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Telecommunications and Free Trade Agreements

In September 2003, the WTO ministerial conference met in Cancun to take stock of ongoing trade negotiations conducted under the auspices of the Doha Development Round. However, due to the impasse between the G22 (an informal grouping of developing countries) and the developed Western

countries, the trade talks in Cancun failed to set an agenda for future negotiations. However, the general sentiment amongst trade specialists is that while Cancun did not sound the death knell for multilateral trade liberalisation at the WTO, it is anticipated that the next few months will see a flurry of activity in regional and bilateral trade negotiations as most countries (including trade giants such as the U.S., China and Japan) will rush to protect their global trading interests by concluding and negotiating free trade agreements with key trading partners.

Many of the existing free trade agreements and these new regional and bilateral trade initiatives will include concessions in the telecommunications sector.

1. Various Agreements

These are some of the existing agreements and ongoing negotiations in the Asia Pacific Region:

(a) ASEAN

The Association of South East Asian Nations (ASEAN) consisting of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam has been involved in negotiations with major Asian trading partners to establish free trade areas. The coverage of the proposed ASEAN-China free trade agreement will include trade in services.

Eager not to be left out in the cold by the impending ASEAN-China free trade agreement, Japan and India have signed framework agreements establishing negotiations for a proposed ASEAN-Japan free trade agreement within 10 years and the ASEAN-India regional trade and investment agreement, respectively, at the recent post-Cancun *ASEAN-Japan Summit* and *ASEAN-India Summit* held in Bali, Indonesia last month. Negotiations for trade in goods, services and investments are slated to commence in 2004 with a view to establishing a free trade agreement by 2012 (allowing additional 5 years' time for newer ASEAN members). Negotiations for trade in services under the ASEAN-India regional trade and investment agreement are scheduled to commence in 2005 and be completed by 2007. Trade ministers from ASEAN countries and the Republic of Korea were also tasked with commencing exploratory talks on the possibility of a free trade agreement between ASEAN and the Republic of Korea.

(b) Hong Kong SAR and China

The Governments of Hong Kong and the People's Republic of China (PRC) recently signed the Annexes to the Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA). The CEPA is a comprehensive free trade agreement which covers trade in goods, trade in services and investments. The Annexes set out the details of the concessions which China will afford to qualifying Hong Kong services suppliers. As the concessions in the area of telecommunications are already in force, the CEPA will give telecommunications companies which qualify as a "Hong Kong service supplier" a head start over other telecommunications companies as China's commensurate commitments under the WTO will only kick in next year.

(c) Singapore

The U.S. Singapore free trade agreement ("USSFTA") is to come into effect on 1 January 2004. This free trade agreement is the first signed by the US and an Asian country. The U.S. has indicated in public statements that the USSFTA could serve as the model for future trade agreements to be negotiated with other ASEAN countries. Under the USSFTA, both countries have made significant commitments in various areas including the access to and use of transport networks, interconnection, resale rates and terms of submarine cable landing stations. Although some of these areas are already addressed under the Code of Practice for Competition in the Telecommunications Sector issued by the Singapore telecommunications regulatory body, the Infocomm Development Authority of Singapore (IDA), it is expected that qualifying U.S. telecommunications suppliers will have additional clout in requiring the IDA to enforce the provisions of the Code.

Apart from free trade agreements with the U.S., Singapore has concluded free trade agreements with Australia, New Zealand, Japan and the European Free Trade Association (consisting of Iceland, Liechtenstein, Norway and Switzerland), all of which contain similar concessions in the telecommunications sector.

2. *What Concessions are Available?*

The following concessions are generally negotiated for under the free trade agreements:

- (a) Lowering or removal of foreign equity restrictions for qualifying infocomm companies.
- (b) Access to and use of public telecommunications networks and rates which are reasonable, non-discriminatory and upon transparent terms and conditions.
- (c) Publication of reference interconnection offers (“RIOs”) for interconnecting with incumbent telecommunications suppliers and such RIOs to include information on interconnection services offered, cost-based pricing, operational and technical requirements on foreign operators.
- (d) Interconnection prices should be made on a cost-oriented, non-discriminatory basis.
- (e) Major telecommunications service providers to allow the suppliers of the other party access to network elements for the provision of public telecommunications services, on an unbundled basis, in a timely fashion and on terms and condition and cost-oriented rates that are reasonable, transparent and non-discriminatory.
- (f) Non-discrimination between the rates that incumbent major telecommunications services suppliers offer qualifying suppliers and itself, its subsidiaries and affiliates.
- (g) Publication of licensing criteria and procedures by regulatory bodies.
- (h) Higher levels of investor protection including guarantees against expropriation.
- (i) Mutual recognition of professional qualifications and technical standards.
- (j) Minimising and ensuring transparency of domestic regulations.
- (k) Streamlining government approval processes.
- (l) Setting rules on fair competition.
- (m) Providing a legally binding dispute settlement process.

3. *“Rules of Origin” for services?*

How then can a telecommunications company seek to avail itself of the concessions available under these numerous trade agreements?

In order to qualify for preferential tariff rates under free trade agreements, goods have to satisfy the rules of origin set out in the agreements. If there are no well defined rules of origin for trade concessions under a preferential trading agreement, then the heavily negotiated concessions would cease to be exclusive to the members of the arrangement as non-members will be able to take advantage of such concessions as well. Similarly, for trade in services, in order to ensure that only “deserving” enterprises of participants to free trade agreements are able to qualify for the concessions negotiated, enterprises and corporations seeking to use the concessions must fall within the definitions of “enterprise of the other Party”, “service supplier of the other Party” or “telecommunications service supplier of the other Party” in the particular free trade agreement.

The above concepts are, in a sense, the “rules of origin” for services. In practice, the definition of the above concepts will vary extensively from free trade agreement to free trade agreement. Generally speaking, however, there are some commonly used tests to determine whether an entity is a qualifying supplier/enterprise of the other Party:

- (a) *Incorporation*: Where is the entity constituted?
- (b) *Control (Direct or Indirect)*: What is the nationality or place of incorporation of the controlling persons of the entity? What is the percentage shareholding in the entity held by persons of the other Party?
- (c) *Substantial Business Presence*: What is the nature and scope of the business which the entity provides in the territory of the other Party? Is this similar to the nature and scope of the business which the entity is seeking to provide in this territory? Does the entity seeking to qualify have substantial business operations in the territory of the other Party?

Companies seeking to take advantage of the concessions under a particular free trade agreement will have to examine the actual text of the free trade agreement to determine the criteria for a qualifying service supplier and consider if they are able to structure their business in a manner which will allow them to take advantage of these concessions and gain a stronger foothold, over their less trade-savvy competitors, in new markets.

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