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

Presentations

Kuala Lumpur, Malaysia
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1. What is this all about?

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

**APEC Model Measure for Investment**

**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: most-favoured-nation treatment and performance requirements obligations do not apply to:
  - 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.
  - 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 parties agree on 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)

**Example of a positive list**

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

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

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 negative concession FTAs that do not have an investment chapter, all the surveyed FTA’s provide for national treatment.
  - Twenty-four FTAs provide NT on both pre-establishment and post-establishment phase.
  - Only the negative list approach on pre-establishment phase.
  - Some economies may have a policy of adopting a positive list approach on pre-establishment NT, and this could become a challenge in a number of scenarios.

**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**

- **Amendment text**
  - Scope
  - Contents
  - Art.
  - PR, SWBD
  - Definitions and exceptions
  - General treatment / minimum standard of treatment
  - Transparency
  - Expropriation and compensation
  - Protection from strife
- **Transfer**
- **ISDS, SSDS**
- **JCT**
- **Annex (Existing Measures)**
  - Specifies existing measures which do not conform to the NT, MFN, PR, and/or SWBD obligations.
  - Often associated with concepts of “standstill” and “ratchet effect”.
- **Annex (Future Measures)**
  - Includes under sections on matters from the NT, MFN, PR, and/or SWBD obligations, even if no conflicting measures currently exist.
  - Relating existing measures are sometimes associated for transparency purposes. (“Future Measures” is not literally accurate title).
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% (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% (signing of agreement) → 75% → 60%

Example of a negative list

<table>
<thead>
<tr>
<th>Sector</th>
<th>Sub-Sector</th>
<th>Industry Classification</th>
<th>Description of the measure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heat Supply</td>
<td>JSIC 3511 Heat Supply</td>
<td>National Treatment (Article 2)</td>
<td>Description of the measure</td>
</tr>
</tbody>
</table>

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.
- 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)