

COMMUNICATION FROM THE REPUBLIC OF KOREA

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NON-DISCRIMINATION AND GATS-TYPE APPROACH FOR INVESTMENT

I. INTRODUCTION

1. In the written contribution dated 6 March 2001 (WT/WGTI/W/96), Korea suggested a GATS approach as a starting point for a multilateral framework for investment (MFI). Specifically, the GATS bottom-up approach, where certain principles and requirements provided in the Agreement are applied only to those sectors committed by individual Members, could serve as a starting point for the MFI.

2. As a follow up to the earlier contribution (2 June 1999 (WT/WGTI/W/79)), this paper includes Korea's views as to how the non-discrimination principle – the Most Favored Nation's Treatment (MFN) and National Treatment (NT) - can be applied to the MFI. The GATS is a good guidance as to the application of the non-discrimination principle, but the differences and caveats should also be considered.

II. GATS APPROACH

3. The application of the non-discrimination principle in the GATS was elaborated in details in the background paper made by the Secretariat. Simply put, the GATS provides "unconditional" MFN and "conditional" NT. The "conditional" NT means that the NT is provided to only those sectors where specific commitments were made by the Members. The MFN treatment, on the other hand, is an "unconditional" obligation in the GATS. However, certain exemptions to the MFN treatment are permitted for only short durations of time on an exceptional basis. This is a difference with the GATT, in which both MFN and NT are unconditional obligations.

4. Then how can the principle of non-discrimination in the GATS be extended to the multilateral investment rules? What would be the differences and commonalities? Under the GATS, investment in the services sector is included through Mode 3, which is defined as "the supply of a service by a service supplier of one Member through commercial presence in the territory of any other Member." The "commercial presence" is normally understood as accommodating direct investment.

5. This gives one reason for applying the GATS-approach to multilateral investment rules. As the investment aspect of services sector is already incorporated in the GATS and the GATS is

regarded to provide the necessary flexibilities for developing countries, the most probable way to form investment disciplines for goods would be to follow the GATS model.

6. At the same time, the GATS-approach provides necessary flexibilities to individual countries at different developmental stages.

7. However, the new investment disciplines may need to go beyond the GATS-approach for the reason that investment disciplines have certain natures and characteristics that were not present in the GATS.

A. MFN TREATMENT

8. Most of all, the major difference found between the GATS and the international investment agreements such as bilateral and regional investment agreements (collectively referred to hereafter as IIA) is that the investment aspect can divide into the pre- and post-establishment stage.

9. MFN is one of the most important principles in the multilateral framework in trade and investment. It gives investors a guarantee for equality of competitive opportunities among investors from different foreign countries.

10. Therefore, it seems most appropriate that MFN be applied as a general obligation in MFI, irrespective of pre- and post-establishment stages of investment.

11. At the same time, as the Secretariat's background note on development (WT/WGTI/W/119) indicates, "applying MFN treatment does not interfere with a developing country's ability to impose measures that give any competitive advantage to national producers over their foreign competitors." Therefore, there is no reason to deny this basic principle to foreign investors.

12. On the other hand, given that there have been certain bilateral and regional investment agreements that provide a high level of preferential treatment on investment, the exemption may be necessary. In this sense, the GATS MFN exemption list can be a guide.

13. However, such exemptions should be strictly limited, based on certain conditions and timetables. And the principle of "standstill" should be applied so as to give foreign investors transparency, stability, and predictability of long-term investment conditions in a host country.

B. NATIONAL TREATMENT

1. Pre-establishment stage

14. The GATS provides "conditional NT". This was a way of balancing between the interests for further liberalization and the interest for sovereign right for domestic protection.

15. The same would apply to the case of investment agreements. Despite the increasing necessity and merits, the NT as an obligation of a host country, and a right to the home country is not yet universally accepted. In this sense, the GATS bottom-up approach seems the best way to balance the need to facilitate investment liberalization to attract more foreign investment and the need to retain national sovereignty for domestic policy objectives and for support of domestic investors and producers.

16. At the pre-establishment stage of investment, the NT would be provided to foreigners based on specific commitments granted. The level of commitments could be low in the beginning,

reflecting individual domestic situations, but be gradually expanded through successive rounds of negotiations.

2. Post-establishment treatment

17. On the other hand, as for the NT at the post-establishment stage of investment, the difference with the GATS approach should be pointed out.

18. The GATS deals with trade in services by its nature, not investment *per se*. Therefore, the “commercial presence” in a host country, even though it includes direct investment, or the establishment of a foreign company, mainly focuses on the supply of services. The difference in the pre-establishment stage and post-establishment stage is not a major concern here. As a result, the national treatment under the GATS applies, irrespective of pre-establishment and post-establishment stage, only in services sectors inscribed as market access and national treatment commitments in a Member’s Schedule.

19. Another important characteristics of the GATS is that backsliding from the existing level of investment (or to use the GATS wording “supply of services through commercial presence”) is possible. First, the current investment level could be withdrawn as long as it does not fall below the level of commitments. Second, Article 21 of the GATS allows withdrawal and modification of the commitments by consultations. A “precautionary reservation” is allowed under the GATS.

20. However, in the IIAs, NT in the post-establishment stage is accepted as a general obligation, and this approach seems more appropriate for a multilateral framework.

21. First of all, a legal entity established in accordance with the host country’s domestic laws and regulations is a national legal entity, regardless of whether its parent company is foreign, or the staff is foreigners. There is little ground for discriminating foreign invested companies against domestic companies upon its relations to the parent company, control, nationalities of its stakeholders, etc.

22. Second, foreign investment incurs “sunk costs” and is not easily withdrawn in reaction to policy changes in a host country. Providing assurance and stable environment to foreign investors who are willing to set up and maintain long-term business relations in a host country is a minimum requirement, if a country aims to induce foreign investment..

23. However, even in this “unconditional NT” for the post-establishment stage, the existing IIAs still allow for exceptions and qualifications to the rules. There would be economic, political, and administrative reasons for allowing certain exceptions. Even in this case, transparency should be the rule. In this line, any exceptions or reservations must reflect actual regulatory situations.

24. In this context, for the post-establishment stage, a general exceptions provision may be most appropriate.

III. CONCLUDING REMARKS

25. A multilateral framework demands flexibility in order to incorporate the interests of all members, developed or developing, home and host countries. At the same time, it needs all-encompassing core principles to bind the rules together. Therefore, a balance would be necessary when applying the non-discrimination principle.

26. Depending on the forms and levels of the principle at the pre- and post-establishment stage of investment, the form of the multilateral framework would be determined.

27. In this sense, the GATS approach gives ample examples on how to balance the goal of retaining disciplines for further liberalization and the goal of providing flexibility for individual needs. At the same time, the commonalities and differences should be carefully examined and reflected in the making of the multilateral investment framework.

28. In particular, this paper emphasized the different aspect in the application of the national treatment between the pre-establishment and post-establishment stage. The post-establishment stage demands a stronger NT if we are to benefit from the multilateral framework on investment.
