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Investment

DRAFT

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INVESTMENT

Article 2101: Scope and Coverage

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

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

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

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

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

3. This Chapter shall not apply to:

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

b) ~~CDA~~ except as provided in the Chapter on Government Procurement]; and

4. Nothing in this Chapter² 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.

¹ U.S. Note - Further coordination with financial services may be necessary.

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

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1 6. In the event of any inconsistency between the provisions
2 of this Chapter and the Telecommunications Annex, the provisions
3 of that Annex shall prevail to the extent of the inconsistency.³

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

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

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

14 Article 2102: Environmental Measures⁴

15 ³ Issues of overlap need to be addressed.

16 ⁴ This language is being negotiated in a separate group.

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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 USA [and in particular] in respect of the establishment, acquisition, expansion, management, conduct, and operation of such investments.

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

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

5. For greater certainty, no Party shall:

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

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

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

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

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2. Each Party shall accord to an investor of another Party treatment no less favorable than that which it accords, in like circumstances, to investors of any other Party or non-Party in respect of its establishment, acquisition, expansion, conduct, management⁵, operation and sale or other disposition of its investment in its territory.]

CDA MEX [Article 2105: Non-Discriminatory Treatment

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

Article 2106: Minimum Standard of Treatment

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

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

Article 2107: Senior Management and Boards of Directors

1. ^{MEX USA} [Subject to Chapter ____ (Temporary entry), a Party shall not require that enterprises which are legally constituted under the applicable laws or regulations of one Party, and which are investments of investors of another Party, engage as top managerial personnel individuals⁶ of any particular nationality.

2. ^{CDA} [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

⁵ Canada agrees on the condition that the Parties agree to an acceptable definition of "management."

⁶ 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 resident in the territory of that Party, provided such a
2 requirement would not materially impair the ability of that
3 investor to control its investments.

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

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

Article 2108: Exceptions

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

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

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

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

22 OK MEX USA [d) nationality and residency requirements for
23 members of senior management or Boards of Directors imposed by
24 a Party in accordance with such measures as are specified in
25 Annex A.]

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

34 2. A Party may continue or promptly renew any such non-
35 conforming measures, and may amend any such measure to the extent
36 that the amendment does not decrease the conformity of the measure,
37 as it existed immediately before the amendment, with Articles 2103,
38 2104, 2105 and 2107.

39 Note: taken from the services chapter.

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1 3. Articles 2103, 2104, 2105 and 2107 shall not apply to
2 measures a Party maintains or adopts with respect to the sectors or
3 subjects inscribed by it in Annex B. ^{MEX USA} [However, any such
4 future nonconforming measure may not require an investor of another
5 Party [by reason of its nationality] to sell or otherwise dispose
6 of investment existing at the time such measure becomes
7 effective.]⁷

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

12 ^{CDAMEX} 5. Notwithstanding Article 2104, a Party need not
13 accord most-favored-nation treatment to investors of another Party
14 or their investments with respect to advantages accorded by that
15 Party pursuant to agreements or sectors listed in Annex [MFN].]

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

24 7. Notwithstanding Articles 2103, 2104, and 2105, a Party
25 may require, from an investor of another Party or its investment,
26 routine business information, to be used solely for informational
27 or statistical purposes, concerning that investment in its
28 territory. Such Party shall protect such business information that
29 is confidential from disclosure that would prejudice the investor's
30 or the investment's competitive position. Nothing in this
31 [Chapter]⁸ shall preclude a Party from otherwise obtaining or
32 disclosing information in connection with the equitable and good
33 faith application of its laws.

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

37 ⁷Canada is still considering this provision in relation to its social
38 services exception.

39 ⁸ Canada is considering use of "Chapter."

40 ⁹ This section would be inserted in the "treatment" section in a way which
41 would capture the "ratchet."

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

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

7 b) For state enterprises not in sectors reserved to the
8 state at the date of entry into force of this Agreement, but
9 carrying on an activity on the date of entry into force of this
10 Agreement, a Party may limit the initial acquisition of its
11 interests in the enterprise to its nationals. However, once the
12 Party's interests have been sold, the obligations of paragraph 1
(national treatment) shall apply.¹⁰¹¹

14 9. CDA[Notwithstanding paragraph 1,

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

20 b) a Party, when selling or disposing of its equity interest
21 in a enterprise established or acquired by the Party after
22 the entry into force of this Agreement, may impose limitations
23 on the initial acquisition of those interests by an investor
24 of another Party. Once the Party's interests have been sold
25 or disposed of, the provision of paragraph 1 shall apply to
26 any subsequent sale or disposition;

27 c) a Party may impose limitations on the participation of
28 investors or investments of another Party in the provision of
29 a service delivered by a government or governmental entity¹²
30 when such limitations are imposed at the time:

31 i) the Party privatizes the delivery of that service;

32 ¹⁰ Requirements that equity interests be held by nationals -- for state
33 enterprises not in sectors reserved to the state at the date of entry into force
34 of this Agreement, but which a Party establishes or acquires subsequent to the
35 date of entry into force of this Agreement -- would be governed by Annexes A or
36 B.

37 ¹¹ Mexico is considering joining the U.S. on this provision.

38 ¹² Note that "entity" (rather than "enterprise") is retained here.
39 Presumably it need not be defined.

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

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

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

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

11 c) any subsidy or grant MEX USA [, insurance or loan program]
12 provided by a Party or state enterprise thereof.

13 Article 2109: Performance Requirements

14 1. Except as provided in Annex , no Party shall apply USA
15 MEX [or enforce], in connection with the establishment, acquisition,
16 expansion, conduct or operation of an investment in its territory
17 of an investor of a Party or non-Party, requirements CDA [for
18 particular action by an investor, or enforce any undertaking or
19 commitment].

20 a) to export a given level or percentage of goods or
21 services;

22 b) to achieve a given level or percentage of domestic
23 content;

24 c) to purchase, use or accord a preference to goods or
25 services produced in its territory, or to purchase goods or
26 services from producers or service providers in its
27 territory;

28 d) to relate in any way the volume or value of imports to
29 the volume or value of exports or to the amount of foreign
30 exchange inflows associated with such investment;

31 e) to restrict sales of goods or services in its territory
32 that such investment produces by relating such sales in any
33 way to the volume or value of its exports or foreign exchange
34 earnings;

35 f) USA MEX [to transfer technology, production process or other
36 proprietary knowledge to a national or enterprise in its
37 territory, except when the requirement is imposed by a court

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1 or administrative tribunal to remedy an alleged violation of
2 competition laws.

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

5 ^{USA} [2. A requirement that an investment use a technology to meet
6 generally applicable health, safety or environmental standards
7 shall not be considered inconsistent with paragraph 1(f). For
8 greater clarity, Articles 2103, 2104, and 2105 shall apply to such
9 requirements.]

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

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

21 a) to purchase or use goods or ^{USA} [services] from investments
22 controlled by their nationals¹³:

23 b) to purchase or use goods:

- 24 i) of domestic origin; or
25 ii) from investments located in their territory.

26 c) to achieve a given level or percentage of domestic
27 content;

28 d) to relate in any way the volume or value of imports to
29 the volume or value of exports or to the amount of foreign
30 exchange inflows associated with such investment;

31 e) to restrict domestic sales of goods or services that such
32 investment produces by limiting such sales in any way to the
33 volume or value of its exports or foreign exchange earnings;

34 f) ^{USA MEX} [to act as the exclusive supplier of the goods or
35 services it produces to a specific, regional or world market.]

¹³ U.S. proposes taking an exception for historically socially disadvantaged minority groups.

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1 4. For greater clarity, the provisions of paragraph 3 do not
2 apply to conditions related to the receipt of an incentive that an
3 investor or investment locate production, produce a service, train
4 or employ workers, construct or expand particular facilities, or
5 conduct research and development, [or spend the incentive] in its
6 territory.

7 3. The provisions of ^{CDA}[this Article shall not apply to]:

8 a) ^{USA}[paragraphs 1(a)-(c), and 3(a)-(c) shall not apply to
9 eligibility criteria for purposes of export promotion
10 programs;]

11 b) ^{USA}[paragraphs 1(b)-(c), 1(f), and 3(a)-(c) shall not
12 apply to] measures related to government procurement,
13 ^{CDA}[including purchases by state enterprises]

14 c) ^{CDA}[the provision of subsidies consistent with Article XVI
15 of the GATT and the Agreement on the Interpretation and
16 Application of Article VI, XVI and XXIII of the GATT,
17 including any amendments, modifications or successor
18 agreements thereto;]

19 ^{USA}[d) paragraph 3(b)(i) shall not apply to conditions
20 related to the content of goods to qualify for preferential
21 tariffs or quotas..]

22 6. The provisions of paragraphs 1 or 2 shall not apply to any
23 requirements other than those listed in paragraphs 1(a)-(g) and
24 2(a)-(f).

25 Article 2110: Transfers

26 1. Subject to paragraph 3 ^{MEX CDA}[and paragraph 5¹⁴] each
27 Party shall permit all transfers and international payments
28 (hereinafter "transfers") relating to an investment in its
29 territory of an investor of another Party to be made freely and
30 without delay. Such transfers include:

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

34 b) proceeds from the sale of all or any part of an
35 investment or from the partial or complete liquidation of an
36 investment;

37 ¹⁴ It may be desirable to refer to the tax article.

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1 c) payments made under a contract entered into by an
2 investor, or its investment, including payments made pursuant
3 to a loan agreement;

4 d) compensation pursuant to Article 2111 ; and

5 e) payments arising out of an investment dispute as defined
6 in Article 2119 .¹⁵

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

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

15 a) bankruptcy, insolvency or the protection of the rights of
16 creditors;

17 b) issuing, trading or dealing in securities;

18 c) criminal or penal offenses;

19 d) reports of currency transfers; or

20 e) ensuring the satisfaction of judgments in adjudicatory
21 proceedings.

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

26 5. MEXCDA [No Party shall require its investors to repatriate,
27 or penalize its investors who fail to repatriate, the income,
28 earnings or profits attributable to any investment in another Party
29 or to any businesses carried on in another Party either directly by
30 the investors or indirectly through a enterprise established in
31 that other Party.]

32 Article 2111: Expropriation and Compensation

33 1. No Party shall directly or indirectly nationalize or
34 expropriate an investment of an investor of another Party in its
35 territory or take any measure or measures tantamount to

36 ¹⁵ Canada agrees subject to overall agreement on dispute settlement.

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1 expropriation or nationalization of such an investment
2 ("expropriation"), except:

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

9 2. Compensation shall be equivalent to the fair market value
10 of the expropriated investment immediately before the expropriatory
11 taking ("date of expropriation"), and shall not reflect any change
12 in value occurring because the expropriatory taking had become
13 known earlier. Valuation criteria shall include going concern
14 value, asset value (including declared tax value of tangible
15 property), and other criteria, as appropriate to determine fair
16 market value.

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

19 4. If payment is made in a G7 currency, compensation shall
20 include interest at a commercially reasonable rate for that
21 currency from the date of expropriation until the date of actual
22 payment thereof.

23 5. If payment is made in a currency other than a G7
24 currency, the amount paid shall be no less than the equivalent of
25 the amount of compensation owed on the date of expropriation
26 converted into a G7 currency at the market rate of exchange
27 prevailing on that date, plus accrued interest at a commercially
28 reasonable rate for that G7 currency from the date of expropriation
29 until the date of actual payment.

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

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

37 Article 2113: National Security

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1. USA[Subject to Articles ____ (Energy) and ____ [Government Procurement], nothing in this Agreement shall be construed CDA[to prevent:

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

CDA[b) any Party from imposing any measure affecting goods, services, service providers, suppliers or investors of a Party which it determines is directly related and essential to:

i) supplying a military establishment of a Party with arms, ammunition or implements of war, or enabling fulfillment of a critical defence contract of a Party;

ii) responding to a situation of armed conflict involving the Party taking the measure;

iii) implementing international agreements relating to the nonproliferation of nuclear, chemical or biological weapons, other nuclear explosive devices, or chemical or biological agents;

iv) responding to direct threats of disruption in the supply of nuclear materials for defence purposes.

USA[b) to prevent any Party from taking any actions that it considers necessary for the protection of public order or its essential security interests, including those:

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 establishment;

ii) taken in time of war or other emergency in international relations; or

iii) relating to the implementation of national policy or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or

c) USA[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.

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1 USA [2. An action taken under this Article shall not be subject
2 to Article _____ (dispute settlement) or Chapter _____ (general
3 dispute settlement).]

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

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

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

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

30 6. No Party may invoke the provisions of this Article to
31 derogate from the requirement to pay compensation for an
32 expropriation in accordance with Article _____ or to permit the
33 transfer of an investment and returns, in accordance with Article
34 _____.]

Article 2114: Competition ¹⁶

36 1. Each Party shall adopt or maintain measures to proscribe
37 anti-competitive business conduct, and shall take appropriate
38 action with respect thereto, recognizing that such measures will
39 enhance the fulfillment of the objects and purposes of this
40 Agreement. To this end the Parties ^{USA} [Parties' authorities] shall

1 ¹⁶ The U.S. proposes that this Article be placed outside this investment
42 chapter in the final text.

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1 consult from time to time about the effectiveness of measures
2 undertaken by each Party.

3 2. Each Party recognizes the importance of cooperation and
4 coordination among their authorities to further effective
5 competitive law enforcement in the Free Trade Area. The Parties
6 VMA[Parties' authorities] shall also cooperate on issues of
7 competition law enforcement and consult on issues of common concern
8 which may include mutual legal assistance, notification,
9 consultation and exchange of information relating to the
10 enforcement of competition laws and policies in the Free Trade
11 Areas.

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

18 a) the relative significance of the anti-competitive
19 activities involved of conduct within the enforcing Party's
20 territory as compared to conduct within the other Party's
21 territory;

22 b) the presence or absence of a purpose on the part of those
23 engaged in the anti-competitive activities to affect
24 consumers, suppliers, or competitors within the enforcing
25 Party's territory;

26 c) the relative significance of the effects of the
27 enforcement activities on the enforcing Party's interests as
28 compared to the effects on the other Party's interests;

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

31 e) the degree of conflict or consistency between the
32 enforcement activities and the other Party's law or
33 articulated economic policies; and

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

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

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

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

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

c) the potential for reliance on competition laws and
policies to discipline anti-competitive transborder pricing
practices and market segmentation.]¹⁷

Article 2115: State Enterprises¹⁸

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

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

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

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

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

USA [1. This Chapter, and in particular the obligation to
accord nondiscriminatory treatment to investments in the territory

¹⁷ The US has proposed a similar concept to (c) in Trade Remedies Working
Group.

¹⁸ Canadian proposal and paragraph 2 of U.S. proposal would be placed with
generic monopolies provision.

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1 of a Party of investors of another Party, shall apply to the state
2 enterprises of a Party.¹⁹

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

Article 2116: Monopolies²⁰

14 CDA [1. Nothing in this Agreement shall prevent a Party from
15 maintaining or designating a monopoly.

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

- 19 a) notify the other Parties;
20 b) upon request, engage in consultations; and
21 c) endeavor to minimize or eliminate any unnecessary
22 nullification or impairment of benefits under this Agreement
23 that might otherwise be caused by the designation.

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

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

34 ¹⁹ Mexico can agree to this provision if placed outside the Investment
35 Chapter and only in respect of non-discriminatory treatment when buying and
36 selling goods or services..

37 ²⁰ U.S. proposal would be placed outside the investment chapter.

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

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

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

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

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

27 2. Subject to Articles _____ (Nullification and Impairment,
28 _____ (Expropriation), and Annex 9.1:3 (Liberalization of Energy
29 Investment and Regulatory Measures), nothing in this Agreement
30 shall prevent a Party from designating a monopoly.

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

34 a) notify the other Parties in writing; and

35 b) endeavor to introduce such conditions on the operation of
36 the monopoly as will minimize or eliminate any nullification
37 or impairment of benefits under this Agreement.

38 For purposes of this Article:

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

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

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

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

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

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

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Article 2117: Technology Consortia

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

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

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Article 2118: Taxation

1. GENERAL EXCLUSION: INCOME TAX AND RELATED MEASURES

Except as provided for in this Article, nothing in this Agreement shall apply to taxes of the Parties. In the event of an ambiguity or conflict between this Article and any other provision of this Agreement, the provisions of this Article shall apply.³

2. TAX CONVENTIONS

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

3. APPLICATIONS OF PROVISIONS RELATING TO TRADE IN GOODS

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

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

Subject to paragraphs 2 and 5,

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

³ Provisions concerning forced repatriations in the transfers sections vis-à-vis taxation are rendered redundant by reason of this provision. This provision should take precedence over paragraph 2 of the provision headed "Scope" in Chapter/Annex XX - Financial Services and any other similar provisions. This provision assumes that tariffs and customs duties are not considered to be taxes within the ambit of this Article.

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

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

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

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

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

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

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

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

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

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

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

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

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

6. EXPROPRIATION

CDAMEX [Article ____ of the Investment Chapter (Expropriation) shall apply to a claim by a Party or an investor of such Party that the measure expressed as a taxation measures constitutes an expropriation or nationalization except where its has been determined pursuant to this paragraph that a taxation measure of a Party is a bona-fide tax. Before an investor or a Party may bring such a claim, however, the issue of whether the measure is a bona-fide tax shall be referred for determination by the competent authorities under the tax convention, if any, between the Parties. If this is no such tax convention of if the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to resolve it within a period of six months after the referral, or such other period as may be agreed upon by the Parties, CDAUSA [the investor or the Party] MEX [the Party may bring such a claim under the appropriate dispute settlement provisions of this Agreement.]²²

6.1 USA [EXPROPRIATION

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

7. WITHHOLDING TAX

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

Notes:

²² A cross reference may be required in the expropriation provision of the Investment Chapter.

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

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1 Article 2119: DISPUTE SETTLEMENT

2 [SEE SUBGROUP TEXT]

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1 DEFINITIONS

2 For purposes of this Chapter:

3 MEX USA [enterprise of a Party means an enterprise constituted or
4 organized under the laws and regulations of a Party or a political
5 subdivision thereof.]²³

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

9 investment of an investor of a Party means an investment owned or
10 controlled directly or indirectly by an investor of such Party,
11 and ^{USA MEX} [means the following:

12 a) an enterprise;

13 b) equity or debt securities of an enterprise, or any
14 interest in such enterprise that entitles the owner to share
15 in the income or profits or to share in the assets on
16 dissolution;

17 c) real estate or other property (tangible or intangible)
18 acquired in the expectation or used for the purpose of
19 economic benefit or other business purposes;

20 d) a loan to an enterprise made ^{USA} [or guaranteed] by an
21 enterprise that is not a financial institution as defined in
22 Chapter ____ (financial services);²⁴

23 e) interests arising from the commitment of capital or other
24 resources in or into the territory of another Party to
25 economic activity in such territory, such as under (i)
26 contracts involving the presence of the investor's property in
27 the territory of another Party (e.g., concession agreements,
28 turnkey or construction contracts), or (ii) contracts where
29 the remuneration depends substantially on the production,
30 revenues or profits of an enterprise.

31 For greater clarity,

32 a) claims to money which arise solely from:

33 ²³ We are checking this definition with the Lawyers' Group.

34 ²⁴ This language must be coordinated with the Financial Services Group,
35 which may wish to include as "investments" a loan by a Bank to provide capital
to its subsidiary.