

# **Arah Kebijakan Nasional dalam Perjanjian Internasional di Bidang Jasa dan Investasi dan Strategi Perundingan dalam Rangka Mempertahankan Kepentingan Nasional**

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# LINKAGE PERDAGANGAN JASA DAN INVESTASI

- ❑ Dua rezim yang berbeda: GATS dan BIT/FTA Investment
  - GATS – termasuk investasi jasa (mode 3 - commercial presence)
  - BIT/FTA Investment – semua jenis investasi termasuk investasi jasa
- ❑ FTA mencakup Agreement atau Chapter mengenai Investment dan Trade in Services

# **Agreement/Chapter Jasa dan Investasi di ASEAN dan ASEAN + 1 FTA**

- **ASEAN** - **Separate agreements on services and investment**
- **ASEAN-China** - **Separate agreements**
- **ASEAN-Korea** - **Separate agreements**
- **ASEAN – India** - **Separate agreements**
- **ASEAN- ANZ FTA** - **Separate chapters**
- **ASEAN – Japan** - **Separate chapters**

# FTA: Dua Pola Utama Pengaturan Investasi Jasa

- ❑ Investasi jasa termasuk dalam Services Chapter (bersama mode 1,2 dan 4) → **GATS-inspired Agreement**
  - Investment Chapter tidak mengatur (exclusion clause atau 'silent')
  - Pendekatan Positive-list

# FTA: Dua Pola Utama Pengaturan Investasi Jasa

- ❑ Investasi jasa diatur/dicakup dalam Investment Chapter (mencakup barang, jasa dan IP) → **NAFTA-inspired agreement**
  - Services Chapter hanya mengatur Cross-border Trade in Services; Temporary Entry of Business Persons dalam Chapter tersendiri
  - Pendekatan negative-list

# Relasi Jasa dan Investasi dalam Negative List Agreement

## □ Negative List Agreements

- all chapters within one legal text (incl. services and investment)
- annexes – non conforming measures or exceptions

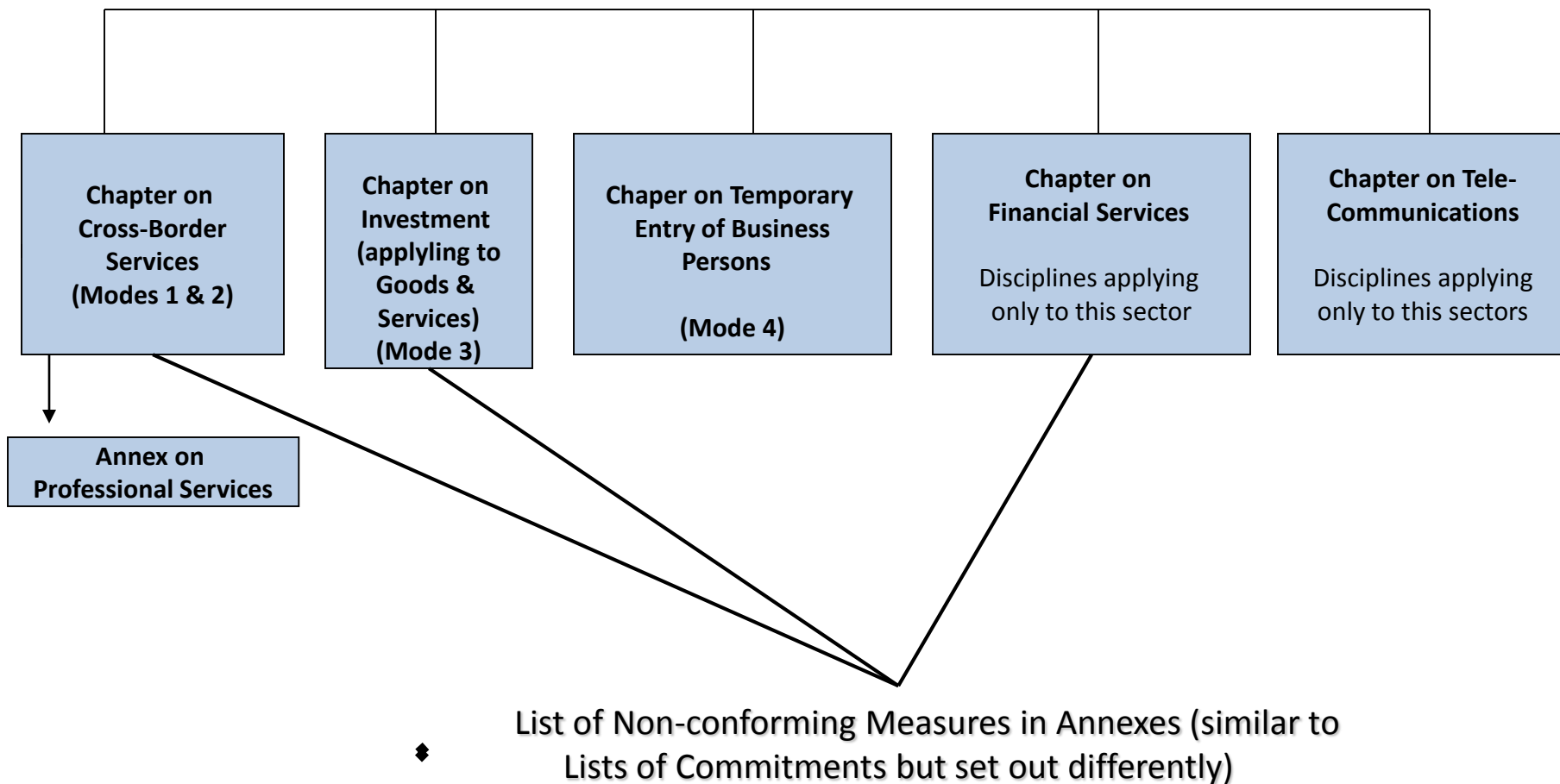
## □ SERVICES

- **Mode 1 and 2:** Cross-border Chapter
- **Mode 4:** Chapter on Temporary Entry of Business Pers

## □ INVESTMENT

- **Mode 3:** Investment Chapter – Goods and Services
- **All disciplines in the Investment Chapter apply across the board to all services sectors**

# Structure of most “negative list” type of FTAs for treatment of Services and Investment



# Perbandingan FTA Investasi dan Jasa

## Investment

- Broad coverage (termasuk portfolio plus IP)
- Liberalisation: All FDI allowed, unless otherwise specified – **mandatory inclusion** – comprehensive coverage
- Core disciplines: MA, NT, no performance requirements, allowance for senior management

## Service

- Mode 3: kehadiran komersial; measures affecting services
- Liberalisation: terbuka melalui SOC, **voluntary inclusion**, non comprehensive bertahap, pembatasan
- Core disciplines: MA, NT (conditional), domestic regulation (not general obligation), senior management specified



# Perbandingan Investasi dan Jasa

## Investment

- Transparency: Information on measures affecting sectors must be provided at the level of regulatory application
- Core protection disciplines: Full and Equitable Treatment, Expropriation/ Compensation
- Dispute settlement: Investor-State Dispute Settlement

## Services

- Transparency: Information on measures affecting sectors does not necessarily indicate the degree of implementation
- Payments and transfers
- Dispute settlement: State-State Dispute Settlement

# Choice of Negotiating Modality

## Main Features of Negotiating Approaches

### POSITIVE LIST

#### Market Access

- voluntary sectoral coverage
- binding at level of choice of restriction

#### National Treatment

- voluntary sectoral treatment obligatory
- binding at level of choice of restriction

### NEGATIVE LIST

#### Market Access

- comprehensive sectoral coverage
- binding at level of applied laws/ regulations

#### National Treatment

- non-discriminatory treatment obligatory unless otherwise specified in exception - (bound at applied level)

### HYBRID

#### Market Access

- voluntary sectoral coverage
- binding at level of applied laws

#### National Treatment

- non-discriminatory coverage unless otherwise specified (bound at applied level)

# Potensi Inkonsistensi

- Potensi inkonsistensi
  - subsektor jasa yang dibuka (coverage), tingkat liberalisasi, pembatasan/persyaratan yang ditentukan, perlakuan national treatment, *scope and definition*
- Penjadwalan komitmen jasa cenderung lebih rendah dari regulasi investasi yang berlaku (aturan DNI) – *policy space*
- Implikasi terhadap kebijakan liberalisasi, komitmen yang dibuat, regulasi domestik, pelaku usaha, implementasi

# Interrelasi Jasa dan Investasi - Minimalisasi Konflik/Inkonsistensi

## I. GATS-inspired Agreement

- **Interrelasi dimuat dalam Investment chapter**
  - Liberalisasi jasa (termasuk commercial presence) diatur dalam Services Chapter berdasarkan positive-list approach
  - Proteksi investasi jasa diatur dalam Investment Chapter
  - Investment chapter mengidentifikasi lingkup (scope) penerapan dan aturan-aturan untuk menangani potensi inkonsistensi antara Investment chapter dengan services chapter
  - Contoh: EFTA agreements, NZ-Singapore Agreement, Japan EPA

# Interrelasi Jasa dan Investasi - Minimalisasi Konflik/Inkonsistensi

## II. GATS-Inspired Agreement

### ▪ Interrelasi dimuat dalam Services Chapter

- Specific “service-investment ‘ linkage clause dalam Service Chapter – menentukan aturan-aturan mana dalam Investment Chapter yang diberlakukan.
- Contoh India-Singapore CECA: Service chapter memuat aturan-aturan yang berasal dari Investment chapter berkaitan dengan *compensation of losses, expropriation, repatriation, investment disputes, dll.*
- Tujuannya meminimalkan kemungkinan konflik antara kedua chapter

# Interrelasi Jasa dan Investasi - Minimalisasi Konflik/Inkonsistensi

## III. GATS-inspired Agreement

- Interrelasi tidak secara eksplisit tercantum
  - Investasi dan perdagangan jasa masing-masing memiliki perjanjian tersendiri (Contoh ASEAN dan Andean Community)
  - Mengandalkan aturan-aturan penafsiran dalam hukum internasional
  - Japan-Singapore, EFTA-Korea agreements: Klausula tentang transfer termuat dalam kedua Chapter, dimana yang satu *less permissive* dari yg lain.

# Interrelasi Jasa dan Investasi - Minimalisasi Konflik/Inkonsistensi

## IV. NAFTA-inspired Agreement

- Pemisahan yang jelas antara Investment chapter dan Cross-border Trade in Services (CBTS) chapter
- Investment chapter mengatur investasi barang dan jasa (kecuali jasa keuangan), CBTS mengatur liberalisasi jasa yang di berikan tanpa *commercial presence*
- Kedua chapter menggunakan *negative-list approach*

# **Services Chapter – Investment Chapter**

## **Opsi-opsi Untuk Dikaji**

### **☐ GATS-inspired**

- **Positive list - Interrelasi diatur dalam Service Chapter – Pola India-Singapore CECA**

### **☐ GATS-inspired**

- **Positive List - Interrelasi diatur dalam Investment Chapter – Pola EFTA dan Japan EPA**

### **☐ NAFTA-inspired**

- **Negative list – Carved out Mode 3 masuk ke dalam Investment Chapter**



# How can future FTAs add Value for Services?

Issue	To Consider
<b>MODALITY</b>	Hybrid approach: “Positive List” for Market Access; “Negative List” for National Treatment (like the TISA)
<b>SCHEDULING DISCIPLINES</b>	Standstill Listing commitments at level of actual practice/ openness Including reference to law / regulations
<b>INTRODUCING DYNAMISM</b>	Periodic review Ratchet Clause?
<b>INVESTMENT</b>	Separate Chapter, with coverage of Investor Protection and other Disciplines for all Services

# *Scheduling Techniques*

- ❑ GATS tidak menentukan/menunjuk pada suatu *scheduling techniques* tertentu
- ❑ GATS memiliki elemen
  - Positive-list dalam penentuan sektor/subsektor
  - Negative-list dalam penetapan pembatasan akses pasar dan national treatment
- ❑ Namun GATS terbuka untuk menggunakan metode/*scheduling* lain, termasuk *negative-list*
- ❑ Juga terbuka bagi penerapan tambahan kewajiban lainnya untuk membuat komitmen yang lebih *commercially meaningful* (enhanced transparency, standstill, phase-in, ratcheting, etc.)

# Persoalan Utama Bukan Pada *Scheduling Techniques*

- ❑ GATS sering dinilai sebagai rezim *bottom-up/positive-list* dengan tingkat liberalisasi yang lebih rendah
  - fleksibilitas dalam membuka pasar, liberalisasi bertahap, acuan pada national policy dan level of development → *development-friendly agreement*
  - kajian menunjukkan bahwa elemen **GATS-minus** pada FTA Negative-list lebih tinggi dari FTA Positive-list

# Persoalan Utama Bukan Pada *Scheduling Techniques*

- ❑ NAFTA style agreement dianggap lebih 'liberalizing' dari GATS style - broader coverage, predictability and transparency ( listing non conforming measures), MFN dan NT granted automatically, ratchet mechanism (some cases)
- ❑ Persoalan bukan pada *scheduling techniques* (hanya sebagai *tool*) tapi pada *political impetus* dari pemerintah negara-negara ybs untuk mencapai *meaningful results* dalam perundingan

# Isu Pokok: *Level of ambition bukan scheduling techniques*

- ❑ Kedua pendekatan – mengejar tujuan yang sama - market access with highest degree of liberalization
  - Masalah kebijakan liberalisasi yang ditempuh
  - Opsi positive list untuk mode 3 dengan high degree of liberalization (misalnya dengan memasukkan dalam SOC semua komitmen dalam peraturan DNI) didukung rules/disciplines.
- ❑ Isu-isu utama: level/degree and pace of liberalization, rules and disciplines, policy space

# Examples of Disciplines relevant to SERVICES being addressed in modern RTAs

- Cross-Border Trade in Services
  - MFN clause
  - Ratchet mechanism
  - Negative lists of commitments
- Temporary Movement: Mode 4
- Facilitation of professional services through mutual recognition
- Open borders for data flows
- Investment
  - Broad definition
  - Generous denial of benefits clause
  - Negative lists of commitments
  - Investor-state dispute settlement
- Competition Policy chapter
- Disciplines for State-owned Enterprises
- Government procurement chapter covering services
- Intellectual Property chapter covering services
- Chapter dealing with Value Chains
- Chapter facilitating international engagement by SMEs
- Facilitation of business out-sourcing and off-shoring for services
- Separate chapters on ICT, Logistics, Telecommunications, Financial Services, Education

# Kebijakan dan Strategi

- ❑ Kepentingan nasional dan rumusan tujuan kebijakan nasional (*national policy objectives*) dalam rangka perundingan FTA/RTA
  - *Focused national interest*
  - *Negotiating objectives*
- ❑ Sinkronisasi/koordinasi kebijakan (*policy coordination*) – *integrated policy*
- ❑ Strategi perundingan melalui pemanfaatan modalitas perundingan

**TERIMA KASIH**