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Financial Services under the North American Free Trade Agreement: An Overview

The North American Free Trade Agreement (NAFTA or the Agreement)[1] will significantly liberalize trade and investment in financial services among the three NAFTA countries, most especially in Mexico, which will open its financial markets to significant foreign participation for the first time in fifty years. This article summarizes the key provisions and principles of the NAFTA, as contained in the official text of the Agreement, relating to financial services.

I. Scope and Definitions

Financial services are governed principally by the Financial Services Chapter (Chapter 14) of the Agreement. On a number of issues, however, financial services also are subject to provisions of other chapters. In some cases this results from specific cross-reference;[2] in others, it is because some provisions of the Agreement apply by their terms to all chapters of the NAFTA.[3] Moreover, for Canada and the United States, certain provisions of the financial services chapter

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1. North America Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., *available in* WESTLAW, NAFTA file [hereinafter NAFTA].
2. *See, e.g., id.* arts. 1401(2), 1412(2), 1414, 1415, 1416.
3. *See, e.g., id.* arts. 105, 201, 1101, chs. 20, 21, 22.

of the prior Canada-United States Free Trade Agreement (CFTA)[4] are incorporated into the NAFTA by reference.[5] Nevertheless, Chapter 14 and its annexes remain the starting point for analyzing financial services under the NAFTA.

The Financial Services Chapter of the NAFTA covers (i) regulated financial institutions from another NAFTA country, (ii) investments in financial institutions by investors from another NAFTA country, and (iii) cross-border trade in financial services.[6] The Agreement imposes obligations with respect to "measures" (for example, laws, regulations, and related requirements) of each NAFTA country, including the measures of any state, province, or local government in a NAFTA country.[7] In particular, each NAFTA country must ensure that its measures conform to the general principles and standards set forth in the chapter—such as national treatment, most-favored-nation treatment, market access, cross-border services, and transparency—insofar as those measures relate to the treatment of providers of and investors in financial services from each other NAFTA country.

In general, a NAFTA country may not enforce any federal, state, or provincial measure that does not conform to the obligations of the Agreement unless the country has "reserved" that measure by including it in a special list.[8] Canada, Mexico, and the United States have all taken reservations (that is, exceptions) to certain specific provisions and issues under the Financial Services Chapter. These reservations contain many important conditions and limitations on market access and cross-border financial services, especially with respect to Mexico.

Certain "exclusion" provisions also permit a NAFTA country to take actions in the future that are inconsistent with the standards of the Agreement. As discussed in part II.H. below, these include exclusions covering actions taken for "prudential" reasons (for example, safety and soundness regulation), in pursuit of monetary and related credit policies, or, subject to certain conditions, in pursuit of exchange rate policies.[9]

A. Key Definitions

A number of definitions are important to an understanding of the financial services provisions of the Agreement. The NAFTA sets forth definitions in several places: in Chapter 2, at the end of Chapter 14,[10] in annex VII to Chapter 14, and occasionally by cross-reference to other chapters.

4. U.S.-Canada Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 L.L.M. 281 [hereinafter CFTA].
5. NAFTA, *supra* note 1, art. 1401(4), annex 1401.4.
6. *Id.* art. 1401(1).
7. *Id.* art. 1401(1); *see also id.* arts. 105, 201(2), 1409(1).
8. *Id.* art. 1409; *see infra* notes 60-69 and accompanying text. The reservations taken by each NAFTA country with respect to the financial services chapter are set out in annex VII and in annexes to several specific articles of Chapter 14.
9. NAFTA, *supra* note 1, art. 1410.
10. *Id.* art. 1416, annex VII (Introduction), annex VII(C)-Mex.

Under the Agreement the term "financial service" means any service of a financial nature, whether or not provided by a regulated financial service provider.[11] Financial services include all services "incidental or auxiliary" to services of a financial nature. Some types of services, however, such as certain services provided by government-related entities or backed by government resources are excluded or reserved from the Agreement.[12]

The NAFTA defines "financial institution" as any entity authorized to do business and regulated or supervised as a financial institution under the laws of a NAFTA country.[13] The Agreement distinguishes between "financial service providers," which may or may not be regulated, and "financial institutions," which must be regulated. Because of differences among the regulatory regimes of the three countries, firms engaged in some types of financial activities (such as factoring or leasing) may be treated as regulated "financial institutions" in one NAFTA country and as unregulated "financial service providers" in another NAFTA country.

An "investment" includes almost any interest of any sort in a business, if that interest would entitle the owner of such interest to share in the income or profits of the business.[14] The concept includes any equity investment and any tangible or intangible property. Investments also include certain loans with maturities of at least three years, but not loans to NAFTA country governments or their agencies.[15] The Agreement defines an "investor of a Party" as any individual, company, or government agency from a NAFTA country that makes, seeks to make or has made an investment.[16]

B. Denial of Benefits (Rule of Origin)

In order to qualify for the benefits of the financial services provisions of the Agreement, financial institutions and investors (or their investments) must satisfy certain "rules of origin," incorporated by reference from the chapter on Cross-Border Trade in Services (Chapter 12).[17] Under these rules a NAFTA country may deny the benefits of the Agreement to any financial service provider that (1) is owned or controlled by nationals or entities of a non-NAFTA country and (2) has no substantial business activities in the territory of any NAFTA country.[18] A NAFTA country may deny the benefits of the NAFTA to financial institutions, investors, or investments controlled by nationals of a non-NAFTA country with

11. *Id.* art. 1416.
12. *See, e.g., id.* arts. 1401(3), 1410(3), annex VII(B)(15)-Mex., annex VII(A)-U.S.
13. *Id.* art. 1416.
14. *Id.* arts. 1139, 1416.
15. *Id.*
16. *Id.* arts. 201, 1416.
17. *Id.* arts. 1211, 1401(2).
18. *Id.* art. 1211(2).

which the NAFTA country does not maintain diplomatic relations or with respect to which the NAFTA country bars certain trade or other transactions.[19]

Canada may apply a more stringent rule of origin. Canada has reserved the right to deny NAFTA benefits to any enterprise not ultimately controlled by persons from NAFTA countries.[20] Thus, for example, subsidiaries of companies from non-NAFTA countries (such as U.S. subsidiaries of German or Japanese banks) would not qualify for the benefits of the Agreement on financial services in Canada.[21]

In contrast, Mexico and the United States have not adopted an ultimate control test for financial services. Entities formed under the laws of any other NAFTA country may qualify for the benefits of the NAFTA in Mexico and the United States, regardless of who ultimately controls those entities. Thus, subject to the two major exceptions noted above,[22] financial institutions from outside the NAFTA region may be able to use Canadian or U.S. financial institution subsidiaries to enter Mexico, for example, or Canadian or Mexican financial institution subsidiaries to enter the United States. To ensure that domestically-owned U.S. and Canadian firms are not squeezed out in the competition to enter Mexico, however, Mexico has committed to administer its licensing and approval procedures during a six-year transition period in a manner that does not deny the benefits of Mexico's liberalization under the NAFTA to entities ultimately controlled by persons from NAFTA countries.[23]

II. Major Principles of the Agreement on Financial Services

A. Standard of Treatment

Under the Financial Services Chapter each NAFTA country agrees to accord to financial institutions, cross-border financial service providers, and investors from other NAFTA countries (and the investments of such investors) both "national treatment" and "most-favored-nation" treatment.[24]

The "national treatment" standard requires a NAFTA country to accord to investors, their investments, and financial institutions of other NAFTA countries treatment no less favorable than it accords to its own domestic investors, their investments, and financial institutions in like circumstances.[25] A NAFTA country's measures meet this standard if they accord equal competitive opportunities to institutions, investors, and their investments from other NAFTA countries.[26]

19. *Id.* art. 1211(1)(a).
20. *Id.* annex VII(B)(2)-Can.
21. *Id.*
22. *See supra* notes 18-19 and accompanying text.
23. NAFTA, *supra* note 1, annex VII(C)(6)-Mex. For a discussion of the transition period and limitations that will apply during that period, see *infra* notes 98-140 and accompanying text.
24. NAFTA, *supra* note 1, arts. 1405, 1406.
25. *Id.* art. 1405(1)-(4).
26. *Id.* art. 1405(5).

The "most-favored-nation" standard requires each country to accord to investors, their investments, and financial institutions of other NAFTA countries treatment no less favorable than it accords to investors, their investments, and financial institutions from any NAFTA or non-NAFTA country in like circumstances.[27] The effect of requiring each NAFTA country to provide both national treatment and most-favored-nation treatment is to require the better of the two in any situation where one or the other is more favorable. The Agreement also requires that whenever a NAFTA country gives effect to the prudential measures of another NAFTA country (as the United States and Canada have done in the Canada-U.S. Multijurisdictional Disclosure Agreement for securities offerings), the country according recognition must allow any other NAFTA country to negotiate for similar treatment.[28]

B. Market Access

Each NAFTA country must permit individuals and companies from the other NAFTA countries to establish financial institutions in its territory and to expand the operations of such institutions throughout its territory.[29] The NAFTA limits this benefit to financial service providers. That is, to be eligible for the Financial Services Chapter benefits on market access, an "investor of another Party" must already be engaged in the business of providing financial services.[30]

The NAFTA countries may restrict cross-border branching of financial institutions. Each NAFTA country may require separate incorporation for financial institutions in its territory, thereby barring entry by direct cross-border branching.[31] However, the parties to the NAFTA have agreed to review and negotiate direct bank branching across NAFTA country borders if and when the United States allows Mexican- and Canadian-owned U.S. banks to expand interstate by subsidiaries or branches throughout substantially all of the United States.[32]

The Financial Services Chapter also applies to certain self-regulatory organizations. If a NAFTA country requires a financial service provider to be a member of, participate in, or have access to any self-regulatory organization in order to provide financial services in that country, then that self-regulatory organization must abide by all the obligations of the Financial Services Chapter (national treatment, most-favored-nation treatment, transparency, and so forth).[33] For these purposes, a "self-regulatory organization" includes any nongovernmental body

27. *Id.* art. 1406(1).
28. *Id.* art. 1406(2)-(4).
29. *Id.* art. 1403.
30. *Id.* art. 1403(5).
31. *Id.* art. 1403(4).
32. *Id.* art. 1403(3).
33. *Id.* art. 1402.

(for example, a securities exchange or clearing agency) that exercises regulatory or supervisory authority over financial service providers.[34]

In addition to these general principles the parties have made a number of specific commitments and undertakings relating to financial services. As noted above each NAFTA country also has taken reservations in order to preserve certain existing discriminatory or nonconforming measures or to take exception to specific provisions under the Agreement. These commitments and reservations, set out in annexes,[35] form an integral part of the Agreement and modify the Financial Services Chapter in important ways. To understand the Chapter's market access provisions, in particular, one must carefully review these annexes. Part III below describes key elements of the provisions relating to market access to the financial services market of Mexico.

C. Cross-Border Financial Services

The concept of cross-border financial services may be thought of as including two separate ideas: "mobility of provider" (the ability of a provider to sell financial services in a jurisdiction where it has no place of business); and "mobility of consumer" (the ability of a consumer to purchase services from a provider located outside the consumer's jurisdiction of residence). The NAFTA addresses these two issues in different ways.

First, the Agreement permits mobility of consumers. Each NAFTA country has agreed to permit its citizens and residents to purchase financial services from any financial service provider that is located in the territory of another NAFTA country and that satisfies the chapter's rules of origin.[36] This obligation does not require a NAFTA country to permit financial service providers from other NAFTA countries to solicit or do business in its territory. The Agreement specifically permits each NAFTA country to adopt its own definition of "doing business" and "soliciting."[37] At a minimum, therefore, the Agreement requires each NAFTA country to permit its citizens and residents located outside its territory to purchase financial services from NAFTA financial service providers also located outside its territory.

Second, each NAFTA country has agreed to a "standstill" obligation with respect to any other measures regulating cross-border trade in financial services by cross-border financial service providers of another NAFTA country.[38] Under this provision a NAFTA country may maintain its existing measures regulating cross-border financial services and mobility of providers. A NAFTA country may

34. *Id.* art. 1416.
35. *See id.* annex 1409.1, annex VII.
36. *Id.* art. 1404(2). For a discussion of the rules of origin for financial services, see *supra* notes 17-23 and accompanying text.
37. NAFTA, *supra* note 1, art. 1404(2).
38. *Id.* art. 1004(1).

not, however, adopt any new measures increasing restrictions on cross-border services permitted on the date the NAFTA enters into force, unless and except to the extent set out in that country's reservations.[39]

Among the noteworthy exceptions to this standstill rule are: (1) a reservation by Canada permitting it to adopt more restrictive measures affecting cross-border trade in securities after the date of entry into force of the Agreement;[40] (2) a similar reservation by the United States with respect to Canada;[41] and (3) a special commitment by Mexico to liberalize certain cross-border insurance services.[42] The three countries have agreed to consult, not later than January 1, 2000, on further liberalization on cross-border trade in financial services, with a view toward allowing a wider range of cross-border trade in insurance services.[43]

D. New Financial Services and Data Processing

As a reflection of its broad scope, the Financial Services Chapter addresses new types of financial services that may not yet exist. Under the chapter each NAFTA country has agreed to permit regulated financial institutions from any other NAFTA country to provide new financial services of a type similar to services that the country permits its own regulated institutions, in like circumstances, to provide under domestic law.[44] A NAFTA country may require prior regulatory authorization for any such new service, but such authorization may be refused only for "prudential reasons" (for example, safety and soundness or regulatory concerns).[45] A financial service provider may be required to satisfy certain requirements regarding institutional or juridical form. For example, a provider may be limited to offering the new service through a bank or through a separate subsidiary.

Each NAFTA country has agreed to permit regulated financial institutions from the other NAFTA countries to transfer information for data processing into and out of the host country's territory, if the transfer is required in the ordinary course of business of such institutions.[46] This issue has caused some friction under the CFTA. Some U.S. firms have complained that Canada's requirement that financial institution subsidiaries conduct their data processing within Canada's borders increased costs and denied economies of scale.

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39. *Id.*
40. *Id.* annex VII(B)(1)-Can.
41. *Id.* annex VII(B)-U.S.
42. *Id.* annex VII(A)-Mex. For a summary of this commitment, see *infra* note 140 and accompanying text.
43. NAFTA, *supra* note 1, annex 1404.4.
44. *Id.* art. 1407(1).
45. *Id.*
46. *Id.* art. 1407(2).

E. Staffing

The Financial Services Chapter sharply limits each country's ability to impose residency or nationality requirements on financial institutions. A NAFTA country may not require a financial institution controlled by persons from any other NAFTA country to employ individuals of any particular nationality as "senior managerial or other essential personnel."[47] A NAFTA country also may not require that more than a simple majority of the board of directors of such financial institutions be composed of its own citizens and/or residents.[48] The United States has taken a limited reservation to these provisions to preserve citizenship and residency requirements for national bank presidents and directors under existing law.[49]

F. Investments in Financial Institutions

The financial services chapter incorporates by reference certain provisions of the Investment Chapter (Chapter 11).[50] Among other things, these provisions permit each NAFTA country to impose special requirements (such as incorporation, residency requirements for investors, or information requirements) in connection with investments by investors from other NAFTA countries, provided that such requirements do not impair the substance of the benefits of the Agreement.[51] These provisions also require NAFTA countries to protect any confidential business information obtained as a result of any such requirements.[52]

These provisions create a number of other important rights and obligations. For example, a NAFTA country may not directly or indirectly nationalize or expropriate the property of an investor from another NAFTA country except: (1) for a public purpose; (2) on a national treatment and most-favored-nation basis; and (3) in accordance with principles of due process of law.[53] Investors in property that is expropriated must be compensated at fair market value, determined and paid in accordance with specific criteria. These criteria must take account of issues such as the timing of valuation and payment, the payment of interest, the currency in which payment is made, going-concern value, and other factors appropriate to determining fair value.[54]

Each NAFTA country also has agreed to permit investors from other NAFTA countries to make investment-related transfers (including dividends, distributions

47. *Id.* art. 1408(1).
48. *Id.* art. 1408(2).
49. *Id.* annex VII(A)-U.S.
50. *Id.* art. 1401(2). This provision incorporates articles 1109 through 1111, 1113, 1114, and 1211 into the Financial Services Chapter.
51. *Id.* art. 1111.
52. *Id.* art. 1111(2). Other provisions relating to confidential information include article 1411(5) under the Financial Services Chapter and article 2105, applicable to the entire Agreement.
53. *Id.* art. 1110(1).
54. *Id.* art. 1110(1)-(6).

of profits, interest, and other payments) in the currency of their choice.[55] This obligation is subject to applicable bankruptcy and securities laws, criminal laws regulating currency transfers, laws regarding the satisfaction of judgments, emergency balance of payments measures, and measures relating to the safety, soundness, integrity, or financial responsibility of financial service providers.[56]

Nothing in the Investment Chapter prevents a NAFTA country from imposing measures it considers necessary to ensure that investment activity is conducted in a manner sensitive to environmental concerns.[57] The NAFTA countries have further agreed that environmental measures should not be waived or relaxed in order to attract, retain, or encourage investment.[58] Finally, the Investment Chapter provides for special dispute resolution procedures for investor-state disputes relating to investments.[59]

G. Reservations and Commitments

As noted in part I above, a crucial element of the NAFTA in general and the Financial Services Chapter in particular is the various reservations taken by the three NAFTA countries. These reservations accommodate differences in legal regimes, objectives, and negotiating concessions between the three NAFTA countries. As a drafting matter, the separation of the reservations from the text of the Agreement permitted many provisions to be worded broadly, as statements of general principles. This feature is in marked contrast to the financial services chapter of the CFTA, which listed specific issues and concessions point by point. This drafting structure also may ease future expansion of the NAFTA, by facilitating accession to the Agreement by additional countries.[60]

Annex VII sets forth the principal reservations to the Financial Services Chapter. The reservations consist of two main types. First, each of the three NAFTA countries has taken (and some U.S. states may yet take) reservations to preserve its right to enforce existing measures that do not conform to articles 1403 (establishment of a financial institution), 1404 (cross-border trade), 1405 (national treatment), 1406 (most-favored-nation treatment), 1407 (new financial services and data processing), and 1408 (staffing).[61] To be reserved in this manner a measure must have been existing on the date of entry into force of the Agreement (January 1, 1994).[62] Except for measures of local governments, the reserved

55. *Id.* art. 1109(1), (2).

56. *Id.* arts. 1109(4), 1410(4).

57. *Id.* art. 1114(1).

58. *Id.* art. 1114(2).

59. *See id.* arts. 1414, 1415, ch. 20. For a discussion of dispute resolution under the Agreement, see *infra* notes 76-97 and accompanying text. For a discussion of provisions applicable to investor-state disputes, see *infra* text accompanying notes 91-93.

60. *See* NAFTA, *supra* note 1, art. 2204.

61. *Id.* art. 1409(1).

62. *Id.* art. 2203.

measure also must be described in a list set forth in each country's respective section A of annex VII.[63]

Although such reserved measures must have been in existence at the date of entry into force of the Agreement, the deadline for listing such measures varies. Nonconforming federal measures must be listed by the date of entry into force.[64] Nonconforming Canadian provincial measures, and measures of six states—California, Florida, Illinois, New York, Ohio, and Texas—also must be listed by the date of entry into force.[65] For the remaining forty-four U.S. states, the Agreement gives the United States until January 1, 1995, to list reservations for such nonconforming measures.[66] The states of Mexico generally do not regulate financial services, and Mexico did not take any reservations for state measures under the Financial Services Chapter. Existing nonconforming measures of local governments may be reserved without being listed.[67] Measures reserved under this provision may be continued or renewed thereafter and may be amended, so long as the amendment does not decrease the measure's conformity with the Agreement.[68]

A second group of reservations includes country-by-country negotiated exceptions to specific provisions of the Financial Services Chapter, which reservations are set forth in each country's section B to annex VII. Like reservations taken under section A, reservations under section B of annex VII may be taken only against certain provisions of the chapter, namely, articles 1403 through 1408. However, section B reservations are not limited to pre-existing measures.[69] The most lengthy and detailed of these reservations are those of Mexico, which define the terms and conditions on which Mexico is to open its financial markets to financial institutions of the United States and Canada. Parts III, IV, and V below discuss highlights of these provisions.

Section C of annex VII sets forth important commitments of the three countries that further modify or expand provisions of the Financial Services Chapter, particularly with regard to market access issues. Parts III, IV, and V below discuss these commitments. The conceptual dividing line between "reservations" and "commitments" in annex VII is not always clear; certain reservations and commitments appear to have elements of the other. In any event, the whole of annex VII must be read together and in context with the Financial Services Chapter and the Agreement.

63. *Id.* art. 1409(1)(a).
64. *See id.* art. 1409(1)(a)(i).
65. *Id.* arts. 1409(1)(a)(ii), annex 1409.1.
66. *Id.*
67. *Id.* art. 1409(1)(a)(iii).
68. *Id.* art. 1409(1)(b), (c).
69. *Id.* art. 1409(2).

H. Exclusions

The Agreement provides important exclusions for certain measures. Generally, exclusions are broader than reservations. They exempt future as well as existing measures, and they typically provide exceptions from a much broader range of NAFTA provisions and standards (often, the entire chapter or Agreement). Within carefully defined limits as to scope, exclusions permit each NAFTA country to exercise important regulatory, economic policy, and government powers unfettered by the Agreement.

Article 1410 of the Financial Services Chapter provides that nothing in the "Part" of the NAFTA containing the Financial Services Chapter shall be construed as preventing a NAFTA country from imposing measures for "prudential" reasons or in pursuit of monetary and related credit policies or exchange-rate policies.[70] This provision is very important and encompasses several different regulatory concepts and objectives. First, it excludes from several chapters of the NAFTA "reasonable" measures adopted or maintained for prudential regulatory reasons. This provision, often referred to as the "prudential carve-out," grants each of the three countries important flexibility to regulate and supervise financial institutions and the financial markets. Prudential measures may include, for example, measures taken for the protection of investors or depositors, to maintain the safety and soundness of financial institutions, or to ensure the integrity and stability of a NAFTA country's financial system.[71]

Article 1410 also excludes measures taken in pursuit of monetary, related credit, or exchange-rate policies. To qualify for this exclusion, measures must be of general application and nondiscriminatory against persons from other NAFTA countries. With respect to monetary policy, the exclusion is expressly subject to and modified by certain provisions and obligations under the Investment Chapter, governing investments and transfers relating to investments.[72]

Each of these exclusions applies to the Part of the NAFTA containing the Financial Services Chapter. This includes Chapter 11 (Investment), Chapter 12 (Cross-Border Trade in Services), Chapter 13 (Telecommunications), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies, and State Enterprises), and Chapter 16 (Temporary Entry for Business Persons).

A separate chapter of the Agreement contains a related exclusion, which applies to the NAFTA as a whole. In general, article 2104 exempts from the Agreement measures taken for balance of payments reasons if the NAFTA country adopting them experiences serious balance of payments difficulties (or the threat thereof) and the measures conform to International Monetary Fund rules. This exclusion is subject to a number of conditions, which vary depending on whether or not

70. *Id.* art. 1410(1), (2).
71. *Id.* art. 1410(1).
72. *Id.* arts. 1410(2), 1106, 1109.

the balance of payments measures are imposed on cross-border trade in financial services.

Other exclusions, contained in the Financial Services Chapter, ensure that the governments of NAFTA countries may operate on an exclusive basis (1) public retirement and statutory social security plans or (2) any activity or service for the account, with the guarantee or using the financial resources of a government or governmental entity.[73] Finally, other chapters of the Agreement contain exclusions that may apply to financial services under some circumstances. Article 2102, for example, exempts measures considered necessary by a NAFTA country for the protection of national security.[74] The agreement also excludes (with certain exceptions) questions of taxation, which are generally governed instead by bilateral tax treaties.[75]

I. Administration and Dispute Settlement

The Agreement establishes a Free Trade Commission to administer the NAFTA.[76] The Free Trade Commission is to be supported by a NAFTA Secretariat.[77] The Agreement also creates a number of committees and working groups on various issues, all under the overall supervision of the Free Trade Commission.[78] Among these is the Financial Services Committee, to be composed of financial services regulatory officials from each of the three NAFTA countries.[79] The Financial Services Committee is charged with supervising the implementation of the Financial Services Chapter, considering financial services issues referred to it by any NAFTA country, and participating in financial services dispute settlement procedures.

The NAFTA contains a number of detailed provisions describing procedures for resolving disputes under the Agreement. The participating countries spent a considerable amount of time and effort in negotiating these provisions. All sides recognized dispute resolution issues as important, complex, and at times involving questions of national sovereignty. Dispute settlement matters occupy virtually all of Chapter 19 (on antidumping and countervailing duty matters) and Chapter 20 (on administration and dispute resolution generally), as well as many other provisions throughout the Agreement. For financial services the Financial Services Chapter, the Investment Chapter, and Chapter 20 contain the most important dispute settlement procedures.

The dispute settlement procedures for financial services are basically the same

73. *Id.* arts. 1401(3), 1410(3).
74. *Id.* art. 2102.
75. *Id.* art. 2103.
76. *Id.* art. 2001.
77. *Id.* art. 2002.
78. *Id.* arts. 2001(2)(d), 2001(3), annex 2001.2.
79. *Id.* art. 1412, annex 1412.1.

as those for the rest of the Agreement, but with some modifications. These procedures involve several layers, invoked successively as the dispute escalates or continues over time. First, a NAFTA country may request consultations with one or more of the other NAFTA countries on any matter arising under the Agreement affecting financial services.[80] These consultations are to be held among designated financial services regulatory authorities. The consultations also may include the participation of other regulatory authorities if deemed appropriate and requested by a NAFTA country.[81]

If consultations fail to resolve the matter, any NAFTA country may call upon the NAFTA Free Trade Commission to assist in settling the dispute.[82] The Commission may conduct further consultations, hold hearings, call upon working groups or advisers, make recommendations, and use mediation and other procedures to resolve disputes in a manner mutually satisfactory to the disputing countries.[83]

If the Commission cannot resolve the dispute in a mutually satisfactory manner, any NAFTA country involved may request the establishment of an arbitral panel to hear the dispute.[84] Each such arbitral panel would be composed of five independent experts, selected by the disputing countries from a roster of experts established and maintained under the Agreement for this purpose.[85] Separate rosters of financial services experts and other experts would be maintained.[86] In the case of financial services disputes all five panelists may be financial services experts if the countries to the dispute agree; if the countries do not agree each disputing country may select either financial or nonfinancial experts as its nominees to the arbitral panel.[87] If the country complained against invokes prudential regulation or monetary policy as a defense, the chair of the panel must be a financial services expert.[88]

The arbitral panel reports its preliminary and final findings to the Free Trade Commission. The Commission, together with the disputing parties, then determines how to resolve the dispute. Normally this would be expected to involve implementing the arbitral panel's recommendations.[89] If the recommendations and findings of the panel are not followed, the prevailing party may retaliate only through denying benefits in the financial services sector that have an effect equivalent to the effect in the financial services sector of the offending measure.[90]

Under the Financial Services Chapter, and under the Agreement generally,

80. *Id.* art. 1413.
81. *Id.*
82. *See id.* arts. 1414, 1415, 2003, 2004, 2006, 2007.
83. *Id.*
84. *Id.* art. 2008.
85. *Id.* arts. 2009, 2010, 2011.
86. *Id.* arts. 1414(1), 2009.
87. *Id.* art. 1414(4).
88. *Id.* art. 1414(4)(ii).
89. *Id.* arts. 2016, 2017, 2018.
90. *Id.* art. 1414(5). *Compare id.* art. 2019.

disputes may be brought only by "Parties"—that is, by the governments of each NAFTA country. A private citizen or company generally may not initiate or participate in a dispute settlement proceeding. Moreover, no NAFTA country may provide any private right of action under domestic law against another NAFTA country for violations of the Agreement.[91] An important exception involves so-called investor-state disputes brought under the Investment Chapter. Under articles 1116 and 1117, a private investor may bring a claim directly against a NAFTA country if the claim involves a violation of certain (but not all) provisions of the Investment Chapter. Such claims may lead to binding arbitration proceedings, under a separate set of rules set forth for such disputes.[92] If the NAFTA country complained against defends its measure as prudential regulation or monetary policy, the arbitral panel must submit the issue of the validity of that defense for decision by the Financial Services Committee.[93]

The dispute resolution provisions of the NAFTA are complex and detailed. They address a number of other important issues, including the interrelationship of proceedings under the Agreement with litigation in domestic courts,[94] alternative dispute resolution programs,[95] and other trade agreements. For example, if a dispute could be brought under either the General Agreement on Tariffs and Trade (GATT) or the NAFTA, the complaining country may choose either forum.[96] Once selected, the chosen forum must be used to the exclusion of the other. In the case of disputes between the United States and Canada, it is not entirely clear whether dispute resolution provisions of the CFTA might continue to apply, at least to the extent not inconsistent with the NAFTA.[97] For financial services, at least, the NAFTA's formal dispute resolution procedures represent a significant step beyond the CFTA. The CFTA provides only for consultations on financial services disputes.

III. Highlights of Provisions Regarding Access to Mexico

The Financial Services Chapter and related annexes, especially annex VII, will afford U.S. and Canadian financial services firms and investors substantially broader access to Mexico. This part summarizes some of the more significant provisions on access to Mexico. These provisions will be implemented and enforced through new legislation, regulations, interpretations, and other measures by the Ministry of Finance of Mexico (the Secretaría de Hacienda y Crédito Público) and its affiliated regulatory commissions (such as the National Banking

91. *Id.* arts. 2004, 2021.
92. *Id.* arts. 1118-1138.
93. *Id.* art. 1415.
94. *Id.* art. 2020.
95. *Id.* art. 2022.
96. *Id.* art. 2005.
97. *See id.* art. 103, annex 1401.4.

Commission, the Securities Commission, and the National Insurance and Bonding Commission).

A. ESTABLISHMENT OF FINANCIAL INSTITUTION SUBSIDIARIES IN MEXICO

U.S. and Canadian financial services providers and investors engaged in financial service activities in their home countries may apply to establish or acquire Mexican-chartered financial institutions to conduct similar activities in Mexico. In the case of certain types of financial services—such as foreign exchange, bonding, and general deposit warehousing services—such applications may be made immediately following the entry into force of the Agreement. For certain other types of financial services—including banking, securities, and insurance services—access to Mexico will be phased in during a six-year "transition period," beginning at entry into force and ending on January 1, 2000.[98]

Once a U.S. or Canadian investor lawfully establishes or acquires a bank or securities firm in Mexico, that investor will then be eligible to form a "financial group holding company" under Mexican law and thereby expand into other types of financial services on the same terms as domestic Mexican investors.[99] Using a Mexican financial group structure, eligible U.S. and Canadian investors may establish or acquire additional Mexican companies engaged in the full range of financial services activities permitted under Mexican law, including banking, securities, insurance, factoring, leasing, bonding, and warehousing, among others. In addition, under Mexican law, financial service companies affiliated through a financial group may share a common name and market their products through the offices of any other company in the group.

1. *Special Restrictions and Powers*

In Annex VII Mexico reserved the right to impose a number of conditions and restrictions on financial service providers and investors seeking access to Mexico. Mexico may require that an investor seeking to establish or acquire any given type of financial service provider in Mexico (for example, bank or securities firm) must already be engaged in providing the same general type of financial service in the territory of its home NAFTA country.[100]

Mexico may limit each investor (together with its affiliates) to owning not more than one financial institution of each type in Mexico.[101] This provision is

98. *Id.* annex VII(B)-Mex. (generally).

99. *Id.* annex VII(C)(5)-Mex.

100. *Id.* annex VII(B)(14)(a)-Mex. This is in addition to the more general requirements that an investor meet the rule of origin test to benefit under the Financial Services Chapter and that a company be engaged in financial services in its home NAFTA country to be considered an eligible "financial service provider" or "financial institution." *See supra* notes 12, 17-23, 29-30 and accompanying text.

101. NAFTA, *supra* note 1, annex VII(B)(14)(b)-Mex.

analogous to provisions under existing Mexican law restricting a financial group to controlling only one financial institution of each type.

Mexico may require a financial institution (other than an insurance company) that is to be established or acquired in Mexico by an investor from another NAFTA country to be wholly owned by that investor.[102] Investments in Mexican insurance companies are excluded from this requirement. In large part this exemption from the "wholly owned" requirement derives from the fact that Mexican law has for several years permitted foreign insurance companies to enter into joint ventures with or make substantial minority investments in Mexican-chartered insurance companies. Other provisions of Mexico's financial services annex also reflect this favored treatment for insurance companies. Examples include certain "grandfather" privileges[103] and separate, alternative authority for phasing-in investments in an insurance company on an accelerated timetable without becoming subject to the capital limits discussed below.[104]

Mexican-chartered financial service companies owned by other NAFTA country investors will enjoy the same powers, and be subject to the same limits and regulation, as domestically owned firms, with a few significant exceptions. Foremost among these exceptions are the capital and asset limits described in the next part, although these limits apply only for a limited period of time and do not apply to some types of financial services. Mexican financial service companies owned by investors from other NAFTA countries also may be restricted from establishing offices, branches, or subsidiaries outside Mexico.[105]

Mexico may deny access to its financial services market for banks or securities firms affiliated with commercial or industrial companies having operations in Mexico. This provision is generally consistent with existing Mexican law, which effectively bars such affiliations for all Mexican-chartered banks and securities firms. In the NAFTA Mexico has agreed that affiliation with nonresident commercial or industrial companies operating only outside Mexico will not be prohibited to U.S. or Canadian investors seeking to own Mexican financial services companies. In addition, Mexican authorities may consider, on a case-by-case basis, exempting from this restriction a bank or security firm affiliated with a commercial corporation operating in Mexico, if the affiliation is determined to be "harmless" and the commercial corporation derives at least 90 percent of its worldwide income from financial-related activities.[106]

Within two years of entry into force of the Agreement, Mexico has committed to study and consider whether or not to authorize the establishment of new types of limited-purpose securities firms.[107] If permitted, such firms could have more

102. *Id.* annex VII(B)(12)-Mex.
103. *Id.* annex VII(C)(4)-Mex.
104. *Id.* annex VII(B)(7)-Mex.
105. *Id.* annex VII(B)(12)-Mex.
106. *Id.* annex VII(C)(1)-Mex.
107. *Id.* annex VII(C)(3)-Mex.

limited powers and be subject to lower capital requirements than currently apply to full-service Mexican securities firms (*casas de bolsa*).[108]

2. *Capital and Asset Limits*

Certain (but not all) types of financial institutions in Mexico owned by other NAFTA country investors will be subject to capital limits during the six-year transition period.[109] The Mexican regulatory authorities will designate a maximum amount of authorized capital for each financial institution affiliate owned by U.S. or Canadian firms.[110] Such Mexican financial institution subsidiaries will not be permitted to issue subordinated debt, except to their foreign parent institutions.[111] One special category of financial institution, called "limited scope financial institutions," will be subject to limits based on the amount of their assets, rather than capital.[112] Regulatory capital requirements (and, where applicable, asset limits) effectively limit the size of a Mexican financial institution's operations.[113] For this reason, these limits are often (but not entirely accurately) referred to as "market share limits."

The capital/asset limits are generally of two types: individual limits for each foreign-owned firm and aggregate limits for all foreign-owned financial service companies of the same type.[114] Different individual and aggregate limits are established for each category of financial institution, expressed as a percentage of total capital (or assets) of all financial institutions of that type in Mexico.[115] In general, these capital/asset limits apply only during the transition period.[116] They begin upon entry into force of the Agreement, increase (in the case of aggregate capital limits) in annual increments through the year 1999, and then expire on January 1, 2000.[117] In the case of the banking and securities industries Mexico may extend or (after expiration) reimpose these limits for a limited period of time under certain "safeguard" provisions.[118]

The capital/asset limits for each type of financial service subsidiary in Mexico are summarized briefly below:

a. Banks

For NAFTA investor-owned banks the aggregate industry capital limit begins at 8 percent in 1994 and rises to 15 percent by 1999.[119] The single-institution

108. *Id.*
109. *Id.* annex VII(B)(1)-(6)-Mex.
110. *Id.*
111. *Id.* annex VII(B)(4)-Mex.
112. *Id.* annex VII(B)(8)-Mex.
113. *Id.* annex VII(B)(1)-(7)-Mex.
114. *Id.* annex VII(B)(2), (5), (6)-Mex.
115. *Id.*
116. *Id.* annex VII(B)(1), (9), (C) (Definitions)-Mex.
117. *Id.* annex VII(B)(1), (2), (5), (6), (9), (C) (Definitions)-Mex.
118. *Id.* annex VII(B)(9); *see also id.* annex 1413.6.
119. *Id.* annex VII(B)(5)-Mex.

capital limit is 1.5 percent through the year 1999.[120] Both of these limits expire on January 1, 2000. During and after the transition period a U.S. or Canadian investor will be permitted to acquire an existing Mexican bank only if the capital of the acquired bank, together with the capital of any Mexican bank already controlled by the acquiror, would not exceed 4 percent of the aggregate capital of all banks in Mexico.[121]

Until the year 2004 a safeguard provision will permit Mexico, under certain conditions, to extend and freeze for three years the aggregate capital limit of foreign-owned banks.[122] Moreover, if at any time (including any time after the transition period and even after the year 2004) the aggregate capital of all commercial banks established in Mexico by investors from other NAFTA countries reaches 25 percent of the aggregate capital of all commercial banks in Mexico, Mexico may request consultations with the United States and Canada to discuss the need for remedial action, including further temporary limitations on market participation.[123] If such consultations do not result in consensus, any NAFTA country may request that the matter be submitted to arbitration under the Agreement.[124]

b. Securities

For NAFTA investor-owned securities firms the aggregate capital limit will rise from 10 percent in 1994 to 20 percent in 1999.[125] The single-institution capital limit is 4 percent through the year 1999.[126] Both limits expire on January 1, 2000.[127] As with bank affiliates, until the year 2004, Mexico may under certain conditions extend and freeze for three years the aggregate capital limit of foreign-owned securities firms under a safeguard provision.[128]

c. Insurance

For insurance the aggregate capital limit will rise from 6 percent in 1994 to 12 percent in 1999.[129] The single-institution capital limit will be 1.5 percent through 1999.[130] Both limits expire on January 1, 2000.[131] The capital limits will be measured and applied separately to life and health insurance and to casualty and other types of insurance.

120. *Id.* annex VII(B)(2)-Mex.
121. *Id.* annex VII(B)(13)-Mex.
122. *Id.* annex VII(B)(9)-Mex.
123. *Id.* annex 1413.6(B), VII(B)(9), (C) (Definitions)-Mex.
124. *Id.* annex 1413.6(B).
125. *Id.* annex VII(B)(5)-Mex.
126. *Id.* annex VII(B)(2)-Mex.
127. *Id.* annex VII(B)(9)-Mex.
128. *Id.*
129. *Id.* annex VII(B)(6)-Mex.
130. *Id.* annex VII(B)(2)-Mex.
131. *Id.* annex VII(B)(9)-Mex.

The NAFTA exempts certain insurance firms and investments from these capital limits. U.S. or Canadian insurance companies that enter into joint ventures with Mexican insurance companies will be permitted to expand their equity participation in such Mexican firms on an accelerated schedule before the end of the transition period, without capital limits. Such investments may be increased from 30 percent of common stock in 1994, to 35 percent in 1995, 40 percent in 1996, 45 percent in 1997, 51 percent in 1998, and 100 percent by the year 2000. No aggregate or single-institution capital limits apply to these investments.[132]

In addition, a U.S. or Canadian insurance company having a 10 percent or greater equity participation in a Mexican insurer as of July 1, 1992, will be allowed to (1) exercise any existing contract right or option relating to ownership interests in such Mexican insurer and (2) increase its stake to 100 percent on the earlier of January 1, 1996, or two years after entry into force of the Agreement.[133] The individual capital limits do not apply to such grandfathered investments.[134]

d. Other Financial Services

The NAFTA will subject Mexican factoring and leasing companies owned by other NAFTA country investors to the same aggregate capital limits as securities firms, until the year 2000.[135] Such companies will not, however, be subject to individual capital limits.[136] Warehousing, bonding, foreign exchange, and mutual fund management firms are not subject to any capital limits.

In conjunction with the NAFTA Mexico has adopted measures permitting the formation of "limited-scope financial institutions," which are authorized to engage in lending and certain other bank-like activities, but not deposit-taking. In the NAFTA Mexico has agreed to permit nonbank investors from the United States and Canada to establish limited-scope financial institutions in Mexico, on terms no less favorable than those applicable to domestic Mexican firms, to provide consumer, commercial, or mortgage lending or credit card services.[137] Until the year 2000 the NAFTA subjects such foreign-owned limited-scope institutions to aggregate, but not individual, limits, based on assets rather than capital.[138] The aggregate assets of such entities may not exceed 3 percent of the aggregate assets of all banks and limited-scope financial companies in Mexico.[139] Lending by limited-scope affiliates of automobile manufacturers will not be subject to or taken into account in calculating this limit.

132. *Id.* annex VII(B)(2), (7)-Mex.
133. *Id.* annex VII(C)(4)-Mex.
134. *Id.* annex VII(B)(2)-Mex.
135. *Id.* annex VII(B)(5)-Mex.
136. *Id.* annex VII(B)(2), (5)-Mex.
137. *Id.* annex VII(C)(2)-Mex.
138. *Id.* annex VII(B)(8)-Mex.
139. *Id.*

B. Cross-Border Insurance Services in Mexico

Under the NAFTA Mexico has agreed to permit U.S. and Canadian firms to provide certain cross-border insurance services currently restricted under Mexican law. Specifically, Mexico will permit the insurance of tourism-related risks in Mexico (not including risks of liability to third parties) and related intermediary services, if purchased via physical mobility of the consumer without solicitation in Mexico by the provider. Mexico also will permit Mexican consumers to purchase from U.S. and Canadian firms the following: insurance of shipments of goods in international transit to or from any NAFTA country from point of origin to final destination; insurance of the vehicle transporting such goods (including vehicles used in maritime shipping, commercial aviation, and space launching and freight, including satellites) during the period of its use in such transportation, provided that such vehicle is licensed and registered outside Mexico; and related intermediary services. Mexico has reserved certain other restrictions on cross-border insurance services under existing law.[140]

IV. Highlights of Provisions Regarding Access to Canada

Canada has taken fewer reservations and made fewer new commitments than has Mexico under the Financial Services Chapter. In general Canada has extended to Mexican firms and investors several benefits already enjoyed by U.S. investors under the CFTA.

Canada will permit Mexican investors to establish subsidiary financial institutions in Canada and will exempt such investments from certain aspects of Canada's so-called 10/25 investment rules otherwise applicable to foreigners. Under the 10/25 rules no investor may own more than 10 percent of the capital of any widely held Canadian financial institution, and non-Canadian investors in the aggregate may not own more than 25 percent of such capital. The NAFTA and the CFTA, respectively, permit Mexican and U.S. investors to control Canadian financial institution subsidiaries (so-called Schedule II subsidiaries) without regard to these limits. These Agreements subject U.S. and Mexican investors, as well as domestic Canadian investors, to a 10 percent per investor limit on investments in Canada's largest, widely held financial institutions. However, the CFTA and NAFTA exempt U.S. and Mexican investors from the 25 percent ceiling on aggregate investments by non-Canadians in widely held financial institutions.[141]

Canada has agreed to exempt Mexican-controlled bank subsidiaries from the requirement to obtain Canadian Ministry of Finance approval before opening additional branches in Canada.[142] The CFTA extended this benefit to U.S.-controlled bank subsidiaries.[143]

140. *Id.* annex VII(A)-Mex.
141. *Id.* annex VII(C)(1)-Can.; CFTA, *supra* note 4, art. 1703.
142. NAFTA, *supra* note 1, annex VII(C)(2)-Can.
143. CFTA, *supra* note 4, art. 1703(2)(c).

Canada did not agree to extend all of the financial services provisions of the CFTA to Mexico. In addition, as noted in part II.G above, Canada also took several reservations under the Financial Services Chapter, most notably with respect to securities regulation, reinsurance, and any existing nonconforming provincial measures.[144]

V. Highlights of Provisions Regarding Access to the United States

The United States has taken considerably more reservations under the Financial Services Chapter than has Canada.[145] Moreover, as noted in part II.G above, the United States has until January 1, 1995, to take reservations for existing nonconforming measures in forty-four states.[146] A comparison of NAFTA to the CFTA suggests that the United States has granted little to Canada in the way of new concessions on financial services.[147] The United States also did not commit to extend all of the financial services provisions of the CFTA to Mexico. In contrast to Canadian government securities under the CFTA, the United States has not granted Mexican government securities "bank eligible" status under the Glass-Steagall Act.[148]

The national treatment and most-favored-nation obligations of the Financial Services Chapter, however, should guarantee Canadian and Mexican investors participation in any future financial services liberalization that may occur in the United States. This may include, for example, interstate branching and Glass-Steagall Act reform. In this connection it is worth repeating that Mexico and Canada have agreed to revisit the form of market access permitted for financial services firms—including consideration of permitting direct, cross-border branching rather than only separately incorporated subsidiaries (but not including review of Mexico's market access limitations)—at such time as the United States permits Canadian and Mexican banks to expand interstate throughout substantially all of the United States.[149]

Finally, the United States has made one limited commitment to Mexico with respect to Glass-Steagall Act issues.[150] The United States agreed to provide a five-year waiver from the Glass-Steagall Act and related restrictions to any Mexican financial group that, in the formation of the group before the NAFTA entered into force, acquired (1) a Mexican bank with U.S. operations and (2) a Mexican securities firm that owns or controls a U.S. securities firm.[151] Such grandfathered financial groups will be permitted to continue to operate the U.S. securities affiliate of

144. NAFTA, *supra* note 1, annex VII(A), (B)(1)-Can., art. 1409(1), annex 1409.1.
145. *See id.* annex VII(A)-U.S.
146. *Id.* art. 1409(1), annex 1409.1.
147. *See* CFTA, *supra* note 4, art. 1702.
148. *Compare id.* art. 1702(1).
149. NAFTA, *supra* note 1, art. 1403(3), annex 1403.3.
150. *Id.* annex VII(C)-U.S.
151. *Id.*

that bank for five years from the date of acquisition, provided that the bank was operating in the United States as of January 1, 1992.[152] The permissible activities of the U.S. securities affiliate must be limited to those in which it was engaged on the date of acquisition, and the U.S. securities affiliate is not permitted to expand through acquisition in the United States during the five-year grace period.[153] This limited five-year waiver would appear to benefit only a few Mexican banks that became affiliated with Mexican securities firms (and their U.S. securities operations) during the privatization of Mexican state-owned banks in 1991 and 1992.[154]

VI. Conclusion

The financial services provisions of the NAFTA are in many ways unprecedented. They will significantly liberalize trade in financial services and related investments in the three NAFTA countries, particularly in Mexico. The scope and complexity of the Financial Services Chapter of NAFTA far exceeds that of the financial services provisions of the CFTA. The Agreement addresses new topics, such as cross-border trade in financial services, and establishes broad principles governing all types of financial services (whether now existing or developed in the future). The Agreement may form the foundation for a broader free trade zone in the Americas if other Latin American countries are permitted to join NAFTA by accession, and at the very least the NAFTA may serve as a model for future agreements on trade in financial services.

Of more immediate significance, as of this writing, the NAFTA countries are adopting legislation where needed to put the financial services provisions of the NAFTA into effect. The juxtaposition of the Agreement's broad principles with exclusions, reservations, and commitments, combined with lengthy annexes and a detailed dispute resolution process, may result in a large number of questions for interpretation and require an ongoing dialogue among all three countries. Mexico, of course, faces the substantial task of implementing the chapter and its detailed annex. Of equal significance, however, are the reservations that the United States and Canada may take for nonconforming state and provincial laws. This is particularly true for those types of financial services (such as insurance, in the United States) regulated primarily by state or provincial law.

Finally, any analysis of financial services issues under the NAFTA must consider other provisions of the Agreement—most notably, the Investment Chapter, definitions, and dispute settlement provisions—in addition to the Financial Services Chapter and its related annexes. The interrelationships among all of the various chapters, provisions, and annexes of the massive Agreement may not be fully understood and may prove to be fertile ground for future interpretations and disputes.

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152. *Id.*
153. *Id.*
154. *Id.*