



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
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APEC#209-CT-01.5

Scheduling of Reservations

A Negotiator's Perspective

June 17, 2009

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I. The Basics

1. What is this all about?

Let's start with what we've already got in APEC !

APEC Model Measure for Investment
(Latest version as submitted to CTI, November 2008)

Modality of commitments*

Sets out the modality of commitments for the NT, MFN and performance requirements

- national treatment, most-favoured-nation treatment and performance requirements obligations do not apply to:
 - existing non-conforming measures that the Parties agree to set forth in the agreement, or
 - any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities that the Parties agree to set forth in the agreement if it is not possible to limit the exclusion to existing measures
- amendments or modifications of existing non-conforming measures **generally** do not decrease their conformity with respect to the national treatment, most-favoured-nation treatment and performance requirements obligations

The specific approach of commitments may be agreed by the Parties.

What does this text tell us?

- The title itself cannot be completely agreed.
(→ negative vs. positive list)
- Note the use of the word "generally" in the second half.
(→ concept of "standstill" almost universally shared, but not quite)

2. Positive lists and negative lists

(1) Positive list approach

- Also known as "schedule of commitments".
- Inspired largely from GATS.
- Decreasing prevalence within APEC, but is sometimes applied in the context of the pre-establishment phase (see below).

APEC Convergence and Divergence Study
(Latest summary for the Investment chapter, April 2009)

National Treatment (NT)

Except for the twelve exceptional FTAs that do not have an investment chapter, all the assessed FTAs provide for national treatment. Twenty-four FTAs* provide NT on both pre-establishment and post-establishment phase by negative list approach and three FTAs** adopt the positive list approach on pre-establishment NT.

Some economies may have a policy of taking a positive list approach on pre-establishment NT, and this could become a challenge in a scenario of harmonizing FTAs.

* Australia-Singapore, Australia-US, Peru-US, NAFTA, Canada-Chile, US-Chile, Korea-Chile, US-Korea, US-Singapore, NZ-Singapore, Singapore-Korea, ASEAN-USA, Japan-Mexico, Japan-Chile, Japan-Singapore, Japan-Malaysia, Japan-the Philippines, Indonesia-Japan, Australia-Chile, Brunei-Darussalam-Japan, Canada-Peru, Japan-Viet Nam, Peru-Singapore, Australia-ASEAN-New Zealand

** Australia-Thailand, Japan-Thailand, NZ-Thailand

Example of a positive list

(Japan-Thailand FTA: Japan's only example)

Sector or subsector	Industry classification	Limitations on national treatment	Commitments on performance requirements
Section B. SECTOR-SPECIFIC COMMITMENTS			
ALL NON-SERVICE SECTORS AND SUBSECTORS NOT LISTED BELOW			
I. Sector: Agriculture, Forestry, and Fisheries (except fisheries within the Territorial Sea, Internal Waters, Exclusive Economic Zone and Continental Shelf provided in Item 4 of Section B)	JSC 01 Agriculture JSC 02 Forestry JSC 03 Fisheries JSC 04 Aquaculture	None except that Japan may maintain the following Existing Measures: Existing Measures Foreign Exchange and Foreign Trade Law (Law No. 228 of 1949), Article 27 Cabotage Order and Foreign Direct Investment (Cabinet Order No. 261 of 1980), Article 1 Disciplines of the Existing Measures The prior notification obligation under the Foreign Exchange and Foreign Trade Law applies to foreign investors who intend to make investment in agriculture, forestry and fisheries (except fisheries within the Territorial Sea, Internal Waters, Exclusive Economic Zone and Continental Shelf provided for in Item 4 of Section B)	As indicated in Horizontal Commitments. As indicated in Horizontal Commitments.

→ Please also refer to the WTO guideline (S/L/92, 28 March 2001) for the general principles in the scheduling of commitments in the GATS context.

(2) Negative list approach

- Also known as "reservations".
- Inspired largely from NAFTA and the OECD / MAI draft text.
- Increasingly prevalent among APEC economies; strongly associated with the pre-establishment phase.

Basic structure of the negative list approach

Agreement text

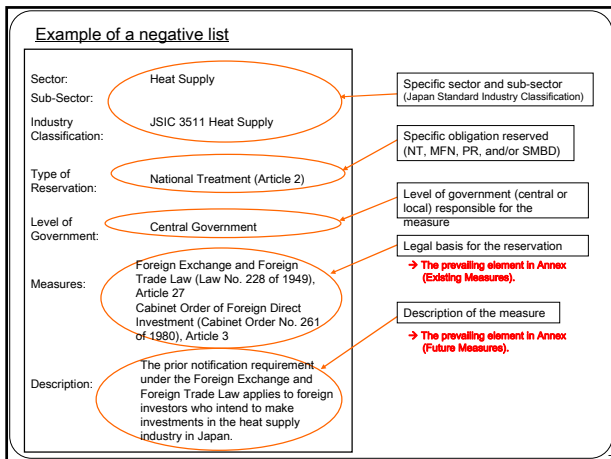
- Scope
- Definitions
- NT
- MFN
- PR, SMBD
- Reservations and exceptions
- General treatment / minimum standard of treatment
- Transparency
- Expropriation and compensation
- Protection from strife
- Transfer
- ISDS, SSDS
- Joint committee

Annex (Existing Measures)

- Specifies existing measures which do not conform to the NT, MFN, PR, and/or SMBD obligations.
- Often associated with concepts of "standstill" and "ratchet effect".

Annex (Future Measures)

- Excludes certain sectors or matters from the NT, MFN, PR, and/or SMBD obligations, even if no conflicting measures currently exist.
- Relating existing measures are sometimes annotated for transparency purposes. ("Future Measures" is not a literally accurate title.)



II. A Few Further Topics

- ### 1. "Standstill" and "ratchet effect"
- (1) "Standstill"
- Amendments or modifications of the existing measures must not decrease their conformity with respect to the NT, MFN, PR, and SMBD obligations compared to the time of the signing of the agreement.
 - Foreign ownership ceiling:
 - 50% (signing of agreement) → 75% → 25% ❌
 - 50% (signing of agreement) → 75% → 60% ✅
- (2) "Ratchet effect"
- Amendments or modifications of the existing measures must not decrease their conformity with respect to the NT, MFN, PR, and SMBD obligations as they existed immediately before the amendment or modification.
 - Foreign ownership ceiling:
 - 50% (signing of agreement) → 75% → 25% ❌
 - 50% (signing of agreement) → 75% → 60% ❌

- (3) Evolution of Japan's approach
- Haphazard process of trial and error – took nearly a decade to arrive at a clean and concise method to incorporate the concepts of "standstill" and "ratchet effect".
- Japan-Singapore EPA (2002)**
- A single negative list. No wording to the effect of "standstill".
 - However, some of the individual Descriptions implicitly depict "standstill".
 - "According to Article 10 of the Seeds and Seeding Law, a foreigner.....cannot enjoy a breeder's right except in any of the following cases....."
- Japan-Malaysia EPA (2006)**
- A single negative list.
 - The cover sheet of the Annex stipulates that an asterisk (*) is used to specify a reservation of an existing measure, with "standstill". A plus sign (+) is used to specify reservations in which "standstill" applies only for existing investors.
 - "...the reservations with an asterisk (*) are related to existing measures that do not conform with obligation imposed by Article 75 (=NT), Article 76 (=MFN), or paragraph 1 of Article 79 (=PR). The reservations without an asterisk (*) are related to specific sectors, sub-sectors or activities for which the Country may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by Article 75, Article 76, or paragraph 1 of Article 79; however, any amendment or modification of an existing measure or adoption of a new measure for sectors, sub-sectors or activities without an asterisk (*), shall not be more restrictive to existing investors and existing investments as defined in paragraph 4 of Article 80 (=Exceptions and Reservations) than the measures applied to such investors and investments immediately before such amendment or modification or adoption, unless such sectors, sub-sectors or activities are indicated with the symbol "+".

- Japan-Peru BIT (2008)**
(and most recent Japanese IIAs)
- Two negative lists, one for existing measures with "ratchet effect", and another without such restrictions (i.e., Future Measures).
 - "Ratchet effect" concisely spelled out in the main text (Article 8, Paragraph 1).
 - "Articles 3 (=NT), 4 (=MFN), 6 (=PR), and 12 (=SMBD) shall not apply to:
 - (a) any existing non-conforming measure that is maintained by.....
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
 - (c) an amendment or modification to any non-conforming measure referred to in subparagraph (a), provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification, with Articles 3, 4, 6 and 12.
 - Compare the provision of the Japan-Peru BIT with the rather complicated Japan-Malaysia EPA.
 - Difference in time is as great a factor as the difference in the partner.

- ### 2. Treatment of the services sector
- Services chapter negotiators also face a choice between negative and positive lists.
 - Because of the close relationship with GATS, positive lists are relatively more used in the services chapter than in the investment chapter.
 - As a result, when Mode 3 supply of services is within the scope of the investment chapter, there is a possibility of a contradiction between the style of reservations / commitments used in the two chapters .
 - (i.e., negative list for the investment chapter and positive list for the services chapter, despite dealing with the same measures)
 - This is less of an issue for economies adopting the Cross-Border Trade in Services framework (Mode 1, 2, 4 only), since the two sets of reservations / commitments would deal with completely different sets of measures, with no overlap.

- Possible solutions to reconcile the two styles:

- 1) Adopt the Cross-Border Trade in Services approach.
- 2) Reserve the entire services sector in the investment chapter.
 - Drawback: must devise an adequate coordination clause, otherwise the level of commitment would be drastically reduced.
- 3) "Flip-side reservation"
 - Reserve the entire services sector, [except for those sectors and matters included in the schedule of commitments for the services chapter](#).
 - Allows the investment chapter to maintain the framework of the negative list, while deferring to the preference of the other Party to adopt a positive list for all services including Mode 3.

3. Negotiating reservations

(1) Creating the lists of reservations

- Requires extensive intra-governmental coordination.
- Existing Measures
 - Time consuming but straightforward.
 - Must require all regulatory divisions of all agencies to examine their regulations for compatibility with the NT, MFN, PR, and SMBD obligations.
 - If not compatible, then include it in the list.
- Future Measures
 - Quite a delicate process.
 - Each agency must debate and determine the sectors and matters to put forward to include in the Future Measures list. These may or may not involve existing regulations.
 - Cannot simply include every sector and matter put forward; otherwise, every agency would be tempted to protect their own little fields.
 - If too many sectors and matters are included, it could result in a decay of trust between the negotiating partner.

(2) Negotiating reservations

- Unlike those based on positive lists (remember GATS.....), negotiations based on negative-list reservations are not conducive to haggling.
- In the best scenario, both parties would simply exchange their best offers from the outset, thereby allowing more time to debate and refine the main text of the IIA.
- Usually, real negotiation for reservations do take place. However, they generally consist of the following:
 - Generic exchange of commercial interests.
 - Questions on the background of Future Measures reservations.
 - Requests to move a Future Measures reservations into the Existing Measures list, if the reservation is based on a specific regulation.

(3) Maintaining reservations

- IIA negotiators (or embassies, chambers of commerce, interested investors) are advised to keep track of the other party's latest change in regulations listed under Existing Measures. There's no sense in the "ratchet effect" if you don't know what it is ratcheted against.
- IIA negotiators **must** keep track of the latest changes in regulations listed in their own Existing Measures. A thorough inter-agency process is highly valuable; even the Congress must be well advised.
- Otherwise.....

(End of presentation)