



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

Presentations

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Transfers of Funds

APEC-UNCTAD Regional Training Course on International Investment Agreements

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Topics To Be Covered

- Overview and Purpose
- Formulations among APEC Economies
- Selected Policy Issues – Balance of Payments Exceptions
- Example Tribunal Decision

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Overview and Purpose

- A core element of APEC IIAs
- Provides investors a right to transfer funds related to an investment
- Coverage
 - Transfers in to the host State
 - Transfers out of the host State
 - No forced repatriation by the *home* State (NAFTA)
- Absolute obligation
- Balance of payments exceptions

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APEC Economies – Formulations

- Typically all transfers freely permitted – an illustrative list
- Only certain transfers permitted – a closed list
- 18 APEC IIAs impose some limitations
 - Balance of payments problems
 - Macroeconomic difficulties
 - Consistent with IMF Articles of Agreement
- Application of laws *provisos*

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Japan-Republic of Korea IPPA (2003), art. 12

1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor . . . may be freely transferred into and out of its territory without delay. Such transfer shall include, in particular, though not exclusively:
- (a) the initial capital and additional amounts to maintain or increase an investment;
 - (b) profits, interest, dividends, capital gains, royalties or fees;
 - (c) payments made under a contract including a loan agreement;
 - (d) proceeds of the total or partial sale or liquidation of investments;
 - (e) payments made in accordance with Articles 10 and 11;
 - (f) payments arising out of the settlement of a dispute under Article 15;
 - (g) earnings and remuneration of personnel engaged from other Party.
2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies at the market rate of exchange existing on the date of the transfer. [...]"

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Malaysia-Viet Nam (1992), art. 6: Repatriation of Investment

- (1) Each Contracting Party shall, subject to its laws, regulations and administrative practices allow without unreasonable delay the transfer in any freely usable currency:
- (a) the net profits, dividends, royalties, technical assistance and technical fees, interest and other current income, accruing from any investment . . . ;
 - (b) the proceeds from total or partial liquidation of any investment . . . ;
 - (c) funds in repayment of loans related to an investment; and
 - (d) earnings of citizens and permanent residents of the other [] Party . . .
- (2) The exchange rates . . . shall be the rate of exchange prevailing at the time of remittance.
- (3) [T]ransfers . . . [shall be accorded] treatment as favourable as that accorded to transfers originating from investments made by investors of a third State."

EFTA-Mexico FTA (2000), art. 46

“The EFTA States and Mexico shall with respect to investments in their territories by investors of another Party guarantee the right of free transfer, into and out of their territories, including initial plus any additional capital, returns, payments under contract, royalties and fees, proceeds from the sale or liquidation of all or any part of an investment.”

Japan-Mexico EPA (2005), art. 72 Temporary Safeguard Measures

1. A Party may adopt or maintain measures not conforming with its obligations under Article 58 [National treatment] relating to cross border capital transactions and Article 63 [Transfers]:
 - (a) in the event of serious balance-of-payments and external financial difficulties or imminent threat thereof; or
 - (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.”

NAFTA Article 1109: Transfers

Exceptions

4. [A] Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
 - (a) bankruptcy, insolvency . . . ;
 - (b) [] securities;
 - (c) criminal offenses;
 - (d) reports of transfers . . . ; or
 - (e) the satisfaction of judgments.[. . .]

NAFTA Article 1109: Transfers

1. [A]ll transfers relating to investment . . . freely and without delay [including]:
 - (a) profits, dividends, interest, capital gains, royalties, management fees, technical assistance [], *returns in kind* and other amounts derived from investment;
 - (b) proceeds from the sale . . . or [] liquidation;
 - (c) payments [] under a contract . . . ;
 - (d) payments made pursuant to Article 1110; and
 - (e) payments arising under Section B.
2. [F]reely usable currency at the market rate of exchange . . .

NAFTA Article 1109: Transfers (cont'd)

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.

NAFTA Article 1109: Transfers (cont'd)

Exceptions

4. [A] Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
 - (a) bankruptcy, insolvency . . . ;
 - (b) [] securities;
 - (c) criminal offenses;
 - (d) reports of transfers . . . ; or
 - (e) the satisfaction of judgments.[. . .]

NAFTA Article 2104: Balance of Payments

Exception to Article 1109 Transfers Provision

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures that restrict transfers where the Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with paragraphs 2 through 4 and are:
 - (a) consistent with paragraph 5 to the extent they are imposed on transfers other than Cross-Border trade in financial services; or
 - (b) consistent with paragraphs 6 and 7 to the extent they are imposed on Cross-Border trade in financial services.

NAFTA Article 2104: Balance of Payments (cont'd)

Exception to Article 1109 Transfers Provision

- General Rules
2. As soon as practicable after a Party imposes a measure under this Article, the Party shall:
 - (a) submit any current account exchange restrictions to the IMF for review under Article VIII of the Articles of Agreement of the IMF;
 - (b) enter into good faith consultations with the IMF on economic adjustment measures to address the fundamental underlying economic problems causing the difficulties; and
 - (c) adopt or maintain economic policies consistent with such consultations.

NAFTA Article 2104: Balance of Payments (cont'd)

Exception to Article 1109 Transfers Provision

- General Rules
3. A measure adopted or maintained under this Article shall:
 - (a) avoid unnecessary damage to the commercial, economic or financial interests of another Party;
 - (b) not be more burdensome than necessary to deal with the balance of payments difficulties or threat thereof;
 - (c) be temporary and be phased out progressively as the balance of payments situation improves;
 - (d) be consistent with paragraph 2(c) and with the Articles of Agreement of the IMF; and
 - (e) be applied on a national treatment or most-favored-nation treatment basis, whichever is better.

NAFTA Article 2104: Balance of Payments (cont'd)

Exception to Article 1109 Transfers Provision

- General Rules
4. A Party may adopt or maintain a measure under this Article that gives priority to services that are essential to its economic program, provided that a Party may not impose a measure for the purpose of protecting a specific industry or sector unless the measure is consistent with paragraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF.

NAFTA Article 2104: Balance of Payments (cont'd)

Exception to Article 1109 Transfers Provision

5. Restrictions imposed on transfers, other than on cross border trade in financial services: [a-d]
- Restrictions on Cross-Border Trade in Financial Services
6. A Party imposing a restriction on Cross-Border trade in financial services:
 7. In consultations under paragraph 6(b), the Parties shall:
 - (a) consider if measures adopted under this Article comply with paragraph 3, in particular paragraph 3(c); and
 - (b) accept all findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and BoPs

US-Singapore FTA Article 15.7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
 - (a) contributions to capital;
 - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
 - (c) interest, royalty payments, management fees, and technical assistance and other fees;
 - (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
 - (e) payments made pursuant to Article 15.6 and Article 15.5.4; and
 - (f) payments arising under Section C.

US-Singapore FTA Article 15.7: Transfers

- Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
- Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in an investment authorization or other written agreement between the Party and a covered investment or an investor of the other Party.
- Notwithstanding paragraphs 1, 2, and 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its law relating to:
 - bankruptcy, insolvency, or the protection of the rights of creditors;
 - issuing, trading, or dealing in securities, futures, options, or derivatives;
 - financial reporting [f]or . . . law enforcement or financial regulatory authorities;
 - criminal or penal offenses; or
 - ensuring compliance with orders or judgments in judicial or administrative proceedings.

US-Singapore FTA Article 15.7: Transfers

- Exchange of Letters
- Annex 15A

Continental Casualty Co. v. Argentina, ICSID, Award, Sept. 5, 2008

ARTICLE V

- [A]ll transfers related to an investment to be made freely and without delay into and out of its territory [including]: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.
- [T]ransfers shall be made in a freely usable currency at the prevailing market rate of exchange
- [E]ither Party may maintain laws and regulations through the equitable, nondiscriminatory and good faith application of its law.

Continental Casualty Co. v. Argentina, ICSID, Award, Sept. 5, 2008

“This type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs. This explains moreover the detailed list of permitted transfers that most BITs set forth. On the other hand, the Treaty terms show that such freedom is not without limit.” ¶ 239

Continental Casualty Co. v. Argentina, ICSID, Award, Sept. 5, 2008

- Argentine CNA prevented from transferring to US;
- Type of transfer at issue not within any art. V categories;
- Merely a change of type, location and currency of part of an existing investment;
- A short term deposit abroad;
- Not a transfer related to an investment protected under art. V.

Testimony before US Congress on US BITs

Capital Controls

“We are concerned that current provisions on financial transfers would limit governments’ ability to use legitimate measures designed to restrict the flow of capital in order to protect themselves from financial instability. Without adequate measures to prevent and respond to such financial instability, broad sustainable development will remain out of reach for many developing countries. The increased frequency and severity of financial crises also hurts U.S. economic interests, as crisis-stricken countries devalue their currencies and flood the U.S. market with under-priced exports in order to recover.”

- Testimony of Thea Mid Lee, Policy Director AFL-CIO Before the Subcommittee on Trade of the House of Representatives Committee on Ways and Means “Investment Protections in U.S. Trade and Investment Agreements,” May 14, 2009 (<http://www.transnational-dispute-management.com/news/20090514-testimonies.pdf>)

Testimony before US Congress on US BITs (cont'd)

Capital Controls

“The United States should ensure – for the sake of developing economies, international financial stability, and its own economic interests – that countries have the policy flexibility needed to impose capital controls in appropriate circumstances. Also, as the international community begins an important discussion on global financial regulation, it is crucial that these international investment agreements not provide an obstacle to needed regulatory reform.”

• Testimony of Thea Mid Lee, Policy Director AFL-CIO Before the Subcommittee on Trade of the House of Representatives Committee on Ways and Means “Investment Protections in U.S. Trade and Investment Agreements” May 14, 2009 (<http://www.transnational-dispute-management.com/news/20090514-testimonies.pdf>)

V. Conclusion

- Right of transfer of funds related to an investment
 - Into the host State
 - Out of the host State
 - No forced repatriation by home State
- A Core Element of APEC Economies' IIAs
- Various APEC formulations
 - Appropriate limits on free transfers

Thank you

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