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International Investment Instruments: A Compendium

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**Regional Integration, Bilateral and
Non-governmental Instruments**



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**FREE TRADE AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF
AMERICA***
[excerpts]

The Free Trade Agreement between Canada and the United States of America was signed in Ottawa on 22 December 1987 and 2 January 1988, and in Washington, D.C. and Palm Springs, on 23 December 1987 and 2 January 1988. This Agreement was the precursor of the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States of America signed on 17 September 1992 (see *volume III* of this *Compendium*), and was superseded by the latter, which entered into force on 1 January 1994.

PART FOUR. SERVICES, INVESTMENT AND TEMPORARY ENTRY

Chapter Sixteen. Investment

Article 1601. Scope and Coverage

1. Subject to paragraphs 2 and 3, this Chapter shall apply to any measure of a Party affecting investment within or into its territory by an investor of the other Party.
2. This Chapter shall not apply to any measure affecting investments related to:
 - a) the provision of financial services unless such measure relates to the provision of insurance services and is not dealt with under paragraph 1 of Article 1703;
 - b) government procurement; or
 - c) the provision of transportation services.
3. The provisions of subparagraph 1 (c) of Article 1602 shall not apply to any measure affecting investments related to the provision of services other than covered services.

Article 1602. National Treatment

1. Except as otherwise provided in this Chapter, each Party shall accord to investors of the other Party treatment no less favourable than that accorded in like circumstances to its investors with respect to its measures affecting:
 - a) the establishment of new business enterprises located in its territory;
 - b) the acquisition of business enterprises located in its territory;

* *Source*: The Government of Canada and the Government of the United States of America (1988). "Canada-United States: Free Trade Agreement", *International Legal Materials*, vol. 27, pp. 281-400. [Note added by the editor.]

- c) the conduct and operation of business enterprises located in its territory; and
- d) the sale of business enterprises located in its territory.

2. Neither Party shall impose on an investor of the other Party requirement that a minimum level of equity (other than nominal qualifying shares for directors or incorporators of corporations) be held by its nationals in a business enterprise located in its territory controlled by such investor.

3. Neither Party shall require an investor of the other Party by reason of its nationality to sell or otherwise dispose of an investment (or any part thereof) made in its territory.

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

5. Canada may introduce any new measure in respect of any business enterprise that is carried on at the date of entry into force of this Agreement by or on behalf of Canada or a province or a Crown corporation that:

- a) is inconsistent with the provisions of paragraphs 1 or 2 and relates to the acquisition or sale of such business enterprise; or
- b) relates to the direct or indirect ownership at any time of such business enterprise.

6. Once Canada has introduced a new measure pursuant to paragraph 5, it shall not:

- a) in the case of a new measure introduced pursuant to subparagraph 5(a), amend such new measure or introduce any subsequent measure that, as the case may be, renders such new measure more inconsistent with, or is more inconsistent with, the provisions of paragraphs 1 or 2; or
- b) in the case of a new measure introduced pursuant to subparagraph 5(b), increase any ownership restrictions contained in such new measure.

7. If, subsequent to the date of entry into force of this Agreement, a business enterprise is established or acquired by or on behalf of Canada or a province or a Crown corporation, the provisions of paragraphs 1 and 2 shall not apply to the subsequent acquisition of such business enterprise as a result of its disposition by or on behalf of Canada or a province or a Crown corporation. Once such subsequent acquisition has been completed, the provisions of paragraphs 1 and 2 shall apply.

8. Notwithstanding paragraph 1, the treatment a Party accords to investors of the other Party may be different from the treatment the Party accords its investors provided that:

- a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;
- b) such different treatment is equivalent in effect to the treatment accorded by the Party to its investors for such reasons; and
- c) prior notification of the proposed treatment has been given in accordance with Article 1803.

9. The Party proposing or according different treatment under paragraph 8 shall have the burden of establishing that such treatment is consistent with that paragraph.

Article 1603. Performance Requirements

1. Neither Party shall impose on an investor of the other Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a requirement to:

- a) export a given level or percentage of goods or services;
- b) substitute goods or services from the territory of such Party for imported goods or services;
- c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or accord a preference to goods or services produced in such territory; or
- d) achieve a given level or percentage of domestic content.

2. Neither Party shall impose on an investor of a third country, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a commitment to meet any of the requirements described in paragraph 1 where meeting such a requirement could have a significant impact on trade between the two Parties.

3. For purposes of paragraphs 1 and 2 and paragraph 2 of Article 1602, a Party "imposes" a requirement or commitment on an investor when it requires particular action of an investor or when, after the date of entry into force of this Agreement, it enforces any undertaking or commitment of the type described in paragraphs 1 and 2 or in paragraph 2 of Article 1602 given to that Party after that date.

Article 1604. Monitoring

1. Each Party may require an investor of the other Party who makes or has made an investment in its territory to submit to it routine information respecting such investment solely for informational and statistical purposes. The Party shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position.

2. Nothing in paragraph 1 shall preclude a Party from otherwise obtaining or disclosing information in connection with the non-discriminatory and good faith application of its laws.

Article 1605. Expropriation

Neither Party shall directly or indirectly nationalize or expropriate an investment in its territory by an investor of the other Party or take any measure or series of measures tantamount to an expropriation of such an investment, except:

- a) for a public purpose;
- b) in accordance with due process of law;

- c) on a non-discriminatory basis; and
- d) upon payment of prompt, adequate and effective compensation at fair market value.

Article 1606. Transfers

1. Subject to paragraph 2, neither Party shall prevent an investor of the other Party from transferring:

- a) any profits from an investment, including dividends;
- b) any royalties, fees, interest and other earnings from an investment; or
- c) any proceeds from the sale of all or any part of an investment or from the partial or complete liquidation of such investment.

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

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) issuing, trading or dealing in securities;
- c) criminal or penal offences;
- d) reports of currency transfers;
- e) withholding taxes; or
- f) ensuring the satisfaction of judgments in adjudicatory proceedings.

Article 1607. Existing Legislation

1. The provisions of Articles 1602, 1603, 1604, 1605 and 1606 of this Chapter shall not apply to:

- a) a non-conforming provision of any existing measure;
- b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or
- c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of Articles 1602, 1603, 1604, 1605 or 1606.

2. The Party asserting that paragraph 1 applies shall have the burden of establishing the validity of such assertion.

3. The *Investment Canada Act*, its regulations and guidelines shall be amended as provided for in Annex 1607.3.

4. In the event that Canada requires the divestiture of a business enterprise located in Canada in a cultural industry pursuant to its review of an indirect acquisition of such business enterprise by an investor of the United States of America, Canada shall offer to purchase the business enterprise from the investor of the United States of America at fair open market value, as determined by an independent, impartial assessment.

Article 1608. Disputes

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

2. Each Party and investors of each Party retain their respective rights and obligations under customary international law with respect to portfolio and direct investment not covered under this Chapter or to which the provisions of this Chapter do not apply.

3. Nothing in this Chapter shall affect the rights and obligations of either Party under the *General Agreement on Tariffs and Trade* or under any other international agreement to which both are party.

4. In view of the special nature of investment disputes and the expertise required to resolve them, where the procedures of Chapter Eighteen (Institutional Provisions) are invoked, the Parties and the Commission shall give the fullest consideration, in any particular case, to settling any dispute regarding the interpretation or application of this Chapter by arbitration or panel procedures pursuant to Articles 1806 or 1807, and shall make every attempt to ensure that the panelists are individuals experienced and competent in the field of international investment. When deciding a dispute pursuant to Articles 1806 or 1807, the panel shall take into consideration how such disputes before it are normally dealt with by internationally recognized rules for commercial arbitration.

Article 1609. Taxation and Subsidies

1. Subject to Article 2011, this Chapter shall not apply to any new taxation measure, provided that such measure does not constitute a means of arbitrary or unjustifiable discrimination between investors of the Parties or a disguised restriction on the benefits accorded to investors of the Parties under this Chapter.

2. Subject to Article 2011, this Chapter shall not apply to any subsidy, provided that such subsidy does not constitute a means of arbitrary or unjustifiable discrimination between investors of the Parties or a disguised restriction on the benefits accorded to investors of the Parties under this Chapter.

Article 1610. International Agreements

The Parties shall endeavour, in the Uruguay Round and in other international forums, to improve multilateral arrangements and agreements with respect to investment.

Article 1611. Definitions

For purposes of this Chapter, not including Annex 1607.3

acquisition with respect to:

- a) a business enterprise carried on by an entity, means an acquisition, as a result of one or more transactions, of the ultimate direct or indirect control of the entity through the acquisition of the ownership of voting interests; or
- b) any business enterprise, means an acquisition, as a result of one or more transactions, of the ownership of all or substantially all of the assets of the business enterprise used in carrying on the business.

business enterprise means a business that has, or in the case of an establishment thereof will have:

- a) a place of business;
- b) an individual or individuals employed or self-employed in connection with the business; and
- c) assets used in carrying on the business.

NOTE: A part of a business enterprise that is capable of being carried on as a separate business enterprise is itself a business enterprise.

control or controlled, with respect to:

- a) a business enterprise carried on by an entity, means
 - i) the ownership of all or substantially all of the assets used in carrying on the business enterprise, and
 - ii) includes, with respect to an entity that controls a business enterprise in the manner described in subparagraph (i), the ultimate direct or indirect control of such entity through the ownership of voting interests; and
- b) a business enterprise other than a business enterprise carried on by an entity, means the ownership of all or substantially all of the assets used in carrying on the business enterprise.

Crown corporation means a Crown corporation within the meaning of the *Financial Administration Act (Canada)* or a Crown corporation within the meaning of any comparable provincial legislation or that is incorporated under other applicable provincial legislation or that is incorporated under the other applicable provincial legislation.

cultural industry has the same meaning as in Article 2012.

entity means a corporation, partnership, trust or joint venture.

establishment means a start-up of a new business enterprise and the activities related thereto.

indirect acquisition has the same meaning as in Annex 1607. 3.

Investment means:

- a) the establishment of a new business enterprise, or
- b) the acquisition of a business enterprise;

and includes:

- c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and
- d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor.

Investor of a Party means:

- a) such Party or agency thereof;
- b) a province or state of such Party or agency thereof;
- c) a national of such Party;
- d) an entity ultimately controlled directly or indirectly through the ownership of voting interests by:
 - i) such Party or one or more agencies thereof,
 - ii) one or more provinces or states of such Party or one or more agencies thereof,
 - iii) one or more nationals of such Party,
 - iv) one or more entities described in paragraph (e), or
 - v) any combination of persons or entities described in (i), (ii) (iii) and (iv); or
- e) an entity that is not ultimately controlled directly or indirectly through the ownership of voting interests where a majority of the voting interests of such entity are owned by:
 - i) persons described in subparagraphs (d) (i), (ii) and (iii),

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