross Border
17 Trade in Services, Financial Services, and Investment,
18 respectively, shall apply to all other taxes of the
19 Parties;
- 20 except that nothing in those Chapters shall apply to
- 21 (c) impose most favoured nation obligations with respect to
22 advantages accorded by a party pursuant to a tax
23 convention or any other agreement or arrangement relating
24 wholly or mainly to taxation;
- 25 (d) a non-conforming provision of any existing taxation
26 measure;
- 27 (e) the continuation or prompt renewal of a non-conforming
28 provision of any existing taxation measure;
- 29 (f) an amendment to a non-conforming provision of any
30 existing taxation measure to the extent that the
31 amendment does not decrease its conformity with any of
32 the provisions of this Agreement;
- 33 (g) an excise tax on insurance premiums introduced by Mexico
34 to the extent that the tax would, if levied by Canada or
35 the United States of America, be excluded from the
36 application of the above mentioned Chapters by reason of
37 subparagraph (d), (e) or (f); or
- 38 (h) any new taxation measure aimed at ensuring the equitable
39 and effective imposition or collection of taxes except
40 where the measure arbitrarily discriminates between

Watergate Daily Update
Investment

18

CONFIDENTIAL
August 9, 1992 8:00 p.m.

1 persons, goods or services of the Parties or arbitrarily
2 restricts benefits accorded under this Agreement.

3 5. APPLICATION OF PROVISIONS RELATING TO PERFORMANCE REQUIREMENTS

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

1 6. EXPROPRIATION

12 Article ____ of the Investment Chapter (Expropriation) shall
13 apply to a claim by a Party or an investor of a Party that a
14 measure expressed as a taxation measure constitutes an
15 expropriation [as defined in paragraph 1 of that Article]
16 except where, in the case of a claim made by such an investor,
17 it has been determined pursuant to this paragraph that the
18 measure is not an expropriation. Before an investor of a
19 Party may bring such a claim, the issue of whether the measure
20 is not an expropriation shall be referred, for determination,
21 to the competent authorities described in the tax convention,
22 if any, between the relevant Parties. If there is no such tax
23 convention or if the competent authorities do not agree to
24 consider the issue or, having agreed to consider it, fail to
25 agree that the measure is not an expropriation within a period
26 of six months after the referral, the investor may bring the
27 claim under Article _____ (Investor-State Arbitration) that
28 the measure is an expropriation.²

29 7. WITHHOLDING TAX

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

34

35 ⁽¹⁾ Provisions concerning forced repatriations in the transfers
36 section vis-a-vis taxation are rendered redundant by reason of
37 this provision. This provision should take precedence over
38 paragraph 2 of the provisions headed "Scope" in Chapter/Annex

**Watergate Daily Update
Investment**

19

**CONFIDENTIAL
August 9, 1992 8:00 p.m.**

- 1 XX - Financial Services and any other similar provisions.
2 This provision assumes that tariffs and customs duties are not
3 considered to be taxes within the ambit of this Article.
- 4 (2) A cross-reference to this provision may be required in the
5 expropriation provision in the Investment Chapter.
- 6 (3) FTA transitional rules required. It is contemplated by Canada
7 and USA that this Agreement is to override FTA vis-a-vis tax.
- 8 (4) It is not intended that existing non-conforming tax measures
9 be listed.

10 Article 2116: Monopolies**11 [SEE SUBGROUP TEXT]**