



**TPSA** | CANADA-INDONESIA TRADE AND  
PRIVATE SECTOR ASSISTANCE PROJECT

# 21<sup>ST</sup> CENTURY TRADE AGREEMENTS: NEW NEGOTIATING ISSUES

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Project Executed by:



The Conference Board  
of Canada

Partner:



# Outline: 21<sup>st</sup> Century Trade Agreements: New Negotiating Issues

## New issues

- Investment
- Government procurement
- State-owned enterprises (SOEs)
- Trade facilitation



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# INVESTMENT

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# Investment

## FTAs

- NAFTA Chapter 11
- Almost all subsequent bilateral FTAs negotiated by Canada

## FIPAs

- Canada has concluded 36 Foreign Investment Promotion and Protection Agreements

## WTO

- Working Group on the Relationship Between Trade and Investment
- Agreement on Trade-related Investment Measures (TRIMs)



# Investment

Canada's FTAs  
& FIPAs

Definition

MFN

National treatment

Minimum standard of treatment

Performance Requirements

Exceptions

Dispute settlement



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# Investment

## Definition of “covered investment”

### Canada's FTAs & FIPAs

- Essential to agree on “what’s going to be protected” under the agreement
- Canada adopted an “exhaustive approach” since 2003
- To ensure predictability, Canada uses an exhaustive or closed list of assets that qualify as investment, e.g.:
  - I. *an enterprise;*
  - II. *an equity security of an enterprise;*
  - III. *a debt security of an enterprise*
  - IV. *a loan to an enterprise*
  - V. *(...)*
- In contrast, the US prefers a “Non-exhaustive Approach”



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Source: Malik, “Definition of Investment in International Investment Agreements” 2009

# Investment

## MFN

### Canada's FTAs & FIPAs

Means that an investor from a party to an agreement, or its investment, would be **treated** by the other party “**no less favourably**” with respect to a given subject-matter **than an investor from any third country**, or its investment.



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Source: OECD, “Most-Favoured-Nation Treatment in International Investment Law” 2004

# Investment

## MFN

### Canada's FTAs & FIPAs

Typical formulation of an MFN clause in the US and Canadian BITs covers both the establishment and post establishment phases

Example: NAFTA Article 1103

*Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the **establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.***



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Source: OECD, "Most-Favoured-Nation Treatment in International Investment Law" 2004

# Investment

## National treatment

Canada's FTAs  
& FIPAs

Means that a host State must accord to foreign investors and their investments "treatment no less favorable than the treatment it accords in like circumstances to its own investors"

Negotiating issues are similar to MFN.



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Source: GÂLEA, "National Treatment in International Trade and Investment Law" 2014

# Investment

## Minimum standard of treatment

Canada's FTAs  
& FIPAs

NAFTA Article 1105: Minimum Standard of Treatment

*1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including **fair and equitable treatment** and full protection and security.*



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Source: GÂLEA, "National Treatment in International Trade and Investment Law" 2014

# Investment

## Minimum standard of treatment

### Canada's FTAs & FIPAs

NAFTA Free Trade Commission on 21 July 2001:  
explicitly restrict the scope of the standard to  
customary international law.

Fair and equitable treatment encompasses the **good faith principle**, and a combination of elements:  
respect of **basic expectations, transparency, lack of arbitrariness**



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Source: GÂLEA, "National  
Treatment in International Trade and  
Investment Law" 2014

# Investment

## Performance Requirements

### Canada's FTAs & FIPAs

“Performance requirements are stipulations imposed on foreign affiliates to act in ways considered beneficial for the host economy.

The most common ones relate to **local content, export performance, domestic equity, joint ventures, technology transfer and employment of nationals.**”



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Source: UNCTAD, “World Investment report” 2003

# Investment

## Performance Requirements

Canada's FTAs  
& FIPAs

Vast majority of BITs make **no reference to PRs**.

**BUT** Canada and the United States are the two countries with the most BITs with clauses restricting PRs.



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Source: IISD, "Performance Requirements in Investment Treaties" 2014

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## Performance Requirements

NAFTA Article 1106: Performance Requirements

*No Party may impose or enforce any of the following requirements (...) in connection with (...) an investment of an investor of a Party or of a non-Party in its territory:*

- (a) to export a given level or percentage of goods or services;*
- (b) to achieve a given level or percentage of domestic content;*
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory (...)*
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;*
- (e) to restrict sales of goods or services in its territory that such investment produces (...)*
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, (...)*
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market*

Canada's FTAs  
& FIPAs



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# Investment

## Performance Requirements

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*(a) to export a given level or percentage of goods or services;*

*(b) to achieve a given level or percentage of domestic content;*

*(c) to purchase, use or accord a preference to goods produced or services provided in its territory (...)*

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

*(e) to restrict sales of goods or services in its territory that such investment produces (...)*

*(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, (...)*

*(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market*

Local content requirement

Export/import restrictions

Technology transfer



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# Investment

## Canada's FTAs & FIPAs

### Exceptions

NAFTA Articles 2106. 2107

**cultural industries** means persons engaged in any of the following activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form (...);
- (b) the production, distribution, sale or exhibition of film or video recordings;
- (c) the production, distribution, sale or exhibition of audio or video music recordings;
- (d) the publication, distribution or sale of music in print or machine readable form; or
- (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;



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# Investment

## Dispute settlement

### Canada's FTAs & FIPAs

- Investor-state dispute settlement (ISDS) mechanisms in Canada's FTAs and FIPAs
- Allow foreign investors to sue domestic governments and ask for financial compensation in cases where governments allegedly breach certain obligations under the FTA
- Potential shift in Canadian practice since the CETA



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# GOVERNMENT PROCUREMENT

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# Canada's government procurement

Canada's government procurement includes federal (Can\$15 billion per year) and provincial procurement (Can\$20 billion per year)



Central government entities



Sub-central government entities



Government entities and Crown corporations



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# Market access offer

## List of entities

- Central government
- Sub-central
- Government entities and Crown corporations

## Type of procurement

- Goods
- Services
- Construction services

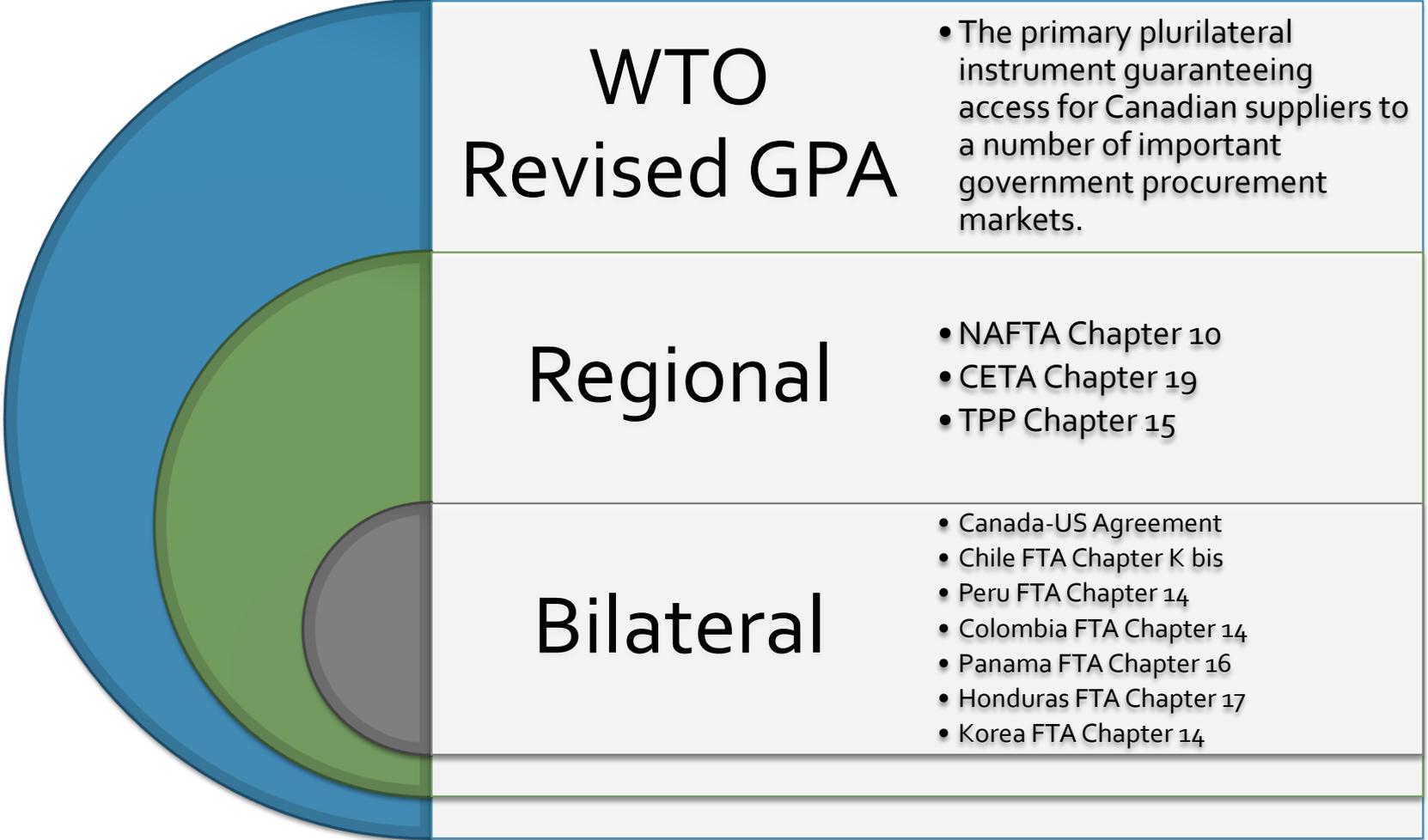
## Thresholds

- Special Drawing Right (SDR) is an international reserve asset, created by the IMF in 1969
- As of August 2017, 1 XDR = 1.42263 USD



Source: IMF, "Special Drawing Right SDR" 2017

# Government Procurement



## WTO Revised GPA

- The primary plurilateral instrument guaranteeing access for Canadian suppliers to a number of important government procurement markets.

## Regional

- NAFTA Chapter 10
- CETA Chapter 19
- TPP Chapter 15

## Bilateral

- Canada-US Agreement
- Chile FTA Chapter K bis
- Peru FTA Chapter 14
- Colombia FTA Chapter 14
- Panama FTA Chapter 16
- Honduras FTA Chapter 17
- Korea FTA Chapter 14



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# Government Procurement

## WTO Revised GPA



Indonesia has  
observer status in  
the GPA Committee

- **Objective:** mutually open government procurement markets among its parties
- **Coverage:** goods, services or construction services
- **Total value:** Opened procurement activities worth an estimated US\$ 1.7 trillion annually
- **Membership:** 19 parties comprising 47 WTO members; 9 observers are in the process of accession



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# Government Procurement

- **NAFTA** built on commitments already made in the U.S.-Canada FTA and the 1979 GATT Government Procurement Code

## Regional

- NAFTA Chapter 10
- CETA Chapter 19
- TPP Chapter 15

- **CETA** covers federal, sub-central, and other entities (Government corp. + Public entities)
- Thresholds From 130,000 SDR for goods and services to 5M SDR for construction services.



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# Government Procurement

- **Canada-U.S. Agreement on Government Procurement** is a response to the Buy American Act requirements
- Provincial and territorial procurement commitments under the WTO GPA for all provinces and territories, in exchange for U.S. sub-federal GPA commitments

## Bilateral

- Canada-US Agreement
- Chile FTA Chapter K bis
- Peru FTA Chapter 14
- Colombia FTA Chapter 14
- Panama FTA Chapter 16
- Honduras FTA Chapter 17
- Korea FTA Chapter 14



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# STATE-OWNED ENTERPRISES (SOES)

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# State-owned enterprises (SOEs)

Definition:

*“any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership, should be considered as an SOE.*

*This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature.”*



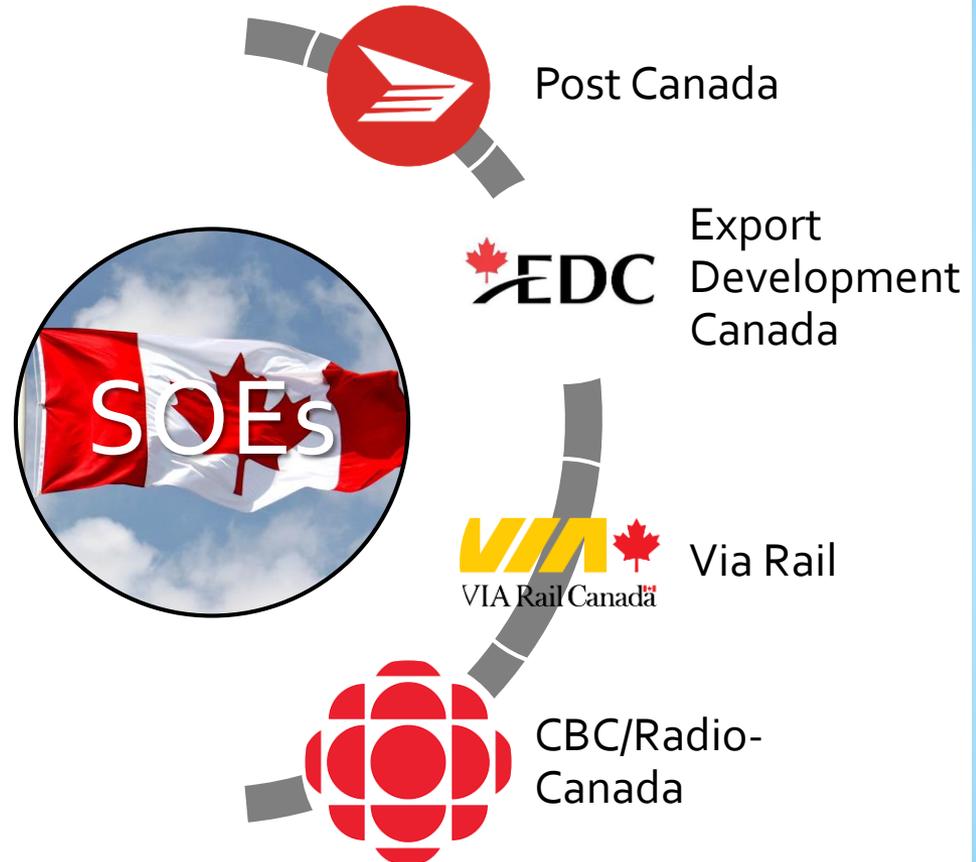
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Source: OECD, “Guidelines on Corporate Governance of State-Owned Enterprises” 2015

# Canada and State-owned enterprises (SOEs)

NAFTA Annex 1505 provides a country-specific definition of "state enterprise":

*(a) with respect to Canada, means a **Crown corporation** within the meaning of the Financial Administration Act (Canada), a Crown corporation within the meaning of any comparable **provincial law** or equivalent entity that is incorporated under other applicable provincial law; and*



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# Disciplines related to SOEs

**Objective:**  
Ensuring fair  
competition  
between  
private  
enterprises and  
SOEs

Non-discrimination & Commercial  
consideration

Non-commercial assistance

Transparency



# TRADE FACILITATION

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# Trade facilitation



## Ongoing process

in cooperation with  
all border and  
regulatory agencies



Transparency and  
efficiency in international  
trade supply chain to  
reduce time and costs of  
cross-border procedures  
through:

Simplification,  
Standardisation,  
Harmonisation and  
Modernisation



**Collaboration  
between public  
and private sector**



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# Border inefficiencies translate into direct and indirect costs impacting business competitiveness...

## Time and resources invested

in managing export administrative activities

Collect, produce, transmit and process required information and documents

Direct  
costs

## Increased operational costs

Delays translate into extra transport, insurance or warehouse costs

1

## Increased working capital requirements

Inventories immobilized are carried out by the exporter (except for EXW sales)

2

## Product deterioration

Delays can lead to the degradation of products and render them unfit for sale

3

## Lost business opportunities

Direct: joining a punctual regional trade

4

Indirect: immobilized stock could have been sold to a local client

Indirect  
costs



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# Trade Facilitation Agreement

## Transparency Articles (1-5)

- 1 - Publication and availability of information
- 2 - Prior publication and consultation
- 3 - Advance Rulings
- 4 - Appeal or Review Procedures
- 5 - Other measures to enhance impartiality, non-discrimination and transparency



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# Trade Facilitation Agreement

## Fees & Formalities (6-10)

- 6 - Disciplines on fees and charges imposed on or in connection with importation and exportation
- 7 - Release and clearance of goods
- 8 - Border agency co-operation
- 9 – Movement of goods under customs control intended for export
- 10 - Formalities connected with importation and exportation and transit



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# Trade Facilitation Agreement

Other  
provisions

- 11 – Freedom of Transit
- 12 – Customs Cooperation



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**Many thanks for your attention !**



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