Asia-Pacific
Economic Cooperation

2005/FTA-RTA/WKSP/008

Understanding and Negotiating the Services and Investment Aspects of FTAs

Submitted by: Ms. Jane Drake-Brockman
Executive Director, Australian Services Roundtable

APEC
2005 KOREA

Workshop on Identifying and Addressing Possible Impacts of RTAs/FTAs Development on APEC Developing Member Economies
Hanoi, Viet Nam
28-30 June 2005

Understanding and Negotiating the Services and Investment Aspects of FTAs

APEC Workshop
Hanoi June 2005
Jane Drake-Brockman
& Professor Rob Scollay

Services and Investment are major aspects of FTA negotiations

- The Table of Contents of most recent FTAs shows that services-related issues increasingly dominate the subject matter.
- Most modelling work assessing the economic impact of any particular FTA shows, despite the problems of measurement, that the potential gains from liberalising services tends to outweigh the gains from liberalising trade in goods. (This is usually due to the positive impact of domestic reform in the services sector rather than market access gains abroad.)

To understand why services and investment are such important parts of most FTAs, we first have to recall some basic facts about the nature of trade in services

1. Trade in Services takes place in several ways

*Cross Border (eg via the internet)
*Temporary movement of customers
(eg tourism, education)
*Temporary movement of service providers into the foreign market
(eg foreign insurance agents, consultants)
*Setting up a local office (investment)

This complexity means it takes more than one Chapter of the FTA to deal with all the issues.

2. The services sector includes major infra-structural industries affecting the entire economy

- Financial services are often dealt with in a separate chapter
- Telecommunications is often dealt with in a separate chapter
- E-Commerce is often dealt with in a separate chapter
- Business mobility needs to be dealt with in a separate chapter

3. The services sector accounts for more than 50%, on average, of GDP and employment (over 75% in the developed economies) and is often the major contributor to innovation and productivity growth and the fastest growing export sector

4. Investment does not fully figure on the WTO agenda

So it is inevitable that developed economies see FTAs as potentially constructive mechanisms for addressing bilateral investment irritants.

- So neither Services issues nor Investment issues can be avoided in any FTA negotiation with a developed economy
- It would be inefficient to try to avoid them also in any FTA/RTA among less developed economies
- But the issues are complex and there are many pitfalls for developing economy negotiators

Lets look at the basic concepts in a sample chapter on Cross Border trade in Services

- As you would expect, the sample chapter contains principles drawn from the WTO/GATS
- But it also contains some new concepts
- Let's focus on the aspects which are different from the GATS ie not necessarily familiar to WTO negotiators

Important Concepts

- Most Favoured Nation
- Denial of Benefits (rules of origin for services - generally more liberal than for goods)
- Positive List approach (like the GATS) or the more deeply liberalising Negative List approach (list it or lose it)
- 2 Schedules of Non Conforming Measures
- Ratchet Mechanism
- Absence of a Safeguards clause?

Negative List Approach

Non Conforming Measures Annex 1

- Existing measures which do not conform with the principles set out in the chapter, but which are "grandfathered" in Annex 1 ie you want to retain them
- If you don't list them in Annex 1, you will lose them.
- In a Federal system, it is typical to "grandfather" all existing measures at State and local level.
- No new measures which are inconsistent with the Chapter can be introduced

Negative List Approach

Non-Conforming Measures Annex 2

- List of measures with respect to which you wish to retain even greater flexibility ie retain the right to increase the level of protection in the future
- These are the most domestically sensitive policy areas
- There will always be considerable negotiating pressure to keep this list short.

How much services sector liberalisation is taking place via FTAs?

- In general, services liberalisation seems no easier in small groups than it is in the WTO.
- Where the negative list approach is used, there have been significant WTO plus strides forward in terms of national treatment.
- Progress is less evident in terms of market access, especially from developed economy partners.
- There is some progress on temporary movement of business persons and there are genuine attempts underway to deal with recognition of professional qualifications
- There is deeper commitment on the part of developing countries to regulatory transparency and there is incremental progress in the direction of regulatory harmonisation, including on telecoms and banking.

Implementing bilateral commitments

- It is worth noting that, unless the barriers to trade are quantitative in nature (eg numbers of foreign universities that can establish locally) it is probably harder to implement services sector liberalisation on an exclusive discriminatory basis than it is for goods
- Many service sector liberalisation and reform measures agreed in the context of a bilateral FTA could quite readily be multilateralised.

Lets look quickly at the main elements in a typical chapter on Investment

- There is more than one way to write a Chapter on Investment.The US approach is gaining in ascendancy ie pull together into one chapter the key elements of the usually pre existing bilateral investment protection and promotion agreement along with more liberal conditions for market entry and national treatment post establishment.

Implementing Investment Liberalisation

- Whatever one thinks about the preferential bilateral approach to trade, there is much less question that a discriminatory approach to investment liberalisation makes no economic sense.
- Wherever possible, pre establishment investment liberalisation which is negotiated bilaterally should be implemented multilaterally as soon as possible.

Food for Thought for developing economy negotiators

- Developing economies need, as a matter of urgency, to improve understanding of their own services sectors and to develop and consolidate their own domestic services sector reform and reregulation strategies
- Appropriate trade and investment negotiating positions should emerge naturally from such strategies
- Services and Investment Regulatory reforms which are negotiated bilaterally should be implemented, wherever possible, on a multilateral basis.