



From UN, to BITS, to RTAs


Marvic M.V.F. Leonen, A.B., L.I.B., L.I.M

Dean and Professor of Law




Questions

- Preferential/Free/Regional Trade Agreements as “second best”
- How has it covered investments?



Consequences

- Investment protection is now part of a menu of options that are on the table in preferential trading arrangements.
- How ready are we, as a government, to negotiate?



Preferential Trade Agreements

- Legal Terminology:
 - Customs Union
 - Free Trade Agreement
- Economic Terminology
 - Customs Union
 - Common Market
 - Single Market
 - “Free” Trade Agreement vs Preferential Trade Agreement

Negotiated Protection

- All “free” trade agreements are examples of “negotiated protection”. Whether they are oriented towards achieving more market access, better technological transfers et al depends on the norms and institutions that come out of the negotiation.

How Many FTAs

- Notified WTO, as of July 2007: 360
 - 300 under GATT Article XXIV
 - 22 under enabling clause
 - 58 under GATS Article V
 - 205 in force
 - 90 % FTA, 10% Customs Union
- Estimate of WTO including those not notified: 400
- Significant increase within the past years
- Significant negotiating activity ongoing in spite of DOHA

Investments

- What are investments?
- Different from
 - Goods
 - Services
 - Intellectual Property Rights
 - Trade facilitation issues
 - Government Procurement issues

Example: JPEPA

- (b) the term “investments” means every kind of asset owned or controlled, directly or indirectly, by an investor of a Party, including:
- (i) a juridical person;
 - (ii) shares, stocks or other forms of equity participation in a juridical person, including rights derived therefrom;
 - (iii) bonds, debentures, and loans and other forms of debt, including rights derived therefrom;
 - (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

Example: JPEPA

- (v) claims to money and claims to any performance under contract having a financial value;
- (vi) intellectual property rights, including copyrights, patent rights, rights relating to trademarks, industrial designs, layout designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
- (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations, and permits; and
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges; investments also include profits, capital gains, dividends, royalties, interests, fees and other current incomes accruing from investments. A change in the form in which assets are invested does not affect their character as investments;

How are Investments Regulated

- Domestic, i.e. National
 - Constitution
 - Statutes
 - Ordinances
- International Law

Domestic

- Article II, section 2
- Article VII, section
- Tanada v Angara (WTO)
- Inchong v Hernandez (hr)
- Bayan Muna v Executive Secretary (VFA)
- AKBAYAN v Executive Secretary (Access to negotiating notes of JPEPA)

International Law

ICJ Statute, article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

International Customary Law

- Protection of Alien Property
 - Chozrow Factory Case
- Exchange of Letters between Mexico and the US
 - Mexican Position and the Calvo Doctrine
 - US Position and the Hull Formula
 - “adequate, prompt and effective”

UN

- General Assembly Resolution 1803

“4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. *In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.* In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication. “

Restatement

A state is responsible under international law for injury resulting from:

- (1) a taking by the state of the property of a national of another state that
 - (a) is not for a public purpose, or
 - (b) is discriminatory, or
 - (c) is not accompanied by provision for just compensation;

For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;

Restatement

- (2) a repudiation or breach by the state of a contract with a national of another state
 - (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by noncommercial considerations, and compensatory damages are not paid; or
 - (b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred; or
- (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

Bilateral Investment Treaty (BIT)

- 1957: West Germany and Pakistan
- Philippines:
 - Argentina, Australia, Austria, Bangladesh, Benelux, Cambodia, Canada, Chile, China, Czech, Denmark, Finland, France, Germany, Italy, Korea, Netherlands, Pakistan, Romania, Spain, Sweden, Switzerland, Thailand, Turkey, UK

RTAs

- History of article XXIV, GATT 1947
 - Atlantic Declaration (US Position)
 - ITO uses term "free trade agreement"
 - UK's position
 - Passage of the GATT
- Uruguay Round, addition of GATS, article V
- Understanding re RTAs
- Actual Practice

Substantive Requirements, WTO

- First, the agreement must be designed to facilitate trade between the constituent territories and not to raise trade barriers between other GATT-contracting countries and such territories.
- Second, the agreement must cover "substantially all the trade" between the constituent territories.
- Third, if the agreement is to be implemented in intervals, there must be a plan and schedule to complete the transition "within a reasonable length of time."
- Finally, the trade restrictions on GATT signatories that are not parties to the regional agreement must not "on the whole be higher or more restrictive" than the "general incidence" of the corresponding restrictions extant before the agreement.

Evolution of FTAs

- NAFTA's contributions
 - Investments Chapter
 - Indirect Expropriation issues
 - Labor and Environment Side Agreements
- European Approach
 - Political Cooperation Agreement with essential human rights clause
 - FTA
- ASEAN approach

JPEPA INVESTMENTS

- CHAPTER 8
- Scope, article 87 (exemptions from 89, 90, 93)
- Definitions, article 88
- National Treatment, article 89
- MFN, article 90
- General Treatment, article 91
- Access to courts of justice, article 92
- Prohibition on performance requirements, article 93

JPEPA INVESTMENTS

- Reservations and exceptions, 94
- Expropriations and compensation, 95
- Protection from strife, 96
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JPEPA INVESTMENTS

- General and Security Exceptions, 99
- Temporary safeguard measures, 100
- Prudential Measures, 101
- Environmental Measures, 102
- Labor, 103
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- Denial of Benefits, 105
- Subcommittee on Investment, 106
- Further negotiation, 107

Exclusions

- See scope, article 87, fourth paragraph
 - National treatment
 - Most favored nation
 - Performance requirements
- See also Reservations and Exclusions, article 94

National treatment

- Establishment
- Acquisition
- Expansion
- Management
- operation
- Maintenance
- Use
- Possession
- liquidation
- Sale or disposition

General Treatment

- Fair and equitable treatment
- Full protection and security
- But, now condition on minimum standard of treatment under customary international law
NOT based on treaty violation
 - See NAFTA
 - Also effect of breaches of labor and environmental treaties
 - See Restatement, 711 and 712

Performance Requirements

1. Neither Party shall impose or enforce, as a condition for investment activities in its Area of an investor of the other Party, any of the following requirements:
 - (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 Area, or to purchase goods or services from persons in its Area;
 - (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments related to such investment activities;
 - (e) to restrict sales of goods or services in its Area that investments related to such investment activities produce or provide by relating such sales to the volume or value of its exports or foreign exchange earnings;

Performance Requirements

- (f) to appoint, as executives, managers or members of boards of directors, individuals of any particular nationality;
- (g) to hire a given level of its nationals;

Performance Requirements

- (h) to transfer technology, a production process or other proprietary knowledge to a person in its Area, except when the requirement:
- (i) is imposed or enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; or
 - (ii) concerns the transfer of intellectual property rights which is undertaken in a manner not inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement (hereinafter referred to in this Chapter as “the TRIPS Agreement”);

Performance Requirements

- (i) to locate the headquarters of that investor for a specific region or the world market in its Area;
- (j) to achieve a given level or value of research and development in its Area; or
- (k) to supply one or more of the goods that the investor produces or the services that the investor provides to a specific region or world market, exclusively from its Area.

Performance Requirements

2. The provision of paragraph 1 above does not preclude either Party from conditioning the receipt or continued receipt of an advantage, in connection with investment activities in its Area of an investor of the other Party, on compliance with any of the requirements set forth in subparagraphs (g) through (k) of paragraph 1 above.

JPEPA, Indirect Expropriation

- Article 95 of Chapter 8
- Same as in most BITS
- Similar to US FTA

Expropriation, IISD Model, Exclusions

“This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.”

Expropriation, IISD Model Exclusions

“(H) A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

Expropriation, IISD Model, Exclusions

“(I) Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article.”

Investments, Dispute Resolution, article 107

1. The Parties shall enter into negotiations after the date of entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party.

Investments, Dispute Resolution, article 107 (2)

2. In the absence of the mechanism for the settlement of an investment dispute between a Party and an investor of the other Party, the resort to international conciliation or arbitration tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing Party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.

Political Risk Insurance

- OPIC
- MIGA

“Special and Differential Treatment”

“...category of measures through which developed countries respond to the particular risks and vulnerabilities that developing countries face in international trade...” (Garcia)

Categories

- Market Access
- Market Protection
- Technical Assistance

Question

- Can this be covered through Regional Trade Agreements?
- To what extent have these undermined the 145 provisions in the WTO Agreements which provide for special and differential treatments?