



The USMCA, Trade in Digital Media Products, and Foreign Direct Investment in the Digital Sector

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September 2020
Series: USMCA
Part 2 of 2

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Overview: This trade brief aims to inform business owners in North America of issues that they face in digital trade and provide recommendations as to how to strategize business and benefit from the new agreement. The first series of the brief dealt with trade in digital services and trade in tangible goods through eCommerce. This second series addresses trade in digital media products and foreign investment in the digital sector.

TABLE OF CONTENTS

I. Trade in Digital Media Products	1
1. Challenges and how the USMCA addresses them.....	1
a. Customs duties	1
b. Internal taxes.....	2
c. Intellectual property: copyright.....	2
2. Industry trend – digital media products.....	3
II. Foreign Investment	1 1
1. Challenges and how the USMCA addresses them	1 1
a. Restrictions on foreign ownership.....	1 1
b. Restrictions on the board of directors or managers	1 2
c. Performance requirements	1 3
1. Industry trends - investments	1 5
III. Recommendations	1 9
1. Capitalize on the prohibition of customs duties on digital products	1 9
2. Keep track of copyright and related rights to digital media products	1 9
3. Follow USMA FDI provisions along with national-level policy	2 0

FIGURES

Figure 1: U.S. Digital Media Industry Value	4
Figure 2: Canada Digital Media Industry Value	4
Figure 3: Mexico Digital Media Industry Value.....	5
Figure 4: Percentage of Users on PlayStation Network Worldwide in 2020.....	6
Figure 5: Number of Users on PlayStation Network Worldwide	6
Figure 6: Number of Netflix Subscribers in North America	8
Figure 7: Number of ePublishing Users in North America.....	9
Figure 8: Number of Users of Digital Music in North America	10
Figure 9: Number of Spotify Users in North America	10
Figure 10: U.S. Direct Investment to Canada and Mexico in Information Sector	15
Figure 11: FDI in the United States in Information Sector	16
Figure 12: Total Book Value of FDI in Canada for Information Sector.....	17
Figure 13: Total Book Value of Canadian Direct Investment in Information Sector	18
Figure 14: FDI Flows in Mexico for Information Sectors	19

The United States-Mexico-Canada Agreement (USMCA) has entered into force on July 1, 2020. The new agreement will increase digital trade in North America as it offers a number of innovations to digital trade.¹ While the first series of the USMCA trade brief dealt with digital services and eCommerce, this second series covers digital media products and foreign investment as in following points:

- **Trade in digital media products:** video games, video-on-demand, ePublishing, and digital music
- **Foreign investment:** telecommunication, computer, and internet services

I. TRADE IN DIGITAL MEDIA PRODUCTS

Digital media products include video games, video contents, ePublishing, and digital music. It is hard to categorize this segment into either goods or services.² Indeed, media streaming businesses, such as Netflix and Spotify, are not selling as a one-off sale but as the “outcome as a service” based on a subscription model.³

1. Challenges and how the USMCA addresses them

Other than intermediary liability, electronic transactions, and data policies that were addressed in [the first series](#), business owners in this sector should be mindful of three issues.

a. Customs duties

While there remains a question as to how countries can impose customs duties on electronic transmissions like digital media products, potential tariffs will increase the prices that they sell in importing markets. In that case, consumers will seek more affordable options that are traded domestically.

Actually, there has been a moratorium on imposing customs duties on electronic transmissions, as signed by WTO Member countries that include the United States, Mexico, and Canada.⁴ It has been renewed almost every two years since it was implemented in 1998. Member countries were supposed to discuss whether or not to continue this moratorium in June, 2020; but, as the Ministerial Conference has been postponed indefinitely, it is presumed that the moratorium stays in effect.⁵

¹ Anupam Chander, *The Coming North American Digital Trade Zone*, COUNCIL ON FOREIGN RELATIONS (Oct. 9, 2018), <https://www.cfr.org/blog/coming-north-american-digital-trade-zone>.

² See Agreement between the United States of America, the United Mexican States, and Canada, art. 19.1, Dec. 13, 2019, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

³ See Jargon Buster, *Servitization in Manufacturing*, K3 SYSPRO, <https://www.k3syspro.com/advice-centre/jargon-buster/servitization/> (last visited July 23, 2020).

⁴ Electronic Commerce, WTO, https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm#:~:text=At%20the%20Second%20Ministerial%20Conference,was%20adopted%20in%20September%201998 (last visited July 23, 2020).

⁵ Twelfth WTO Ministerial Conference WTO,

Regardless of the result on this decision, under the USMCA, the United States, Mexico, and Canada have agreed not to impose customs duties, fees or other charges on cross-border trade in digital products.⁶ Therefore, electronic transmissions are exempt from customs duties in North America under the agreement.⁷

b. Internal taxes

Prohibition on customs duties does not mean that the countries cannot impose internal taxes on digital products. Although the taxes can increase the prices, it is less detrimental to the products' competitiveness than customs duties because the taxes will likely apply also to domestic products.

The USMCA does not prohibit the countries from imposing internal taxes, fees, or other charges on digital products.⁸ Yet, the countries cannot discriminate against digital products provided by foreign business owners.⁹ This means that foreign business owners will not lose competitiveness because of taxes on their products. However, business owners must be aware that governments can still subsidize domestic products.¹⁰

c. Intellectual property: copyright

Since digital media products are content-based, copyright protection is essential to do business in foreign markets for this sector. The lack or inadequate enforcement of relevant legal frameworks pose to business owners a significant risk of duplication and misinformation on the products.

The USMCA aims to protect following copyrights on digital media products. Note that successors of interest of authors, performers, or producers of phonograms are also granted corresponding rights.¹¹ Also note that each country can have exceptions to the following exclusive rights of copyright owners.¹²

- **Right of reproduction:** Authors, performers, and producers of phonograms (i.e., mostly, owners of sound recordings) have an exclusive right to authorize or prohibit all reproduction of works in electronic form.¹³

https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (last visited July 23, 2020).

⁶ USMCA art. 19.3(1).

⁷ Note that digital product under the agreement means “a computer program, text, video, image, sound recording, or other product that is digitally encoded . . . and can be transmitted electronically.” This does not include crypto-currency or other digitalized representations of a financial instrument, including money. *Id.* art. 19.1.

⁸ *Id.* art. 19.3(2).

⁹ *Id.* art. 19.4.

¹⁰ *Id.* art. 19.4(2).

¹¹ *Id.* art. 20.57 fn. 54.

¹² *Id.* art. 20.64.

¹³ *Id.* art. 20.57. The USMCA defines a producer of a phonogram as “a person that takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds.” *Id.* art. 20.56.

- **Right of communication:** Authors of works have an exclusive right to authorize or prohibit the communication to the public of their works.¹⁴
- **Right of distribution:** Authors, performers, and producers of phonograms have an exclusive right to distribute the original and copies of their works through sale or other transfer of ownership.¹⁵
- **Related rights:** Performers and producers of phonograms have an exclusive right to broadcast and communicate performances or phonograms.¹⁶
- **Rights management information (RMI):** RMI is information that identifies the author of a work and terms and conditions relating to its use.¹⁷ The agreement prohibits removing or altering it.¹⁸ It also prohibits making RMI available to the public, knowing that RMI has been removed or altered without authority.¹⁹

Either civil remedies or criminal sanctions are available for violations of these rights.²⁰

Under the agreement, term of protection for these rights can be calculated in three ways:²¹

- If on the basis of the life of a natural person: not less than the life of the author and 70 years after the author's death.
- If on a basis other than the life of a natural person:
 - Not less than 75 years from the end of the calendar year of the first authorized publication of the content.
 - In the absence of such publication within 25 years from the creation of the content, not less than 70 years from the end of the calendar year of the creation.

2. Industry trend – digital media products

Digital media products include digital games, digital video contents (e.g., movies and TV shows), digital music provided through download or internet-stream, and ePublishing such as eBook.²²

The industry outlook is straightforwardly positive. Given Figures 1–3, there is steady growth in all the segments of digital media products in each country in terms of the industry value. While Canada has slightly greater industry value than Mexico, the

¹⁴ *Id.* art. 20.58.

¹⁵ *Id.* art. 20.59.

¹⁶ *Id.* art. 20.61.

¹⁷ *Id.* art 20.67(6).

¹⁸ *Id.* 20.67(1)(a).

¹⁹ *Id.* art. 20.67(1)(b). It also prohibits making it available to the public copies of content of digital products with knowledge that RMI has been removed or altered without authority. *Id.* art. 20.67(1)(c).

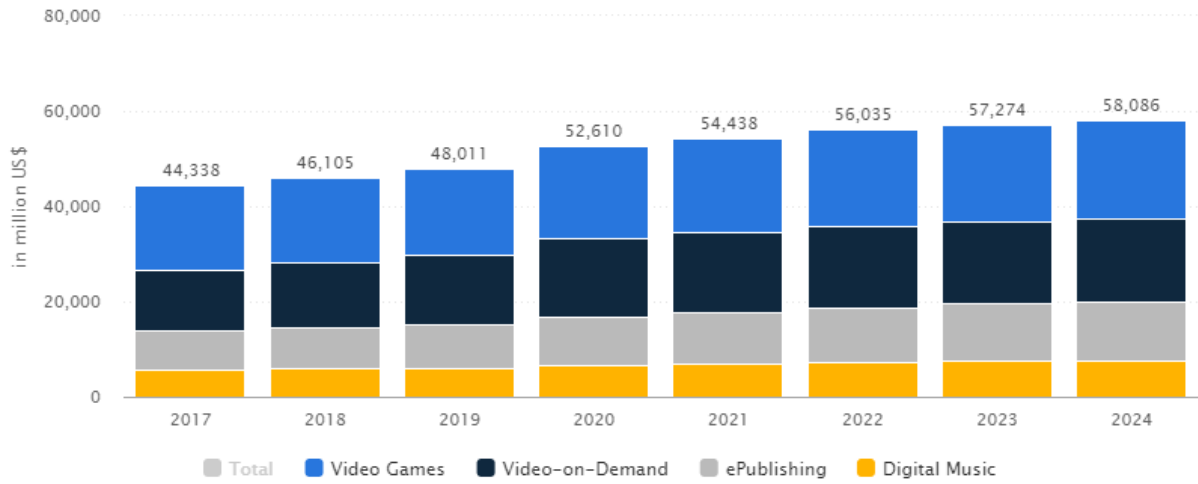
²⁰ *Id.* art. 20.66, 20.67

²¹ *Id.* art. 20.62.

²² *Digital Media – Worldwide*, STATISTA, <https://www.statista.com/outlook/200/100/digital-media/worldwide> (last visited July 07, 2020).

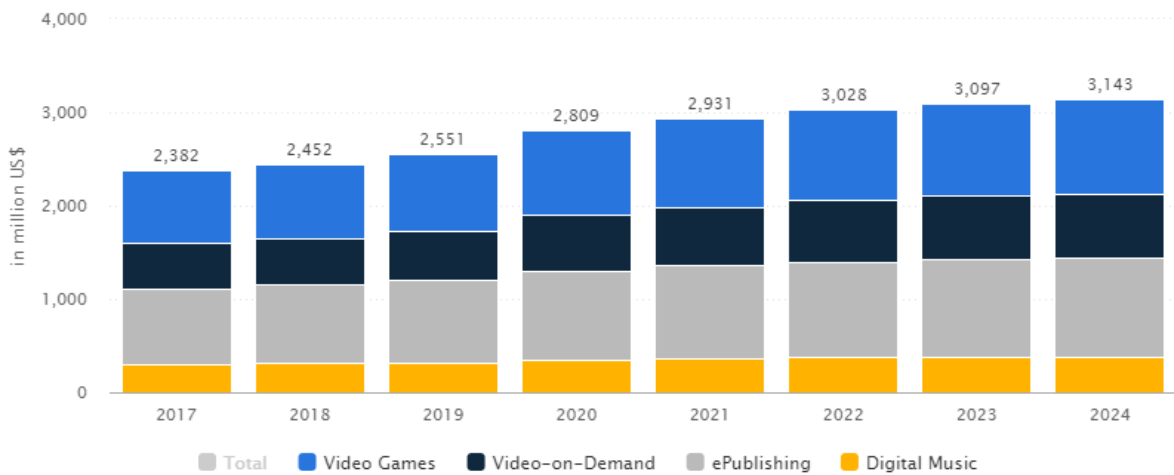
value of digital media in both countries is lower than even one tenth of the industry value in the United States.

Figure 1: U.S. Digital Media Industry Value²³



Source: Statista (forecast adjusted for expected impact of Covid-19)

Figure 2: Canada Digital Media Industry Value²⁴

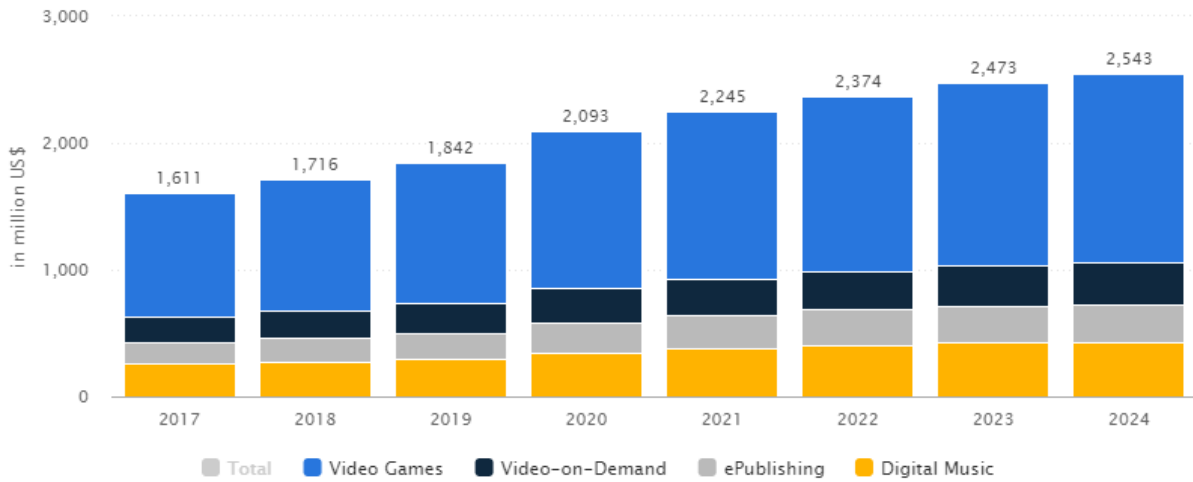


²³ *Id.*

²⁴ *Id.*

Source: Statista (forecast adjusted for expected impact of Covid-19)

Figure 3: Mexico Digital Media Industry Value²⁵



Source: Statista (forecast adjusted for expected impact of Covid-19)

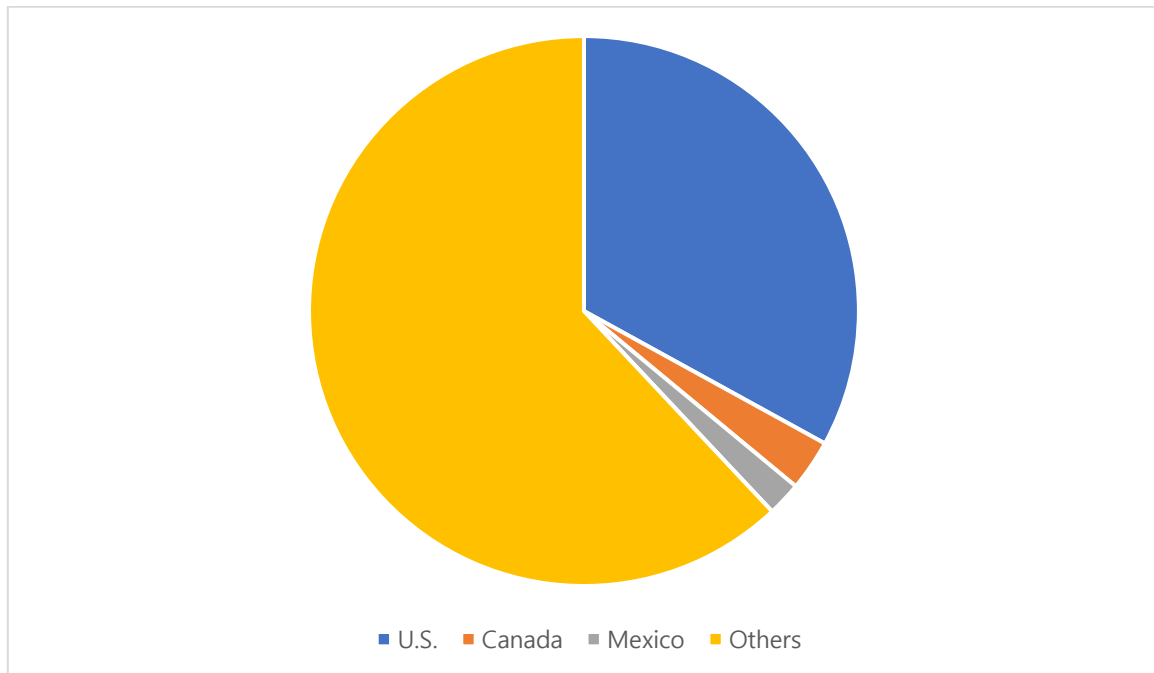
More specifically, video games include mobile games, downloads games, online games, and game networks.²⁶ Among them, gaming networks are based on subscription-based access to online services such as Xbox Live and PlayStation Network.²⁷ Video games industry may expect an increase in its sales globally. For example, based on Figure 4, as of 2020, 33% of PlayStation Network (PSN) are from the United States, 3% from Canada, and 2% from Mexico. Since the number of users on PSN has steadily increased over time (Figure 5), it can be inferred that the three countries have seen an increase in the number of users on PSN.

²⁵ *Id.*

²⁶ DIGITAL MEDIA REPORT 2019, SEBASTIAN LINDLAHR, STATISTA 23 (2019).

²⁷ *Id.*

Figure 4: Percentage of Users on PlayStation Network Worldwide in 2020

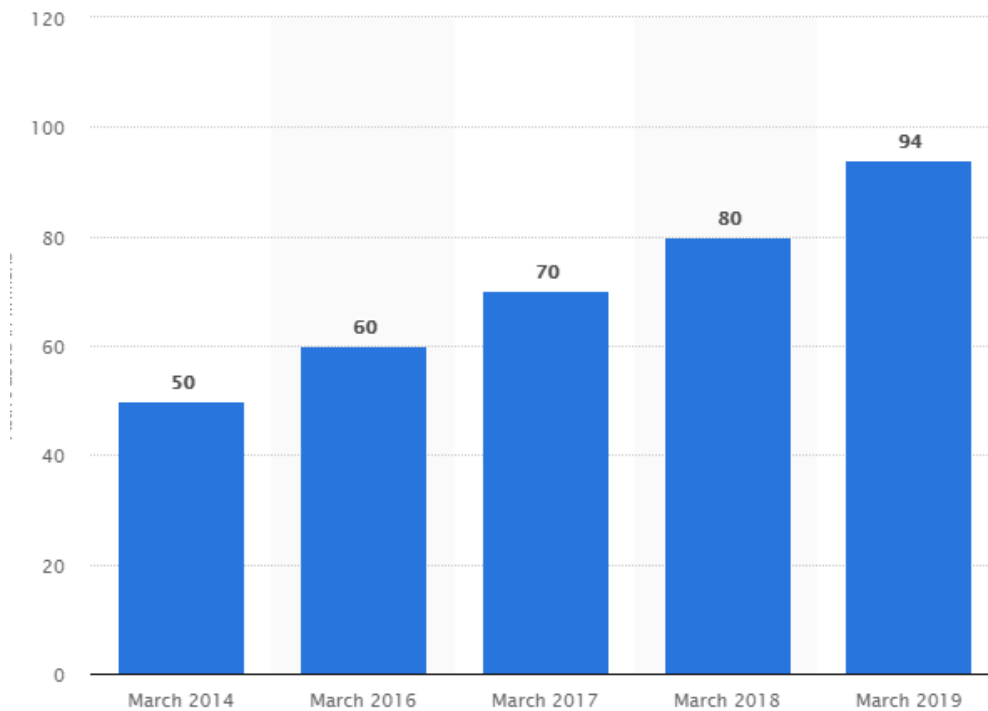


Source: Gamstat²⁸

Figure 5: Number of Users on PlayStation Network Worldwide²⁹

²⁸ See *PlayStation Global Stats*, GAMSTAT, <https://gamstat.com/playstation/> (last visited July 13, 2020).

²⁹ *Number of active users on PlayStation Network worldwide from 2014 to 2019 (in millions)* STATISTA, <https://www.statista.com/statistics/272639/number-of-registered-accounts-of-playstation-network/> (last visited July 13, 2020).



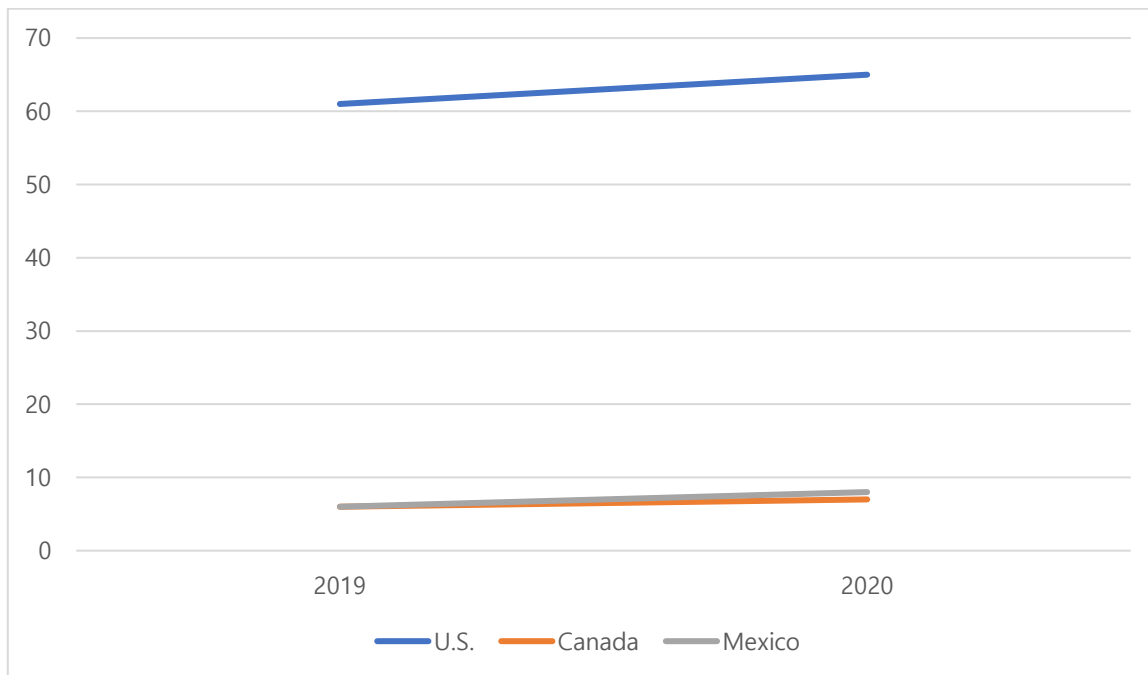
Million
Source: Statista

Digital video contents include video streaming, video downloads, and pay-per-view services.³⁰ Video streaming services, such as Netflix and Prime Video, account for the most of the share in revenues.³¹ One may safely estimate that the industry may continue to expand in the region. For example, given Figure 6, the number of Netflix subscribers has increased in all the three countries. Canada and Mexico have the similar number of subscribers, although users are slightly more in Mexico than in Canada.

³⁰ *Supra* LINDLAHR, note 31 at 49.

³¹ *Id.* at 53.

Figure 6: Number of Netflix Subscribers in North America



Million
Source: Comparitech³²

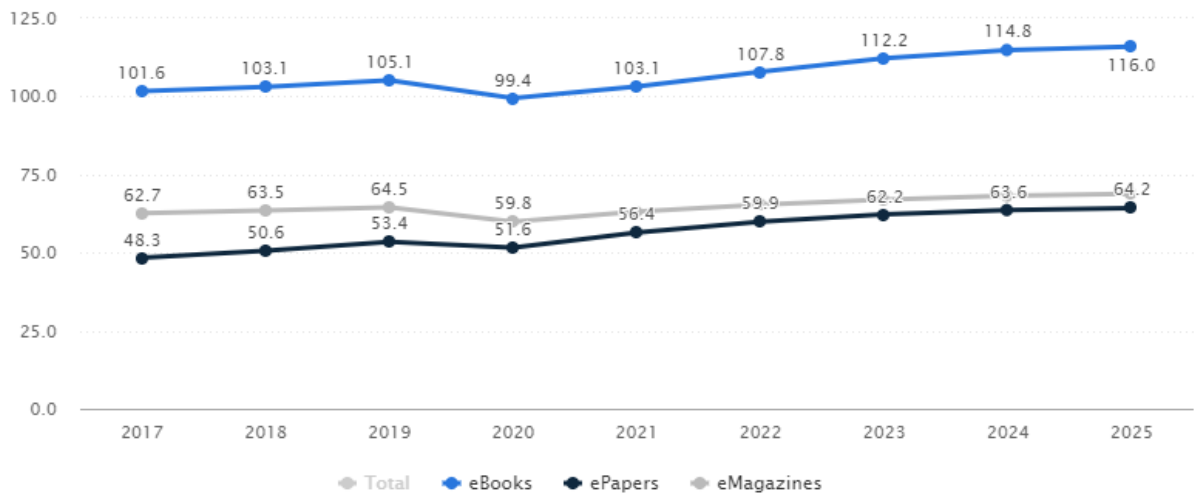
ePublishing includes eBook, ePapers, and eMagazines.³³ While eBooks are mostly download-based, ePapers and eMagazines also have subscription options.³⁴ Given Figure 7, the number of users of ePublishing has increased steadily over years in North America.

³² *Netflix Subscribers and Revenue by Country*, Rebecca Moody, COMPARITECH (June 16, 2020), <https://www.comparitech.com/tv-streaming/netflix-subscribers/>.

³³ *Supra* LINDLAHR, note 31 at 75.

³⁴ *Id.*

Figure 7: Number of ePublishing Users in North America³⁵



Million
Source: Statista

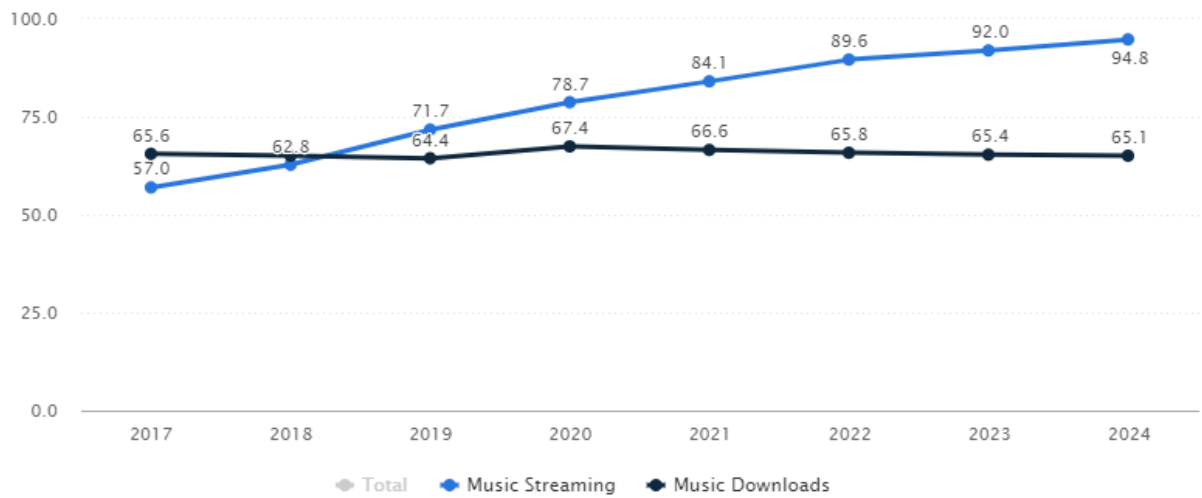
Digital music has two segments: music streaming and music download.³⁶ Music streaming is subscription-based, giving subscribers unlimited access to music while music download is purchase-based for each track, album, or compilation.³⁷ For digital music industry, the number of users for music streaming has steadily increased in North America while the number of music downloads has relatively declined (Figure 8). One may infer that music streaming services generally will increase in the region over time given this general trend and also taking a glance at the increasing number of Spotify users in North America from 2016 to 2017 (Figure 9).

³⁵ *ePublishing - North America*, STATISTA, <https://www.statista.com/outlook/204/109/epublishing/united-states> (last visited July 13, 2020).

³⁶ *Supra* LINDLAHR, note 31 at 93.

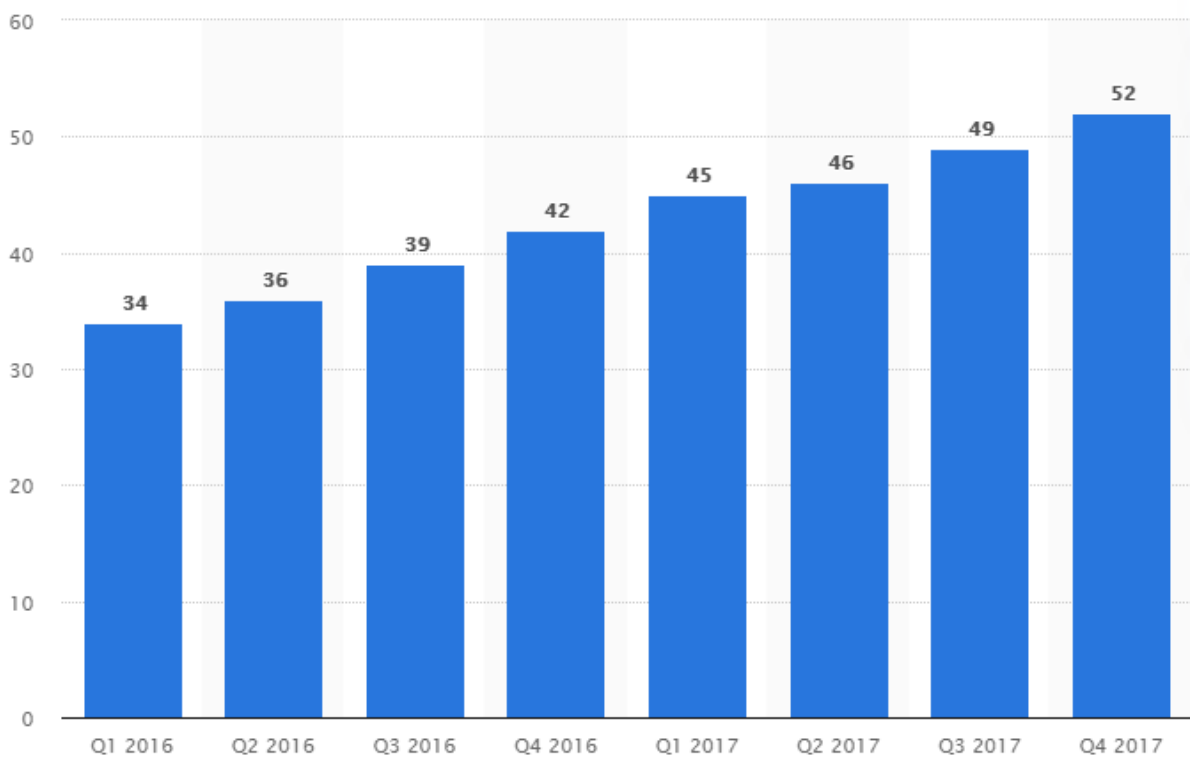
³⁷ *Id.*

Figure 8: Number of Users of Digital Music in North America³⁸



Million
Source: Statista

Figure 9: Number of Spotify Users in North America³⁹



³⁸ *Digital Music - North America*, STATISTA, <https://www.statista.com/outlook/202/109/digital-music/north-america> (last visited July 14, 2020).

³⁹ *Spotify's Monthly Active Users in North America 2016-2017*, STATISTA, <https://www.statista.com/statistics/813864/spotify-monthly-active-users-quarter/> (last visited July 14, 2020).

II. FOREIGN INVESTMENT

Foreign investment in digital trade involves investment in the telecommunication sector, computer, and internet services.⁴⁰

1. Challenges and how the USMCA addresses them

Investors in digital sectors should be mindful mainly of anti-competitive measures in host countries. They include restrictions on foreign ownership, restrictions on board of directors or management, and discriminatory performance requirements.⁴¹

a. Restrictions on foreign ownership

The restrictions could take different forms. It could be a maximal cap on foreign equity shares, joint-venture requirements, minimum capital requirements, or certain quota on the number of foreign companies that can enter the territory.⁴²

In general, the USMCA prohibits these kinds of restrictions by obligating national treatment and most-favored-nation (MFN) treatment when it comes to establishment, acquisition, and expansion of enterprises.⁴³ It means that a country should not only equally treats foreign investors or investments as it treats local counterparts but also grants the best treatment that it provides to other countries.

However, the countries under the agreement may discriminate against foreign investors or investments according to their schedules to the agreement.⁴⁴ Following are notable requirements or restrictions that the countries may still impose:

The United States

- Radio licenses cannot be owned by foreign nationals, foreign enterprises, or an enterprise where more than one fifth of the stock is owned by foreign nationals, foreign enterprises, or a foreign government.⁴⁵
- No broadcasting station license can be granted to a corporation directly or indirectly controlled by an enterprise where more than one fifth of the stock is owned by foreign nationals, foreign enterprises, or a foreign government.⁴⁶
- Foreign investors of the other two countries cannot own or operate a cable television system unless the countries permit U.S. nationals to do so and grant

⁴⁰ EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY, DIGITAL TRADE RESTRICTIVENESS INDEX 39 (2018), https://ecipe.org/wp-content/uploads/2018/05/DTRI_FINAL.pdf.

⁴¹ *See id.* at 86.

⁴² *See id.*

⁴³ USMCA art. 14.4, 14.5.

⁴⁴ *Id.* art 14.12.

⁴⁵ *Id.* annex I-U.S.-12.

⁴⁶ *Id.*

MFN treatment.⁴⁷

- Foreign investors of the other two countries cannot offer direct-to-home and direct broadcasting satellite television services and audio services unless the countries permit U.S. nationals to do so and grant MFN treatment.⁴⁸

Canada

- The Director of Investments may review “direct acquisition of control” of a Canadian enterprise with the value more than a certain threshold to determine whether the investment will benefit the economy and thus is qualified.⁴⁹
- A federally incorporated corporation may impose limitations on transfer and ownership of shares.⁵⁰
- A cooperative may impose similar limitations under certain circumstances.⁵¹
- The government can put limitation on foreign investors’ voting interest in telecommunication services. Such service providers must be controlled in fact by Canadians.⁵²

Mexico

- The National Commission on Foreign Investments (CNIE) evaluates an acquisition or establishment of investments in “restricted activities” based on various criteria.⁵³
- A favorable resolution from the CNIE is required to own more than 49 percent of interests in a Mexican enterprise with assets beyond a certain threshold in “unrestricted sectors.”⁵⁴
- A Mexican cooperative cannot have more than 10 percent of foreign nationals’ participation, and also foreign investors may not own more than 10 percent of the interest in a Mexican cooperative.⁵⁵
- Frequency band concessions will not be granted to foreign nationals or foreign enterprises; a foreign investor may not own more than 49 percent in a broadcasting services enterprise; a favorable review by CNIE is required for granting sole concession for broadcasting services that foreign investment participates.⁵⁶
- Foreign nationals or foreign enterprises cannot resell telecommunication services without being a concessionaire.⁵⁷

b. Restrictions on the board of directors or managers

These restrictions are requirements on composition of board of directors or

⁴⁷ *Id.* annex II-U.S.-2.

⁴⁸ *Id.* annex II-U.S.-1.

⁴⁹ *Id.* annex I-Can.-2

⁵⁰ *Id.* annex I-Can.-7.

⁵¹ *Id.*

⁵² *Id.* annex I-Can.-13.

⁵³ *Id.* annex I-Mex.-4.

⁵⁴ *Id.* annex I-Mex.-5.

⁵⁵ *Id.* annex I-Mex.-6.

⁵⁶ *Id.* annex I-Mex.-10.

⁵⁷ *Id.* annex I-Mex.-13.

management in enterprises. It could be that they must be nationals of the host country or residents in the territory.

The USMCA only prohibits nationality requirement on management positions.⁵⁸ This means that the host country may require managers to be residents in the territory. It also means that the host country can require board of directors to be nationals of the country or residents in the territory, as long as these requirements do not significantly impair the investors' control on their enterprises.⁵⁹ Additionally, the host country can require under certain circumstances that investors must be residents of the country.⁶⁰

Despite the prohibition, the countries may take further exceptions. Following are notable requirements that the countries may still impose:

Canada

- In cases of selling interests in government enterprises, Canada may impose limitations on the ownership, assets, or the ability to control the enterprises such as nationality requirements on the board or management.⁶¹
- At least 80 percent of the board members of telecommunication services providers must be Canadians excepts for certain sub-sectors.⁶²

Mexico

- Foreign nationals cannot engage in general administrative and managerial functions of a Mexican cooperative.⁶³

c. Performance requirements

Performance requirements can restrict foreign investments when they require them to show a certain level of net economic benefits or to use local contents as a component of their goods or services.

The USMCA prohibits different types of performance requirements. First, the agreement bans the countries from requiring investors or investments to export a given level or percentage of goods or services⁶⁴ or to use local goods or services.⁶⁵ However, the countries may require these as qualification requirements for export promotion and foreign aid programs.⁶⁶ Furthermore, the countries can still require local contents in goods to qualify for preferential tariffs or quotas.⁶⁷ Lastly, the countries may also require local contents for government procurement.⁶⁸

⁵⁸ *Id.* art. 14.10(1).

⁵⁹ *Id.* art. 14.10(2).

⁶⁰ *Id.* art. 14.13(1).

⁶¹ *Id.* annex-I-Can.-6.

⁶² *Id.* annex-I-Can.-13.

⁶³ *Id.* annex-I-Mex.-6.

⁶⁴ *Id.* art 14.10(1)(a), (2)(b).

⁶⁵ *Id.* art. 14.10(1)(b), (1)(c), (2)(a), (2)(c).

⁶⁶ *Id.* art. 14.10(3)(d).

⁶⁷ *Id.* art. 14.10(3)(f).

⁶⁸ *Id.* art. 14.10(3)(e).

Second, the countries cannot restrict sales of goods or services that investment produces to adjust its exports or foreign exchange earnings.⁶⁹

Third, the countries cannot force transfer of technology or trade secrets.⁷⁰ In the same vein, the host countries cannot require or prevent the use of local technology.⁷¹ However, this is subject to several exceptions. The countries may impose these requirements in government procurement⁷² or for the purpose of judicial or administrative proceedings.⁷³ Furthermore, the countries may require investee companies to use (or not to use) local technology if such a requirement promotes “legitimate public welfare objectives.”⁷⁴

Fourth, the USMCA bans the countries from requiring investee companies to provide goods or services exclusively in their territory.⁷⁵ However, note that the countries may still require so for government procurement.⁷⁶

Lastly, the countries may not specify a royalty or duration of a license contract that investors enter into in a manner that directly interferes with the contract by a governmental authority.⁷⁷ Yet, this prohibition also does not apply to government procurement.⁷⁸ Furthermore, the countries may take such measures if they promote “legitimate public welfare objectives.”⁷⁹

Despite these legal frameworks, the countries may take further exceptions. Following are notable requirements that the countries may still impose:

Canada

- The government may require transfer of technology or other trade secrets for the purpose of the investment review.⁸⁰

Mexico

- Broadcasting shall promote the values of national identity, including local and national artistic values and expressions of Mexican culture. Furthermore, daily programming with personal performances shall include more time covered by

⁶⁹ *Id.* art. 14.10(1)(d)-(e), 14.10(2)(c)-(d).

⁷⁰ *Id.* art. 14.10(1)(f), 2(f).

⁷¹ *Id.* art. 14.10(1)(h), 14.13(2).

⁷² *Id.* art. 14.10(3)(e). It is unlikely that the countries are allowed to force transfer of technology or source code even in government procurements, given that provisions in other chapters prohibit it. *See id.* art. 19.16; *see also id.* art 14.3 (“In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.”).

⁷³ *Id.* art. 14.10(3)(b)(ii).

⁷⁴ *Id.* art. 14.10(3)(g).

⁷⁵ *Id.* art. 14.10(1)(g).

⁷⁶ *Id.* art. 14.10(3)(e).

⁷⁷ *Id.* art. 14.10(1)(i).

⁷⁸ *Id.* art. 14.10(3)(e).

⁷⁹ *Id.* art. 14.10(3)(g).

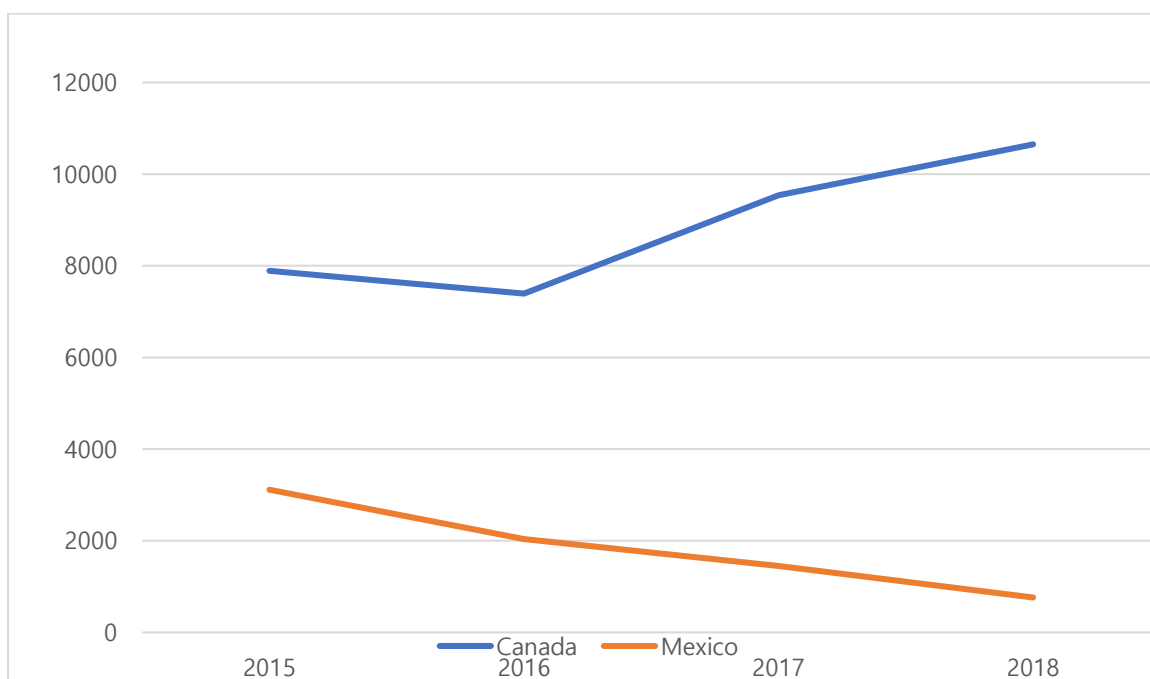
⁸⁰ *Id.* annex I-Can.-2.

Mexicans.⁸¹

1. Industry trends - investments

This section examines investment flows in North America in information sector.⁸² For the United States, given Figure 10, its direct investment in Canada has increased since 2016 after a slight decrease between 2015 and 2016. By contrast, the investment in Mexico has steadily decreased since 2015.

Figure 100: U.S. Direct Investment to Canada and Mexico in Information Sector



USD Million

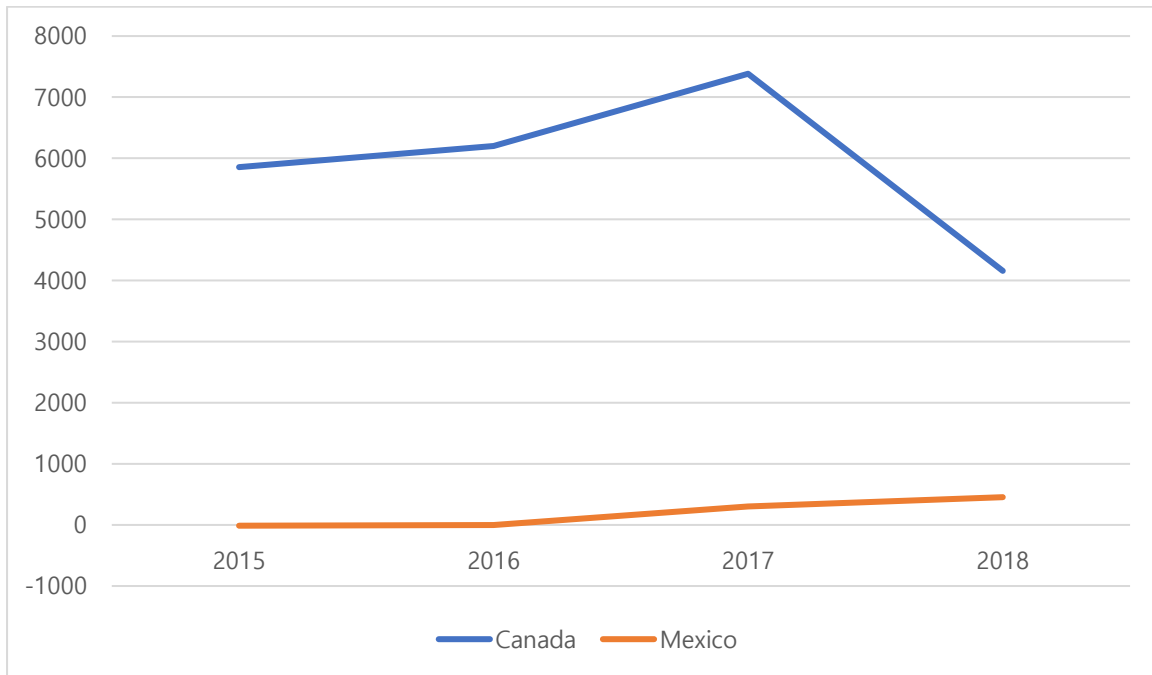
Source: U.S. Department of Commerce - Bureau of Economic Analysis

FDI in the United States by the two countries has shown the opposite direction. Given Figure 11, between 2017 and 2018, FDI from Canada has steeply declined. By contrast, investment from Mexico has steadily increased in the United States.

⁸¹ *Id.* annex I-Mex.-11.

⁸² Please note that information sector includes publishing industries, motion picture and sound recording industries, broadcasting, telecommunications, information services, and data processing services.

Figure 11: FDI in the United States in Information Sector

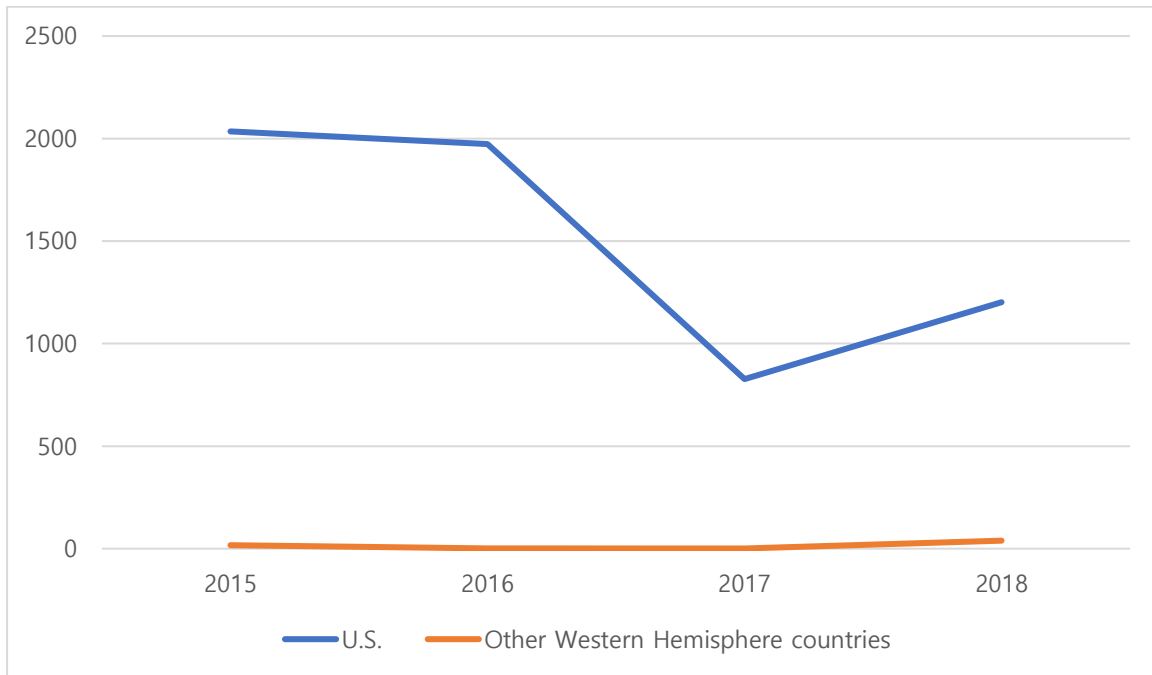


USD Million

Source: U.S. Department of Commerce - Bureau of Economic Analysis

For Canada, Figure 12 shows that FDI in the country from the U.S. has increased between 2017 and 2018 after a drop between 2016 and 2017. In contrast, FDI from Mexico has steadily increased, although, compared to the value of FDI from the U.S., the value is much smaller.

Figure 12: Total Book Value of FDI in Canada for Information Sector

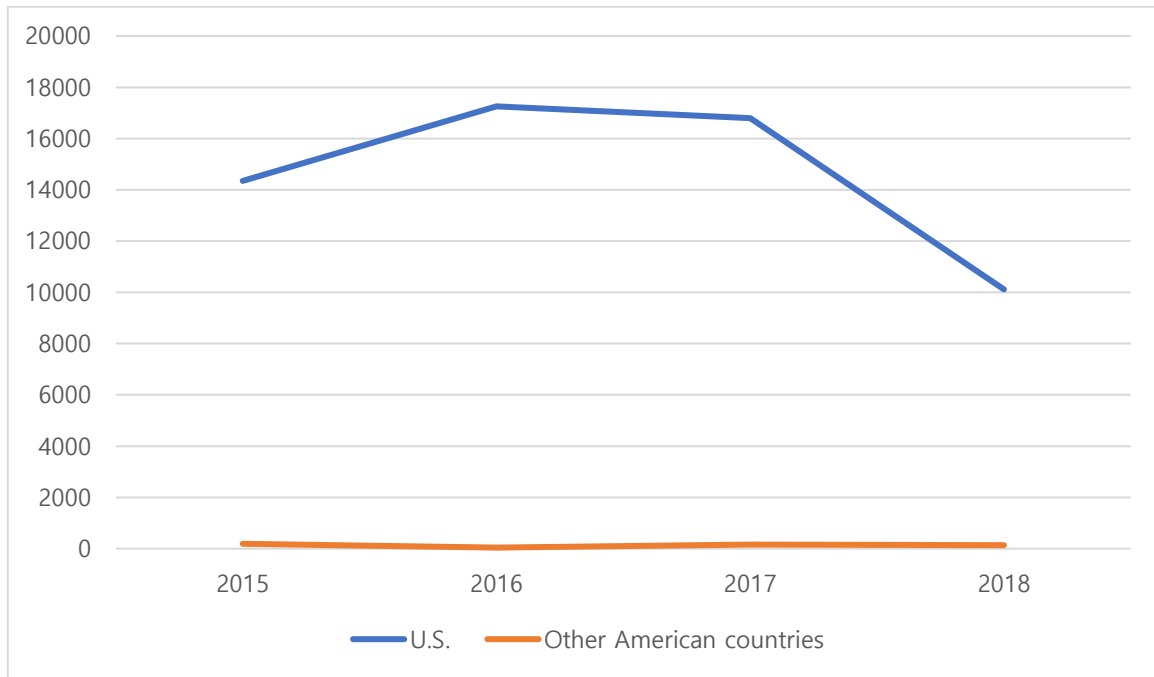


USD Million

Source: Canadian International Development Platform

For Canada's FDI in the two countries, Figure 13 indicates that its investment in the U.S. has decreased between 2016 and 2017 after an increase between 2015 and 2016. Investment in Mexico from Canada has steadily increased, although the value is much smaller than investment in the U.S.

Figure 13: Total Book Value of Canadian Direct Investment in Information Sector



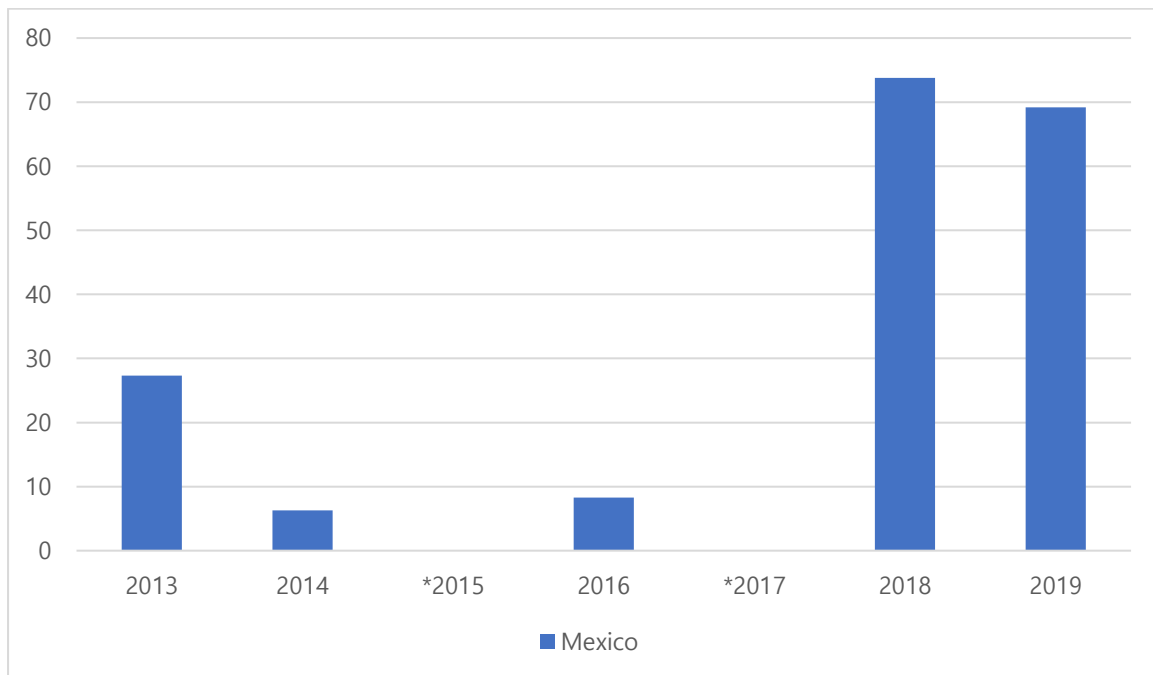
USD Million

Source: Canadian International Development Platform

While data on FDI flows in information sectors of Mexico specifically from the United States and Canada are not available, data on general FDI flows in those sectors (Figure 14) indicate that the investment has significantly increased during the past seven years. More specifically, while there was a decline between 2018 and 2019 as well as 2013 and 2016, FDI flows in 2018 are about as ten times, compared to 2016.⁸³ Data on outward investment from Mexico are not available.

⁸³ Information sectors include publications, development of software, film, video, and sound industry, telecommunications, information processing and hosting, and other related services.

Figure 14: FDI Flows in Mexico for Information Sectors



USD Million

Source: The Ministry of Economy of Mexico⁸⁴

III. RECOMMENDATIONS

Based relevant provisions of the USMCA, here are recommendations for business owners in digital media or investors in digital trade when exporting in North America.

1. Capitalize on the prohibition of customs duties on digital products

This recommendation pertains to businesses in digital media industries. Although the moratorium of customs duties on electronic transmissions has been in place due to the postponement of the WTO Ministerial Conference that was supposed to be held in June this year, it is taking effect only indefinitely. Therefore, the explicit ban on such duties in the USMCA will give certainty to business owners in this sector. Nevertheless, they must be aware that internal taxes may still be imposed on digital products.

2. Keep track of copyright and related rights to digital media products

Generally speaking, the USMCA is fairly comprehensive in terms of types of rights and types of contents it protects. Given that the United States and Mexico tend to recognize the rights for a longer period, the USMCA will not particularly affect the term

⁸⁴ *Statistical Information on Foreign Direct Investment*, GOB.MX, <https://datos.gob.mx/busca/dataset/informacion-estadistica-de-la-inversion-extranjera-directa> (last visited, July 30, 2020).

in those countries whereas the agreement will extend the duration for which Canada recognizes the rights owned by persons of the other two countries since the country recognizes the rights only for 50 years after the authors have died.⁸⁵ For more information on copyright law for each country:

- [General overview](#)
- [U.S.](#)
- [Canada](#)
- [Mexico](#)

3. Follow USMA FDI provisions along with national-level policy

Although the USMCA has liberalized foreign investment in various aspects, that does not mean that such commitments will be exactly implemented for the following reasons. First, the countries issued certain reservations to this liberalization, as outlined above. Second, given that the USMCA has just taken into effect, it remains much to be seen how relevant provisions of the USMCA will be actually implemented against existing national law. For general overview of relevant national law of each country, click [here](#).

[\[GO BACK TO TABLE OF CONTENTS\]](#)

⁸⁵ The duration can be different in cases where authors are anonymous in Canada.