



Asia-Pacific
Economic Cooperation

2006/SOM1/CTI/FTA-RTA/011

Investment

Submitted by: Jane Drake-Brockman



**APEC Workshop on Best Practices in Trade
Policy for RTAs/FTAs: Practical Lessons and
Experiences for Developing Economies
Ha Noi, Viet Nam
27 February-1 March 2006**

INVESTMENT

APEC Workshop on FTAs
Hanoi February/March 2006
Jane Drake-Brockman

Investment does not (yet?) fully figure on the WTO negotiating agenda

- Most OECD economies have relatively open foreign investment regimes and offensive investment interests in developing economies
- Developing economies, despite their obvious and overwhelming economic interests in attracting foreign investment, typically operate more restrictive regimes
- So it is inevitable that developed economies will see FTAs as potentially useful mechanisms for addressing bilateral investment irritants
- Developing countries need to be ready to discuss ways of covering investment issues in FTAs and to respond to demands from bilateral partners to make investment related commitments that go “beyond the WTO”

Remember

A potential bilateral offer of investment liberalisation is very valuable negotiating coin – it may be enough to bring a reluctant major trading partner to the negotiating table.....

*In a globalising world economy, the interactive relationship between Investment and Trade is extremely complex & evolving
Trade Negotiators need to understand this better*

Trade and Investment ? -Goods-

- In protected goods sectors, inward flows of foreign direct investment can act a **SUBSTITUTE** for trade. Foreigners are motivated to invest overseas in order to get around tariff barriers in the host country by servicing the host market from inside. “Pre-establishment” barriers to investment limit this option.
- Foreign investment also acts as a **COMPLEMENT** to trade
 - Investment may be focused on exploiting comparative advantages in the host economy, boosting bilateral or global **EXPORT** from the host economy
 - Investment also seems to stimulates **EXPORT** growth from the home economy, of both goods and services, including via intra-industry trade

Trade and Investment -Services-

- When their domestic clients invest offshore, services providers try to follow those domestic clients abroad. Often they require a commercial presence in the offshore market to service those customers effectively, so they also invest. **If the policy regime is sufficiently open, foreign investment in goods can breed foreign investment in services.**
- Services providers look for foreign clients in their own right - & to service them effectively, they need to pursue their own offensive investment interests to achieving **commercial presence** in that market.
- As services activities which traditionally have been government-owned & operated enter the realm of the private market place, they also become attractive to the international market. Foreign participation in these activities requires inward direct investment.

Although we don't fully understand it yet, we do know that the relationship between Trade and Investment is increasingly seamless.....but

- Investment policy tends to be in the realm of Finance Ministries, Treasuries and Investment Authorities
- The idea of investment negotiations, in any forum, is still a bit of a mystery to trade negotiators – and trade negotiations, in any forum, still remain a bit of mystery to Finance Departments and Treasury officials
- Disciplines on Investment have proved elusive to date in the multilateral fora, including the OECD

So how should we handle Investment in FTAs?

There is more than one way to draft an FTA chapter on Investment

- All of them are potentially confusing for private sector investors!
- The US approach is gaining in ascendancy?
- Typically, the Investment Chapter will aim to cover investment in both **goods sectors & services sectors**.
- Typically, the Investment Chapter will aim to pull together into 1 chapter
 - the key elements of the usually pre-existing **Bilateral Investment Protection and Promotion Agreement**
 - along with reaffirmation of various relevant **WTO disciplines** (eg TRIPS)
 - plus commit, where possible, to more liberal conditions for **market entry &**
 - extend **National Treatment** post-establishment
 - commit perhaps to a "minimum standard of treatment"?

Defining Investment

- Investment means every asset that an investor owns or controls, directly or indirectly, involving eg the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk.
- **FDI** (involving direct participation by the investor in the management of the investment)
- **Portfolio Investment** (minority holding of shares, bonds or other securities)

Treatment of Investors and their Investments

- *Pre-Establishment Disciplines*
- *Post-Establishment Disciplines*
- *Non Discrimination*
 - National Treatment
 - Most-Favoured-Nation Treatment
- *Minimum Standard of Treatment*
- *Performance Requirements*
- *Transfers and Payments*
- *Expropriation & Compensation*
- *Senior Personnel*

Scheduling Commitments

- *Horizontal Commitments*
 - foreign investment approval mechanisms
 - land purchases
 - foreign exchange regulations
 - eligibility for government subsidies
- *Sectoral Schedules of Non Conforming Measures (Negative List?)*
- *Sectoral Schedules of Reserved Sectors (Negative List?)*
- *Combined Schedules (Negative Lists) of both Services and Investment Commitments*

Non Conforming Measures

A schedule containing a list of all those measures that are not fully in conformity with the liberalising provisions of the Agreement

Reserved Sectors (Sensitive Carve Outs)

A schedule listing the sectors in which future "policy space" is preserved ie in which the parties may unilaterally introduce policy changes without contravening the provisions of the Agreement.

Dispute Settlement

Benefits to developing economies of negotiating a deal on Investment

In addition to all the other important “non – trade” public policy objectives you may be seeking to preserve, remember that the overriding objective in negotiating an Investment Chapter in an RTA/FTA, should be to send a positive and **welcoming message to (desperately needed) private sector foreign investors.**

Implementing Investment Liberalisation

- Whatever one thinks about the bilateral preferential 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